Date and Time: Wednesday, October 25, 2023 1:48:00 PM CST

Job Number: 208876105

Documents (100)

1. Nutrition Distrib., LLC v. S. Sarms, Inc., 2017 Cal. App. Unpub. LEXIS 8173

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

2. Intellectual Ventures I LLC v. Capital One Fin. Corp., 280 F. Supp. 3d 691

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

3. Power Analytics Corp. v. Operation Tech., Inc., 2017 U.S. Dist. LEXIS 226665

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

4. Ass'n of Am. Physicians & Surgeons v. Am. Bd. of Med. Specialites, 2017 U.S. Dist. LEXIS 205845

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

5. Hosp. Auth. of Metro. Gov't v. Momenta Pharms., Inc., 2017 U.S. Dist. LEXIS 205747

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

6. *FTC v. Sanford Health, 2017 U.S. Dist. LEXIS 215937*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

7. *Hu Honua Bioenergy v. Hawaiian Elec. Indus., 2017 U.S. Dist. LEXIS 208236*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

8. *In re EpePen ((Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig., 2017 U.S. Dist. LEXIS 209710*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

9. *IQ Dental Supply, Inc. v. Henry Schein, Inc., 2017 U.S. Dist. LEXIS 211070*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

10. *Helmerich & Payne Int'l Drilling Co. v. Schlumberger Tech. Corp., 2017 U.S. Dist. LEXIS 211447*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

11. [In re Korean Ramen Antitrust Litig., 281 F. Supp. 3d 892]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

12. [Malden Transp., Inc. v. Uber Techs., Inc., 286 F. Supp. 3d 264]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

13. [Garlington v. Kima, 2018 U.S. Dist. LEXIS 13396]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

14. [Wyo. Bevs., Inc. v. Core-Mark Int'l, Inc., 2018 U.S. Dist. LEXIS 230106]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

15. [Meyer v. Aabaco Small Bus., LLC, 2018 U.S. Dist. LEXIS 3177]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

16. *Baar v. Jaguar Land Rover N. Am., LLC, 295 F. Supp. 3d 460*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

17. *United States v. Sanchez, 2018 U.S. Dist. LEXIS 6128*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

18. *Imhoff v. Goin, 2018 Cal. Super. LEXIS 4*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

19. *Mayes v. Summit Entm't Corp., 2018 U.S. Dist. LEXIS 8902*

Client/Matter: -None-

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Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

20. *Gilmour v. Aetna Health, Inc., 2018 U.S. Dist. LEXIS 99537*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

21. [Hu Honua Bioenergy, LLC v. Hawaiian Elec. Co., 2018 U.S. Dist. LEXIS 8835]

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

22. [Dvorak v. St. Clair Cty., 2018 U.S. Dist. LEXIS 10585]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

23. [Ixchel Pharma, LLC v. Biogen Inc., 2018 U.S. Dist. LEXIS 13548]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

24. [LBM Props. LLC v. DirecTV Inc., 2018 Cal. Super. LEXIS 4046]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

25. [GolTV, Inc. v. Fox Sports Latin Am., Ltd., 2018 U.S. Dist. LEXIS 29836]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

26. [Hush Hush Sound, Inc. v. H& M Hennes, 2018 U.S. Dist. LEXIS 221973]

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

27. *Old Town Util. & Tech. Park v. Mfgr, 2018 Me. Bus. & Consumer LEXIS 6*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

28. *St. Mary's Med. Ctr., Inc. v. Steel of W. Va., Inc., 240 W. Va. 238*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

29. *Seaman v. Duke Univ., 2018 U.S. Dist. LEXIS 16136*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

30. *Clean Water Opportunities, Inc. v. Williamette Valley Co., 2018 U.S. Dist. LEXIS 19307*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

31. *Roxul USA, Inc. v. Armstrong World Indus., 2018 U.S. Dist. LEXIS 21513*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

32. [Steves & Sons, Inc. v. Jeld-Wen, Inc., 292 F. Supp. 3d 656]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

33. [St. Lawrence Communs. LLC v. Motorola Mobility LLC, 2018 U.S. Dist. LEXIS 25229]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

34. [Fenner v. GM, LLC (In re Duramax Diesel Litig.), 298 F. Supp. 3d 1037]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

35. [N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 883 F.3d 32]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

36. [General Nutrition Corp. v. Javaid, 2018 U.S. Dist. LEXIS 30154]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

37. *In re LIBOR-Based Fin. Instruments Antitrust Litig., 299 F. Supp. 3d 430*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

38. *Int'l Equip. Trading, Ltd. v. Illumina, Inc., 312 F. Supp. 3d 725*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

39. *Cal. Ass'n of Realtors v. PDFfiller, Inc., 2018 U.S. Dist. LEXIS 45482*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

40. *Carey & Assocs., P.A. v. Sheriffs & Counties of Cumberland, 320 F. Supp. 3d 226*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

41. *PEG Bandwith TX, LLC v. Texhoma Fiber, LLC, 299 F. Supp. 3d 836*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

42. [Inline Packaging, LLC v. Graphic Packaging Int'l, LLC, 2018 U.S. Dist. LEXIS 74102]

Client/Matter: -None-

Search Terms: "antitrust law"

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Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

43. [Koppitz v. Chesapeake Energy Corp., 2018 OK CIV APP 50]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

44. [Ne. Farm Sales & Serv. v. Krone, NA Inc., 2018 U.S. Dist. LEXIS 248563]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

45. [Hogan v. Pilgrim's Pride Corp., 2018 U.S. Dist. LEXIS 41909]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

46. [Marion Healthcare, LLC v. S. Ill. Healthcare, 2018 U.S. Dist. LEXIS 41955]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

47. [Contant v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 42870]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

48. *Amphastar Pharms., Inc. v. Momenta Pharms., Inc., 297 F. Supp. 3d 222*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

49. *In re Certain Carbon & Alloy Steel Prods., 2018 Ct. Intl. Trade LEXIS 42*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

50. *Turner v. Va. Dep't of Med. Assistance Servs., 301 F. Supp. 3d 637*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

51. *In re Niaspan Antitrust Litig., 2018 U.S. Dist. LEXIS 55298*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

52. *Toranto v. Jaffurs, 297 F. Supp. 3d 1073*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

53. *Ragner Tech. Corp. v. Berardi, 324 F. Supp. 3d 491*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

54. *Innovation Marine Protein, LLC v. Pac. Seafood Grp., 2018 U.S. Dist. LEXIS 48296*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

55. *Phila. Taxi Ass'n v. Uber Techs., 886 F.3d 332*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

56. *Cargill, Inc. v. WDS, Inc., 2018 U.S. Dist. LEXIS 51854*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

57. *In re Mylan N.V. Sec. Litig., 2018 U.S. Dist. LEXIS 52084*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

58. *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 52230*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

59. *Dvorak v. St. Clair Cty., 2018 U.S. Dist. LEXIS 53286*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

60. *San Miguel v. HP Inc., 317 F. Supp. 3d 1075*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

61. *Lenhoff Enters. v. United Talent Agency, Inc., 729 Fed. Appx. 528*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

62. *Unigestion Holding, S.A. v. UPM Tech., Inc., 305 F. Supp. 3d 1134*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

63. *In re Blue Cross Blue Shield Antitrust Litig., 308 F. Supp. 3d 1241*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

64. *Henderson v. MTC Fin. Inc., 2018 U.S. Dist. LEXIS 235663*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

65. *Safransky v. Fossil Grp., Inc., 2018 U.S. Dist. LEXIS 60946*

Client/Matter: -None-

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

66. *Sourceone Dental, Inc. v. Patterson Cos., Inc., 310 F. Supp. 3d 346*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

67. *Dieffenbach v. Barnes & Noble, Inc., 887 F.3d 826*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

68. *State v. AstraZeneca AB, 249 So. 3d 38*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

69. *Branta, LLC v. Newfield Prod. Co., 310 F. Supp. 3d 1166*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

70. *Sc Licensing v. 5 Horizons Group, 2018 U.S. Dist. LEXIS 237189*

Client/Matter: -None-

Search Terms: "antitrust law"

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

71. *Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

72. *Huawei Techs. Co v. Samsung Elecs. Co, 2018 U.S. Dist. LEXIS 63052*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

73. *United States ex rel. Millin v. Krause, 2018 U.S. Dist. LEXIS 65801*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

74. [Bank Leumi USA v. R&R Food Servs. LLC, 2018 U.S. Dist. LEXIS 226505]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

75. [Gomez v. Mort. Elec. Registration Sys., 2018 U.S. Dist. LEXIS 67148]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

76. [Neptun Light, Inc. v. City of Chi., 2018 U.S. Dist. LEXIS 63440]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

77. [Daldumyan v. World Fin. Group Ins. Agency, Inc., 2018 Cal. App. Unpub. LEXIS 2645]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

78. [Clary v. State Farm Mut. Auto. Ins. Co., 246 So. 3d 8]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

79. Sumotext Corp. v. Zoove, Inc., 2018 U.S. Dist. LEXIS 67179

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

80. Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 311 F. Supp. 3d 468

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

81. Texas v. O.S.T Lounge, 2018 U.S. Dist. LEXIS 68034

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

82. In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 70144

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

83. Helicopter Helmet, LLC v. Gentex Corp., 2018 U.S. Dist. LEXIS 72623

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

84. *Procurement, LLC v. Ahuja, 2018 Conn. Super. LEXIS 900*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

85. *Caldwell Wholesale Co., L.L.C. v. R.J. Reynolds Tobacco Co., 2018 U.S. Dist. LEXIS 81080*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

86. *Chamber of Commerce of the United States v. City of Seattle, 890 F.3d 769*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

87. *Reibstein v. Rmd Group Llc E-File, 2018 Cal. Super. LEXIS 54760*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

88. *Smith v. McPharlin, 2018 U.S. Dist. LEXIS 151043*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

89. *Authenticom, Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig.), 313 F. Supp. 3d 931*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

90. *Cable Line, Inc. v. Comcast Cable Communs. of Pa., Inc., 2018 U.S. Dist. LEXIS 80961*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

91. *Swallow v. Torngren, 2018 U.S. Dist. LEXIS 82014*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

92. *United States v. Giraudo, 2018 U.S. Dist. LEXIS 81019*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

93. *Boardman v. Pac. Seafood Grp., 2018 U.S. Dist. LEXIS 81611*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

94. *Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV, 2018 U.S. Dist. LEXIS 83471*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

95. *Nemickas v. Linn Cty. Anesthesiologists, P.C., 919 N.W.2d 637*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

96. *Thompson v. 1-800 Contacts, Inc., 2018 U.S. Dist. LEXIS 83806*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

97. *United States v. W.A. Foote Mem. Hosp., 2018 U.S. Dist. LEXIS 96326*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

98. *Conn. Ironworkers Employers' Ass'n v. New Eng. Reg'l Council of Carpenters, 324 F. Supp. 3d 293*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

99. *In re Interest Rate Swaps Antitrust Litig., 2018 U.S. Dist. LEXIS 86732*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by

Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

100. *XY, LLC v. Trans Ova Genetics, L.C., 890 F.3d 1282*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Practice Areas & Topics: Antitrust & Trade Law; Timeline: Jul 05, 2017 to Dec 31, 2022

Nutrition Distrib., LLC v. S. Sarms, Inc.

Court of Appeal of California, Second Appellate District, Division Seven

November 28, 2017, Opinion Filed

B278132

Reporter

2017 Cal. App. Unpub. LEXIS 8173 *; 2017 WL 5712760

NUTRITION DISTRIBUTION, LLC, Plaintiff and Appellant, v. SOUTHERN SARMS, INC., Defendant and Respondent.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: [*1] APPEAL from a judgment of the Superior Court of Los Angeles County, No. BC616482, Michael L. Stern, Judge.

Disposition: Affirmed in part and dismissed in part.

Core Terms

Nutrition, preliminary injunction, restitution, disgorgement, demurrer, unfair, false advertising, misleading, trial court, injunctive relief, advertising, profits, unfair competition, cause of action, leave to amend, damages, first amended complaint, fluid recovery, marketing, modulators, consumers, androgen, receptor, class action, restitutionary, violations, practices, products, moot, deceptive

Counsel: Tauler Smith, Robert Tauler and Lisa Zepeda for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Arezoo Jamshidi, Daniel C. DeCarlo and Josephine Brosas for Defendant and Respondent.

Judges: PERLUSS, P. J.; ZELON, J., SEGAL, J. concurred.

Opinion by: PERLUSS, P. J.

Opinion

Nutrition Distribution, LLC, dba Athletic Xtreme, a manufacturer and marketer of nutritional supplements specifically for bodybuilders, sued Southern SARMs, Inc., a competing nutritional supplement company, for unfair competition (*Bus. & Prof. Code, § 17200 et seq.*)[1] and false advertising (*§ 17500 et seq.*), requesting injunctive relief and restitutionary disgorgement. Nutrition Distribution also moved for a preliminary injunction prohibiting Southern

[1] Statutory references are to the Business and Professions Code unless otherwise stated.

SARMs from manufacturing, marketing or selling any products containing the pharmaceutical ingredient Ostarine, a selective androgen receptor modulator. The trial court denied Nutrition Distribution's motion for a preliminary injunction, sustained without leave to amend Southern SARMs's demurrer to the first amended complaint and dismissed the action. We affirm the order of dismissal and dismiss the **[*2]** appeal from denial of the preliminary injunction as moot.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Nutrition Distribution's First Amended Complaint*

On April 8, 2016 Nutrition Distribution filed a complaint, and on July 18, 2016 a first amended complaint,[2] against Southern SARMs for unfair competition and false advertising. Nutrition Distribution alleged Southern SARMs misbranded and unlawfully marketed its product (MK-2866) Ostarine, which contained as its active ingredient a selective androgen receptor modulator (SARM). According to Nutrition Distribution's pleading, "SARMs, like Defendant's Ostarine Product, are synthetic drugs with similar effects to illegal anabolic steroids."

Nutrition Distribution alleged, although Southern SARMs labeled its product as not intended to treat, cure or diagnose any condition or disease and not for human consumption, it simultaneously marketed the product on its website and otherwise as a new miracle dietary supplement to bodybuilders and other competitive athletes to enhance their physiques, promising, for example, lean mass increase and accelerated fat loss in an easy-to-dose oral form. According to Nutrition Distribution, Southern SARMs also misrepresented **[*3]** that its Ostarine product affords similar benefits to testosterone and other anabolic steroids without the negative side effects.

The first amended complaint asserted that medical experts have opined that products containing selective androgen receptor modulators have potential serious side effects including liver damage and increased risk for heart disease and that sale of those products is highly dangerous to public safety. In addition, selective androgen receptor modulators are specifically prohibited for use by participants in sporting events by the World Anti-Doping Agency (WADA) and the United States Anti-Doping Agency (USADA), facts that Southern SARMs did not disclose in its marketing materials.

Nutrition Distribution alleged it is a direct competitor of Southern SARMs in the nutritional supplement industry: In July 2009 Nutrition Distribution introduced "Advanced PCT," a natural product, for sale in the "muscle-gainer sub-market of the nutritional supplement world." However, as a result of Southern SARMs's misleading and deceptive marketing and sale of its Ostarine product, Southern SARMs caused Nutrition Distribution irreparable injury and wrongfully took Nutrition Distribution's **[*4]** profits and "the benefit of its creativity and investment of time, energy and money."

In its second cause of action for false and misleading advertising, Nutrition Distribution alleged that, by virtue of the conduct described in its pleading, Southern SARMs had disseminated advertising regarding its Ostarine product on its website and otherwise to the public and to consumers that it knew, or in the exercise of reasonable care should have known, was untrue and/or misleading and that was, in fact, likely to mislead or deceive a reasonable consumer. As a result, Nutrition Distribution suffered an ascertainable economic loss of money and reputational injury by the diversion of its business to Southern SARMs. In addition, Nutrition Distribution avers, Southern SARMs's conduct "is a black eye on the industry as a whole, and has the tendency to disparage [Nutrition Distribution's] products and goodwill."

Nutrition Distribution sought preliminary and permanent injunctive relief, prohibiting Southern SARMs from "producing, licensing, marketing, and selling its Ostarine Product, and any other product containing Ostarine and/or other Selective Androgen Receptor Modulators ('SARMs')." Nutrition **[*5]** Distribution also sought disgorgement of

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[2] The first amended complaint was filed after the parties met and conferred to discuss Southern SARMs's contemplated motion to strike and demurrer to the original complaint.

all Southern SARMs's profits from its unlawful conduct and full restitution of all of Southern SARMs's "ill-gotten gains."

2. *Nutrition Distribution's Motion for a Preliminary Injunction*

One week after filing its first amended complaint Nutrition Distribution moved for a preliminary injunction to prohibit Southern SARMs from manufacturing, marketing and selling products containing Ostarine on its website. Southern SARMs opposed the motion, principally on the ground that the requested injunction, which would require a complete cessation of marketing and sales of Ostarine, was overbroad. Southern SARMs also argued that the federal Food and Drug Administration (FDA) had primary jurisdiction to determine whether Ostarine (or products containing selective androgen receptor modulators) was a "drug" or a "dietary supplement" and that such a determination was a condition precedent to any prohibition of the sale of Ostarine.

3. *Southern SARMs's Demurrer*

Prior to responding to Nutrition Distribution's motion for a preliminary injunction, Southern SARMs demurred to the first amended complaint, arguing Nutrition Distribution was not entitled to restitution **[*6]** or restitutionary disgorgement since it had failed to allege Southern SARMs had wrongfully acquired money or property in which Nutrition Distribution had a vested interest; rather, it was seeking standard tort damages, which are not recoverable in an action for unfair competition or false advertising. And, as in its subsequently filed opposition to the motion for a preliminary injunction, Southern SARMs asserted the injunctive relief sought by Nutrition Distribution was overly broad, seeking wholesale prohibition of marketing and sales of Ostarine rather than prohibiting the allegedly false or misleading advertising. In the absence of a right to the relief requested as a matter of law, Southern SARMs contended, Nutrition Distribution had failed to plead viable causes of action.[3]

4. *The Trial Court's Ruling*

After full briefing on Nutrition Distribution's motion and Southern SARMs's demurrer, the court heard oral argument on both matters on September 12, 2016.[4] The court denied the motion for a preliminary injunction and sustained Southern SARMs's demurrer without leave to amend.[5] A judgment of dismissal was entered on September 15, 2016.

DISCUSSION

1. *Standard of Review*

a. *Review of an order **[*7]** sustaining a demurrer*

A demurrer tests the legal sufficiency of the factual allegations in a complaint. We independently review the superior court's ruling on a demurrer and determine de novo whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. (*Loeffler v. Target Corp. (2014) 58 Cal.4th 1081, 1100, 171 Cal. Rptr. 3d 189, 324 P.3d 50*; *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal.4th 32, 42, 105 Cal. Rptr. 3d 181, 224 P.3d 920*.) We assume the truth of the properly pleaded factual allegations, facts that reasonably can be inferred from those expressly pleaded and matters of which judicial notice has been taken. (*Evans v. City of Berkeley (2006) 38 Cal.4th 1, 20, 40 Cal. Rptr. 3d 205, 129 P.3d 394*; *Schifando v. City of Los*

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[3] Southern SARMs also filed a separate motion to strike those portions of the first amended complaint seeking restitution, including disgorgement of profits, and injunctive relief. Presenting the same arguments as contained in its demurrer, Southern SARMs argued those allegations constituted "irrelevant, false or improper matter inserted in any pleading" within the meaning of *Code of Civil Procedure section 436*.

[4] The record on appeal does not contain a reporter's transcript of the joint hearing on the motion for preliminary injunction and demurrer.

[5] In light of its order sustaining Southern SARMs's demurrer, the court deemed the motion to strike moot.

Angeles (2003) 31 Cal.4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569.) However, we are not required to accept the truth of the legal conclusions pleaded in the complaint. (Zelig v. County of Los Angeles (2002) 27 Cal.4th 1112, 1126, 119 Cal. Rptr. 2d 709, 45 P.3d 1171; Tepper v. Wilkins (2017) 10 Cal.App.5th 1198, 1203, 217 Cal. Rptr. 3d 111.) We liberally construe the pleading with a view to substantial justice between the parties. (Code Civ. Proc., § 452; Ivanoff v. Bank of America (2017) 9 Cal.App.5th 719, 726, 215 Cal. Rptr. 3d 442; see Schifando, at p. 1081 [complaint must be read in context and given a reasonable interpretation].)

"'Where the complaint is defective, "[i]n the furtherance of justice great liberality should be exercised in permitting a plaintiff to amend his [or her] complaint."'" (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 970-971, 9 Cal. Rptr. 2d 92, 831 P.2d 317.) We determine whether the plaintiff has shown "in what manner he [or she] can amend [the] complaint and how that amendment will change the legal effect of [the] pleading." (Goodman v. Kennedy (1976) 18 Cal.3d 335, 349, 134 Cal. Rptr. 375, 556 P.2d 737.) "[L]eave to amend should *not* be granted where . . . amendment would be futile." (Vaillette v. Fireman's Fund Ins. Co. (1993) 18 Cal.App.4th 680, 685, 22 Cal. Rptr. 2d 807; see **[*8]** generally Ivanoff v. Bank of America, supra, 9 Cal.App.5th at p. 726.)

b. *Review of the denial of a preliminary injunction*

In determining whether to issue a preliminary injunction a trial court weighs two interrelated factors: "[T]he likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." (Hunt v. Superior Court (1999) 21 Cal.4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705; accord, White v. Davis (2003) 30 Cal.4th 528, 554, 133 Cal. Rptr. 2d 648, 68 P.3d 74; City of Corona v. AMG Outdoor Advertising, Inc. (2016) 244 Cal.App.4th 291, 298, 197 Cal. Rptr. 3d 563.) Generally, the trial court's ruling on an application for a preliminary injunction rests in its sound discretion and will not be disturbed on appeal absent an abuse of discretion. (City of Corona, at p. 298; SB Liberty, LLC v. Isla Verde Assn., Inc. (2013) 217 Cal.App.4th 272, 280-281, 158 Cal. Rptr. 3d 105.) An order denying an application for a preliminary injunction may be reversed only if the trial court abused its discretion with respect to both the question of success on the merits and the question of interim harm. (See Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286-287, 219 Cal. Rptr. 467, 707 P.2d 840.)

Notwithstanding this general standard of review, the specific determinations underlying the superior court's decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination. (People ex rel. Gallo v. Acuna (1997) 14 Cal.4th 1090, 1136-1137, 60 Cal. Rptr. 2d 277, 929 P.2d 596; accord, Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 739, 106 Cal. Rptr. 3d 318.) Thus, the superior court's express and implied findings of fact must be accepted by the appellate court if supported by substantial evidence, and its conclusions on issues of pure law are subject to independent **[*9]** review. (People ex rel. Feuer v. FXS Management, Inc. (2016) 2 Cal.App.5th 1154, 1158-1159, 206 Cal. Rptr. 3d 819; 420 Caregivers, LLC v. City of Los Angeles (2012) 219 Cal.App.4th 1316, 1331, 163 Cal. Rptr. 3d 17.)

2. *The Trial Court Properly Sustained the Demurrer to Nutrition Distribution's First Amended Complaint*

a. *Claims under the unfair competition and false advertising laws*

Unfair competition under section 17200, the unfair competition law (UCL), means "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . ." Written in the disjunctive, section 17200 establishes "three varieties of unfair competition—acts or practices which are unlawful, unfair, or fraudulent." (Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (*Cel-Tech*); accord, Kasky v. Nike, Inc. (2002) 27 Cal.4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243.)

The "unlawful" prong of the UCL "'borrows' violations from other laws by making them independently actionable as unfair competitive practices." (Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1143, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (*Korea Supply*); accord, Kasky v. Nike, supra, 27 Cal.4th at p. 949.) The "unfair" prong authorizes a cause of action under the UCL if the plaintiff can demonstrate the objectionable act, while not unlawful, is "unfair" within the meaning of the UCL. (Cel-Tech, supra, 20 Cal.4th at p. 182.) "When a plaintiff who claims to have suffered injury from a direct competitor's 'unfair' act or practice invokes section 17200, the word 'unfair' in that section means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are **[*10]** comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." (*Id. at p. 187*.)

Under the "fraudulent" prong, a business practice violates the UCL if it "is likely to deceive the public. [Citations.] It may be based on representations to the public which are untrue, and '"also those which may be accurate on some level, but will nonetheless tend to mislead or deceive. . . . A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under"' the UCL. [Citations.] The determination as to whether a business practice is deceptive is based on the likely effect such practice would have on a reasonable consumer." (*McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1471, 49 Cal. Rptr. 3d 227*; accord, *Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1380, 137 Cal. Rptr. 3d 293*; see *Rubenstein v. The Gap, Inc. (2017) 14 Cal.App.5th 870, 876-877, 222 Cal. Rptr. 3d 397*; see also *Zhang v. Superior Court (2013) 57 Cal.4th 364, 370, 159 Cal. Rptr. 3d 672, 304 P.3d 163* ["[f]alse advertising is included in the 'fraudulent' category of prohibited practices"].)

In cases involving advertising or statements that are not literally false, '"[l]ikely to deceive' implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a **[*11]** significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." (*Lavie v. Procter & Gamble Co. (2003) 105 Cal. App. 4th 496, 508, 129 Cal. Rptr. 2d 486*; accord, *Chapman v. Skype Inc. (2013) 220 Cal.App.4th 217, 226, 162 Cal. Rptr. 3d 864*; *People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes (2006) 139 Cal.App.4th 1006, 1016, 43 Cal. Rptr. 3d 513*.)

Like *section 17200*, *section 17500*, the false advertising law, generally prohibits advertising that contains "any statement . . . which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . . ." To prove a violation under *section 17500*, however, the plaintiff must also demonstrate the defendant knew, or in the exercise of reasonable care, should have known, that the advertisement was untrue or misleading. (See *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 224, 197 Cal. Rptr. 783, 673 P.2d 660*.)

Notwithstanding its broad reach, an action under the UCL '"is not an all-purpose substitute for a tort or contract action.' [Citation.] Instead, the act provides an equitable means through which both public prosecutors and private individuals can bring suit to prevent unfair business practices and restore money or property to victims of these practices. . . . [T]he "overarching legislative concern [was] to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.] Because of this objective, the remedies provided are limited." (*Korea Supply, supra, 29 Cal.4th at p. 1150*.)

"To **[*12]** achieve its goal of deterring unfair business practices in an expeditious manner, the Legislature limited the scope of the remedies available under the UCL. 'A UCL action is equitable in nature; damages cannot be recovered.'" (*In re Tobacco II Cases (2009) 46 Cal.4th 298, 312, 93 Cal. Rptr. 3d 559, 207 P.3d 20*; see *Korea Supply, supra, 29 Cal.4th at p. 1150* [damages are not available under the UCL].) "Injunctions are 'the primary form of relief available under the UCL to protect consumers from unfair business practices,' while restitution is a type of 'ancillary relief.'" (*Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 337, 120 Cal. Rptr. 3d 741, 246 P.3d 877*.) Restitution is available "to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition." (*§ 17203*; see *Kraus v. Trinity Management Services, Inc. (2000) 23 Cal.4th 116, 126, 96 Cal. Rptr. 2d 485, 999 P.2d 718* (*Kraus*) ["[t]hrough the UCL a plaintiff may obtain restitution and/or injunctive relief against unfair or unlawful practices"]; see also *In re Tobacco Cases II (2015) 240 Cal.App.4th 779, 790, 192 Cal. Rptr. 3d 881*.)

Similarly, orders of restitution and injunctive relief, but not damages, are authorized for violations of *section 17500*. (*§ 17535*; see *Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal.4th 163, 177, fn. 10, 96 Cal. Rptr. 2d 518, 999 P.2d 706* ["[t]he restitutionary remedies of *section 17203* and *17535* . . . are identical and are construed in the same manner"]; *People ex rel Harris v. Sarpas (2014) 225 Cal.App.4th 1539, 1548, 172 Cal. Rptr. 3d 25*.)

b. *Nutrition Distribution failed to allege facts that would entitle it to restitution under the UCL or false advertising law*

Nutrition Distribution's first amended complaint sought recovery of Southern SARMs's profits from the sale of **[*13]** Ostarine through false and misleading advertising and "restitution of all Defendant's ill-gotten gains." Nutrition Distribution is not entitled to either remedy for violations of the UCL or false advertising law under the facts alleged in its pleading.

As discussed, damages are not available under the UCL or false advertising law. (*Cel-Tech, supra, 20 Cal.4th at p. 179*; *Korea Supply, supra, 29 Cal.4th at p. 1150*.) Recognizing this limitation, Nutrition Distribution argues "restitutionary disgorgement" is a recognized remedy and contends it has adequately pleaded its entitlement to such relief. However, restitution under the UCL must be restorative in nature: '"Restitution under [*Business and Professions Code] section 17203* is confined to restoration of any interest in "money or property, real or personal, which may have been *acquired* by means of such unfair competition." (Italics added.) A restitution order against a defendant thus requires both that money or property have been lost by a plaintiff, on the one hand, and that it have been acquired by a defendant, on the other.' [Citation.] '[C]ompensatory damages are not recoverable as restitution.'" (*Zhang v. Superior Court, supra, 57 Cal.4th at p. 371*; accord, *Korea Supply, at p. 1149* [the "object of restitution is to restore the status quo by returning to the plaintiff funds in which he or she has an ownership interest"]; see *Madrid v. Perot Systems Corp. (2005) 130 Cal.App.4th 440, 453, 30 Cal. Rptr. 3d 210* ["in the context **[*14]** of the Unfair Competition Law, 'restitution' is limited to the return of property or funds in which plaintiff has an ownership interest (or is claiming through someone with an ownership interest)"]; see also *Cortez v. Purolator Air Filtration Products Co., supra, 23 Cal.4th at pp. 173, 177-178*.)

Although Nutrition Distribution asserts it has a vested interest in any profits and business Southern SARMs wrongfully diverted from it, its characterization of its requested remedy as restitution does not make it so. To the contrary, compensation for lost business opportunities is a traditional measure of tort damages, not restitution, as the Supreme Court explained in rejecting a markedly similar argument in *Korea Supply*. In that case the plaintiff arms broker had sought to recover sums it allegedly would have received as a commission from its principal had the defendant-competitor not unfairly won an arms contract by bribing Korean officials. (*Korea Supply, supra, 29 Cal.4th at p. 1142*.) The Supreme Court held the relief sought was not available under the UCL, "This proposed recovery would be exactly the same amount that plaintiff is seeking to recover as damages for its traditional tort claim of interference with prospective economic advantage. The only difference between what plaintiff seeks to recover as 'disgorgement' **[*15]** and the damages it seeks under its traditional tort claim is that plaintiff would not recover its full commission under a 'disgorgement' remedy if, for some reason, the profits obtained by Lockheed Martin did not equal the amount of plaintiff's expected commission." (*Id. at p. 1151*; see *id. at p. 1149* ["[i]n an attempt to fit its claim within the statutory authorization for relief, and as an implicit acknowledgement that nonrestitutionary disgorgement is not an available remedy in an individual action under the UCL,[6] plaintiff describes its requested remedy as 'restitution.' This term does not accurately describe the relief sought by plaintiff"].)

Nutrition Distribution has not alleged any facts showing it had an "ownership interest" in the profits it seeks to recover from Southern SARMs, nor has it alleged it seeks to recover for some benefit it conferred on Southern

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[6] "Disgorgement as a remedy is broader than restitution or restoration of what the plaintiff lost. [Citations.] There are two types of disgorgement: restitutionary disgorgement, which focuses on the plaintiff's loss, and nonrestitutionary disgorgement, which focuses on the defendant's unjust enrichment. [Citation.] 'Typically, the defendant's benefit and the plaintiff's loss are the same, and restitution requires the defendant to restore the plaintiff to his or her original position.' [Citation.] However, '[m]any instances of "liability based on unjust enrichment . . . do not involve the restoration of anything the claimant previously possessed . . . includ[ing] cases involving the disgorgement of profits . . . wrongfully obtained . . . ." [Citation.] "[T]he public policy of this state does not permit one to 'take advantage of his own wrong'" regardless of whether the other party suffers actual damage. [Citation.] Where "a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust . . . the defendant may be under a duty to give to the plaintiff the amount by which [the defendant] has been enriched."'" (*American Master Lease LLC v. Idanta Partners, Ltd. (2014) 225 Cal.App.4th 1451, 1482, 171 Cal. Rptr. 3d 548*.)

SARMs for which it has a legal right of recovery. Nutrition Distribution has thus failed to state a cause of action for restitution under the UCL.

In a final attempt to maintain its action to recover Southern SARMs's profits from its allegedly deceptive marketing of Ostarine, Nutrition Distribution contends, at a minimum, it may seek disgorgement of those **[*16]** profits into a fluid recovery fund, citing as support language from *Alch v. Superior Court (2004) 122 Cal.App.4th 339, 19 Cal. Rptr. 3d 29*. Nutrition Distribution fundamentally misapprehends the import of *Alch.*

In *Alch* our colleagues in Division Eight of this court first explained that the Supreme Court has held that "disgorgement of unfairly obtained profits into a fluid recovery fund" is not an available remedy in either a representative action brought under the UCL" (*Alch v. Superior Court, supra, 122 Cal.App.4th at p. 405*, citing *Kraus, supra, 23 Cal.4th at p. 121*) or an individual UCL action (*Alch, at p. 406*, citing *Korea Supply, supra, 29 Cal.4th at p. 1147*), but then observed, "It may well be that in a proper case a court may order disgorgement of profits into a fluid recovery fund in a UCL class action; at least one case has so held." (*Alch, at pp. 407-408*, citing *Corbett v. Superior Court (2002) 101 Cal.App.4th 649, 655, 125 Cal. Rptr. 2d 46* (*Corbett*).) In the next several sentences, however, which Nutrition Distribution omits from its brief discussion of the purported availability of a fluid fund recovery, the *Alch* court held, "Fluid recovery in class actions, however, is merely a method of paying out damages after they have been awarded. [Citation.] The question is not whether the court could order fluid class recovery of a damages award; it is whether the trial court has the authority to award nonrestitutionary backpay under the UCL in the first instance. It does not." (*Alch, at p. 408*.)

Indeed, **[*17]** the decision in *Corbett*, cited in *Alch* as the one case permitting a fluid recovery fund in a UCL class action, evaluated the availability of that remedy for purposes of restitutionary disgorgement, not nonrestitutionary disgorgement, as Nutrition Distribution seeks in this case. In *Corbett* the defendants were a bank and a car dealership that allegedly made car loans at interest rates lower than the rate disclosed and charged to the customer. The defendants then split the excess interest payments. Thus, the disgorgement was restitutionary—to return money to those who had paid it. (See *Corbett, supra, 101 Cal.App.4th at p. 668*.) As the court held in *Madrid v. Perot Systems Corp., supra, 130 Cal.App.4th 440*, neither *Corbett* nor any other authority supports nonrestitutionary disgorgement into a fluid recovery fund in a UCL class action, "[T]he use of the class action vehicle to litigate a UCL claim does not expand the substantive remedies available, and the availability of fluid recovery in a UCL class action (which we presume for purposes of this appeal) says nothing about availability of *non*restitutionary disgorgement of profits." (*Id. at p. 461*.)

c. *Nutrition Distribution failed to allege facts that would justify the broad injunctive relief it seeks prohibiting all production and sales of any product* ***[*18]*** *containing selective androgen receptor modulators*

Section 17203 authorizes the court to issue injunctive relief "as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition" as defined by the UCL. Similarly, *section 17535* authorizes injunctive relief "as may be necessary to prevent the use or employment by any person . . . of any practices which violate" the false advertising law. Although this power is broad (see *People v. Toomey (1984) 157 Cal.App.3d 1, 20, 203 Cal. Rptr. 642)*, it is not unlimited. (See *Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal.App.4th 663, 702, 38 Cal. Rptr. 3d 36* ["A trial court has broad authority to enjoin conduct that violates *section 17200*. [Citation.] That authority is expansive but not unlimited."]; see also *In re Tobacco Cases II, supra, 240 Cal.App.4th at p. 802*; *People ex rel. Herrera v. Stender (2012) 212 Cal.App.4th 614, 631, 152 Cal. Rptr. 3d 16*.) In particular, an injunction must be directed to the unlawful or unfair acts or practices prohibited by the UCL or the false advertising law—here, the allegedly false, unfair, misleading and deceptive advertising used by Southern SARMs to sell Ostarine and related products. (*In re Tobacco Cases II, at p. 802*; *Madrid v. Perot Systems Corp., supra, 130 Cal.App.4th at p. 464*.)

The relief requested by Nutrition Distribution fails to satisfy this requirement. In its amended complaint Nutrition Distribution did not seek to enjoin Southern SARMs's allegedly misleading and deceptive advertising of Ostarine as identified in its pleading, but rather prayed for a complete and **[*19]** total prohibition of any production, marketing or sales of Ostarine and any other product containing selective androgen receptor modulators. As Southern SARMs has argued, the requested injunctive relief is vastly overbroad and in no way tethered to the wrongful conduct alleged.[7]

In its briefs and at oral argument in this court, Nutrition Distribution has continued to argue it is entitled under the UCL and the false advertising law to the broad injunctive relief it has requested. Neither in the trial court nor on appeal has it asked leave to amend to narrow the scope of the injunction sought to parallel the statutory violations it has alleged. Indeed, any such effort might well be futile. Although not properly considered in ruling on Southern SARMs's demurrer, in connection with its opposition to the motion for preliminary injunction, Southern SARMs introduced evidence, uncontradicted by Nutrition Distribution, it had stopped all marketing and sales of Ostarine (and had never manufactured it) and had no intention of resuming marketing or sales of the product. (See *In re Tobacco Cases II, supra, 240 Cal.App.4th at p. 802* ["'in order to grant injunctive relief under section 17204 or section 17535, there must be a threat that the wrongful conduct will continue"]; *Colgan v. Leatherman Tool Group, Inc., supra, 135 Cal.App.4th at p. 702* ["' **[*20]** [i]njunctive relief will be denied if, at the time of the order of judgment, there is no reasonable probability that the past acts complained of will recur, i.e., where the defendant voluntarily discontinues the wrongful conduct'"]; *Madrid v. Perot Systems Corp., supra, 130 Cal.App.4th at p. 463* ["[i]njunctive relief is appropriate only when there is a threat of continuing misconduct"].)[8]

In sum, because Nutritional Distribution did not allege facts that would entitle it under the UCL or false advertising law to the remedies it seeks, the demurrer to the first amended complaint was properly sustained.

3. *The Trial Court Did Not Abuse Its Discretion in Denying Leave To Amend*

"'If we see a reasonable possibility that the plaintiff could cure the defect by amendment, then we conclude that the trial court abused its discretion in denying leave to amend. If we determine otherwise, then we conclude it did not.' [Citation.] "'The burden of proving such reasonable possibility is squarely on the plaintiff."' [Citation.] To satisfy this burden, "'a plaintiff 'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading'"' by clearly stating not only the legal basis for the amendment, but also the factual allegations to sufficiently **[*21]** state a cause of action." (*Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 618, 172 Cal. Rptr. 3d 218*.)

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[7] Southern SARMs also argues the question whether sales of Ostarine or other products containing selective androgen receptor modulators should be banned raises issues that must be answered in the first instance by the FDA, including "[w]hether Ostarine is a 'drug,' 'new drug,' 'a prescription drug,' or a 'dietary supplement' proscribed or regulated by the FDA." Thus, it contends, Nutrition Distribution's request for injunctive relief is precluded by the primary jurisdiction doctrine. (See, e.g., *Farmers Ins. Exchange v. Superior Court (1992) 2 Cal.4th 377, 390, 6 Cal. Rptr. 2d 487, 826 P.2d 730* [primary jurisdiction "'applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views'"; italics omitted].)

In response, quoting extensively from *Nutrition Distribution, LLC v. Custom Nutraceuticals LLC (D.Ariz. 2016) 194 F.Supp.3d 952*, in which the defendants were alleged to have violated the federal Lanham Act by engaging in false advertising of Ostarine, Nutrition Distribution insists the trial court can decide whether Ostarine is as safe as Southern SARMs claims without expressing an opinion on any technical or policy questions committed to the FDA. (See *Custom Nutraceuticals, at p. 956* [the court does not "require FDA's expertise to determine whether it is false and misleading to market a product to competitive athletes while neglecting to mention that it has been banned by the World Anti-Doping Agency and the U.S. Anti-Doping Agency. It is not clear that this question even implicates the FDA's regulatory scheme . . ."].)

In light of our holding that the requested injunctive relief is impermissibly overbroad, we need not address the primary jurisdiction issue.

[8] In an appropriate situation a court may enter an injunction requiring corrective advertising to make up for past misleading statements. (See, e.g., *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy (1992) 4 Cal.App.4th 963, 972-974, 6 Cal. Rptr. 2d 193* [upholding court order requiring defendant to place a warning on its product, which it continued to sell, to correct a misperception created by prior false advertising].) No analogous circumstance is present in the case at bar.

In connection with its argument that it should be permitted to seek disgorgement of Southern SARMs's unlawful profits into a fluid recovery fund, Nutrition Distribution contends, if class certification is required for this remedy, it should be granted leave to amend "to consider whether or not to proceed as a class action." Even were this otherwise a proper request for leave to amend, nonrestitutionary disgorgement, whether directly to an individual or into a fluid recovery fund, is not an available remedy under the UCL or the false advertising law. Accordingly, this proposed amendment (such as it is) would be futile. Because Nutrition Distribution has not suggested any other amendment to change the legal effect of its pleading, the trial court properly sustained the demurrer to the first amendment complaint without leave to amend.

4. *The Appeal from the Denial of the Preliminary Injunction Is Moot*

As this court explained *MaJor v. Miraverde Homeowners Assn. (1992) 7 Cal.App.4th 618, 623, 9 Cal. Rptr. 2d 237*, "A preliminary injunction is an interim remedy designed to maintain the status quo pending a decision on the merits. [Citation.] It is not, in itself, a cause of action. Thus, a cause of action must exist before injunctive relief may be granted. . . **[*22]** . [¶] . . . In the present case, the trial court having sustained a demurrer without leave to amend to the only cause of action which might have supported a preliminary injunction in favor of Ms. MaJor, her appeal from the denial of a preliminary injunction is moot." (Accord, *Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal.App.4th 376, 399, 28 Cal. Rptr. 2d 530* ["in the case at bar, the trial court sustained the City's demurrer without leave to amend to those causes of action alleging the City's procedures were preempted by state constitutional and statutory law. Because these were the only causes of action which would have supported a preliminary injunction in plaintiffs' favor, their appeal from the denial of a preliminary injunction is dismissed as moot"]; see *Agnew v. Los Angeles (1958) 51 Cal. 2d 1, 2, 330 P.2d 385* [because the order denying plaintiff's motion for a temporary restraining order and for a preliminary injunction "dealt solely with the right to preventive relief pending final judgment," the entry of a judgment in favor of defendants after their demurrer to the complaint was sustained without leave to amend "rendered the right to interim relief moot"].)

Having concluded that Nutrition Distribution failed to state a cause of action under the UCL or the false advertising law and that the trial court properly **[*23]** sustained Southern SARMS's demurrer without leave to amend, we need not consider Nutrition Distribution's appeal from the denial of its motion for a preliminary injunction. That portion of Nutrition Distribution's appeal is dismissed as moot. (See *Agnew v. City of Los Angeles, supra, 51 Cal.2d at p. 2*.)

DISPOSITION

The judgment of dismissal is affirmed. The appeal from denial of the motion for preliminary injunction is dismissed as moot. Southern SARMs is to recover its costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

End of Document

Intellectual Ventures I LLC v. Capital One Fin. Corp.

United States District Court for the District of Maryland, Southern Division

November 30, 2017, Decided; December 1, 2017, Filed

Case No.: PWG-14-111

Reporter

280 F. Supp. 3d 691 *; 2017 U.S. Dist. LEXIS 197714 **; 2017-2 Trade Cas. (CCH) P80,212; 2017 WL 5970720

INTELLECTUAL VENTURES I LLC, et al., Plaintiffs/Counter-Defendants, v. CAPITAL ONE FINANCIAL CORP., et al., Defendants/Counter-claimants/Third-Party Plaintiffs, v. INTELLECTUAL VENTURES MANAGEMENT, LLC, et al., Third-Party Defendants/Joined Counter-Defendants.

Subsequent History: Affirmed by *Intellectual Ventures I LLC v. Capital One Fin. Corp., 2019 U.S. App. LEXIS 27200 (Fed. Cir., Sept. 10, 2019)*

Prior History: *Intellectual Ventures I LLC v. Capital One Fin. Corp., 2014 U.S. Dist. LEXIS 31715 (D. Md., Mar. 12, 2014)*

Core Terms

patent, relevant market, antitrust, license, sham, portfolio, collateral estoppel, immunity, parties, anti trust law, technology, banks, infringement, baseless, monopoly power, monopolization, relitigation, litigate, markets, merits, summary judgment, cluster, patent infringement, counterclaims, cases, antitrust claim, allegations, competitor, lawsuit, proceedings

LexisNexis® Headnotes

Business & Corporate Compliance > ... > US Patent & Trademark Office Proceedings > Patent Law > US Patent & Trademark Office Proceedings

HN1[] **Patent, US Patent & Trademark Office Proceedings**

A "patent troll" is an individual or company who acquires by purchase or application to the Patent and Trademark Office a patent that he or she uses not to protect an invention but to obtain a license fee from, or legal judgment against, an alleged infringer. Patent trolls are also known as patent assertion entities and non-practicing entities.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN2[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

Under the Noerr-Pennington doctrine, those who petition the government for redress, including by filing suit in court, are generally immune from antitrust liability.

Business & Corporate Compliance > ... > Infringement Actions > Patent Law > Infringement Actions

Business & Corporate Compliance > ... > Ownership > Patent Law > Ownership

HN3[] **Patent, Infringement Actions**

A patent, by its very nature, vests its owner with a type of legal monopoly, which it can enforce against anyone who infringes the patent. Enforcing a patent through litigation protects this monopoly, even though in other circumstances monopolies are viewed as harmful.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

HN4[] **Antitrust & Trade Law**

To promote the benefits of robust competition, ***antitrust law*** aims to prevent a company from having the ability to control the price of its product or exclude competitors to the extent that it can charge sustained supracompetitive prices (prices substantially above what a competitive price would be if consumers could simply buy a close substitute product from a competitor at lower cost).

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Business & Corporate Compliance > ... > Ownership > Patent Law > Ownership

HN5[] **Regulated Practices, Monopolies & Monopolization**

The exercise of monopoly power with regard to a single patent (or even a few patents) usually does not offend ***antitrust law***. But it is another matter to acquire a vast portfolio of patents that are essential to technology employed by an entire industry and then to compel its licensing at take-it-or-leave-it prices because it is not economically feasible to determine if alternative technologies, not covered by the accumulation of patents, are available. This acquisition and compelled licensing may amount to the ability to exercise monopoly power on an entirely different scale.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

HN6[] **Regulated Practices, Monopolies & Monopolization**

The power to control prices or exclude competitions is the essence of monopoly power. ***Antitrust law*** is designed to prevent the acquisition and exercise of monopoly power. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

HN7[] **Market Definition, Relevant Market**

The essential first step in analyzing antitrust claims is to define the relevant market by product(s) and geography. Market definition is a deeply fact-intensive inquiry. In determining the relevant market, a court must consider the commercial realities faced by consumers. Where the facts are hotly disputed, defining relevant market is generally a question for a trier of fact. The burden of proof lies with the antitrust plaintiff to prove relevant market. When the parties proffer competing economic experts on the proper definition of relevant market, summary judgment is inappropriate as long as each expert's views could be found by the trier of fact to be reasonable.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

HN8[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is proper when the moving party demonstrates, through particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials, that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*, *(c)(1)(A)*. If a party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify evidence that shows that a genuine dispute exists as to material facts. The existence of only a scintilla of evidence is not enough to defeat a motion for summary judgment. Instead, the evidentiary materials submitted must show facts from which the finder of fact reasonably could find for the party opposing summary judgment.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Business & Corporate Compliance > ... > Infringement Actions > Patent Law > Infringement Actions

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Business & Corporate Compliance > ... > Ownership > Patent Law > Ownership

HN9[] **Regulated Practices, Monopolies & Monopolization**

Antitrust law proscribes the willful acquisition or maintenance of monopoly power within a market, as well as attempts to monopolize. *15 U.S.C.S. § 2*. In contrast, a patent creates a legal monopoly. Additionally, those who petition the government for redress are generally immune from antitrust liability under what is known as Noerr-Pennington immunity. This holds true for parties who file suit in court. And, patent holders that believe that their patents have been infringed may seek to enforce their rights under the patent through patent litigation. *35 U.S.C.S. § 281*. Thus, when a party challenges a patent holder's efforts to enforce its patents through litigation, a court must determine whether the patent holder is exercising the lawful restraint on trade of the patent monopoly or the illegal restraint prohibited broadly by the *Sherman Act*. To do so, courts must balance the privileges of a patent holder under its patent grants with the prohibitions of the *Sherman Act* against combinations and attempts to monopolize.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

HN10[] Misuse of Rights, Patent Misuse Defense

Patent acquisition is actionable under the *Clayton Act* only where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. *15 U.S.C.S. § 18*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN11[] Exemptions & Immunities, Noerr-Pennington Doctrine

A patentee who brings an infringement suit may lose its Noerr-Pennington immunity and be subject to antitrust liability for the anti-competitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud within the meaning of Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp. or (2) that the infringement suit was a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN12[] Misuse of Rights, Patent Misuse Defense

The enforcement of a patent procured by fraud on the Patent Office may be violative of *15 U.S.C.S. § 2* provided the other elements necessary to a *15 U.S.C.S. § 2* case are present. Thus, to strip a patentee of its exemption from the antitrust laws because of its attempting to enforce its patent monopoly, an antitrust plaintiff is first required to prove that the patentee obtained the patent by knowingly and willfully misrepresenting facts to the Patent and Trademark Office and that the patent holder seeking to enforce its patent through litigation was aware of the fraud when bringing suit. For Walker Process purposes, fraud is a more serious offense than inequitable conduct. Where there is no evidence that the Patent Office was tricked by fraud or that the patentee (which later acquired the patents) was aware of any such fraud, Walker Process's holding has no application.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN13[] Misuse of Rights, Patent Misuse Defense

The U.S. Supreme Court has observed that there may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover up what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor, and the application of the *Sherman Act* is justified. This sham litigation exception has been extended to patent litigation, in which a patentee's conduct in the prosecution of a patent is sufficient to strip the patentee of its immunity from the antitrust laws. But this exception to Noerr-Pennington immunity is narrow, given the presumption of patent validity and the burden on a patent challenger to prove invalidity by clear and convincing evidence. Consequently, rarely is a patentee's assertion of its patent in the face of a claim of invalidity so unreasonable as to support a claim that the patentee has engaged in sham litigation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

HN14[] Noerr-Pennington Doctrine, Right to Petition Immunity

An antitrust claim cannot be based upon the approach of citizens or groups of them to administrative agencies or to courts.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN15[] Noerr-Pennington Doctrine, Sham Exception

Allegations that parties sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process and instituted proceedings and actions with or without probable cause, and regardless of the merits of the cases, fall within the sham exception in the Noerr case, as adapted to the adjudicatory process. When a party's legal actions reflect a pattern of baseless, repetitive claims that leads a factfinder to conclude that the administrative and judicial processes have been abused, that party cannot acquire immunity by seeking refuge under the umbrella of political expression.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN16[] Noerr-Pennington Doctrine, Sham Exception

To qualify as sham litigation, for purposes of an exception to the Noerr-Pennington doctrine, a lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and the litigant's subjective motivation must be to interfere directly with the business relationships of a competitor.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN17[] Noerr-Pennington Doctrine, Sham Exception

A finding of an objectively reasonable effort to litigate is sufficient to show that litigation was not a sham, for purposes of the sham litigation exception to the Noerr-Pennington doctrine, regardless of subjective intent. Simply put, if a court concludes that an antitrust defendant had probable cause to file suit (which it can determine as a matter of law if there is no dispute over the predicate facts of the underlying legal proceeding), it cannot find that the defendant engaged in sham litigation, even if the litigant filed suit without any expectation of success.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN18[] Noerr-Pennington Doctrine, Sham Exception

When considering whether the sham litigation exception to the Noerr-Pennington doctrine applies, the notion of probable cause requires a plaintiff to prove that a defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. Probable cause to institute civil proceedings requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication. Because the absence of probable cause is an essential element of the tort of wrongful civil proceedings, the existence of probable cause is an absolute defense. When a court has found that an antitrust defendant claiming Noerr immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. Therefore, a proper probable cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to Noerr immunity.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN19[] **Noerr-Pennington Doctrine, Sham Exception**

When considering the sham litigation exception to Noerr-Pennington immunity under the California Motor standard, the focus is not on any single case. Rather a district court should conduct a holistic evaluation of whether the administrative and judicial processes have been abused. It is the pattern of the legal proceedings, not their individual merits, that the court considers to determine whether an antitrust defendant indiscriminately filed a series of legal proceedings without regard for the merits and for the purpose of violating federal law. The subjective motive of the litigant and the objective merits of the suits are relevant, but the California Motor standard is different because other signs of bad-faith litigation may also be probative of an abuse of the adjudicatory process.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN20[] **Noerr-Pennington Doctrine, Sham Exception**

When considering whether the sham litigation exception to Noerr-Pennington immunity applies, PREI and California Motor apply to different situations. PREI provides a strict two-step analysis to assess whether a single action constitutes sham petitioning. California Motor deals with a case where a defendant is accused of bringing a whole series of legal proceedings. The PREI standard is ill-fitted to test whether a series of legal proceedings is sham litigation, especially when a presiding tribunal for earlier cases had no occasion to measure the baselessness of the suit because (1) it had no inkling that the action comprised a possible campaign of sham litigation, and (2) the plaintiffs preempted an assessment of frivolity by prematurely withdrawing some of their suits. Thus, when purported sham litigation encompasses a series of legal proceedings rather than a singular legal action, the sham litigation standard of California Motor should govern.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN21[] **Misuse of Rights, Patent Misuse Defense**

It has been held that an antitrust claim premised on stripping a patentee of its immunity from the antitrust laws is typically raised as a counterclaim by a defendant in a patent infringement suit, and, because most cases involving these issues are appealed to United States Court of Appeals for the Federal Circuit (Federal Circuit), immunity from antitrust laws should be decided as a matter of Federal Circuit law, rather than by relying on various regional precedents. On that basis, the Federal Circuit has held that for all antitrust claims premised on the bringing of a patent infringement suit, the issue of whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law, although the law of the appropriate regional circuit applies to issues involving other elements of ***antitrust law*** such as relevant market, market power, damages, etc. This language is unambiguous in its application to instances of patent litigation.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN22[] **Noerr-Pennington Doctrine, Sham Exception**

When considering the sham litigation exception to Noerr-Pennington immunity, under PREI, what a court needs to determine is whether a reasonable litigant in the position of the party asserting immunity could realistically expect to succeed on the merits of its claims because, if it could, the litigation was not objectively baseless and therefore not sham litigation. This is an absolute defense that requires no more than a reasonable belief that there is a chance that a claim may be held valid upon adjudication.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN23[] **Estoppel, Collateral Estoppel**

Collateral estoppel, also known as issue preclusion, works to ensure that parties get one full and fair opportunity to litigate a particular issue, while preventing needless relitigation of that issue. Collateral estoppel bars relitigation of an issue or fact if (1) the issue or fact is identical to one previously litigated, (2) the issue or fact was actually resolved in the prior proceeding, (3) the issue or fact was critical and necessary to the judgment in the prior proceeding, (4) the judgment in the prior proceeding is final and valid, and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN24[] **Estoppel, Collateral Estoppel**

Collateral estoppel may be offensive or defensive. Offensive collateral estoppel is when a plaintiff or counter claimant or third party plaintiff employs the doctrine of collateral estoppel or issue preclusion to foreclose a defendant or counter defendant or third party defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive collateral estoppel is when a defendant or counter defendant or third party defendant employs the doctrine to prevent a plaintiff or counter claimant or third party plaintiff from asserting a claim the plaintiff or counter claimant or third party plaintiff has previously litigated and lost against another defendant. A defendant (or defending party) also can employ defensive collateral estoppel to bar claims the plaintiff (or claimant) already unsuccessfully made against it, rather than another defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN25[] **Attempts to Monopolize, Sherman Act**

For an attempted monopolization claim under *15 U.S.C.S. § 2*, to determine whether there is a dangerous probability of monopolization, courts find it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

HN26[] **Actual Monopolization, Claims**

To prevail on a claim of monopolization under *15 U.S.C.S. § 2*, a plaintiff must prove (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Clayton Act > Scope

HN27[] Antitrust & Trade Law, Clayton Act

A merger which produces a firm controlling an undue percentage share of a relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it is a violation of *15 U.S.C.S. § 7* unless there is evidence clearly showing that the merger is not likely to have such anticompetitive effects.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN28[] Attempts to Monopolize, Elements

To prevail on a claim of attempted monopolization, a plaintiff must prove (1) a specific intent to monopolize a relevant market, (2) predatory or anticompetitive acts, and (3) a dangerous probability of successful monopolization.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN29[] Relevant Market, Product Market Definition

A relevant market is generally viewed as the field of meaningful competition. It is determined by commercial realities and consumer choice and, while it typically includes substitutes for a particular product, it may also consist of a single product or brand where there is no reasonable interchangeability with other comparable products, that is, where there are essentially no substitutes for a given product.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN30[] Estoppel, Collateral Estoppel

Even though the doctrine of collateral estoppel was designed to bar the relitigation of issues determined in a prior suit, it may apply to relitigation within the same suit because where the relitigation involves the same parties, the same issues arising out of the same set of facts, and the same court, the "sameness" or mutuality of parties in interests which serves as the basis for the development of collateral estoppel doctrines is present. Thus, the court can utilize the doctrine of collateral estoppel without fear of denying a litigant a right to argue his or her claims to the best of his or her ability before a competent court.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN31[] Estoppel, Collateral Estoppel

Where a court in a prior suit has determined two issues, either of which could independently support a result, then neither determination is considered essential to the judgment and collateral estoppel does not bar relitigation of either issue, unless one of the two determinations is upheld on appeal, in which case collateral estoppel bars relitigation as to that issue. The rationale underlying this corollary to the collateral estoppel doctrine is that it guards against the use of non-essential dicta and ancillary findings to estop later litigations. Non-essential findings should not serve as the basis for collateral estoppel because the litigants might not have concentrated their energies and resources upon the full development and presentation of these issues. Thus, this requirement ensures the integrity and competence of any particular finding before it is allowed to estop collateral relitigation.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN32[] **Estoppel, Collateral Estoppel**

Collateral estoppel is limited by the overriding principle that courts should protect a litigant's right to a full and fair opportunity to litigate his or her claims but is otherwise capable of flexible determination to serve the interests of judicial economy by preventing needless relitigation.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN33[] **Estoppel, Collateral Estoppel**

The United States Supreme Court grants courts broad discretion to determine when offensive collateral estoppel should be applied because of a greater possibility of unfairness from the use of offensive collateral estoppel.

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For Capital One Financial Corporation, Counter Claimant: Brent P Ray, LEAD ATTORNEY, Kristina Hendricks, Kirland and Ellis LLP, Chicago, IL; Mary Catherine Zinsner, LEAD ATTORNEY, Lesley Whitcomb Fierst, Syed Mohsin Reza, Troutman Sanders LLP, Tysons Corner, VA; Matthew Moore, LEAD ATTORNEY, Latham and Watkins LLP, Washington, DC; Adam M Greenfield, Latham and Watkins LLp, Washington, DC; Alicia R Jovais, PRO HAC VICE, Christopher St. john Yates, Latham and Watkins LLP, San Francisco, CA; Andrew Jay Graham, James P Ulwick, Kramon and Graham PA, Baltimore, MD; Christopher J Forstner, Dabney J Carr, IV, Megan C Rahman, Robert A Angle, Troutman Sanders LLP, Richmond, VA; Clement Naples, Latham and Watkins LLP, New York, NY; Daniel Anziska, Susan Grace, PRO HAC VICE, Troutman Sanders LLP, New York, NY; David W Higer, Kirland and Ellis LLp, Chicago, IL; Jeffrey G Homrig, Lathma and Watkins LLP, Menlo Park, CA; Joel Merkin, Kenneth R Adamo, Megan M New, Ryan M Hubbard, Kirkland and Ellis LLP, Chicago, IL; Katherine M Schon, Michelle Patricia Woodhouse, **[**19]** Latham and Watkins LLP, Menlo Park, CA; Kristopher Davis, Latham and Watkins, Chicago, IL; Patricia Young, Latham and Watkins, Menlo Park, CA; Paul E McGowan, Troutman Sanders LLP, Atlanta, GA.

For Intellectual Ventures I LLC, Intellectual Ventures II LLC, Counter Defendant: Brent P Ray, LEAD ATTORNEY, Kristina Hendricks, Kirland and Ellis LLP, Chicago, IL; Mary Catherine Zinsner, LEAD ATTORNEY, Lesley Whitcomb Fierst, Syed Mohsin Reza, Troutman Sanders LLP, Tysons Corner, VA; Matthew Moore, LEAD ATTORNEY, Latham and Watkins LLP, Washington, DC; Adam M Greenfield, Latham and Watkins LLp, Washington, DC; Alicia R Jovais, PRO HAC VICE, Christopher St. john Yates, Latham and Watkins LLP, San Francisco, CA; Andrew Jay Graham, James P Ulwick, Kramon and Graham PA, Baltimore, MD; Christopher J Forstner, Dabney J Carr, IV, Megan C Rahman, Robert A Angle, Troutman Sanders LLP, Richmond, VA; Clement Naples, Latham and Watkins LLP, New York, NY; Daniel Anziska, Susan Grace, PRO HAC VICE, Troutman

Sanders LLP, New York, NY; David W Higer, Kirland and Ellis LLp, Chicago, IL; Jeffrey G Homrig, Lathma and Watkins LLP, Menlo Park, CA; Joel Merkin, Kenneth R Adamo, Megan M New, Ryan M Hubbard, Kirkland **[**20]** and Ellis LLP, Chicago, IL; Katherine M Schon, Michelle Patricia Woodhouse, Latham and Watkins LLP, Menlo Park, CA; Kristopher Davis, Latham and Watkins, Chicago, IL; Patricia Young, Latham and Watkins, Menlo Park, CA; Paul E McGowan, Troutman Sanders LLP, Atlanta, GA.

For Intellectual Ventures Management, LLC, Invention Investment Fund I, L.P., Invention Investment Fund II, LLC, Counter Defendant: Daniel J Weinberg, PRO HAC VICE, Freitas Angell and Weinberg LLP, Redwood Shores, CA; Jessica N Leal, PRO HAC VICE, Freitas Andell and Weinberg LLP, Redwood Shores, CA.

Judges: Paul W. Grimm, United States District Judge.

Opinion by: Paul W. Grimm

Opinion

[*694] **MEMORANDUM OPINION**

The litigation history between the Intellectual Ventures companies (Plaintiffs, Counter-Defendants, Third-Party Defendants, and Joined Counter-Defendants to this action; collectively referred to as "IV") and the Capital One companies (Defendants, Counterclaimants, and Third-Party Plaintiffs in this action; collectively referred to as "Capital One") is protracted, beginning with a patent infringement action that Intellectual Ventures I, LLC and Intellectual Ventures II, LLC (together, "IV I and II") filed in the Eastern District of Virginia on June 19, **[**21]** 2013. In that case, as well as in this patent infringement action that IV I and II filed on January 15, 2014, Capital One brought antitrust counterclaims. The Virginia court dismissed Capital One's antitrust claims for failure to state a claim, and IV now seeks summary judgment on very similar claims. ECF No. 656. Because *Noerr—Pennington* immunity and collateral estoppel both bar Capital One's antitrust claims, I will grant IV's motion.

Procedural Background

IV I and II filed suit in this Court, alleging that Capital One infringed five of their patents. Compl., ECF No. 1. IV I and II ultimately voluntarily withdrew one patent infringement claim and proceeded with the others. ECF Nos. 80, 81. The parties engaged in extensive discovery and agreed to referral to a Special Master highly experienced in patent law, jointly selected by the parties and appointed pursuant to *Fed. R. Civ. P. 53*. ECF Nos. 134, 136, 143. He oversaw additional discovery, following which the parties extensively briefed the patent infringement claims. ECF Nos. 147, 147-1, 169, 169-1, 227, 246, 297, 300, 303. The Special Master issued two reports and recommendations, ECF **[*695]** Nos. 298 and 315, in which he ruled in favor of IV with respect **[**22]** to two of its patents, United States Patent Nos. 7,984,081 and 6,546,002 ("the '081 Patent" and "the '002 Patent"), and in favor of Capital One on the claims related to United States Patent Nos. 6,314,409 and 6,715,084 ("the '409 Patent" and "the '084 Patent"). Both parties challenged the Special Master's rulings adverse to them, and further briefing ensued. ECF Nos. 307, 311, 312, 313, 319, 324, 325, 330, 335, 336, 344.

After reviewing the Special Master's reports and recommendations and the parties' extensive briefs, I overruled the Special Master with respect to the '081 Patent and the '002 Patent, finding that they were unenforceable. ECF Nos. 377, 378. I also ruled that collateral estoppel applied regarding the '409 Patent and the '084 Patent, barring IV from bringing claims against Capital One for infringement of those patents. ECF No. 382. The net effect of my ruling was that each of the patents that IV claimed Capital One had infringed was unenforceable, two patents because I concluded that they were invalid pursuant to *35 U.S.C. § 101*, and two patents because the United States District Court for the Southern District of New York in *Intellectual Ventures v. JPMC, Case No. 13-3777-AKH, 2015 U.S. Dist. LEXIS 56092, 2015 WL 1941331 (S.D.N.Y. Apr. 28, 2015)*, concluded that they were invalid, and issue preclusion barred me from reaching a different conclusion. On those grounds, I entered summary judgment in

Capital One's favor on those four **[**23]** remaining patent infringement claims. ECF Nos. 378, 382. And, finding no just reason for delay, I entered a final judgment in favor of Capital One on the patent infringement claims, making that order immediately appealable. ECF No. 387. The Federal Circuit affirmed my rulings, *Intellectual Ventures I LLC v. Capital One Fin. Corp., 850 F.3d 1332 (Fed. Cir. 2017)*, thereby ending the patent infringement claims against Capital One.

Meanwhile, Capital One had sought leave to file three antitrust counterclaims, claiming monopolization and attempted monopolization, in violation of Section 2 of the Sherman Act, *15 U.S.C. § 2*, and unlawful asset acquisition, in violation of Section 7 of the Clayton Act, *15 U.S.C. § 18*, as part of its Third Amended Answer, Defenses, and Counterclaims. ECF No. 106. IV I and II opposed the motion. ECF No. 118. I granted Capital One leave to file its counterclaims, ECF Nos. 194, 195, which it did, ECF No. 196; *see also* Fourth Amended Answer, Defenses, and Counterclaims, ECF Nos. 438 (redacted), 439 (sealed). It also filed a Third Party Complaint against additional Intellectual Ventures companies: Invention Investment Fund II, LLC; Intellectual Ventures Management, LLC; Invention Investment Fund I, L.P. ECF Nos. 228 (sealed), 230 (redacted). Capital One alleges that IV has tried, without success, **[**24]** to license to Capital One its extensive patent portfolio, which includes the patents that IV has sued Capital One, in this suit and the Virginia suit, for infringing. Capital One believes that IV's repeated claims against it are actionable under ***antitrust law***.

I denied IV's motions to dismiss the counterclaims and Third Party Complaint, ECF Nos. 225, 296, finding that Capital One had pled them sufficiently to proceed to discovery. ECF No. 328. After another round of extensive (and expensive) discovery regarding liability on the antitrust counterclaims, I attended a tutorial involving the economic experts that the parties had identified. ECF No. 651. Also in attendance was the court technical advisor, Professor John M. de Figueiredo of Duke University Law and Business Schools, whose appointment the parties had confirmed on a status conference call, and who assisted the court in evaluating the economic **[*696]** evidence. ECF Nos. 606, 608.[1] At the close of discovery, IV filed the pending Motion for Summary Judgment, which the parties fully briefed.[2] In support of their positions, the parties jointly submitted a 13,344 page Joint Record, comprising 286 exhibits in sixteen, 3-inch binders. Having **[**25]** reviewed the parties' memoranda and exhibits, I now rule.

Parties' Arguments

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[1] Unlike expert witnesses appointed under *Rule 706*, technical advisors are appointed under the court's inherent authority, and they do not testify at trial (and are not deposed or subject to cross examination). Joe S. Cecil & Thomas E. Willging, *Court-Appointed Experts in* Reference Manual on Scientific Evidence 527, 531 (Fed. Judicial Ctr. 1994). Accordingly, Professor de Figueiredo did not provide his independent opinion on the issues, but instead helped me understand the parties' experts' methodology, any assumptions underlying the experts' opinions, and how the methodology applies to the facts of this case. Thus, the purpose of the technical expert was to assist me in understanding the economic issues in this litigation and to enhance my ability to make an informed ruling on the pending motion. In this regard, Professor de Figueiredo's assistance was invaluable.

[2] The parties fully briefed the motion. ECF Nos. 657 (sealed opening brief), 668 (redacted opening brief), 662 (redacted opposition), 664 (sealed opposition), 669 (sealed reply), 671 (redacted reply). A hearing is not necessary. *See Loc. R. 105.6*.

Also pending are motions to seal the opening brief and opposition. ECF Nos. 658, 665. I have considered the motions and other filings in this case, included redacted versions of the sealed documents, and in the interest of protecting confidential, proprietary, trade secret, and/or commercially sensitive information, I will grant the motions to seal.

Intellectual Ventures also has filed objections to the Joint Record Exhibits, ECF No. 674 (redacted), 675 (sealed), as well as a motion to seal its objections, ECF No. 676. Its motion to seal is granted for the same reasons that the summary judgment briefings are sealed. However, the objections are overruled. And, although I relied on the sealed briefings for this Memorandum Opinion, its contents do not justify sealing it, because the public's interest in a public ruling outweighs the parties' interest in sealing information related to this case.

The essence of Capital One's antitrust claim is that IV is a "patent troll,"[3] and not just any patent troll, but a veritable Dovregubben.[4] Capital One asserts that IV's business practice is to acquire a vast portfolio of thousands of patents that purportedly deal with technology essential to the types of services offered by commercial banks (such as ATM transactions, mobile banking, on-line banking, and credit card transactions). It then employs an aggressive marketing scheme whereby it makes an "offer" for banks to license (Capital One really would prefer to say "extorts" banks to license) its entire portfolio for a period of years at a jaw-droppingly high price. But, Capital One insists, when the banks ask for details about the patents covered in the portfolio in order to determine whether their services infringe them, IV refuses to disclose sufficient information to enable them to make an intelligent decision about whether they should agree to the license. And, if the bank balks at licensing the entire portfolio at IV's take-it-or-leave-it price, IV then threatens to file a patent **[**26]** infringement claim against the bank regarding only a few of the patents in the portfolio. Adding insult to injury, IV then makes it clear that should it lose the **[*697]** patent infringement case, it will simply file another (and if needed, another, and so on) regarding a different set of its patents, until the prospect of endless high-cost litigation forces the bank to capitulate and license the entire portfolio.[5]

Capital One characterizes IV's business model as comprised of three components: *accumulate* a vast portfolio of patents purportedly relating to essential commercial banking services, *conceal* the details of those patents so that the banks cannot determine whether their products infringe any of IV's patents, and serially *litigate* to force the banks to capitulate and license the portfolio at exorbitant cost. This conduct, Capital One insists, constitutes monopolization under § 2 of the Sherman Act, *15 U.S.C. § 2*, attempted monopolization under § 2 of the Sherman Act, and unlawful asset acquisition under § 7 of the Clayton Act, *15 U.S.C. § 18*.

Nonsense, IV indignantly responds. It counters Capital One's charges by arguing that it legitimately purchased or otherwise acquired its large portfolio **[**27]** of patents that relate to multiple technology markets. It then offers to license its portfolio to banks (and other types of businesses), beginning its negotiation with an opening offer, and expecting the bank to counteroffer, thereby initiating a back-and-forth exchange that it hopes will result in a mutually-agreeable licensing fee. IV vehemently denies that it conceals the details of its individual patents or that Capital One could not determine what they relate to by reviewing publicly available information. As IV sees things, when Capital One declined to make a counter offer to its opening bid, it then selected a number of its patents and brought suit against Capital One, first in the Eastern District of Virginia, and then, when that suit was unsuccessful, in this Court, with respect to a different set of patents. Moreover, IV claims that Capital One is, in essence, an "efficient infringer"—an entity that engages in its business without care for whether it infringes on patents held by others, with the knowledge that a patent infringement case is expensive to bring, and many patent holders lack the funds to do so to protect their rights. As such, Capital One can play the odds, infringing **[**28]** patents with near impunity until the rare patent holder with the resources to sue does so, and then negotiate a favorable license fee.

IV points out that each of its patents is presumptively valid, and that it has an absolute right to file litigation to enforce them. And, in IV's view, if enforcing its patents through litigation has any monopoly effect (which IV denies it does), it has immunity under the *Noerr—Pennington* doctrine.[6] Moreover, IV argues that Capital One is barred by

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[3] ***HN1***[] A "patent troll" is an individual or company "who acquires by purchase or application to the Patent and Trademark Office a patent that he uses not to protect an invention but to obtain a license fee from, or legal judgment against, an alleged infringer." *Carhart v. Carhart-Halaska Int'l, LLC, 788 F.3d 687, 691 (7th Cir. 2015)*. "Patent trolls are also known [as] 'patent assertion entities' (PAEs), [and] 'non-practicing entities' (NPEs)." *In re Packard, 751 F.3d 1307, 1325 (Fed. Cir. 2014)*.

[4] Dovregubben was the Troll King in Henrik Ibsen's 1867 play *Peer Gynt*.

[5] Capital One is not the first to make these claims about IV's business practices. *E.g.*, Robin Feldman & Tom Ewing, *The Giants Among Us*, 2012 Stan. Tech. L. Rev. 1, 2-15 (2012).

[6] ***HN2***[] Under the *Noerr—Pennington* doctrine, "[t]hose who petition government for redress," including by filing suit in court, "are generally immune from antitrust liability." *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56, 57,*

both claim and issue preclusion from asserting its antitrust counterclaims because it brought virtually the exact claims in the Eastern District of Virginia suit, lost, and elected not to appeal. Further, IV challenges Capital One's definition of the relevant market for purposes of antitrust analysis, insisting that its portfolio consists of numerous distinct technology markets, not some monolithic **[*698]** "financial services portfolio" as claimed by Capital One.

IV also asserts that Capital One's antitrust theory is fundamentally flawed, because no liability can attach unless Capital One can prove that IV exercises monopoly power within a relevant market. "Monopoly power is the power to control prices **[**29]** or exclude competition." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*; *see* *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *E.I. du Pont*); *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (same). IV insists that it does neither, because the correct market definition would recognize that what IV owns is a series of patents that relate to multiple, distinct technology markets. And IV could exercise monopoly power only if Capital One can show that its patents include those affecting alternative substitute technologies that Capital One otherwise could turn to in order to avoid having to license IV's patents. Capital One has not made this showing, IV contends, entitling it to summary judgment.

Antitrust Analysis and Economic Theory

Underlying the legal issues in this case are two important but competing policies. On one hand, we value innovation that leads to new inventions that advance science and technology, protecting that creative effort by issuing patents. ***HN3***[] A patent, by its very nature, vests its owner with a type of legal monopoly, which it can enforce against anyone who infringes the patent. Enforcing a patent through litigation protects this monopoly, even though in other circumstances we view monopolies as harmful.

The other important policy implicated by this case, of course, is the strong desire to ensure vigorous **[**30]** competition in the marketplace, so that consumers (whether businesses or individuals) can purchase at the lowest possible price. ***HN4***[] To promote the benefits of robust competition, ***antitrust law*** aims to prevent a company from having the ability to control the price of its product or exclude competitors to the extent that it can charge sustained supracompetitive prices (prices substantially above what a competitive price would be if consumers could simply buy a close substitute product from a competitor at lower cost).

HN5[] The exercise of monopoly power with regard to a single patent (or even a few patents) usually does not offend ***antitrust law***. But it is another matter to acquire a vast portfolio of patents that are essential to technology employed by an entire industry and then to compel its licensing at take-it-or-leave-it prices because it is not economically feasible to determine if alternative technologies, not covered by the accumulation of patents, are available. This acquisition and compelled licensing could amount to the ability to exercise monopoly power on an entirely different scale.

In a very real sense, ***antitrust law*** is founded on economic theory about how efficient markets should **[**31]** operate. In an ideally competitive market where there are no barriers to entry or exit by competing businesses, the availability of the same product (or a close substitute) from many sources will tend to drive the price downwards to a point slightly above the cost to make the product—the so-called "competitive price." Think of pizzerias. There are lots of them, and entry and exit from this business is relatively free and unrestricted. If one restaurant decides to charge too much for a slice of pizza, there are many others nearby where the consumer can buy at a lower cost. The ready supply of close substitutes keeps costs competitive—slightly above the cost of making the pizza.

[*699] But, if circumstances are such that one pizzeria can exclude competition or control prices by charging more than a competitive price because consumers are unable to avoid paying it by turning to lower-priced alternatives, then it has the ability to exercise market power. And ***HN6***[] the power to control prices or exclude competitions is

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113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993) (citing *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965))*.

the essence of monopoly power. *See Grinnell Corp., 384 U.S. at 571*. ***Antitrust law*** is designed to prevent the acquisition and exercise of monopoly power. *See id.*; *15 U.S.C. § 2*.

Each of the above important competing policies is at **[**32]** play in this case. Capital One argues, through its highly credentialed and impressive economic expert, Professor Fiona Scott Morton of Yale University, that IV possesses monopoly power in connection with its large financial services patent portfolio, which touches on essential technologies that commercial banks have heavily invested in and cannot realistically design around to avoid the reach of IV's patents. Because of the size of this portfolio (between 7,725 and 35,000 patents, depending on whether Capital One or IV's expert is correct),[7] IV is able to charge supracompetitive prices to license the portfolio. And IV's concealment of the details regarding the patents leaves Capital One unable (without incurring ruinous cost) to ferret out the particulars of each patent and assess whether it infringes any patents. Also at play is IV's aggressive policy of threatening (and bringing) expensive serial patent infringement suits. IV's aggregation of such a large portfolio, combined with its concealment and aggressive litigation strategies will, according to Capital One, eventually force it to capitulate and pay IV's supracompetitive price to license the entire portfolio.

As Professor Scott **[**33]** Morton sees it, antitrust analysis commonly used to determine whether a proposed merger will result in anticompetitive effects, simply does not work for the facts of this case. That is because merger analysis is *ex ante*, focusing on whether, if the merger is approved, the new entity will be able to charge a small but significant non-transitory increase in price (referred to as "SSNIP")[8] that it could maintain over time without competition from others making that price increase unsustainable. Put differently, SSNIP analysis is best done *before* the entity of interest has acquired monopoly power. Scott Morton reasons that this case requires *ex post* analysis because Capital One already had incurred significant costs to acquire the technology to compete with other commercial banks in essential services such as on-line banking, remote banking, and ATM and credit card transactions when IV began licensing its massive financial services patent portfolio. In other words, IV already had acquired monopoly power when it approached Capital One to license its patents. Because Capital One already had incurred substantial sunk costs in the technology in which it had invested, it was unable to design **[**34]** around IV's enormous portfolio to adopt non-infringing technologies the way it could have done if it knew of the breadth and scope of IV's patents before it incurred the cost of the technologies it adopted.

[*700] Under her proposed *ex post* analysis, it is IV's conduct after having acquired monopoly power that is critical to antitrust scrutiny. Through its trio of patent aggregation, concealment and litigation, IV has acquired insurmountable bargaining power enabling it to exercise "hold-up" power by demanding take-it-or-leave-it supracompetitive prices to license its financial services portfolio. And even though it has resisted doing so to date, eventually Capital One will be forced to capitulate to the threat of exorbitantly expensive patent litigation to purchase a license that it does not want, despite the fact that IV's singular lack of success in prosecuting any of its patent suits against IV (or other banks) suggests that its massive portfolio is in truth composed of nothing more than an amalgamation of weak patents. And, but for IV's practice of accumulation, concealment and litigation, it could never command a price to license its portfolio **[**35]** of weak patents at anything near the supracompetitive price it sought from Capital One.

Scott Morton analogizes IV's financial services patent portfolio to a "cluster market" that IV promotes as a single product (for which there are no close substitutes) at a supracompetitive price. And she asserts that IV exercises monopoly power, despite the fact that no bank (including Capital One) has agreed to purchase a license to the entire portfolio, and IV has yet to prevail in any of its patent suits against banks.

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[7] According to Professor Scott Morton, IV has approximately 40,000 patents, 7,725 of which are financial services patents. Scott Morton Report ¶¶ 96 n.59, 170 n.136. Professor Gilbert asserts that "the portfolio that Intellectual Ventures initially offered to license to Capital One includes a much larger number of patents. Capital One's complaint characterizes Intellectual Ventures' offer as covering 35,000 patents." Gilbert Report ¶ 40 (citing Third-Party Compl. ¶ 40).

[8] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 4.1.1 (Aug. 19, 2010), *available at* https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (discussing SSNIP).

Pure humbug, counters IV, through its equally well-credentialed and impressive economic expert, Professor Richard Gilbert from the University of California, Berkley. He challenges Professor Scott Morton's market definition, arguing that the proper definition is not a "cluster" of financial services patents constituting a single product, but rather a collection of patents that relate to multiple distinct technology markets. Professor Gilbert relies on the Antitrust Guidelines for the Licensing of Intellectual Property issued jointly by the U.S. Department of Justice and the Federal Trade Commission ("Guidelines"). *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidelines* ***[**36]*** *for the Licensing of Intellectual Property* (Jan. 12, 2017), *available at* https://www.justice.gov/atr/guidelines-and-policy-statements-0/2017-update-antitrust-guidelines-licensing-intellectual-property. The Guidelines state, relevantly, that "[a]lthough the intellectual property right confers the power to exclude with respect to the specific product, process, or work in question, there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power." *Id.* § 2.2, at 4. The flaw in Capital One's antitrust analysis, according to Professor Gilbert, is its failure to analyze the distinct technology markets for which IV does have patents to determine whether there are alternative close substitutes that Capital One could turn to in order to avoid having to license from IV.

As Professor Gilbert sees it, IV's patents touch on a large number of distinct technology markets, each of which must be analyzed using SSNIP analysis, which Professor Scott Morton failed to do. Thus, he strongly disagrees that IV's patent portfolio can be analyzed as a cluster market at all. And, even more fundamentally, he challenges Professor Scott Morton's **[**37]** conclusions, arguing that proper market definition and analysis requires looking at actual prices (competitive price, market price and monopoly price). Here, he insists, there are no prices at all because IV's licensing offer was only an opening bid in a negotiation, not a take-it-or-leave-it supracompetitive monopoly ultimatum. The negotiation did not progress to a point where a final demand was reached because Capital One refused to engage by making a **[*701]** counter-offer. Indeed, at least as of the time that discovery closed in this case, IV had not succeeded in selling a single license to its banking-related patents to Capital One or any other bank.

As IV and Capital One agree, ***HN7***[] the essential first step in analyzing the antitrust claims in this case is to define the relevant market by product(s) and geography. *See* *United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*; *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1319-20 (10th Cir. 2017)*. "[M]arket definition is a deeply fact-intensive inquiry . . . ." *E.I. DuPont de Nemours & Co. v. Kolon Indus. Inc., 637 F.3d 435, 443 (4th Cir. 2011)* (quoting *Todd v. Exxon Corp., 275 F.3d 191, 199 (2d Cir. 2001))*. In determining the relevant market, the Court must consider "the 'commercial realities' faced by consumers." *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. Where the facts are hotly disputed, as here, defining relevant market is "generally a question for the trier of fact." ABA Section of ***Antitrust Law***, ***Antitrust Law*** *Developments* 627-30 (ABA 8th ed. 2017) **[**38]** , Ex. 127, Jt. Rec. 9557; *see also Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 199 (3d Cir. 1992)* ("[T]he determination of a relevant product market or submarket . . . is a highly factual one best allocated to the trier of fact."). The burden of proof lies with the antitrust plaintiff to prove relevant market. *Spectrum Sports, Inc. v. McQuillan 506 U.S. 447, 455-56, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *Berlyn Inc. v. The Gazette Newspapers, Inc., 73 F. App'x 576, 582 (4th Cir. 2003)*; *Satellite Television & Associated Res., Inc. v. Cont'l Cablevision of Va., Inc., 714 F.2d 351, 355 (4th Cir. 1983)*. When the parties proffer competing economic experts on the proper definition of relevant market, summary judgment is inappropriate as long as each expert's views could be found by the trier of fact to be reasonable. *Sprint Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 945 (6th Cir. 2006)* ("'[I]ntellectual disagreement' among the parties' experts creates material factual disputes on the relevant market . . . so as to preclude an award of summary judgment." (quoting record)); *Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1573-74 (11th Cir. 1991)* ("The parameters of a given market are questions of fact, and therefore summary judgment is inappropriate if there are material differences of fact." (internal citations omitted)).

IV does not dispute this authority, but contends that it is entitled to summary judgment despite the substantial disagreement between Professor Scott Morton and Professor Gilbert on the definition of relevant market (as well as other antitrust elements) because the methodology used by Professor Scott Morton is so far removed from commonly employed **[**39]** antitrust analysis that it must be rejected as unreasonable as a matter of law. It is true that Professor Gilbert's analysis of relevant market is firmly grounded in commonly used antitrust analysis, as evidenced by its reliance on the Department of Justice and Federal Trade Commission's Antitrust Guidelines for the Licensing of Intellectual Property. But, in support of their alternative analysis, Capital One and Professor Scott Morton have cited authority for the application of cluster market analysis to the definition of a relevant antitrust market. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 355-56, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963) (citing *Brown Shoe*); United States v. Grinnell Corp., 384 U.S. 563, 572-73, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966) (citing *Brown Shoe*); Brown Shoe, 370 U.S. at 324-25; and Fed. Trade Comm'n v. Staples, **[*702]** Inc., 190 F. Supp. 3d 100, 116-17 (D.D.C. 2016) (citing *Brown Shoe*); *see also* Ian Ayres, *Rationalizing Antitrust Cluster Markets*, 95 Yale L. J. 109 (1985). And, Professor Scott Morton has noted that the Department of Justice Horizontal Merger Guidelines that Professor Gilbert referenced do recognize that "[e]vidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects." *Horizontal Merger Guidelines* § 4.

With respect to cluster markets, Professor Ayres, one of the early scholars to study such markets in ***antitrust law***, was critical of the courts' failure to articulate "a sound justifying **[**40]** theory" of when cluster analysis is appropriate, opting instead for a series of "ad hoc" standards. He noted:

> The lack of a justifying theory apparent in *Philadelphia National Bank* and *Grinnell* has left lower courts virtually unconstrained to develop additional criteria for cluster definitions. Lower courts have based cluster definitions on the existence of trade associations; census classifications; functional complementarity; common technology, distribution or marketing; a unique product group; and other market characteristics. While courts have a plethora of standards from which to choose, they currently have no basis for distinguishing the good from the bad (and the ugly). In sum, while some cluster markets have been defined correctly, the lack of a sound justifying theory has led courts to adopt conflicting and ad hoc standards. In a world in which antitrust defendants are usually multiproduct firms, the problem of deciding when to cluster a group of products needs to be formally addressed.

Ayres, supra, at 112-14. He advocated using a standard he called "transactional complementarity," meaning:

> Goods are transactional complements if buying them from a single firm significantly reduces consumers' transaction **[**41]** costs. In other words, given equal prices, consumers prefer to buy transactional complements from a single firm. If consumers strongly prefer to purchase a group of goods from a single firm, firms selling only part of this group will not compete effectively with firms supplying the full line.

Id. at 114-15.

Applying Ayres's standard for using cluster markets to define a relevant antitrust market in this case would be problematic for Capital One, because Professor Scott Morton's analysis rests on the notion that Capital One (and other banks to which IV has pitched its portfolio) *does not want* the cluster of products that IV offers. In such circumstances, it would be difficult to argue that consumers (banks) "strongly prefer to purchase a group of goods" (IV's patent portfolio) from a single firm (IV). Nevertheless, the parties do not cite, nor have I located, any controlling legal authority that Professor Ayres's test for the use of cluster markets must be used instead of any others that courts that have employed cluster market analysis in antitrust cases have used. While factfinders ultimately might reject Scott Morton's reliance on cluster markets to justify her antitrust market analysis, I cannot **[**42]** conclude that as a matter of law it is unreasonable.

But, neither is Professor Gilbert's analysis immune from criticism. His contention that it would be economically feasible for Capital One to discern the particulars of each of IV's thousands of patents to determine whether there are close substitutes to which Capital One could turn in order to avoid IV's portfolio, even if all of the information needed to do so was readily available, stretches plausibility to the near breaking point.[9] Capital One has produced

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[9] It is ironic that, to support its argument that it had a good faith basis to bring patent infringement claims against Capital One in this case, IV designated nine Ph.D.s who would support its infringement analysis. *See* ECF Nos. 616 (paperless order

[*703] evidence that IV does conceal a significant amount of information regarding its patent holdings, which has been confirmed by others. *See, e.g.*, Robin Feldman & Tom Ewing, *The Giants Among Us*, 2012 Stan. Tech. L. Rev. 1 (2012). Feldman and Ewing concluded:

> Much about Intellectual Ventures is shrouded in secrecy. Intellectual Ventures has acknowledged that it intentionally withholds the true scope and nature of its IP portfolio. Its licensing transactions and interactions are protected by strict nondisclosure agreements, and the structure of its business activities makes it difficult to get a handle on the full extent of its activities. For example, or research has identified more than a thousand shell companies **[**43]** that intellectual Ventures has used to conduct its intellectual property acquisitions, and it has taken considerable effort to identify these. The range and scope of its activities are so vast that it is difficult to conceptualize the reach of Intellectual Ventures.

Id. at 3.

The sheer scope of IV's patent holdings calls into question how it would be feasible to perform the analysis of available substitutes that Professor Gilbert calls for to determine whether there are close substitutes to which Capital One could turn to avoid the reach of IV's portfolio. And while the Antitrust Guidelines for the Licensing of Intellectual Property do apply the SSNIP analysis favored by Professor Gilbert, there is nothing in the Guidelines that seems to recognize the near impossibility of doing so with a collection of intellectual property as massive as IV's (despite the fact that it was revised and reissued on January 12, 2017).

After all, the phenomenon of applying antitrust doctrine to intellectual property rights on the scale presented by IV's holdings is a new challenge. As noted by Feldman and Ewing:

> The patent world is quietly undergoing a change of seismic proportions. In a few short **[**44]** years, a handful of entities have amassed vast treasuries of patents on an unprecedented scale. To give a sense of the magnitude of this change, our research shows that in little more than five years, the most massive of these has accumulated 30,000-60,000 patents worldwide, which would make it the 5th largest patent portfolio of any domestic US company and the 15th largest of any company in the world. . . .
>
> These entities, which we call mass aggregators, do not engage in the manufacturing of products nor do they conduct much research. Rather, they pursue other goals of interest to their founders and investors. Non-practicing entities have been around the paten world for some time, and in the past they have fallen into two broad categories. The first category includes universities and research laboratories, which tend to have scholars engaged in basic research and license out inventions rather than manufacturing products on their **[*704]** own. The second category includes individuals or small groups who purchase patents to assert them against existing, successful products. Those in the second category have been described colloquially as 'trolls,' which appears to be a reference to the children's **[**45]** tale of the three billy goats who must pay a toll to the troll waiting under the bridge if they wish to pass. Troll activity is generally reviled by operating companies as falling somewhere between extortion and drag on innovation. In particular, many believe that patent trolls often extract a disproportionate return, far beyond the value that their patented invention adds to the commercial product, if it adds at all.
>
> The new mass aggregator, however, is an entirely different beast. To begin with, funding sources for mass aggregators include some very successful and respectable organizations, including manufacturing companies such as Apple, eBay, Google, Intel, Microsoft, Nokia, and Sony, as well as some academic institutions such as the University of Pennsylvania and Notre Dame . . . .

Id. at 1.

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acknowledging receipt of expert reports, on file in chambers), 619 (letter order addressing quantity of expert reports), 621 (correspondence from IV explaining purpose of multiple experts). If, *a fortiori*, it takes an assortment of Ph.D.s just to support the bringing of a patent infringement suit with respect to only *four* patents, imagine the scope of the analysis Capital One would have to conduct (and cost it would have to incur) in order to determine whether the technologies it had acquired before IV approached it with its licensing demands infringed the thousands of patents in IV's portfolio (assuming the information needed to do so was fully available to it, and not concealed as Capital One contends).

And even if cluster market analysis ultimately is not considered the appropriate framework for analyzing the relevant antitrust market in cases such as this one (despite the fact that Capital One has cited abundant facts that a jury reasonably could conclude supports its contention that IV does, in fact, market its patents as a portfolio, rather than a collection of individual patents relating to a number **[**46]** of discrete technology markets), it is hard to deny that there is something concerning from an antitrust perspective about the way in which IV engages in its licensing business. *See, e.g.*, Michelle Miller & Janusz Ordover, *Intellectual Ventures v. Capital One: Can* ***Antitrust Law*** *and Economics Get Us Past the Trolls*?, Competition Policy Int'l: Antitrust Chronicle (Jan. 19, 2015), *available at* https://www.competitionpolicyinternational.com/intellectual-ventures-v-capital-one-canantitrust-law-and-economics-get-us-past-the-trolls ("[M]any PAEs [Patent Assertion Entities] exploit the lack of transparency in patent ownership to amass huge portfolios of 'secret' patents that are then asserted against manufacturers. Manufacturers faced with a royalty demand based on a large number of unidentified patents cannot determine an appropriate royalty, or even whether any royalty is owed at all. That uncertainty may lead to manufactures paying supracompetitive royalties that can depress product innovation.").

If the only issue raised in IV's summary judgment motion was whether there are genuine disputes of material fact that would entitle it to judgment as a matter of law on the issues of possession **[**47]** of monopoly power in a relevant market and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident, *see* *Eastman Kodak, 504 U.S. at 481*, I would deny the motion and allow the case to proceed to trial. This is because I have concluded from the record before me that Capital One has identified admissible evidence to establish a genuine dispute as to these issues, precluding summary judgment. But as next will be seen, there are further legal issues which, when resolved, require the granting of IV's motion.

Standard of Review

HN8[] Summary judgment is proper when the moving party demonstrates, through "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials," that "there is no genuine dispute as to any **[*705]** material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*, *(c)(1)(A)*; *see* *Baldwin v. City of Greensboro, 714 F.3d 828, 833 (4th Cir. 2013)*. If the party seeking summary judgment demonstrates that there is no evidence to support the nonmoving party's case, the burden shifts to the nonmoving party to identify **[**48]** evidence that shows that a genuine dispute exists as to material facts. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 & n.10 (1986)*. The existence of only a "scintilla of evidence" is not enough to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Instead, the evidentiary materials submitted must show facts from which the finder of fact reasonably could find for the party opposing summary judgment. *Id.*

Noerr-Pennington Immunity

HN9[] ***Antitrust law*** proscribes the willful acquisition or maintenance of monopoly power within a market, as well as attempts to monopolize. *See* *15 U.S.C. § 2*; *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)*; *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. In contrast, a patent creates a legal monopoly. *Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 2231, 186 L. Ed. 2d 343 (2013)*. Additionally, "[t]hose who petition government for redress are generally immune from antitrust liability" under what is known as *Noerr-Pennington* immunity. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc. ("PREI"), 508 U.S. 49, 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (citing *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of Am. v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*). This holds true for parties who file suit in court. *See* *id. at 57* (noting that *California Motor Transport Co. v. Trucking Unlimited ("California Motor"), 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, "extended *Noerr* to 'the approach of citizens . . . to courts'"). And, patent holders that believe that their patents have been infringed may seek to enforce their rights under the patent through patent litigation. *35 U.S.C. § 281* ("A patentee shall have remedy by **[**49]** civil action for infringement of his patent."). Thus, when a party challenges a patent holder's efforts to enforce its patents through litigation, the court must determine whether the patent holder is exercising "the lawful restraint on trade of the patent monopoly" or "the illegal restraint prohibited broadly by the *Sherman Act*." *United States v. Line Material Co., 333 U.S. 287, 310, 68 S. Ct. 550, 92 L. Ed. 701 (1948)*. To do so, courts must "balance the privileges of [a patent holder] under [its] patent grants with the prohibitions of the *Sherman Act* against combinations and attempts to monopolize." *United States v. U.S. Gypsum Co., 333 U.S. 364, 390-91, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*.

IV contends that "[u]nder the *First Amendment* and the *Noerr-Pennington* doctrine, Intellectual Ventures I and Intellectual Ventures II, like other patent owners, . . . are entitled to petition a court for a redress of their grievances," that is, IV may sue corporations like Capital One for patent infringement without being sued under the antitrust laws for bringing suit. IV Mem. 12. On that basis, it argues that, for Capital One to proceed on its antitrust claims against IV based on IV's patent litigation activities, Capital One must establish that an exception to *Noerr-Pennington* exists such that IV was not entitled to exercise its right to sue. *Id.* According to IV, Capital One has failed **[**50]** to prove that IV's claims were "objectively baseless," as it had to do to **[*706]** prove that IV was not exempt from antitrust liability. *Id.* at 13. IV asserts that Capital One instead tried to prove that IV's claims were "unsuccessful," which IV insists is not enough. *Id.*

Applicability of Noerr-Pennington immunity

Capital One counters that *Noerr-Pennington* immunity simply does not apply because the "litigation conduct is part of a broader monopolistic scheme," and "*Noerr* does not insulate the entire scheme." Capital One Opp'n 19; *see also id.* at 21 ("IV's lawsuits against Capital One (and other banks) are part of its overall, multi-step scheme to force a portfolio license at a supracompetitive price."). Insofar as Capital One argues that "IV's aggregation of patents to create market power would support substantial Section 2 and Section 7 claims on its own," and that "the concealment and misdirection at the heart of IV's extortive licensing strategy would be anticompetitive even if IV had never filed a lawsuit," *id.*, this contention is contrary to Capital One's pleadings. Capital One alleges that "IV has eliminated banks' access to substitutes for IV's license, both in the form of other patent licenses and banking-product designs, **[**51]** through a carefully orchestrated campaign of patent aggregation, concealment, and sham litigation," Fourth Am. Countercl. (Redacted) ¶ 157, and that "IV's use of patent accumulations to cut off banks' design and license choices, as weapons in negotiation, and to provide fuel for repeated sham litigation, violates *Section 2* of the Sherman Act," *id. ¶ 125*. *See also id.* ¶ 171 ("IV's actions in secretly aggregating 3,500 financial-services patents through shell companies, subjecting Capital One to sham litigation, demanding nine-figure sums for a limited and temporary patent respite, and refusing to disclose many of the patents that IV demanded Capital One pay more than $100 million for are all part of a carefully orchestrated plan to achieve monopoly power in the relevant technology-licensing market and wield it against the banking industry."); *id. ¶ 177* ("Even though the patents in its portfolio are individually of little or no worth, IV can and does acquire monopoly power by amassing them as a source of serial sham litigation threats."); Third Party Compl. (Redacted) ¶¶ 17, 49, 63, 69 (same).

And, while patent acquisition and aggregation is the focus of the *Clayton Act* claim, ***HN10***[] acquisition is actionable **[**52]** under the *Clayton Act* only where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. To establish this effect, Capital One relies on IV's purported "campaign," which could not succeed absent the allegedly sham litigation. *See* Third Am. Countercl. (Sealed) ¶ 218 ("IV combines [its patent acquisitions] in a way that 'gives [IV] market power,' because, now that IV has eliminated alternative licensing sources by acquiring the patents, banks 'can not avoid' paying a hold-up demand (which IV styles as a 'license') if they want to avoid repeated meritless litigation and uncertainty."); *see also* Third Party Compl. (Sealed) ¶ 110 (same). Clearly, the allegation of sham litigation is an integral component of IV's alleged strategy underlying all of Capital One's claims. *See* Third Am. Countercl. ¶¶ 125, 157, 171, 177, 218; Third Party Compl. ¶¶ 17, 49, 63, 69, 110.

Moreover, even if the sham litigation allegations could be excised from its pleadings, Capital One does not cite any controlling authority in support of its position that *Noerr-Pennington* immunity does not apply because sham litigation is only one component of a larger scheme, **[**53]** and I am not persuaded by the authority it cites from other circuits. Capital One includes a quote from *California Motor* as indirect support for its argument: "*First Amendment* rights are not immunized from regulation when they are used as an integral **[*707]** part of conduct which violates a valid statute. . . . If the end result is unlawful, it matters not that the means used in violation may be lawful." Capital One Opp'n 19 (quoting *California Motor, 404 U.S. at 514-15*). These two sentences that Capital One pairs together (with the effect that it appears, from the quote, that *California Motor* provides that an exception exists to *Noerr-Pennington* immunity when the litigation is part of a broader scheme to violate the law) actually bookend a section of the opinion that has nothing to do with litigation as part of a broader scheme. Rather, on pages 514 and 515 of its *California Motor* opinion, the Supreme Court explained the principles underpinning *Noerr-Pennington* immunity and the sham litigation exception (which I discuss further, below). First, it observed that citizens are not always immune from legal consequences when exercising their *First Amendment* rights and that the *First Amendment* does not protect the press from antitrust laws. *California Motor, 404 U.S. at 514*. It then noted that "*First Amendment* rights may **[**54]** not be used as the means or the pretext for achieving 'substantial evils' which the legislature has the power to control." *Id. at 515* (internal citation omitted). And it concluded that when businesses combine efforts to "harass and deter their competitors," even when their actions are in litigation that otherwise would be protected under *Noerr-Pennington*, their actions violate the antitrust laws. *Id.*

Capital One also cites *Fed. Trade Comm'n v. Actavis, Inc., 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, as stating that "anticompetitive effects [that] fall within the scope of the exclusionary potential of the patent" do not "immunize [conduct] from antitrust attack." Capital One Opp'n 19 (quoting *Actavis, 133 S. Ct. at 2230*). But, a holding that, when the validity and preclusive scope of a patent are in question, the patent holder can be sued under antitrust laws for activities that may be permissible under the patent (such as charging *supra*-competitive prices) does not mean that a patent holder can be sued under antitrust laws for *filing suit* to enforce the patent, and Capital One has not identified any binding authority extending the Supreme Court holding in this manner.

Exceptions to Noerr-Pennington immunity

Alternatively, Capital One argues that IV is not immune to suit under *Noerr-Pennington* because **[**55]** a party loses its immunity if it brings a series of "petitions . . . 'pursuant to a policy of starting legal proceedings without regard to the merits' and for the purpose of injuring competition," which is what, in Capital One's view, IV did when it "brought its ten patent claims against Capital One without regard to the merits and for the purpose of restraining trade." Capital One Opp'n 22-25 (quoting *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Constr. Trade Council, AFL-CIO, 31 F.3d 800, 811 (9th Cir. 1994))*.

> ***HN11***[] A patentee who brings an infringement suit may [lose its *Noerr-Pennington* immunity and] be subject to antitrust liability for the anti-competitive effects of that suit if the alleged infringer (the antitrust plaintiff) proves (1) that the asserted patent was obtained through knowing and willful fraud within the meaning of *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*, or (2) that the infringement suit was "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."

Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998) (quoting *Noerr, 365 U.S. at 144*); **[*708]** *see also* *Actavis, 133 S. Ct. at 2239* (Roberts, C.J., dissenting) ("If its actions are within the scope of the patent, they are not subject to antitrust scrutiny, with two exceptions concededly not applicable here: (1) when the parties settle sham litigation, cf. [*PREI, 508 U.S. at 60-61*]; and (2) when the litigation involves **[**56]** a patent obtained through fraud on the Patent and Trademark Office. *Walker Process Equipment, supra, at 177, 86 S.Ct. 347*.").

1. Exception for litigation of patents procured by fraud

Walker Process held narrowly that ***HN12***[] "the enforcement of a patent procured by fraud on the Patent Office may be violative of *§ 2* of the Sherman Act provided the other elements necessary to a § 2 case are present." *382 U.S. at 174*. Thus, "'to strip [a patentee] of its exemption from the antitrust laws' because of its attempting to enforce its patent monopoly, an antitrust plaintiff is first required to prove that the patentee 'obtained the patent by knowingly and willfully misrepresenting facts to the [Patent and Trademark Office]'" and that the patent holder seeking to enforce its patent through litigation was "aware of the fraud when bringing suit." *Nobelpharma, 141 F.3d at 1068-69* (citing *Walker, 382 U.S. at 177* & n.6) (footnote omitted). For *Walker Process* purposes, "fraud is a more serious offense than inequitable conduct." *Id. at 1070*. Where, as here, there is no evidence that the Patent Office was tricked by fraud or that IV (which later acquired the patents) was aware of any such fraud, *Walker Process*'s holding has no application.

2. Sham litigation exception

Because *Walker Process* is inapplicable, to determine whether IV is immune from antitrust **[**57]** liability stemming from its patent litigation, I must determine whether the "sham litigation exception to *Noerr-Pennington* immunity" applies. *See Tyco Healthcare Grp. LP v. Mut. Pharm. Co., 762 F.3d 1338, 1343 (Fed. Cir. 2014)*. ***HN13***[] The Supreme Court first observed that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover up what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the *Sherman Act* would be justified" in *Noerr, 365 U.S. at 144*. The sham litigation exception has been extended to patent litigation, in which a patentee's "conduct in the prosecution of a patent" may be "sufficient to strip [the] patentee of its immunity from the antitrust laws." *Nobelpharma, 141 F.3d at 1067*. But this exception to *Noerr-Pennington* immunity is narrow, "[g]iven the presumption of patent validity and the burden on the patent challenger to prove invalidity by clear and convincing evidence." *Tyco Healthcare, 762 F.3d at 1343*. Consequently, rarely will "a patentee's assertion of its patent in the face of a claim of invalidity . . . be so unreasonable as to support a claim that the patentee has engaged in sham litigation." *Id.*

As for what qualifies as sham litigation, *PREI, 508 U.S. 49*, and *California Motor, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642*, provide guidance. **[**58]** In *California Motor*, a group of trucking companies brought antitrust claims against another group of trucking companies, alleging that the defendants "conspired to monopolize trade and commerce in the transportation of goods" through "a concerted action . . . to institute state and federal proceedings [including rehearings, reviews, and appeals from agency and court orders] to resist and defeat applications by [the plaintiffs] to acquire operating rights or to transfer or register those rights." *404 U.S. at 509*. **[*709]** As noted, the *California Motor* Court extended *Noerr-Pennington* immunity, holding that ***HN14***[] an antitrust claim cannot be based upon "the approach of citizens or groups of them to administrative agencies . . . [or] to courts." *Id. at 510*. But, the Court concluded that the ***HN15***[] allegations in the case before it, that the defendants "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process" and "'instituted the proceedings and actions . . . with or without probable cause, and regardless of the merits of the cases,'" fell "within the 'sham' exception in the Noerr case, as adapted to the adjudicatory process." *Id. at 512, 516*. It reasoned that, when a party's legal **[**59]** actions reflect "a pattern of baseless, repetitive claims" that "leads the factfinder to conclude that the administrative and judicial processes have been abused," that party "cannot acquire immunity by seeking refuge under the umbrella of 'political expression.'" *Id. at 513*.

In *PREI*, the operators of a resort hotel ("PRE") "sought to develop a market for the sale of videodisc players to other hotels wishing to offer in-room viewing of prerecorded material." Columbia Picture Industries, Inc. ("Columbia") "held copyrights to the motion pictures recorded on the videodiscs that PRE purchased" and, like PRE, "licensed the transmission of copyrighted motion pictures to hotel rooms." *508 U.S. at 51-52*. Columbia sued PRE for copyright infringement, and PRE counterclaimed in antitrust, claiming that "Columbia's copyright action was a mere sham that cloaked underlying acts of monopolization and conspiracy to restrain trade." *Id. at 52*. Notably, Columbia only initiated one suit against PRE, *id.*, unlike the "pattern of baseless, repetitive claims" that defeated the antitrust defendants' immunity claim in *California Motor, 404 U.S. at 513*. It is also significant that in *PREI*, the district court case was in the same posture as this case, with a summary judgment motion **[**60]** pending, and the court decided the case on summary judgment. *PREI, 508 U.S. at 53*.

The *PREI* Court held that, ***HN16***[] to qualify as "sham litigation," a lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and "the litigant's subjective motivation" must be "to interfere *directly* with the business relationships of a competitor." *PREI, 508 U.S. at 60-61*; *see Tyco Healthcare, 762 F.3d at 1343* (noting that a lawsuit qualifies as "sham litigation" under the *PREI* test when it "(1) is 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits' (the objective element), and (2) is motivated by a desire 'to interfere *directly* with the business relationships of a competitor' (the subjective element)" (quoting *PREI, 508 U.S. at 60-61*)). Because "the antitrust defendant admittedly had probable cause to institute [its copyright suit]," the Court concluded that its suit against PREI was not objectively baseless and therefore could not qualify as sham litigation to defeat Noerr-Pennington immunity. *PREI, 508 U.S. at 51*. Thus, although both factors must be present to establish that litigation is a sham, ***HN17***[] a finding of "an objectively reasonable effort to litigate" is sufficient to show that the litigation **[**61]** was not a sham, "regardless of subjective intent." *Id. at 51*. Simply put, if the court concludes that the antitrust defendant had probable cause to file suit (which it can determine as a matter of law if, as here, "there is no dispute over the predicate facts of the underlying legal proceeding"), it cannot find that the defendant engaged in sham litigation, even if the **[*710]** litigant filed suit without any expectation of success. *See id. at 62, 63*.

The *PREI* Court analogized to the common law tort of wrongful civil proceedings (often erroneously referred to as malicious prosecution, a tort that involves wrongful *criminal* proceedings) to define probable cause for purposes of determining whether litigation is objectively baseless. *Id. at 62*.

> ***HN18***[] The notion of probable cause . . . requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. *Stewart v. Sonneborn, 98 U.S. 187, 194, 25 L. Ed. 116 . . . (1879)*; *Wyatt v. Cole, 504 U.S. 158, 176, 112 S. Ct. 1827, 118 L. Ed. 2d 504 . . . (1992)* (REHNQUIST, C.J., dissenting); T. Cooley, Law of Torts. *Cf. Wheeler v. Nesbitt, 65 U.S. 544, 24 How. 544, 549-50, 16 L.Ed. 765 (1861)]* Probable cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication" (internal quotation marks omitted). **[**62]** *Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 262, 178 N.E.2d 485, 488 (1961)*; *Restatement (Second) of Torts § 675, Comment e*, pp. 454-455 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense. *See Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141, 149, 7 S. Ct. 472, 30 L. Ed. 614 . . . (1887)*; *Wheeler, supra, 24 How. at 551*; *Liberty Loan Corp. of Gadsden v. Mizell, 410 So. 2d 45, 48 (Ala. 1982)*. . . . When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit. . . . [T]herefore, a proper probable cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

Id. at 62-63 (some internal citations omitted).

In his concurrence, Justice Stevens "agreed with the Court's disposition of [*PREI*] and with its holding that 'an objectively reasonable effort to litigate cannot be sham regardless of subjective intent,'" but he wrote separately because he believed that the majority's opinion included "unnecessarily broad dicta" that the Court "might regret when confronted with a more complicated case." *Id. at 67-68*. Justice Stevens distinguished cases like *PREI* in which a single lawsuit is alleged to be a sham, from **[**63]** cases like *California Motor* that involved "repetitive filings." *Id. at 67-73*. He noted that "[t]here might well be lawsuits" in which "'reasonable litigant[s] could realistically expect success on the merits,'" but the litigation could "be objectively *unreasonable*" nonetheless, "and thus shams." *Id. at 68*. Justice Stevens observed that "more complicated cases [previously before the Supreme Court], in which, for example, the alleged competitive injury has involved something more than the threat of an adverse outcome in a single lawsuit, have produced less definite rules." *Id. at 72-73*. Citing *California Motor*, he stated that "[r]epetitive filings, some of which are successful and some unsuccessful, may support an inference that the process is being misused." *Id. at 73*. Moreover, he said, "[i]n such a case, a rule that a single meritorious action can never constitute a sham cannot be dispositive," and "a simple rule may be hard to apply when there is evidence that the judicial process has been used as part of a larger program to control a market and to interfere **[*711]** with a potential competitor's financing without any interest in the outcome of the lawsuit itself . . . ." *Id. at 73*. But, notably, the majority did not modify its opinion to **[**64]** address the concerns Justice Stevens raised, and his views regarding how *Noerr-Pennington* immunity should apply do not limit the majority opinion.

Similarly, in *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, the Fourth Circuit, considering a series of proceedings in the labor context, observed that "[i]t is unclear whether *PREI* [and its two-step standard] distinguished or displaced the sham litigation test first propounded in *California Motor*" for analyzing the proceedings on the record before it. *728 F.3d 354, 363 (4th Cir. 2013)*. The Fourth Circuit noted that, ***HN19***[] under the *California Motor* standard, "the focus is not on any single case. Rather a district court should conduct a holistic evaluation of whether 'the administrative and judicial processes have been abused.'" *Id.* (quoting *Cal. Motor, 404 U.S. at 513*). It is "[t]he pattern of the legal proceedings, not their individual merits," that the court considers to determine "whether the [antitrust defendant] indiscriminately filed . . . a series of legal proceedings without regard for the merits and for the purpose of violating federal law." *Id.* As with the *PREI* standard, "the subjective motive of the litigant and the objective merits of the suits are relevant," but **[**65]** the *California Motor* standard is different because "other signs of bad-faith litigation . . . may also be probative of an abuse of the adjudicatory process." *Id.*

The Fourth Circuit adopted the Second and Ninth Circuits' approach[10] in reading ***HN20***[] *PREI* and *California Motor* "as applying to different situations. *Professional Real Estate Investors* provides a strict two-step analysis to assess whether a single action constitutes sham petitioning . . . . *California Motor Transport* deals with the case where the defendant is accused of bringing a whole series of legal proceedings." *Id.* (quoting *USS-POSCO Indus. v. Contra Costa Cty. Bldg. & Const. Trades Council, AFL-CIO ("POSCO"), 31 F.3d 800, 810-11 (9th Cir. 1994)*; citing *Primetime 24 Joint Vent. v. Nat'l Broad. Co., 219 F.3d 92, 101 (2d Cir. 2000))*. The Fourth Circuit noted that the *PREI* standard "is ill-fitted to test whether a series of legal proceedings is sham litigation," especially when "the presiding tribunal [for earlier] cases had no occasion to measure the baselessness of the suit because (1) it had no inkling that the action comprised a possible campaign of sham litigation, and (2) the plaintiffs preempted an assessment of frivolity by prematurely withdrawing some of their suits." *Id. at 364*. Thus, under Fourth Circuit law, in the labor context, "when purported **[**66]** sham litigation encompasses a series of legal proceedings rather than a singular legal action, . . . the sham litigation standard of *California Motor* should govern." *Id.*

The parties disagree about which standard I should apply in this case. IV insists that Federal Circuit law governs, and therefore I should apply the *PREI* standard. *See* IV Mem. 13. Indeed, ***HN21***[] "an antitrust claim premised on stripping a patentee of its immunity from the antitrust laws **[*712]** is typically raised as a counterclaim by a defendant in a patent infringement suit," and, "[b]ecause most cases involving these issues will therefore be appealed to [the Federal Circuit]," immunity from antitrust laws "should [be] decide[d] . as a matter of Federal Circuit law, rather than [by] rely[ing] on various regional precedents." *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1067-68 (Fed. Cir. 1998)*. On that basis, the Federal Circuit held that for "all antitrust claims premised on the bringing of a patent infringement suit," the issue of "whether conduct in procuring or enforcing a patent is sufficient to strip a patentee of its immunity from the antitrust laws is to be decided as a question of Federal Circuit law," although "the law of the appropriate **[**67]** regional circuit [applies] to issues involving other elements of ***antitrust law*** such as relevant market, market power, damages, etc." *Id. at 1068*. This language is unambiguous in its application to instances of patent litigation.

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[10] Other circuits do not take this approach. *E.g., In re Wellbutrin XL Antitrust Litig. Indirect Purchaser Class, 868 F.3d 132, 148 (3d Cir. 2017)* (applying two-part test from *PREI* without considering *California Motor*'s standard), *judgment entered sub nom. In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 2017 WL 3529114 (3d Cir. 2017)*; *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n, 776 F.3d 1343, 1350 (Fed. Cir. 2014)* (same); *Bryant v. Military Dep't of Mississippi, 597 F.3d 678, 690-91 (5th Cir. 2010)* (considering *PREI* standard as well as test stated in *Bill Johnson's Rest. v. NLRB, 461 U.S. 731, 733-35, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983)*, in labor context).

Nonetheless, Capital One argues that Federal Circuit law does not apply in this instance because it is not necessary to resolve any issues under patent law to determine antitrust liability, and this Court should, under Fourth Circuit law, apply the *California Motor* standard instead because the facts of this case involve what Capital One characterizes as a series of legal proceedings. Capital One Opp'n 23 n.7. In its view, "Capital One's claims are based on IV's overall scheme, not solely on IV's 'conduct in . . . enforcing a patent." *Id.* Capital One contends in the alternative that, even under Federal Circuit law, *California Motor*, not *PREI*, "is still the correct standard because the Federal Circuit has not reached the question of whether [*California Motor*] applies to a series of petitions," as Capital One asserts is present in this case, and "every circuit that has addressed the issue [including the Fourth Circuit] holds that the [*California Motor*] standard, not *PREI* **[**68]** , applies where, as here, more than one lawsuit (or petition) is at issue." *Id.* at 23.

Federal Circuit law, under which *PREI* provides the standard for deciding whether *Noerr-Pennington* immunity exists or whether the sham-litigation exception is present, clearly applies in this case. Capital One's antitrust claims are counterclaims brought in the patent litigation that IV initiated. These are the circumstances that *Nobelpharma* describes.

In any event, even if Fourth Circuit law applied or the Federal Circuit applied the *California Motor* standard to cases involving a series of claims, the result would not change: *PREI* still would provide the standard. The facts before me are easily distinguished from the facts of *California Motor, Waugh Chapel*, and the cases on which the Fourth Circuit relied, *POSCO, 31 F.3d 800*, and *Primetime 24 Joint Vent., 219 F.3d 92*. In *California Motor, 404 U.S. at 509, 513*, there was a "pattern of baseless and repetitive claims" made in a number of administrative and court proceedings. In *Primetime 24 Joint Venture, 219 F.3d at 101*, there were "voluminous challenges," and in *POSCO, 31 F.3d at 804*, there were "numerous grievances, arbitrations and enforcement proceedings." *Waugh Chapel, 728 F.3d 354*, involved fourteen separate proceedings—a barrage of proceedings that was clearly **[**69]** a series. Here, there have been only two cases that IV has brought against Capital One. While it is true that IV has sued various other entities in other courts, that litigation does not make its two instances of litigation against Capital One a series.[11] Further, IV's suits against other defendants, alleging infringement of various **[*713]** patents based on those other defendants' independent actions, have no bearing on the merits of the litigation before me or Judge Trenga. *See Waugh Chapel, 728 F.3d at 366-67* (considering only claims against one development even though two different developments had been subject to suit, one named as a defendant three times and one named fourteen times). Accordingly, I only will consider the two suits against Capital One. Additionally, multiple claims brought in one case do not constitute a series. IV has not identified any controlling case law to the contrary.

Moreover, insofar as the *Waugh Chapel* Court identified *PREI* as the standard when there was only *one* lawsuit that could qualify as sham litigation and *California Motor* as the standard for when there was a *series* of prior proceedings, it left open the question of the standard to apply when there were *two* lawsuits that could have been **[**70]** sham litigation (a situation closer to the facts in *PREI* than in *California Motor*). After all, the sham litigation cases array along a continuum of instances of only one case filed to instances where many have been filed, and it seems overly rigid to limit the underlying analysis of *PREI* to situations involving only a single suit. Therefore, even if I applied Fourth Circuit law, I would have to consider the underlying rationale of *Waugh Chapel* to determine whether these allegations of two instances of sham litigation are analyzed best under *PREI* or *California Motor*. As the *Waugh Chapel* Court observed, the *PREI* standard is "ill-fitted" when "the presiding tribunal [for earlier] cases had no occasion to measure the baselessness of the suit," while the *California Motor* standard enables a court to assess potentially sham litigation when it cannot determine whether each legal proceeding was objectively baseless. *Waugh Chapel, 728 F.3d at 364*.

In *Waugh Chapel*, there was no way of knowing what the merits were of the various earlier proceedings. At least two petitions were withdrawn such that the tribunals never had the chance to consider them. Others were dismissed as moot or as conjecture without any decision on the **[**71]** merits with regard to whether the claims were objectively baseless.

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[11] This is not to say that the lawsuits IV has filed against Capital One could not evolve into a series if IV continues to litigate its patents against Capital One.

Here, in contrast, in the sole earlier proceeding, Judge Trenga clearly had the opportunity to consider the bona fides because, as in this case, Capital One brought its antitrust counterclaims in response to IV's patent litigation. Indeed, Judge Trenga reached a decision on the merits with regard to four of the five patents IV originally identified. His conclusions are available to me in a published opinion that informed me of the court's rationale. Further, the issue of sham litigation arose in the Virginia court, and I have the benefit of Judge Trenga's cogent analysis.[12] And, **[*714]** the other instance of purportedly sham litigation is the patent litigation that IV brought before me—in which both a Special Master and I considered four claims on summary judgment. Thus, I need not resort to analyzing "[t]he pattern of the legal proceedings" in lieu of "their individual merits" to determine whether IV "indiscriminately filed . . . a series of legal proceedings without regard for the merits." *Waugh Chapel, 728 F.3d at 363*. Rather, it is quite feasible to apply the *PREI* standard to determine if these two instances of litigation were objectively baseless.

HN22[] Under *PREI*, what I need to determine is whether a reasonable litigant in IV's position could realistically expect to succeed on the merits of its claims in this Court because, if it could, the litigation was not objectively baseless and therefore not sham litigation. *PREI, 508 U.S. at 51, 62*. As noted, this is an "absolute defense" that "requires no more than a 'reasonabl[e] belie[f] that there is *a chance* that [a] claim may be held valid upon adjudication.'" *Id. at 62* (emphasis added) (citation omitted).

Fatally, Capital One cannot establish that IV's litigation against it was objectively baseless because there were too many indicia of probable cause. Most significantly, in this case, it is undisputed that the parties selected (ECF No. 134) and the Court appointed (ECF No. 143) an independent Special Master (with significant experience handling patent litigation), who wrote two comprehensive reports and recommendations (ECF Nos. 298, 315) regarding the merits of four of IV's patent claims after the parties submitted cross-motions for summary judgment on patent validity under *35 U.S.C. § 101*. Prior to issuing those reports and recommendations, the Special Master resolved **[**73]** multiple discovery disputes (ECF Nos. 170, 199, 203, 209, 223, 286, 290, 294); reviewed the parties' extensive formal briefing (ECF Nos. 147-1, 169-1, 227, 246), as well as supplemental letter briefing that the Special Master requested (ECF Nos. 298-1, 298-2) and twenty-seven exhibits; and heard argument (ECF No. 298-3). Under the Special Master's detailed and insightful analysis, IV did succeed on two of its patent claims: the Special Master recommended a judgment of patent eligibility for the '084 and '002 Patents. ECF No. 298. This fact alone is sufficient to show that a reasonable litigant could realistically expect to succeed on the merits, and it vitiates the notion that the loss before Judge Trenga meant that IV no longer could reasonably believe that it could prevail in this court. And, next to this fact, any other disputes are scintillae.

Moreover, various other undisputed facts also support the finding that IV's litigation in this Court was not objectively baseless. First, there is the presumptive validity of each of the nine patents that were the subjects of IV's claims against Capital One. *See* *35 U.S.C. § 282(a)* ("A patent shall be presumed valid."). Second, IV filed both suits before the Supreme Court decided **[**74]** *Alice Corp. Pty. v. CLS Bank Int'l, 134 S. Ct. 2347, 2351-52, 82 L. Ed. 2d 296, 189 L. Ed. 2d 296 (2014)* (holding that claims "disclos[ing] a computer-implemented scheme for mitigating 'settlement risk' . . . by using a third-party intermediary" were not patent eligible under *35 U.S.C. § 101* but rather were "drawn to the abstract idea of intermediated settlement, and that merely requiring generic computer implementation fails to transform that abstract idea into a patent-eligible invention"). I considered *Alice* and the parameters it set for eligibility in concluding that two of the patents before me were not actually patent-eligible. *See*

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[12] The Eastern District of Virginia observed that "[c]entral to Capital One's theory of monopolization [was] that IV ha[d] engaged in or threaten[ed] to engage in 'sham litigation' to enforce a patent portfolio whose patents are, in fact, either unenforceable or so weak that, absent IV's 'hold-up,' they have limited commercial value." *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-740 AJT, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *7 (E.D. Va. Dec. 18, 2013)* **[**72]** . But, it rejected that theory because Capital One failed to "allege any specific litigation history to support that claim or identify any particular patents IV ha[d] attempted or threatened to enforce that have expired, been cancelled or adjudicated to be invalid." *Id.* The court also found that "IV and Capital One do not compete in any relevant market, so it cannot be said that IV's object is to use th[at] or any other litigation to interfere with the business relationships of a competitor." *Id.* Thus, it concluded that "Capital One ha[d] not alleged facts or circumstances that would plausibly place th[at] litigation within any recognized exception to the *Noerr—Pennington* doctrine, which protects private parties from antitrust liability based on even unsuccessful litigation attempts to enforce laws with potential anti-competitive effects." *Id.*

*Intellectual [*715] Ventures I LLC v. Capital One Fin. Corp., 127 F. Supp. 3d 506, 511-31 (D. Md. 2015)*, *aff'd*, *850 F.3d 1332 (Fed. Cir. 2017)*.[13] The Special Master did not consider post-*Alice* cases and found that the same patents *were* patent eligible. *See* *Intellectual Ventures, 127 F. Supp. 3d at 509* ("[The Special Master did not] address in any depth the increasing number of cases that have been decided by the Federal Circuit and District Courts around the country that have been decided since the Supreme Court's recent decisions in *Alice Corp. Pty. Ltd. v. CLS Bank Int'l, __ U.S. __, 134 S. Ct. 2347, 82 L. Ed. 2d 296, 189 L. Ed. 2d 296 (2014)*, and *Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66, [132 S. Ct. 1289, 182 L. Ed. 2d 321] (2012)*, that have found patents that are highly analogous to the '081 and '002 patents to be invalid for abstractness under *35 U.S.C. § 101*."). This shows that when IV filed suit, before *Alice* was decided, it was realistic to expect success on the merits, at least with regard to these two patents. *See also* *Content Extraction & Transmission LLC v. Wells Fargo Bank, Nat'l Ass'n, 776 F.3d 1343, 1350 (Fed. Cir. 2014)* ("CET's infringement suits, though **[**75]** unsuccessful, were not objectively baseless . . . . because the state of the law of *§ 101* was deeply uncertain at the time CET filed its complaints against Wells Fargo and PNC in 2012. Under these circumstances, we cannot conclude that as a matter of law, no reasonable litigant in 2012 could have expected success on at least one of CET's claims.").

Third, IV has not filed any additional suits against Capital One post-*Alice*. Fourth, IV withdrew specific claims when it was persuaded that it would not prevail, suggesting that it reasonably believed it could prevail on the others. Fifth, IV appealed my summary judgment rulings, an extra step that one who did not expect to succeed likely would not bother taking. Sixth, while Capital One incurred significant costs defending IV's patent claims, IV also incurred substantial litigation expenses. The litigation before me has involved nineteen attorneys for IV, as well as a Special Master and an economic consultant, the costs of whom the parties have shared. The docket includes almost 700 entries, and the documents in support of the parties' pending summary judgment briefing **[**76]** exceed 13,000 pages. Seventh, IV did not file for these patents with the Patent and Trademark Office; it acquired them and was entitled to rely on their presumptive validity. Eighth, Judge Trenga ruled that IV's patent infringement action was not an "exceptional case" marked by "unreasonable conduct" that would justify an award of attorneys' fees to Capital One pursuant to *35 U.S.C. § 285*. *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13CV0740 (AJT/TCB), 2015 U.S. Dist. LEXIS 155525, 2015 WL 7283108, at *1, *4 (E.D. Va. Nov. 17, 2015)*. Ninth, IV incurred the significant expense of designating nine experts on objective reasonableness—in comparison to Capital One's failure to designate any—something IV hardly would have done had it thought its underlying patent claims were objectively baseless. Under these circumstances, no reasonable factfinder could conclude that IV lacked probable cause.

Further, if I were to reach the subjective inquiry of whether IV initiated litigation to interfere directly with its *competitor's* business, it is questionable whether Capital One, a bank, could qualify as a **[*716]** competitor of IV, a patent assertion entity. Indeed, Judge Trenga found that Capital One is not IV's competitor. *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-740 AJT, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *7 (E.D. Va. Dec. 18, 2013)*. Thus, even if this litigation **[**77]** were objectively baseless—which it clearly is not—Capital One cannot establish that IV intended to interfere "with the business relationships of a competitor." *See* *PREI, 508 U.S. at 60-61* (emphasis added).

In sum, not only is Capital One not a competitor of IV, but more significantly, a reasonable litigant in IV's position realistically could have expected to succeed on the merits of its claims in this Court. Therefore, the litigation was not objectively baseless. Consequently, it was not sham litigation, and IV is entitled to *Noerr—Pennington* immunity, as its patent litigation is integral to Capital One's antitrust claims. *PREI, 508 U.S. at 51, 62*.

Collateral Estoppel

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[13] Judge Trenga granted summary judgment in Capital One's favor on April 16, 2014, before the Supreme Court decided *Alice* on June 19, 2014. *See* *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-CV-740 AJT, 2014 U.S. Dist. LEXIS 53001, 2014 WL 1513273, at *1 (E.D. Va. Apr. 16, 2014)*, *aff'd sub nom.* *Intellectual Ventures I LLC v. Capital One Bank (USA), 792 F.3d 1363 (Fed. Cir. 2015)*.

HN23[] Collateral estoppel, also known as issue preclusion, "works to ensure that parties get 'one full and fair opportunity to litigate a particular issue, while preventing needless relitigation of that issue.'" *Barna Conshipping, S.L. v. 2,000 Metric Tons, More or Less, of Abandoned Steel, 410 F. App'x 716, 720 (4th Cir. 2011)* (quoting *In re Cygnus Telecomms. Tech., LLC, Patent Litig., 536 F.3d 1343, 1350 (Fed. Cir. 2008))*. Collateral estoppel bars relitigation of an issue or fact if

> (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) **[**78]** the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding.

In re Microsoft Corp. Antitrust Litig., 355 F.3d 322, 326 (4th Cir. 2004) (emphasis added).

HN24[] Collateral estoppel may be offensive or defensive. *Id.* Offensive collateral estoppel is "[w]hen a *plaintiff* [or counter claimant or third party plaintiff] employs the doctrine of collateral estoppel or issue preclusion 'to foreclose the defendant [or counter defendant or third party defendant] from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party.'" *Id.* (quoting *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.4, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979))*. Defensive collateral estoppel is "when a *defendant* [or counter defendant or third party defendant] employs the doctrine 'to prevent a plaintiff [or counter claimant or third party plaintiff] from asserting a claim the plaintiff [or counter claimant or third party plaintiff] has previously litigated and lost against another defendant.'" *Id.* (quoting *Parklane Hosiery, 439 U.S. at 326 n.4*). A defendant (or defending party) also can employ defensive collateral estoppel to bar claims the plaintiff (or claimant) already unsuccessfully made against *it*, rather than another defendant. *See* *Zeno v. United States, No. DKC-09-544, 2009 U.S. Dist. LEXIS 115616, 2009 WL 4910050, at *8 (D. Md. Dec. 11, 2009)*, *aff'd*, *451 F. App'x 268 (4th Cir. 2011)*. **[**79]** Here, the Intellectual Ventures companies, which are Counter Defendants and Third Party Defendants, invoke the doctrine to prevent the Capital One companies, which are Counter Claimants and Third Party Plaintiffs, from asserting the claims they unsuccessfully alleged against IV in the Virginia litigation. This is an instance of defensive collateral estoppel. *See id.; Microsoft, 355 F.3d at 326*.

[*717] IV insists that collateral estoppel bars relitigation of whether the market that Capital One identifies is a "relevant market," because the Eastern District of Virginia already determined that the same market that Capital One describes here was not a relevant market for antitrust purposes, IV Mem. 7-8, and that issue was critical and necessary to Judge Trenga's judgment, which was a valid, final judgment, *id.* at 9, 12. IV contends that, although Capital One pleaded different facts in this case, the changes were "immaterial," and "[a]ltering the facts alleged cannot avoid issue preclusion" because "[i]ssue preclusion prevents a second attempt to relitigate with additional pleaded facts, or any other way." *Id.* at 8-9. Capital One counters that the pleadings define a different relevant market, Capital One Opp'n 15-17, that the changes are not **[**80]** immaterial, *id.* at 17, and that in any event, the market definition was not critical or necessary to the judgment, *id.* at 17-18, because "the Virginia court's decision rested on the independent grounds that Capital One's market definition and monopoly power allegations were both insufficient to state a claim." *Id.* at 18.

Notably, "relevant market" is a necessary element of all of Capital One's antitrust claims. *See* *Berlyn Inc. v. The Gazette Newspapers, Inc., 73 F. App'x 576, 582 (4th Cir. 2003)* (noting that, "to determine whether any antitrust violation [under the *Sherman Act* or the *Clayton Act*] has occurred, '[the court]must first define *the relevant market* because the concept of competition has no meaning outside its own arena, however broadly that arena is defined,'" and that the party bringing an antitrust claim "bears the burden of proof on the issue of the relevant product and geographic markets" (emphasis added) (citing *Satellite Television & Assoc. Res., Inc., v. Continental Cablevision of Va., Inc., 714 F.2d 351, 355 (4th Cir.1983)))*; *see also* *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (stating that, HN25[] for an attempted monopolization claim under *§ 2* of the Sherman Act, "to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider *the relevant market* and the defendant's ability to lessen or destroy competition in that market" (emphasis added)); *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (stating that, HN26[] to prevail on a claim of monopolization **[**81]** under *§ 2* of the Sherman Act, a plaintiff must prove: "(1) the possession of monopoly power in *the relevant market* and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" (emphasis added)); *United States v. Phila. Nat'l Bank, 374 U.S. 321, 363, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)* (holding that ***HN27***[] "a merger which produces a firm controlling an undue percentage share of *the relevant market*, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it [is a violation of *§ 7* of the Clayton Act unless there is] evidence clearly showing that the merger is not likely to have such anticompetitive effects" (emphasis added)); *It's My Party, Inc. v. Live Nat., Inc., 88 F. Supp. 3d 475, 503 (D. Md. 2015)* (stating that, ***HN28***[] to prevail on a claim of attempted monopolization, a plaintiff must prove "(1) a specific intent to monopolize *a relevant market*; (2) predatory or anticompetitive acts; and (3) a dangerous probability of successful monopolization") (emphasis added) (quoting *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co., 748 F.3d 160, 177 (4th Cir. 2014))*, *aff'd sub nom. It's My Party, Inc. v. Live Nation, Inc., 811 F.3d 676 (4th Cir. 2016)*. Therefore, if the relevant market that Capital One alleges has **[*718]** not changed in any material respect from the relevant market it defined in the Virginia litigation, then **[**82]** Judge Trenga's conclusion that Capital One's "relevant market" did not constitute a relevant market for antitrust purposes prevents relitigation of that issue, and IV is entitled to judgment as a matter of law on all counts. *See* *Berlyn, 73 F. App'x at 582*.

Capital One does not challenge whether it had a full and fair opportunity to litigate the sufficiency of its market definition before the Eastern District of Virginia, whether the sufficiency of the relevant market it alleged was actually resolved in that court, or whether Judge Trenga issued a valid, final judgment. *See* Capital One Opp'n 15-17. Rather, as noted, Capital One challenges the applicability of issue preclusion in two regards: (1) whether the relevant market is materially different in this litigation, and (2) whether Judge Trenga's conclusion that the proposed relevant market was not a relevant market for antitrust purposes was critical and necessary to the judgment he issued. *See id.* I will consider each challenge in turn.

Is the relevant market materially different in this litigation?

> ***HN29***[] A relevant market is generally viewed as the field of "meaningful competition." *IGT v. Alliance Gaming Corp., 702 F.3d 1338, 1344 (Fed. Cir. 2012)*. It is determined by "commercial realities" and "consumer choice" and, while it typically **[**83]** includes substitutes for a particular product, it may also consist of a single product or brand where there is no "reasonable interchangeability" with other comparable products, that is, where there are essentially no substitutes for a given product. *Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 481-82, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. at 404*).

*Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-CV-00740 AJT, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *4 (E.D. Va. Dec. 18, 2013)*.

In the Virginia litigation, Capital One alleged that the relevant market was the "market for technology enabling business processes common throughout the commercial banking industry in the United States." *Intellectual Ventures, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *5* (quoting pleadings). The Virginia court reworded the relevant market definition as "IV's 'portfolio of 3,500 or more patents that [IV] alleges cover widely used financial and retail banking services' in the United States." *Intellectual Ventures, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *5*. Here, Capital One once again alleges that IV's 3,500 patents comprise the relevant market. Fourth Am. Countercl. ¶ 158; Third Party Compl. ¶ 50. Notably, the alleged market has not changed because IV has not acquired any new patents in the relevant investment funds since Capital One filed its antitrust counterclaim in the Virginia litigation. Detkin Decl. ¶ 4, Ex. 69, Jt. Rec. 3,415. And, Capital One acknowledges that, previously, I observed **[**84]** that the "[Virginia] court restated the relevant market as the Intellectual Ventures companies' 'portfolio of 3,500 or more patents,' the same market alleged here." *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. PWG-14-111, 2016 U.S. Dist. LEXIS 4581, 2016 WL 160263, at *3 (D. Md. Jan. 14, 2016)* (quoting

*Intellectual Ventures, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *5)*; *see* Capital One Opp'n 16. Yet, in Capital One's view, the Virginia court's "restatement [of what the relevant market was] was dicta . . . based on comments made by Capital One's counsel during oral argument on IV's motion to dismiss," and the actual alleged market in the Virginia litigation was not the same as it is here. Capital One Opp'n 16. On the contrary, as IV asserts, IV Reply 5, the transcript from oral argument demonstrates that Judge Trenga **[*719]** paraphrased the relevant market to confirm his understanding of what Capital One alleged, and Capital One confirmed that his definition was accurate. Hr'g Tr., Ex. 3, Jt. Rec. 147 ("THE COURT: You're saying the 3,500 patents that are owned by Intellectual Ventures constitutes 100 percent of the patents involved in the *ex post* market for technology enabling — for patents pertaining to technology enabling business processes. [CAPITAL ONE'S COUNSEL]: And that's because of the ***antitrust law***. We're **[**85]** not saying they're the only patents that relate to commercial banking services. . . . We're saying they have effectively an inescapable threat [sic], which in ***antitrust law*** is what is controlling prices and eliminating competition. . . . The commercial reality faced by Capital One is you can't get around this market."). Thus, the alleged relevant market is the same.

But, in this case, Capital One sets forth different facts to support a finding that these patents qualify as a relevant market for antitrust purposes. In the Virginia litigation, Capital One alleged that IV's patent portfolio qualified because Capital One had a business need to avoid litigation, which it only could do by licensing the patents in the portfolio. Now, instead of relying solely on the need to avoid litigation, which Judge Trenga already found to be insufficient to define a relevant market, Capital One also contends that "continu[ing] to provide the online services they already offer without paying the cost-prohibitive licensing fees to the Intellectual Ventures companies—the only source of such licenses—," is a business necessity. *See* *Intellectual Ventures, 2016 U.S. Dist. LEXIS 4581, 2016 WL 160263, at *3* (quoting *Intellectual Ventures I LLC v. Capital One Fin. Corp., 99 F. Supp. 3d 610, 622-23 (D. Md. 2015))*. Based on this change in the factual allegations, I denied IV's **[**86]** motion to dismiss on claim preclusion grounds. *Intellectual Ventures, 2016 U.S. Dist. LEXIS 4581, 2016 WL 160263, at *3*. Thus, pre-discovery, I concluded that Capital One adequately alleged a plausible relevant market that was not identical to the one alleged in Virginia and therefore not barred by collateral estoppel. *Id.*

Capital One relies on this preliminary finding to argue that the relevant markets are not identical. Capital One Opp'n 15, 17. In its view, these changes are material because "the evidence confirms that, to compete, Capital One must provide the core banking services that IV's infringement claims targeted, including ATMs, payment cards, and online and mobile banking," and "the business necessity allegations (and evidence) raise different market definition issues than those present in Virginia." *Id.* at 17.

IV counters that there "is no evidence to support the argument that a license was a 'business necessity' for Capital One or any other bank, none of which licensed any patents." IV Reply 23 n.17. Indeed, discovery has concluded, and to date, IV's patent litigation has not led to Capital One (or any other company) licensing the portfolio of thousands of financial services patents that IV amassed, as none of IV's patent claims have resulted in a judgment **[**87]** in IV's favor. Nor is there any other evidence that Capital One has to license IV's patent portfolio or has been unable to do business because it has not licensed the patents. Certainly, Capital One may feel compelled to license the patents to avoid litigation, but Judge Trenga already concluded that avoiding litigation is not a sufficient business necessity to define a relevant market. Therefore, despite the new factual allegations before me, the alleged relevant market has not changed in a material way.

Was Judge Trenga's conclusion that the proposed relevant market was not a relevant market for antitrust purposes critical and necessary to the judgment he issued?

The crux of Capital One's argument is that the Fourth Circuit has stated that **[*720]** "when issue preclusion is considered in the context of two separate litigations," as it is here, "if a judgment in the prior case is supported by either of two findings, neither finding can be found essential to the judgment." *In re Microsoft Corp. Antitrust Litig., 355 F.3d 322, 328 (4th Cir. 2004)*. The parties agree that separate findings supported Judge Trenga's judgment, IV Mem. 10; Capital One Opp'n 17-18, but they disagree about the effects of those independent grounds. Capital One relies on the *Microsoft* holding **[**88]** to argue that Judge Trenga's conclusion regarding the relevant market was not critical and necessary to his judgment. Capital One Opp'n 17-18. IV relies on *Ritter v. Mount St. Mary's Coll., 814 F.2d 986, 994 (4th Cir. 1987)*, and insists, to the contrary, that "'alternative determinations' should each be held material, and thus a basis for issue preclusion," IV Mem. 10 (quoting Restatement (First) of Judgments § 68 cmt. n). Notably, in *Ritter*, the Fourth Circuit considered circumstances in which (as here) the defendant had raised collateral estoppel *defensively* to preclude relitigation of issues previously determined by the court, *814 F.2d at 989-90*, whereas in *Microsoft*, the Fourth Circuit considered whether *offensive* collateral estoppel should preclude relitigation of certain factual findings, *355 F.3d at 325*.

Because, as noted, the motion before me involves defensive collateral estoppel, I look first to *Ritter*. There, the district court had dismissed the plaintiff's legal claims of discrimination against her employer under the *Equal Pay Act* ("EPA") and *Age Discrimination in Employment Act ("ADEA")* and held a bench trial on her equitable claims under Title VII. *814 F.2d at 988*. At trial, the court found that Ritter "was not qualified for tenure" ("tenure issue") and that the only valid comparator she identified **[**89]** "was clearly more qualified" than she ("comparator issue"). *Id. at 989-90*. Ritter appealed the dismissal and the trial ruling. *Id. at 989*. The Fourth Circuit affirmed the results of trial based on the trial court's finding on the tenure issue, without reaching the comparator issue, but remanded for the trial court to hold a second trial, this time by jury, on the EPA and *ADEA* claims. *Id. at 988*.

On remand, the employer moved for summary judgment on the EPA and *ADEA* claims, arguing that, "because the *ADEA* and EPA claims had common elements with the Title VII claim, the issues determined by the court in the Title VII claim collaterally estopped the relitigation of those issues before a jury," and the district court granted the motion. *Id. at 988-90*. Ritter again appealed, and the Fourth Circuit considered "whether the findings of fact made by the trial judge in the Title VII equitable suit should collaterally estop the relitigation of those facts before the jury on the remanded EPA and *ADEA* legal actions." *Id. at 988*.[14]

The Fourth Circuit decided that, ***HN30***[] even though "the doctrine of collateral estoppel was designed to bar the relitigation of issues determined in a *prior* suit," it could apply to relitigation within the same suit (as in the **[**90]** case before it), because where the relitigation "involves the same parties, the same issues arising out of the same set of facts, and the same court," the "'sameness' or mutuality of parties in interests which serves as the basis for the development **[*721]** of collateral estoppel doctrines" is present. *Id. at 991-92*. Thus, the case before it was "the classic case in which the court can utilize the doctrine of collateral estoppel without fear of denying a litigant a right to argue his claims to the best of his ability before a competent court." *Id. at 992*.

The court then considered whether collateral estoppel should apply, given that the district court decided both the tenure issue and the comparator issue when resolving Ritter's Title VII claim, and the Fourth Circuit had affirmed based on only the tenure issue. *Id. at 993*. It observed the general rule that, ***HN31***[] "where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment" and collateral estoppel does not bar relitigation of either issue, unless "one of the two determinations is upheld on appeal," in which case "collateral estoppel [bars relitigation] as **[**91]** to that issue. *Id.* The Fourth Circuit noted:

> The rationale underlying this corollary to the collateral estoppel doctrine is that it guards against the use of non-essential dicta and ancillary findings to estop later litigations. . . . Non-essential findings should not serve as the basis for collateral estoppel because the litigants might not have concentrated their energies and resources upon the full development and presentation of these issues. Thus, . . . this requirement ensures the integrity and competence of any particular finding before it is allowed to estop collateral relitigation.

Id. at 993-94.

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[14] As for the summary judgment ruling precluding trial *by jury*, because the issues had been decided by the judge at a bench trial, the Fourth Circuit observed that "an equitable determination can have collateral-estoppel effect in a subsequent legal action and . . . this estoppel does not violate the *Seventh Amendment*." *Ritter, 814 F.2d at 990-91* (quoting *Parklane Hosiery, 439 U.S. at 335*).

Despite this rule, the Fourth Circuit concluded that collateral estoppel barred relitigation of both issues in the case before it, reasoning that ***HN32***[] collateral estoppel is "limited by the overriding principle that the courts should protect a litigant's right to a full and fair opportunity to litigate his claims" but otherwise "capable of flexible determination to serve the interests of judicial economy by preventing needless relitigation." *Id. at 994*. It noted that Ritter "had a full and fair opportunity to litigate" the comparator issue as well as the tenure issue, given that she had "conducted extensive discovery" **[**92]** and "presented a vigorous argument to the trial court" on the comparator issue, and both rounds of litigation involved "the same parties, the same issues, the same facts, and even the same court." *Id.*

Zeno v. United States, No. DKC-09-544, 2009 U.S. Dist. LEXIS 115616, 2009 WL 4910050 (D. Md. Dec. 11, 2009), *aff'd*, *451 F. App'x 268 (4th Cir. 2011)*, in which this Court considered both *Ritter* and *Microsoft*, also provides guidance. In *Zeno*, the plaintiff, an attorney who had been subject to disciplinary proceedings in Puerto Rico, Massachusetts, and Texas, filed suit (with his wife) in this Court against several federal judges, the United States Attorney for the District of Puerto Rico, and several Assistant United States Attorneys, a Massachusetts state court judge, two clerks from the Massachusetts state court, and three Massachusetts attorneys. *2009 U.S. Dist. LEXIS 115616, [WL] at *1*. The defendants moved to dismiss, and this Court granted the motion on the bases of lack of personal jurisdiction, improper venue, and, with regard to the defendant judges, prosecutors, and clerks, absolute and qualified immunity. *Id.* The plaintiffs appealed but then voluntarily dismissed their appeal. *Id.*

Thereafter, they filed suit again in this Court, against the same federal defendants as in their earlier lawsuit, as well as the United **[**93]** States. *2009 U.S. Dist. LEXIS 115616, [WL] at *2*. They asserted that the Court had jurisdiction under the *Federal Tort Claims Act*. *Id.* The defendants moved to dismiss and the Court considered both claim and issue preclusion, concluding that claim preclusion barred **[*722]** the plaintiffs' claims in the second suit. *2009 U.S. Dist. LEXIS 115616, [WL] at *6*. As for issue preclusion, the Court observed:

> In *In re Microsoft, [355 F.3d 322,]* the plaintiffs attempted to use *offensive* collateral estoppel to preclude the defendant from relitigating factual findings that were made in a case brought against the defendant by different plaintiffs in a different court. In deciding the meaning of "critical and necessary," the court expressed the following concern regarding the use of *offensive* collateral estoppel: "If a trial court were to make an unnecessary or collateral finding in a case and the defendant appealed the judgment, the appellate court, in affirming the judgment, would generally not reach the unnecessary findings. Thus, such findings would evade appellate review." *Id. at 327*.[15] The court noted that ***HN33***[] the United States Supreme Court granted courts "broad discretion to determine when [offensive collateral estoppel] should be applied" because of a "greater possibility of unfairness from the use of offensive collateral **[**94]** estoppel." *Id. at 326*. The court decided that parties would have a greater opportunity for full litigation of issues if the "critical and necessary" requirement were interpreted strictly to mean that the issue or fact must be "essential to," instead of merely "supportive of" the judgment in the prior proceeding in order to be barred by collateral estoppel in a future proceeding. In other words, in the Fourth Circuit, issues are generally not barred by collateral estoppel when more than one issue could independently support the result of the prior judgment.

*Zeno, 2009 U.S. Dist. LEXIS 115616, 2009 WL 4910050, at *7* (emphasis added; original emphasis removed). Indeed, the Fourth Circuit noted that, in *Ritter*, it "essentially appl[ied] a law-of-the-case principle" while "call[ing] it collateral estoppel and appl[ying] it in the exceptional circumstances of that case, where the parties were the same,

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[15] The *Microsoft* Court stated that, if the judgment went up on appeal, the court in which issue preclusion is raised "must take care to limit is application to facts that were necessary to the judgment actually affirmed by the [appellate court]." *Microsoft, 355 F.3d at 328*. Here, Capital One appealed the dismissal of its claims in the Virginia litigation but then abandoned the appeal. *See* IV Mem. 1; Mot. to Dismiss Cross-Appeal, Ex. 11, Jt. Rec. 349-55 (stating that the question it posed for the Federal Circuit, "whether Capital One's antitrust counterclaims, as pleaded before discovery, alleged enough facts about the relevant market and Intellectual Venture's [sic] . . . conduct to state a claim," was "effectively irrelevant because the District of Maryland . . . allowed Capital One to file new antitrust counterclaims against IV based on a more developed pleading," and if the Federal Circuit ruled in Capital One's favor, it "would move to transfer and consolidate these claims with the ongoing litigation in Maryland, and that consolidation would not meaningfully expand the relief that Capital One seeks in that litigation").

the issues were the same, the facts were the same, and even the court was the same." *355 F.3d at 328*. In *Microsoft*, the Fourth Circuit held, *in the context of offensive collateral estoppel*, that "when issue preclusion is considered in the context of two separate litigations, the restrictive principle recognized in *Ritter* remains viable—that if a judgment in the prior case **[**95]** is supported by either of two findings, neither finding can be found essential to the judgment." *Id.*

But, significantly, in *Zeno*, this Court then noted that, "[d]espite the Fourth Circuit's general rule regarding alternative rulings and collateral estoppel, the Fourth Circuit [in *Ritter]* applied *defensive* collateral estoppel to bar issues in a case where two issues were previously decided and where both of the issues could have independently supported the result." *Zeno, 2009 U.S. Dist. LEXIS 115616, 2009 WL 4910050, at *8* (citing *Ritter, 814 F.2d 986*). This Court concluded in *Zeno* **[*723]** that "defensive collateral estoppel . . . bar[red] the court's consideration of issues that involve[d] 'the same parties, the same issues, the same facts, and even the same court.'" *Id.* It reasoned:

> Though this case has been assigned to a different judge, Plaintiffs' allegations regarding the individual Defendants are exactly the same as in Plaintiffs' complaint in the prior case. Because the complaints are nearly identical, this case presents the same issues of personal jurisdiction, venue, and immunity as to the individual Defendants that were resolved by the court's judgment in the prior proceeding. Furthermore, Plaintiffs had a full and fair opportunity to litigate those **[**96]** issues in the prior proceeding. Plaintiffs filed a notice of appeal in the Fourth Circuit after their case was dismissed, and then asked the Fourth Circuit to dismiss their appeal, citing a change in their own legal strategy. In doing so, Plaintiffs conceded the issues of personal jurisdiction, venue, and immunity as to the individual Defendants. The court's prior decision became final when Plaintiffs' appeal was dismissed by the Fourth Circuit. Finally, despite the fact that the court's previous decision rested on three alternative grounds for dismissal—personal jurisdiction, venue, and immunity—all of the grounds apply in this case.

Id.

As noted, what IV seeks to invoke is defensive collateral estoppel. Thus, the "greater possibility of unfairness from the use of offensive collateral estoppel" is not present. *See* *Microsoft, 355 F.3d at 326*. And, the prior litigation in the Eastern District of Virginia involved "the same parties, the same issues, [and] the same facts." *Ritter, 814 F.2d at 994*. Although the prior litigation was not in this Court, Judge Trenga's reasoning and analysis in his comprehensive written opinions in the Virginia case is available to me. *See* *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13CV0740 (AJT/TCB), 2015 U.S. Dist. LEXIS 155525, 2015 WL 7283108, at *1, *4 (E.D. Va. Nov. 17, 2015)*; **[**97]** *Intellectual Ventures I LLC v. Capital One Fin. Corp., No. 13-CV-740 AJT, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981 (E.D. Va. Dec. 18, 2013)*. Certainly, the conclusion that Capital One's alleged relevant market was "not a 'relevant market' under any recognized antitrust jurisprudence," *Intellectual Ventures, 2013 U.S. Dist. LEXIS 177836, 2013 WL 6682981, at *5*, which provided a basis for dismissal of the monopolization and attempted monopolization claims, *see* *2013 U.S. Dist. LEXIS 177836, [WL] at *5, *8*, was only one of two alternative grounds for dismissal of these claims. *See* *2013 U.S. Dist. LEXIS 177836, [WL] at *6-7* (concluding that capital One failed to alleged unlawful monopoly power sufficiently); *see also* *2013 U.S. Dist. LEXIS 177836, [WL] at *8* ("Capital One's attempted monopolization claim alleges the same injury, and in the same fashion, as its monopolization claim . . . and fails to state a claim for the same reasons.").

But, as noted, Capital One does not challenge whether it had a full and fair opportunity to litigate the sufficiency of its market definition before the Eastern District of Virginia. *See* Capital One Opp'n 15-17. Indeed, Capital One filed an opposition to IV's motion to dismiss in that court and argued its position at a hearing, advocating for its alleged relevant market in both instances. Moreover, the court considered both the opposition brief and the oral argument in resolving the motion, *2013 U.S. Dist. LEXIS 177836, [WL] at *5* (citing hearing transcript and opposition). Also, as in *Zeno*, Capital One appealed the prior court's **[**98]** ruling to the Fourth Circuit and then withdrew its appeal. Thus, the sufficiency of the market definition was fully and fairly litigated. Under these circumstances, it is appropriate to apply defensive collateral estoppel in this case to estop Capital One from arguing that its relevant market, which has not changed materially from the relevant market alleged **[*724]** in the Virginia litigation, is not a relevant market for antitrust purposes.

Conclusion

In sum, IV's Motion for Summary Judgment, ECF No. 656, IS GRANTED because *Noerr—Pennington* immunity and collateral estoppel both bar Capital One's antitrust claims. The parties' Motions to Seal, ECF Nos. 658, 665, and 676, ARE GRANTED. IV's objections to the Joint Record Exhibits, ECF No. 674, ARE OVERRULED. A separate Order will issue.

Dated: November 30, 2017

/s/ Paul W. Grimm

United States District Judge

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] ORDER

For the reasons stated in the Memorandum Opinion issued this same date, it is, this 30th day of November, 2017, hereby ORDERED that

1. The Motion for Summary Judgment that Intellectual Ventures I, LLC; Intellectual Ventures II, LLC; Intellectual Ventures Management, LLC; Invention Investment Fund I, L.P.; and Invention Investment Fund II, LLC **[**99]** (collectively, "IV") filed, ECF No. 656, IS GRANTED;
2. Judgment IS ENTERED in IV's favor on Counts One, Two, and Three of Capital One's Third-Party Complaint and Counts Twelve, Thirteen, and Fourteen of Capital One's Counterclaim;
3. The parties' Motions to Seal, ECF Nos. 658, 665, and 676, ARE GRANTED;
4. IV's objections to the Joint Record Exhibits, ECF No. 674, ARE OVERRULED; and
5. The Clerk SHALL CLOSE this case.

/s/ Paul W. Grimm

United States District Judge

Power Analytics Corp. v. Operation Tech., Inc.

United States District Court for the Central District of California

December 7, 2017, Decided; December 7, 2017, Filed

SA CV16-01955 JAK (FFMx)

Reporter
2017 U.S. Dist. LEXIS 226665 *; 2017 WL 11486807

Power Analytics Corporation v. Operation Technology, Inc., et al.

Prior History: Power Analytics Corp. v. Operation Tech., Inc., 2017 U.S. Dist. LEXIS 166458 (C.D. Cal., Mar. 20, 2017)

Core Terms

alleges, Products, Grid, Platform, customers, real time, software, markets, competitors, antitrust, relevant market, suppliers, Sherman Act, facilities, historian, sells, end-user, reasons, audit, market share, monitoring, foreclose, anticompetitive, announcement, harmed, monopolization, sellers, bundle, de facto, Infrastructure

Counsel: **[*1]** Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

Judges: JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN A. KRONSTADT

Opinion

CIVIL MINUTES — GENERAL

(IN CHAMBERS) ORDER RE DEFENDANTS' OPERATION TECHNOLOGY Proceedings: INC. AND OSISOFT, LLC'S MOTION TO DISMISS SECOND AMENDED COMPLAINT (DKT. 303); SCHNEIDER ELECTRIC USA, INC.'S MOTION TO DISMISS NON-PATENT CLAIMS IN SECOND AMENDED COMPLAINT (DKT. 304)

I. Introduction

Power Analytics Corporation ("Plaintiff") brought this action against Operation Technology, Inc. ("Etap"), OSIsoft LLC ("OSI") and Schneider Electric USA, Inc. ("Schneider") (collectively, "Defendants") asserting claims for patent infringement, federal antitrust violations under the Sherman Act, 15 U.S.C. §§ 1 and 2, violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. §§ 75-1, 75-1.1, 75-2, and 75-2.1, conspiracy and several business torts. Dkt. 1. On June 21, 2016, Plaintiff filed a First Amended Complaint ("FAC"). Dkt. 38. On June 20, 2017, Plaintiff filed a Second Amended Complaint ("SAC"). Dkt. 285.

On July 17, 2017, Schneider brought a Motion to Dismiss the non-patent claims in the SAC ("Schneider Motion"). Dkt. 304. Plaintiff opposed the Schneider Motion **[*2]** (Dkt. 331), and Schneider replied. Dkt. 336. On the same day, Etap and OSI brought a Motion to Dismiss the non-patent claims in the SAC ("Etap Motion"). Dkt. 303. Plaintiff opposed the Etap Motion (Dkt. 330), and Etap and OSI replied. Dkt. 335.

On October 2, 2017, a hearing on the Schneider Motion and the Etap Motion was held and they were taken under submission. Dkt. 345. For the reasons stated in this Order, the Schneider Motion and the Etap Motion (collectively, "the Motions") are **GRANTED** and the non-patent claims in the SAC are dismissed with leave to amend*, i.e.*, without prejudice.[1]

II. Background

A. The Parties

Plaintiff is a Delaware corporation whose principal place of business is in North Carolina. SAC, Dkt. 285 ¶ 1. Plaintiff "is in the business of developing, selling and supporting software products which are used in the operation of electric power distribution systems." *Id.* "Power Analytics' line of products are employed in Power Grid design; control and safety management; the collection, storage and analysis of system data; and the modeling, simulation and visualization of grid operations." *Id.*

Etap is a California corporation whose principal place of business is here. *Id.* ¶ **[*3]** 2. Etap "develops and sells software products for use with Power Grids, many of which are similar in functionality to those developed and sold by Power Analytics." *Id.* OSI is a Delaware corporation whose principal place of business is also in California. *Id.* ¶ 4. OSI "develops and sells Power Grid data collection and archiving software products for use with Power Grids. OSI sells these products and related services to customers located throughout North America." *Id.* ¶ 5.

Schneider is a Delaware corporation whose principal place of business is in Massachusetts. *Id.* ¶ 6. "Among other things, Schneider makes and sells software products and a multitude of devices for use with Power Grids. Schneider sells these products and related services to customers "together with products and services provided by other suppliers as a bundled or 'Platform' product" to customers in North America. *Id.* ¶ 8.

B. Procedural History

This Order addresses the second round of motions to dismiss the operative complaint in this action. On July 22, 2016, Schneider moved to dismiss the non-patent claims in the FAC. Dkt. 42. On the same day, Etap and OSI moved to dismiss the non-patent claims in the FAC. Dkt. 44. On **[*4]** October 26, 2016, this action was transferred to this District from the District of Delaware. Dkt. 73. On January 30, 2017, a hearing on both motions to dismiss was held and they were taken under submission. Dkt. 158. On May 10, 2017, both motions to dismiss were granted without prejudice ("Prior Order"). Dkt. 227. The Prior Order identified several deficiencies in the Sherman Act claims as presented in the FAC, including that the FAC failed plausibly to allege any of the following: (i) the existence of de facto exclusive dealing arrangements between or among any of the Defendants; (ii) foreclosure from competition in a relevant market as a result of the alleged exclusive dealing arrangements among the Defendants; (iii) harm to competition; and (iv) antitrust injury. The Prior Order also identified deficiencies in the remaining causes of action.

C. Overview of Technology

1. Power Grids

"Power Grids are networks that move and distribute electric power between supply sources and electricity consuming devices." *Id.* ¶ 14. "Microgrids are smaller-scale Power Grids used for the distribution of electrical power in specific facilities, applications, or defined geographic areas" and may operate **[*5]** "while either connected to

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[1] Plaintiff's motion for reconsideration of a prior order granting partial summary judgment as to the patent claims advanced in this action is addressed in a separate order. Dkt. 362. Etap's motion for review of Judge Mumm's July 31, 2007 discovery order is also addressed in a separate order. Dkt. 363.

other Microgrids, a larger Power Grid or in isolation." *Id.* ¶ 15. The SAC alleges that "Power Grids and Microgrids are often employed in power generation facilities, like nuclear power plants, data centers and other facilities that consume large volumes of electrical power." *Id.* ¶ 16. It also alleges that Power Grids and Microgrids are comprised of "Grid Elements, i.e., devices and operational components physically connected to the Grid." *Id.* ¶ 17. The SAC next alleges that one category of operational components for Power Grids, which Plaintiff produces, consists of "software and hardware used in the design of, and the safe, stable and efficient operation and management of, facilities that employ their own Power Grids and/or Microgrids." *Id.* ¶ 18. The SAC defines these components as "Grid D and M Products." *Id.* It alleges that these components are used in facilities including "nuclear power plants, oil refineries, manufacturing facilities, data centers, military installations, and air traffic control centers." *Id.*

2. Grid Design Products

The SAC alleges that Plaintiff makes and sells Grid Design Products, which "are software programs used in the engineering, **[*6]** design and subsequent management of Power Grids." *Id.* ¶ 21. It alleges that Grid Design Products "provide a functionality unique for use in Power Grids; thus, other software programs, are not reasonable substitutes for Grid Design Products." *Id.* Plaintiff's Grid Design Products are "NUPIC-certified Products." *Id.* ¶ 22. The SAC alleges that Etap makes Grid Design Products that compete with those of Plaintiff. *Id.* ¶ 17. Further, it alleges that, during the relevant time period, Plaintiff's Grid D and M Products "have been consistently priced at levels lower than ETAP's competing products, and are designed to deliver a lower total cost of ownership to customers as compared to ETAP's competing products." *Id.* ¶ 20.

3. Real Time Products

The SAC alleges that Plaintiff produces and sells Real Time Products, which "are software products that provide for additional functionality once the Power Grid is installed and deployed." *Id.* ¶¶ 25, 27. It also alleges that such functionality may include "the monitoring, modeling, simulation, and visualization, the current and future operation of the Power Grid by collecting and utilizing current data in near real time." *Id.* ¶ 25. It then alleges that Real **[*7]** Time Products enable "Power Grids to run securely, safely, efficiently and without significant interruption" by "evaluat[ing] and track[ing] system failures and avoid[ing] future damaging events by analyzing trends and predicting potentially damaging events." *Id.* Further, the SAC alleges that Real Time Products "include software applications with functionality that is unique for use in power grids; thus, other general system monitoring products are not reasonable substitutes for Real Time Products." *Id.* ¶ 26.

The SAC alleges that Plaintiff has obtained certain patents associated with its Real Time Products. *Id.* ¶ 27. It alleges that Etap and Schneider make and sell Real Time Products that compete with Plaintiff's Real Time Products. *Id.* ¶ 31. It also alleges that Defendants' Real Time Products do not offer the same level of functionality as those of Plaintiff. *Id.* ¶ 26. The SAC alleges that in November 2013, Plaintiff issued a press release announcing its patented Real Time Product. *Id.* ¶ 32. It alleges that, after Etap learned about the content of the press release, it "immediately recognized that [Plaintiff] posed a competitive threat that could not be tolerated." *Id.* ¶ 34. It alleges **[*8]** that an Etap employee emailed colleagues regarding the announcement and stated: "Great!!!!! All of our USP will be now for EDSA. We need to kill such competition from these companies. (EDSA, Cyme, DigSilent, PSSE in particular)." *Id.* ¶ 33.

4. Historian Software

The SAC alleges that, in order to function effectively, Real Time Products and Grid Design Products must interact with historian software. *Id.* ¶ 36. The SAC defines "Historian Software" as software products that "collect and retain certain categories of past information related to the operation of the Power Grid and . . . store such information for prescribed periods of time as 'records' of the Power Grid's past performance." *Id.* It alleges that historian software may be sold separately or together with Grid Design and Real Time Products. *Id.* Plaintiff sells historian software. *Id.* ¶ 40. Each of the Defendants sells unique historian software that competes with Plaintiff's product. *Id.* ¶¶ 37-41. The Real Time Products of Plaintiff and Etap both allegedly interface with third party historian software. *Id.*

D. Overview of the Alleged Relevant Product Markets

The SAC alleges that there are several relevant product markets: (i) the NUPIC **[*9]** Grid Design Market; (ii) the NUPIC Real Time Market and (iii) the EMS Platform Market. It alleges in the alternative to the EMS Platform Market the following four end-user EMS platform markets: (i) the Commercial Buildings EMS Platform Market; (ii) the Data Center EMS Platform Market; (iii) the Industrial EMS Platform Market and (iv) the Infrastructure/Grid EMS Platform Market.

1. <u>The Relevant NUPIC Markets</u>

a) In General

The SAC makes several allegations concerning the common elements of the NUPIC Grid Design Market and the NUPIC Real Time Market. It alleges that NUPIC stands for "the Nuclear Procurement Issues Committee." *Id.* ¶ 54. It alleges that NUPIC is "an industry partnership among nuclear power plants" and the "Nuclear Regulatory Commission (NRC) Licensees' preferred and cost-effective method of maintaining their Approved Suppliers List." *Id.* It alleges that customers in both alleged relevant markets "are primarily nuclear power generation facilities, other facilities that use or employ nuclear power, and entities who provide design and other services to such nuclear power facilities." *Id.* ¶ 53.

The SAC alleges that "[a]ll North American nuclear facilities are members of NUPIC." **[*10]** *Id.* It also alleges that all members of NUPIC are required to have "the current release of any installed software." *Id.* ¶ 64. It alleges that products used in nuclear facilities attain NUPIC certification through an audit by "at least five separate NUPIC members." *Id.* ¶ 54. It alleges that "[o]nce the required number of NUPIC members are satisfied with the audit results, one utility is selected as the lead utility for that supplier, and conducts an audit on behalf of the other NUPIC members every three years." *Id.* ¶ 55. Further, it alleges that the NUPIC audit process "imposes a significant burden on a company interested in selling its products to NUPIC members," including an up-front "seven figure capital expenditure, an initial commitment of several years" and additional expenditures for subsequent audits. *Id.* ¶ 56.

The FAC next alleges that the NUPIC market is a "low growth market in terms of new customers and new sites for existing customers." *Id.* ¶ 72. It alleges that because the NUPIC market is largely comprised of existing nuclear reactors, "competition within this market is substantially limited to switching out . . . existing grid design and management products or offering **[*11]** new applications and products with additional functionality." *Id.* ¶ 73.

b) NUPIC Grid Design Market

The SAC alleges that one relevant product market is the NUPIC Grid Design Market. *Id.* ¶ 52. The SAC defines that market as one for "the sale and servicing of Grid Design Products to customers who are, by law and or regulation, limited to purchasing only Grid Design Products that have successfully completed a NUPIC audit within the prior three years." *Id.* The geographic market for the NUPIC Grid Design market is North America. *Id.* ¶ 71.

The SAC alleges that Plaintiff and Etap are the only entities that compete within the NUPIC Grid Design Market. *Id.* ¶ 59. It alleges that Etap and Plaintiff are both authorized to sell their respective Grid Design Products to NUPIC customers. *Id.* ¶¶ 60-61. Further, it alleges that Plaintiff "has historically participated" in the NUPIC Grid Design Market. *Id.* ¶ 61. It alleges that Plaintiff's Grid Design Product "is lower priced than Etap's competing product and offers additional functionality attractive to NUPIC market customers, such as direct current system design management." *Id.* The SAC alleges that Etap "has stated publicly that its Grid Design Products **[*12]** are currently in use at 97% of the NUPIC facilities, with at least 60 of 64 U.S. nuclear power facilities as customers. Etap also has 5 of the 6 Canadian nuclear power facilities and all 3 of the nuclear power facilities in Mexico." *Id.* ¶ 74.

The SAC also alleges that the time and expense associated with the NUPIC certification and audit processes pose "a high entry barrier" into the NUPIC Grid Design Market. *Id.* ¶ 57. Further, it alleges that these processes distinguish the NUPIC Grid Design Market from the general market for the sale and servicing of Grid Design Products. *Id.* ¶ 58. Thus, it alleges that other companies that make and sell Grid Design Products do not compete in the NUPIC Grid Design Market because they have not completed a NUPIC audit for their respective Grid Design Products. *Id.* ¶ 62. The SAC also alleges that these Grid Design Products are "not reasonable substitutes" for the NUPIC-certified Grid Design Products offered by Plaintiff and Etap. It also alleges that these companies do not have an economic incentive to have a NUPIC audit performed for their Grid Design Products "absent a critical level of contestable sales opportunities for the sale of Grid Design Products **[*13]** to NUPIC customers." *Id.* ¶ 63.

c) NUPIC Real Time Market

The SAC alleges that a second relevant product market is the NUPIC Real Time Market. *Id.* ¶ 52. The SAC defines this market as one for "the sale and servicing of Real Time Products to customers who are, by law and or regulation, limited to purchasing only Real Time Products that have successfully completed a NUPIC audit within the past three years." *Id.* The geographic market for the NUPIC Grid Design Market is North America. *Id.* ¶ 71.

The SAC alleges that the time and expense associated with the NUPIC certification and audit processes pose "a high entry barrier" into the NUPIC Real Time Market. *Id.* ¶ 57. Further, it alleges that these processes distinguish the NUPIC Real Time Market from the general market for the sale and servicing of Real Time Products. *Id.* ¶ 58.

The SAC alleges that, based on Plaintiff's knowledge of the relevant markets, no Real Time Products have been subjected to a NUPIC audit that resulted in a positive report. *Id.* ¶ 65. It alleges that Plaintiff has not undertaken a NUPIC audit for its Real Time Product "because of foreclosure of sales opportunities within the NUPIC market, as a result of Etap's and OSI's **[*14]** anticompetitive agreement." *Id.* ¶¶ 65-66. It alleges that this agreement has resulted in Plaintiff having a market share of approximately 3% of all sales of Real Time Products. *Id.* ¶ 66. Plaintiff contends that its market share is "below the critical level needed to justify the investment required to obtain NUPIC certification." *Id.* ¶ 67.

The SAC alleges that Plaintiff is a potential participant in the NUPIC Real Time Market because "it stands ready to undergo a NUPIC audit for its Real Time Product . . . once the anticompetitive agreement between ETAP and OSI is nullified and enjoined." *Id.* ¶ 68. It alleges that Plaintiff's decision not to elect to have its operations subjected to a NUPIC audit "supports the reasonable inference that other potential competitors . . . have been similarly foreclosed from contesting ETAP in this market." *Id.* ¶ 69.

2. <u>The EMS Relevant Markets</u>

a) The EMS Platform Market

The SAC alleges that the market for the sale and servicing of Energy Management Systems platforms ("EMS Platform Market") is a separate, relevant product market. *Id.* ¶ 107. The SAC defines EMS as "the full bundle of automation, monitoring and control software, hardware and related equipment **[*15]** purchased by facility owner/operators for use as an 'EMS Platform.'" *Id.* EMS Platform software includes Grid Design Products and Real Time Products. *Id.* ¶ 135. The geographic market for the EMS Platform Market is North America. *Id.* ¶ 147.

The SAC alleges that customers in the EMS Platform Market share "common characteristics" including the following: (i) they operate in low or medium voltage environments and (ii) they place a premium on the reliability of their electrical power systems and employ "more sophisticated monitoring systems" and "redundant equipment" to prevent power outages. *Id.* ¶¶ 109-10. It alleges that in the EMS Platform Market, "the demand for bundled sales is sufficiently strong so as to restrict competition to sales among firms that are able to provide a complete or nearly complete bundle or Platform," and that such firms include Schneider and certain other competitors. *Id.* ¶ 128. It alleges that competition among EMS platform suppliers has "critical implications" for component suppliers like Plaintiff because they are "wholly reliant upon platform suppliers to include their component products in the platform in order for those products to be available to end use **[*16]** customers at all." *Id.* ¶ 129.

The SAC alleges that Schneider has a dominant share of the EMS Platform Market, which makes it a "critical bridge" to customers in that market. *Id.* ¶ 130. It alleges that if component suppliers like Plaintiff do not have access to this critical bridge, they "lack a viable method for selling their Grid D and M Products to the EMS Platform Market customers." *Id.* ¶ 131. It alleges that, as a result of an agreement between Schneider and Etap, Etap is the sole supplier of Grid Design Products and Real Time Products within the EMS Market. *Id.* ¶ 137.

The SAC alleges that Schneider holds more than 50% of the EMS Platform Market. *Id.* ¶ 140. It alleges that, because the remainder of the EMS Platform Market is fragmented, none of Schneider's competitors "represent[s] a viable alternative by which competitors to Etap, like Power Analytics and others, could reach a meaningful share of EMS platform customers with their Grid D and M Products." *Id.* ¶ 141. It alleges that Schneider has a dominant share of the EMS Platform Market because it "possesses the manufacturing capability for virtually all the equipment needed in EMS" and EMS platform suppliers that have worked with **[*17]** a customer in the past often work with that customer on new projects. *Id.* ¶¶ 144, 146. The SAC alleges in the alternative to the EMS Platform Market, the following four end-user EMS markets:

> (i) the sale and servicing of Energy Management Systems (EMS) platforms for Commercial Buildings (Commercial Buildings EMS Platform Market); (ii) the sale and servicing of Energy Management Systems (EMS) platforms for Data Centers (Data Center EMS Platform Market); (iii) the sale and servicing of Energy Management Systems (EMS) platforms for Industrial (Industrial EMS Platform Market); and (iv) the sale and servicing of Energy Management Systems (EMS) platforms for Infrastructure/Grid (Infrastructure/Grid EMS Platform Market).

Id. ¶ 150. North America is the alleged geographic market for the four end-user markets. *Id.* ¶ 161. The SAC alleges that these end-user markets are distinct "based on the configuration, integration and automation of select components" even though some components are used in more than one end-user platform. *Id.* ¶¶ 151, 154. It alleges that Schneider has publicly stated that it has a "dominant position" in each end-user market. *Id.* ¶ 153.

b) The End-User EMS Markets

(1) <u>The Commercial **[*18]** Buildings EMS Platform Market</u>

The SAC alleges that facilities in the Commercial Buildings EMS Platform Market include healthcare, hotel, office and "other similar low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 162. It alleges that, with at least a 40% market share, Schneider is the largest EMS platform supplier in the Commercial Buildings EMS Platform Market. *Id.* ¶ 164.

(2) <u>The Data Center EMS Platform Market</u>

The SAC alleges that Data Centers are "low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 166. It alleges that, with at least a 50% market share, Schneider is the largest supplier in the Data Center EMS Platform Market. *Id.* ¶ 168. It alleges that this market is concentrated. *Id.*

(3) <u>The Industrial EMS Platform Market and the Infrastructure/Grid EMS Platform Market</u>

The SAC alleges that the Industrial EMS Platform Market includes "discrete and continuous **[*19]** process facilities, including Packaging, Machine Building, Food and Beverage, Mining, Metals, Minerals, Oil & Gas facilities, among other similar low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 170. It alleges that, with at least a 30% market share, Schneider is one of the two largest suppliers in the Data Center EMS Platform Market. *Id.* ¶ 172. It alleges that this market is concentrated. *Id.*

The SAC alleges that facilities in the Infrastructure/Grid EMS Platform Market include "Water & Wastewater plants, Transportation systems, Electric Generation and Transmission Utility facilities and other similar low and medium voltage power system facilities where the prohibitive costs of power failure and/or power-related accidents require high levels of redundancy and more sophisticated monitoring and modeling software." *Id.* ¶ 174. It alleges that, with at least a 33% market share, Schneider is the largest supplier in the Infrastructure/Grid EMS Platform Market. *Id.* ¶ 176. It alleges that this market is concentrated. *Id.* **[*20]** It alleges that because many of the components used in industrial EMS platforms are also used in infrastructure EMS platforms, the Industrial EMS Platform Market and the Infrastructure/Grid EMS Platform Market constitute a single product market. *Id.* ¶ 178.

E. The Alleged Anticompetitive Arrangement Between Etap and OSI

The SAC alleges that "OSI's Historian Software, PI Systems, has a dominant share of customers in the NUPIC Market." *Id.* ¶ 75. It also alleges that "100% of operating nuclear power generators in Canada and 76% of operating nuclear power generators in the U.S. use PI Systems." *Id.* Further, it alleges that it is expensive to switch historian software. *Id.* ¶ 76. It alleges that because of these high switching costs, OSI "does not face a viable competitive threat to installed historian software customer base, which amounts to over 80% of the customers in the NUPIC market." *Id.* The SAC alleges that this makes the vendor of historian software a "critical bridge" "that suppliers like Power Analytics must access . . . in order to sell their Grid D and M Products to those potential NUPIC Market customers." *Id.* ¶ 77. It alleges that OSI's dominant market share makes it a "critical **[*21]** bridge" to potential customers in the NUPIC market. *Id.* ¶ 93.

The SAC alleges that Etap and OSI have entered an anti-competitive agreement ("OSI—Etap Agreement") that is "not a vertical agreement between a buyer and a seller, or a manufacturer and a retailer" but instead an agreement between "two sellers of Grid D and M Products into the NUPIC Markets." *Id.* ¶¶ 78, 79. It alleges that the OSI—Etap Agreement has been in place since at least 2013. *Id.* ¶ 79.

The SAC alleges that in September 2014, Etap and OSI announced the OSI—Etap Agreement, "which they characterized as a 'strategic partnership,' but was intended and operated to 'ensure that the OSI products can only be used by end users in conjunction with the OEM [ETAP] products." *Id.* ¶ 80. It alleges that according to Etap, the OSI—Etap Agreement would result in a "joint sale of their respective products" and would allow for no substitutes. *Id.* ¶ 85. It alleges that a 2013 term sheet documenting key provisions in the agreement stated that customers who made purchases of OSI products under the OSI—Etap Agreement could only use those products in conjunction with Etap products. *Id.* ¶ 87. It also alleges that the OSI—Etap Agreement caused **[*22]** harm to potential and actual competitors, including Plaintiff. *Id.* ¶ 89. Further, it alleges that the memorandum of understanding entered by Etap and OSI requires that OSI exclusively "recommend and promote ETAP Products as a preferred power systems analysis and management platform to all prospective customers." *Id.* ¶ 90.

It is also alleged that in 2011, Plaintiff approached OSI and proposed the entry of a non-exclusive cooperative relationship through which OSI would serve as the critical bridge for Plaintiff's products. *Id.* ¶ 93. It alleges that OSI's CEO told Plaintiff's former CEO that Plaintiff's Real Time Products represented a growth opportunity in the NUPIC Market. *Id.* ¶ 97. Further, it alleges that Plaintiff's employees met with OSI's employees in 2012 to discuss the possibility of targeting existing OSI customers in the NUPIC

Market, which would have enabled Plaintiff "to seek and obtain NUPIC certification for its Real Time Products." *Id.* ¶ 98. It alleges that Plaintiff's employee who prepared the 2011 proposal joined Etap in 2013, and thereafter OSI terminated the foregoing discussions with Plaintiff. *Id.* ¶ 94. It also alleges that, following the announcement of the OSI—Etap **[*23]** Agreement, OSI ceased all marketing and joint sales efforts with Plaintiff in the NUPIC Market. *Id.* ¶¶ 91, 99. It alleges that before the announcement, Plaintiff paid OSI to obtain access to its historian software code to ensure that Plaintiff's Grid D and M Products "worked seamlessly with OSI's PI System Historian Software." *Id.* ¶ 95.

The SAC alleges that if component suppliers like Plaintiff do not have access to OSI's critical bridge, they "lack a viable method for selling their Grid D and M Products to the EMS Platform Market customers." *Id.* ¶¶ 101, 131. Further, it alleges that the OSI—Etap Agreement is exclusionary. *Id.* ¶ 103. The basis for this claim includes the following:

> ETAP's high market share in the NUPIC Grid Design Market supports a finding that ETAP had monopoly power in that Market. The other party to the arrangement, OSI, has a market share for Historian software used by NUPIC customers in excess of 80%. The arrangement has operated to stop OSI's interactions with ETAP's competitors with regard to NUPIC customers. OSI's high market share means that the Agreement excluded all competition facing ETAP in at least 80% of the NUPIC Grid Design Market. The loss of this actual **[*24]** and potential competition has reduced output, stifled innovation and customer choice, and has eliminated the source of price competition in the NUPIC Grid Design Market.

Id. ¶ 103.

The SAC then alleges that since the announcement of the OSI—Etap Agreement, Plaintiff has lost four NUPIC customers: Duke Energy, Enercon, Atomic Energy of Canada and Energy Northwest. *Id.* ¶ 106. It alleges that collectively these customers represented more than 35% of Plaintiff's pre-OSI—Etap Agreement business. *Id.* It alleges that Plaintiff believes that all four customers "switched over to ETAP." *Id.*

F. The Alleged Anticompetitive Arrangement Between Etap and Schneider

The SAC alleges that Schneider is an EMS platform supplier. *Id.* ¶ 123. It alleges that Schneider "exercises complete control over which other suppliers' products will be offered to customers and ultimately used in the EMS Platform sale." *Id.* ¶ 135 The SAC alleges that there is an anticompetitive agreement between Etap and Schneider ("Schneider—Etap Agreement") that is "not a vertical agreement between a buyer and a seller, or a manufacturer and a retailer" but an agreement "between two sellers of components in a bundle offered to EMS Platform **[*25]** customers, where one of the two suppliers controls the contents of the bundle and has substantial market power." *Id.* ¶ 184.

The SAC alleges that, on December 11, 2012, Schneider and Etap announced a cooperative agreement. *Id.* ¶ 186. Its terms included the launch of a module that combined Schneider's electrical power analysis and simulation solution software with Etap's Power Grid D and M Products. *Id.* ¶ 186. It alleges that the Schneider—Etap Agreement "became exclusive and sole-sourced with the announcement in 2015 that Schneider had 'standardized' all of its EMS Platform Grid D and M Products components on ETAP products." *Id.* ¶ 190. It then alleges that the agreement has harmed competition by "excluding lower cost, and more efficient and innovative Grid D and M products offered by competing component suppliers" like Plaintiff from the EMS Platform Market. *Id.* ¶ 193.

The SAC alleges that internal Etap correspondence from 2016 includes statements that "Both SEL and SE [Schneider Electric] will be only looking at ETAP for RT PSMS [Real Time Power System Monitoring Software] software and integration support of our software." *Id.* ¶ 199. The SAC also alleges that

> [s]ubsequent to the announcement **[*26]** of its agreement with Etap, and notwithstanding Power Analytics' previous business dealings with Schneider, Schneider has refused to recommend or use Power Analytics' Grid Design, Real Time and Arc Flash Products in any EMS Platform that Schneider has bid on, sold or managed, even though certain project specification requirements could only be satisfied by using Power Analytics' patented technology.

Id. ¶ 201.

The SAC alleges that before the Schneider—Etap Agreement was finalized, Schneider included Plaintiff's Grid D and M Products in multiple EMS platform bids. *Id.* ¶ 179. It alleges that in 2010, for example, Schneider included "Power Analytics' products in discussions regarding a potential, multiple location EMS Platform project for Citibank." *Id.* ¶ 183.

G. Additional Alleged Anti-Competitive Conduct

The SAC alleges that Defendants engaged in willful infringement of Plaintiff's patents. *Id.* ¶¶ 218-25.

H. Claims asserted in the SAC

1. <u>Federal Claims</u>

The SAC alleges that Defendants violated *Section 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*.

a) Sherman Act *Section 1*

The SAC alleges that Defendants violated *Section 1* through the OSI—Etap Agreement. It alleges that this agreement illegally restrains trade in the NUPIC Grid Design **[*27]** Market and the NUPIC Real Time Market. *Id.* ¶ 298. It alleges that the OSI—Etap Agreement "included unreasonable impediments and conditions upon customers who would wish to swap out OSI and/or ETAP's products for those of competitors." *Id.* ¶ 311. It alleges, for example, that the agreement includes a "contractually imposed penalty" because if a customer with a joint OSI/Etap product wants to purchase a competitor's product, "such customer would need to purchase a duplicative copy of the OSI or Etap software." *Id.* ¶ 312. It also alleges that the agreement has had "a direct, substantial adverse effect on competition including (i) foreclosing competition from lower cost, higher quality products and services in those markets; (ii) reducing customer choice within those markets; . . . (iii) foreclosing innovation in those markets, and (iv) reducing consumer welfare through the above adverse effects." *Id.* ¶ 315.

The SAC also alleges that Defendants violated *Section 1* through the Schneider—Etap Agreement. It alleges that this agreement illegally restrains trade in the EMS Platform Market, or, alternatively, in the Commercial Buildings EMS Platform Market, Data Center EMS Platform Market, Industrial EMS **[*28]** Platform Market and Infrastructure/Grid EMS Platform Market. *Id.* ¶¶ 328-29. It alleges that "Schneider offers only Etap's Grid Design and Real Time Products for EMS Platform projects which Schneider controls." *Id.* ¶ 335. It alleges that this agreement became "exclusive and sole-sourced" when Schneider announced in 2015 that it had standardized "all of its EMS Platform Grid Design components on ETAP products." *Id.* ¶ 340. Further, it alleges that the agreement has "harmed competition by denying end use[r] customers access to price competition and innovative products offered by Power Analytics and other competitors for the sale of Power Grid D and M Products to the EMS Platform Market." *Id.* ¶ 342.

The SAC alleges that both agreements have reduced Plaintiff's share of the relevant markets to levels "significantly lower" than they would be in the absence of these agreements. *Id.* ¶ 344. It also alleges that Defendants "have no *bona fide* pro-competitive justifications for their anticompetitive agreements, and any business justifications for these agreements are decidedly outweighed by the agreements' adverse effect on competition in the relevant markets." *Id.* ¶¶ 316, 343.

b) Sherman Act *Section 2*

The **[*29]** SAC also alleges violations of *Section 2* through Etap's monopolization and attempted monopolization of the NUPIC Grid Design Market. It alleges that this conduct constitutes predatory conduct that violates *Section 2*.

The SAC alleges that, because Etap has a 97% share in the NUPIC Grid Design Market, it has monopoly power there. *Id.* ¶¶ 353-54. It also alleges that Etap has the power to control prices and exclude actual and potential competitors in the NUPIC Grid Design Market and in the NUPIC Real Time Market. It is alleged that Etap can do so due to its ability to sell its lower quality, higher priced products and as the result of its exclusivity agreement with OSI. *Id.* ¶¶ 357-58. It alleges that the licensing terms Etap and OSI agreed to make it "economically irrational for a NUPIC customer to switch" to competing Grid Design Products and has allowed Etap to obtain monopoly power in the NUPIC Grid Products Market. *Id.* ¶¶ 359, 362. Further, it alleges that even if Etap does not possess monopoly power in the NUPIC Grid Design Market, "its anticompetitive conduct constitutes an attempt to monopolize." *Id.* ¶ 364. It alleges that because of Etap's high market share, there is a "dangerous likelihood" that **[*30]** it will achieve monopoly power in the NUPIC Grid Design Market. *Id.* ¶ 365.

The SAC alleges that the foregoing conduct has caused harm to Plaintiff and other competitors, as well as consumers and potential consumers, in the NUPIC Grid Design and NUPIC Real Time Markets. *Id.* ¶ 366.

2. State Law Claims

The SAC brings a Cartwright Act claim, *Cal. Bus. & Prof. Code §§ 16700 et seq.*, that parallels the ones brought under *Section 1* of the Sherman Act. *Id.* ¶¶ 350-51. It also alleges that the conduct giving rise to liability under the Sherman Act gives rise to a claim against Defendants under the North Carolina Unfair and Deceptive Trade Practices Act, *N.C. Gen. Stat. §§ 75-1*, *75-1.1*, *75-2*, and *75-2.1* (¶¶ 369-73), and

California's Unfair Competition Law, *Cal. Bus. & Prof Code §§ 17200 et seq.*, ¶¶ 374-75. The SAC also brings a claim for tortious interference with prospective economic advantage based on allegedly lost sales to four commercial entities with which Plaintiff had ongoing commercial relationships. *Id.* ¶¶ 376-80. Finally, the SAC advances a related claim for civil conspiracy. *Id.* ¶¶ 381-86.

III. Analysis

A. Legal Standards

Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." The complaint must **[*31]** state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id. at 555*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation marks and citations omitted).

Pursuant to *Fed. R. Civ. P. 12(b)(6)*, a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008)*. In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true **[*32]** allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (citing *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001))*. "Moreover, the Supreme Court has cautioned against permitting antitrust cases to proceed to discovery without a plaintiff demonstrating 'plausibility' because of the high cost of discovery in antitrust cases in particular." *Pro Search Plus, LLC v. VFM Leonardo, Inc., No. SACV 12-2102-JST ANX, 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *1 (C.D. Cal. July 30, 2013)*; *see also* *Twombly, 550 U.S. at 558* ("Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (internal citation omitted)).

B. Application

1. Antitrust Claims

a) Sherman Act *Section 1*

(1) Statutory Standards and Relevant Allegations in the SAC

Section 1 of the Sherman Act, *15 U.S.C. § 1*, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* (quoting *15 U.S.C. § 1*). "Despite the breadth of the statutory language, the Supreme Court 'has long recognized that Congress intended to outlaw only unreasonable restraints.'" *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997))*. "To establish liability under *§ 1*, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement **[*33]** was in unreasonable restraint of trade." *Id.* (citing *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189-90, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010))*.

The SAC alleges that Etap entered separate agreements with OSI and Schneider, and that each unreasonably restrains trade. SAC ¶¶ 298, 328-29. With respect to the OSI—Etap Agreement, the SAC alleges that it "included unreasonable impediments and conditions upon customers who would wish to swap out OSI and/or ETAP's products for those of competitors." *Id.* ¶ 311. It further alleges that this agreement has had "a direct, substantial adverse effect on competition including (i) foreclosing competition from lower cost, higher quality products and services in th[e relevant] markets; (ii) reducing customer choice within those markets; . . . (iii) foreclosing innovation in those markets, and (iv) reducing consumer welfare through the above adverse effects." *Id.* ¶ 315. With respect to the Schneider—Etap Agreement, the SAC alleges that "Schneider offers only Etap's Grid Design and Real Time Products for EMS Platform projects which Schneider controls." *Id.* ¶ 335. It alleges that this agreement became "exclusive and sole-sourced" when Schneider announced in 2015 that it had standardized "all of its EMS Platform Grid Design components on ETAP **[*34]** products." *Id.* ¶ 340. Further, it alleges that the agreement has "harmed competition by denying end use[r] customers access to price competition and innovative products offered by Power Analytics and other competitors for the sale of Power Grid D and M Products to the EMS Platform Market." *Id.* ¶ 342.

Defendants contend that the SAC fails plausibly to allege the existence of an exclusive dealing arrangement, a relevant market, and harm to competition. OSI and Etap also argue that Plaintiff lacks antitrust standing.

(2) Exclusive Dealing Arrangements

"Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor." *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 996 (9th Cir. 2010)*. "The main antitrust objection to exclusive dealing is its tendency to 'foreclose' existing competitors or new entrants from competition in the covered portion of the relevant market during the term of the agreement." *Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997)* (footnote omitted) (citing *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984)* (Posner, J.)).

There are "well-recognized economic benefits to exclusive dealing arrangements, including the enhancement of interbrand competition." *Id.* "[A]n exclusive-dealing arrangement does not constitute a per se violation of *section 1*." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291, 1303-04 (9th Cir. 1982)*. This is because "virtually **[*35]** *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought." *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1st Cir. 1983)* (Breyer, J.); *see also* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)* ("Exclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition."). Therefore, "the rule of reason rather than a per se analysis" is applied to exclusive dealing arrangements. *Aerotec Int'l, 836 F.3d at 1181 n.2*. "Under the antitrust rule of reason, an exclusive dealing arrangement violates *Section 1* only if its effect is to 'foreclose competition in a substantial share of the line of commerce affected.'" *Allied Orthopedic Appliances, 592 F.3d at 996* (quoting *Omega, 127 F.3d at 1162*); *see also* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (O'Connor, J., concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.").

"[A] prerequisite to any exclusive dealing claim is an agreement to deal exclusively." *ZF Meritor, 696 F.3d at 270*. To establish a de facto exclusive dealing claim, "a plaintiff must still show that contracts that were induced were exclusive rather than run-of-the-mill contracts, which inevitably foreclose or exclude alternative sellers from *some* portion of the market, namely the portion consisting **[*36]** of what was bought." *Aerotec Int'l, 836 F.3d at 1181* (internal quotation marks and alterations omitted). Courts may focus on the terms of the agreement to determine if it is a de facto exclusive arrangement. *See id.* (exclusive arrangements include those with "requirements terms, . . . volume or market share targets, or long-term contracts that prevent meaningful competition by taking potential purchasers off the market" (citations omitted)); *see also* *id. at 1182* ("In certain limited situations, discounts and rebates conditioned on a promise of exclusivity or on purchase of a specified quantity or market share of the seller's goods or services may be understood as 'de facto' exclusive dealing contracts because they coerce buyers into purchasing a substantial amount of their needs from the seller.").

The Ninth Circuit has "not explicitly recognized a 'de facto' exclusive dealing theory," but has not rejected it. *Id.* The allegations of the SAC do not specify whether the alleged exclusive dealing arrangements between Defendants are express or de facto. However, the SAC does not plausibly allege the existence of either type of exclusive dealing agreement. Nor does it plausibly allege that the agreements have the effect of "foreclos[ing] **[*37]** competition in a substantial share of the line of commerce affected." *Omega, 127 F.3d at 1162*.

(a) Schneider—Etap Agreement

Plaintiff argues that the Schneider—Etap Agreement is not a vertical one, but an "agreement between two sellers of components in a bundle offered to EMS Platform Customers, where one of the two suppliers controls the contents of the bundle and has substantial market power." SAC ¶ 184. It alleges that this agreement "became exclusive and sole-sourced with the announcement in 2015 that Schneider had 'standardized' all of its EMS Platform Grid D and M Products components on ETAP products." *Id.* ¶ 190. In support of this allegation, the SAC includes an excerpt of a May 27, 2015 press release that states that "Schneider Electric decided to standardize the use of ETAP for its project in order to leverage the advanced, next generation technology of the integrated ETAP software suite to further increase its productivity through greater efficiencies." *Id.* ¶ 190. Further, the SAC alleges that the Schneider—Etap Agreement ultimately applied to "all EMS Platform Markets in addition to data centers." *Id.* ¶ 191.

The SAC also alleges that internal Etap correspondence from 2016 states that "Both SEL and **[*38]** SE [Schneider Electric] will be only looking at ETAP for RT PSMS [Real Time Power System Monitoring Software] software and integration support of our software." *Id.* ¶ 199. It alleges that this "'standardization' and sole-sourcing mechanism" has excluded "actual and potential competitors capable of offering Grid D and M products as components of Schneider's EMS Platforms, including Power Analytics." *Id.* ¶ 192. It also alleges that, since entering into this agreement, Schneider has "refused to recommend or use Power Analytics' Grid Design, Real Time and Arc Flash Products in any EMS Platform that Schneider has bid on, sold or managed, even though certain project specification requirements could only be satisfied by using Power Analytics' patented technology." *Id.* ¶ 201.

Defendants argue that the exclusive dealing claim fails because the SAC does not plausibly allege that the Schneider—Etap Agreement was more than a cooperative one or that it was exclusive. They argue that the new allegations included in the SAC do not cure the deficiencies identified in the Prior Order.

The SAC does not plausibly allege the existence of an express or de facto exclusive dealing arrangement between Schneider **[*39]** and Etap. The allegations that the Schneider—Etap Agreement became "exclusive and sole sourced with the announcement in 2015 that Schneider had 'standardized' all of its EMS Platform Grid D and M Products components on ETAP products," are conclusory. Plaintiff describes the Schneider—Etap Agreement as a "sole-sourcing mechanism," in what appears to be an effort to remedy the absence of allegations in the FAC as to any exclusionary mechanism. *See* Dkt. 227. The SAC does not, however, present any allegations that would support a claim of exclusivity, *e.g.*, "requirements terms, . . . volume or market share targets, or long-term contracts that prevent meaningful competition by taking potential purchasers off the market." *Aerotec Int'l, 836 F.3d at 1181* (citations omitted). Indeed, the press release that is cited in the SAC states that Schneider "'standardized' all of its EMS Platform Grid D and M Products components on ETAP products." SAC ¶ 190. There are no later allegations as to how this standardization prevented Schneider from bundling its products with those of Etap's competitors.

Plaintiff argues that the SAC plausibly states an exclusive dealing arrangement because it alleges that, through the Schneider—Etap Agreement, **[*40]** Schneider committed to use only Etap's Grid D and M Products in its EMS platform products. However, the SAC alleges that Schneider and Etap announced a cooperative agreement to bundle Etap's Grid D and M Products with Schneider's electrical power analysis and simulation solution software. *Id.* ¶¶ 186-201. It then alleges that, since the entry of this agreement, Schneider "has refused to recommend or use Power Analytics' Grid Design, Real Time and Arc Flash Products in any EMS Platform that Schneider has bid on, sold or managed, even though certain project specification requirements could only be satisfied by using Power Analytics' patented technology." *Id.* These allegations are not sufficient plausibly to state that the Schneider—Etap Agreement was more than a run-of-the-mill agreement to bundle two complementary products. *Aerotec Int'l, 836 F.3d at 1181*. For example, it does not plausibly allege why that agreement prevents Schneider from entering into a similar bundling agreement with Plaintiff or another EMS platform component provider. It also does not allege how Schneider's decision to "standardize the use of ETAP for its products" results in exclusivity.

The SAC does allege that, prior to entering the Schneider—Etap **[*41]** Agreement, Schneider had included Plaintiff's Grid D and M Products in multiple EMS platform bids and that in 2010 Plaintiff and Schneider were engaged in discussions regarding specific future potential business opportunities. SAC ¶¶ 179-183. However, the SAC does not include allegations as to how those dealings relate to the claimed exclusivity. *Id.* Indeed, all of the allegations in the SAC regarding the business negotiations between Plaintiff and Schneider refer to communications that occurred on or before December 2010. *Id.* ¶ 183. It was not until December 2012 that Schneider and Etap announced their agreement. *Id.* ¶ 186. In light of these omissions, as well as the period of approximately two years that elapsed between these negotiations and the entry of the challenged agreement, it is not plausible to infer from the SAC that Schneider has refused to do business with Plaintiff due to an exclusive dealing arrangement with Etap. *See, e.g.*, *Pro Search Plus, 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *4* ("While the case law does support the general proposition that a de facto exclusive dealing arrangement can run afoul of the antitrust laws, Pro Search has not alleged anything beyond the existence of the contracts to support its apparently broader **[*42]** 'de facto arrangement' theory."). Without more, a refusal to deal is not an antitrust violation. *See* *Aerotec Int'l, 836 F.3d at 1184* ("As the Supreme Court has repeatedly emphasized, there is 'no duty to deal under the terms and conditions preferred by [a competitor's] rivals.'" (quoting *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*).

(b) OSI—Etap Agreement

The SAC next alleges that the OSI—Etap Agreement is "not a vertical agreement between a buyer and a seller, or a manufacturer and a retailer" but instead an agreement between "two sellers of Grid D and M Products into the NUPIC Markets." *Id.* ¶¶ 78, 79. It also alleges that "the sole purpose and effect of this agreement has been exclusionary." *Id.* ¶ 297.

The SAC alleges that in September 2014, Etap and OSI formed a strategic partnership that was "intended and operated to 'ensure that the OSI products can only be used by end users in conjunction with the OEM [ETAP] products'." *Id.* ¶ 80. It alleges that Etap has acknowledged that the OSI—Etap Agreement would result in a "joint sale of their respective products" and would allow for no substitutes. *Id.* ¶ 85. The SAC then alleges that the agreement is exclusive for the following reasons:

> ETAP's high market share in the NUPIC Grid Design Market supports a finding that **[*43]** ETAP had monopoly power in that Market. The other party to the arrangement, OSI, has a market share for Historian software used by NUPIC customers in excess of 80%. The arrangement has operated to stop OSI's interactions with ETAP's competitors with regard to NUPIC customers. OSI's high market share means that the Agreement excluded all competition facing ETAP in at least 80% of the NUPIC Grid Design Market. The loss of this actual and potential competition has reduced output, stifled innovation and customer choice, and has eliminated the source of price competition in the NUPIC Grid Design Market.

Id. ¶ 103.

Defendants argue that these allegations to do not plausibly allege de facto exclusivity because they are conclusory. That argument is persuasive. These allegations are not sufficient plausibly to allege an exclusive dealing arrangement between OSI and Etap for reasons that parallel those stated above with respect to the alleged agreement between Schneider and Etap. The allegations do not, for example, plausibly allege that the strategic partnership entered by OSI and Etap prevented OSI from entering into similar strategic partnerships with Plaintiff and other suppliers of Grid D **[*44]** and M Products. The SAC alleges that OSI is a critical bridge to the NUPIC market because more than 80% of existing NUPIC facilities use OSI's base historian software. This allegedly makes it very unlikely that they would switch to a different historian software due to the high cost of doing so. SAC ¶ 77. This is not sufficient to state this element of the claim. The SAC does not allege any specific terms of this agreement that make it de facto exclusive. Instead, the SAC alleges only that OSI has not partnered with Plaintiff. Given the absence of some specificity as to the challenged agreement and its effect, the SAC does not plausibly allege exclusivity. *Aerotec Int'l, 836 F.3d at 1183* ("Just as in any exclusive dealing claim, however, the court first had to be satisfied that specific features of the agreement required exclusivity.").

For the foregoing reasons, the SAC does not plausibly allege the existence of express or de facto exclusive dealing arrangements between or among any of the Defendants.

(3) Preclusion from a Relevant Market

Defendants argue that, even if the SAC plausibly alleged the existence of exclusive dealing arrangements, it does not allege that these arrangements foreclosed competition in a relevant **[*45]** market. "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects. The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market." *Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)* (internal quotation marks and citations omitted). Defendants also argue that the *Section 1* claim fails because the SAC does not plausibly allege the existence of product markets that consist of distinct products. Defendants contend that the SAC continues to define the alleged relevant markets in terms of customers. Defendants also argue that the SAC has not plausibly alleged that the challenged agreements between Defendants create significant anticompetitive effects that preclude Plaintiff from selling in the relevant markets.

"The term relevant market encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition . . . where buyers can turn for alternate sources of supply." *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)* (internal quotation marks omitted). "The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." **[*46]** *Id.* "The relevant market for this purpose includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations." *Omega, 127 F.3d at 1162* (quoting 2A Phillip E. Areeda et al., ***Antitrust Law*** ¶ 570b1 (1995)). Although "[d]efining the relevant market is a factual inquiry ordinarily reserved for the jury," *Oltz, 861 F.2d at 1446*, "[f]ailure to identify a relevant market is a proper ground for dismissing a Sherman Act claim." *Tanaka, 252 F.2d at 1063*.

(a) Schneider—Etap Agreement

Defendants argue that the SAC does not adequately allege a relevant market for purposes of the anti-completive effects of the Schneider—Etap Agreement. The SAC alleges that the Schneider—Etap Agreement has unreasonably restrained competition in the market for the sale and servicing of Energy Management Systems platforms ("EMS Platform Market").[2] *Id.* ¶ 107. The SAC defines EMS as "the full bundle of automation, monitoring and control software, hardware and related equipment purchased by facility owner/operators for use as an 'EMS Platform.'" *Id.* ¶ 123.

The SAC alleges that customers in the EMS Platform Market share "common characteristics," including: **[*47]**

(i) they operate in low or medium voltage environments, (ii) they place a premium on the reliability of their electrical power systems and (iii) they employ "more sophisticated monitoring systems" to prevent power outages. *Id.* ¶¶ 109-10; *see also id.* ¶ 111 ("The distinguishable demands of EMS Platform consumers is evidenced by the sophistication of the monitoring equipment and levels of redundancy included in their electric power grid systems.").

The SAC alleges in the alternative to the EMS Platform Market the following four end-user EMS platform markets:

> (i) the sale and servicing of Energy Management Systems (EMS) platforms for Commercial Buildings (Commercial Buildings EMS Platform Market); (ii) the sale and servicing of Energy Management Systems (EMS) platforms for Data Centers (Data Center EMS Platform Market); (iii) the sale and servicing of Energy Management Systems (EMS) platforms for Industrial (Industrial EMS Platform Market); and (iv) the sale and servicing of Energy Management Systems (EMS) platforms for Infrastructure/Grid (Infrastructure/Grid EMS Platform Market).

Id. ¶ 150.

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[2] This is a different relevant market than the one that was alleged in the FAC. The FAC alleged that the Schneider—Etap Agreement had unlawfully restrained competition in the "HR Data Center Market," which it defined as "the market for the sale of Power Grid Design and Management Products and related services for the operation of Power Grids for use in Data Centers which require high levels of reliability." FAC ¶ 43.

The SAC alleges that "[a]lthough each end-user EMS Platform provides many of the same functions, the **[*48]** four end-user EMS Platforms are distinguishable from one another based on the configuration, integration and automation of select components." *Id.* ¶¶ 151; *see also id.* ¶ 154 ("While some EMS Platform components are used in more than one end-user platform, the platforms themselves are not substitutable across the four groups of end-users."). The SAC then distinguishes the four end-user EMS platform markets based on customer type and/or industry. *See id.* ¶¶ 162, 166, 170, 174. The SAC also alleges that because many of the components used in industrial EMS platforms are used in infrastructure EMS platforms, the Industrial EMS Platform Market and the Infrastructure/Grid EMS Platform Market should be considered a single antitrust market. *Id.* ¶ 178.

Defendants contend that the relevant markets alleged in the SAC are implausible. In support of this position they note than the SAC alleges that the products in the EMS Platform Market and the four end-user markets are sold to customers outside of those markets. Defendants also contend that the alleged relevant markets are deficient because Plaintiff is neither a buyer nor a seller in any of them. Schneider contends that because the SAC alleges **[*49]** that Plaintiff competes only in the upstream market for the sale of components used in EMS platforms, Plaintiff cannot demonstrate that it has suffered any antitrust injury. Plaintiff contends that the EMS Platform Market and the four end-user markets constitute relevant products markets because customers in these markets "demand a bundled offering of products, services and integration that cannot be replicated, and is not reasonably interchangeable with the purchase of individual component products."

Plaintiff's claims as to the alleged relevant markets are not adequately supported by the allegations in the SAC. "While a relevant product market can be limited to a portion of customers, such a limitation must be based on a distinction in the product sold to those customers." *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc., 931 F.2d 816, 824 (11th Cir. 1991)*. Plaintiff has provided no plausible explanation for a distinction in the products it sells to customers in the EMS Platform Market or to customers in any of the four end-user markets as opposed to the identical products it sells to other customers who want a similar level of reliability in their power grid design and management software. *See* *Dominick v. Collectors Universe, Inc., 2012 U.S. Dist. LEXIS 179703, 2012 WL 6618616, at *5 (C.D. Cal. Dec. 18, 2012)* ("But Plaintiffs misunderstand that a market is defined by *products* **[*50]** , not by *users* of those products.").

The allegations that customers in the EMS Platform Market operate in low or medium voltage environments and require more sophisticated monitoring systems and redundant equipment to prevent power outages are not sufficient to establish that EMS platform customers comprise a submarket. SAC ¶ 48. The SAC does not allege that other customers do not also require sophisticated monitoring systems and/or redundant equipment. Nor does it allege that Plaintiff's software products are only sold to and used by customers in the EMS Platform Market. Moreover, although the SAC alleges that the four end-user markets are distinguishable from each other "based on the configuration, integration and automation of select components," it does not allege that such distinctions result in any differences in the products Plaintiff offers to customers in each end-user market.

For the foregoing reasons, the SAC does not plausibly allege that the Schneider—Etap Agreement operates to exclude Plaintiff from the entire market for its products. Indeed, the SAC alleges that Schneider competes in the EMS Platform Market with Eaton, Siemens, GE, ABB, Honeywell and other smaller competitors. **[*51]** *Id.* ¶ 141. The SAC does not allege that the Schneider—Etap Agreement has affected Plaintiff's ability to partner with those competitors. As noted, the SAC also does not include allegations about how the differences in the products sold to these customers plausibly show that the EMS Platform Market or any of the four end-user markets is a distinct submarket. Therefore, the allegations in the SAC are not sufficient as to Plaintiff's foreclosure from the relevant product market.

(b) OSI—Etap Agreement

Defendants also argue that the SAC does not adequately allege a relevant market for purposes of the OSI—Etap Agreement. The SAC alleges that the OSI—Etap Agreement unlawfully restrains trade in two distinct markets: the NUPIC Grid Design Market and the NUPIC Real Time Market. *Id.* ¶ 298. It defines the NUPIC Grid Design Market as one for "the sale and servicing of Grid Design Products to customers who are, by law and or regulation, limited to purchasing only Grid Design Products that have successfully completed a NUPIC audit within the prior three years." *Id.* ¶ 52. It defines the NUPIC Real Time Market as one for "the sale and servicing of Real Time Products to customers who are, by law and **[*52]** or regulation, limited to purchasing only Real Time Products that have successfully completed a NUPIC audit within the past three years." *Id.* Defendants contend that these allegations as to markets are implausible because they define each alleged market based solely on claimed distinctions among the needs of customers. Defendants also argue that the SAC does not plausibly allege a NUPIC Real Time Market because the SAC alleges that no Real Time Products have completed a NUPIC audit.

For similar reasons to those stated above, the allegations in the SAC do not plausibly allege a NUPIC Grid Design Market or that Plaintiff has been excluded from this market. As with the EMS Platform Market, the SAC does not plausibly allege that non-NUPIC certified facilities would not purchase the same grid design or real time products as those sold in these markets. *See* SAC ¶¶ 60-61. For example, the SAC alleges that Plaintiff makes and sells Grid Design Products, including DesignBase™ and DesignBase Xi™. *Id.* ¶ 22. It also alleges that Plaintiff's Grid Design Products are NUPIC-certified and that Plaintiff has sold its NUPIC-certified DesignBase™ to NUPIC customers. *Id.* ¶¶ 61-62. Further, it alleges that **[*53]** EMS platform suppliers purchase grid design products from software suppliers such as Plaintiff. *Id.* ¶ 135. However, the SAC does not allege that Plaintiff makes or sells any grid design products that are not NUPIC-certified. The SAC also does not allege that Plaintiff's NUPIC-certified grid design products cannot be used by different customers, *e.g.*, EMS platform suppliers. For these reasons, the SAC cannot reasonably be construed to allege that NUPIC-certified grid design products cannot be sold outside of the alleged NUPIC Grid Design Market. The SAC also does not plausibly allege a NUPIC Real Time Products Market. The SAC alleges that "[u]pon information and belief, there are no Real Time Products that have successfully completed a NUPIC audit." *Id.* ¶ 65. Accordingly, there are no market participants in the NUPIC Real Time Market. *Id.* ¶ 135.

Even if the SAC plausibly alleged a relevant product market as to the NUPIC Grid Design Market, the SAC does not adequately allege that Plaintiff has been foreclosed from this market. Plaintiff's exclusive dealing theory relies on the allegations that OSI serves as a "critical bridge" to customers, and without a partnership with OSI, Plaintiff **[*54]** cannot sell its products to customers that use OSI historian software. *Id.* ¶ 101. However, the allegations in the SAC suggest that Plaintiff is not foreclosed from selling its products to customers who use OSI historian software. The SAC alleges that Plaintiff previously worked with OSI to integrate its products with OSI's historian software. *See id.* ¶ 95 ("Prior to 2014, Power Analytics paid fees to OSI to gain access to its PI System code in order to assure that Power Analytics' Power Grid Design and Management Products worked seamlessly with OSI's PI System. Power Analytics achieved that objective."). Moreover, the SAC alleges that Plaintiff is "currently eligible" to sell its grid design products to customers in the NUPIC Grid Design Product Market, *id.* ¶ 61, and that Plaintiff has been able to negotiate directly with customers in this market. *See id.* ¶ 67 ("In 2012, OSI and Power Analytics personnel participated in meetings where they discussed strategies to target certain of OSI's existing nuclear customers in an effort to increase sales for OSI's Historian and Power Analytics' Grid D and M Products.").

The SAC alleges that the purpose of the OSI—Etap Agreement is to foreclose **[*55]** Plaintiff and other competitors from selling their Grid D and M Products in the NUPIC Markets. *Id.* ¶ 79. It also alleges that since the OSI—Etap Agreement was entered, Plaintiff has lost four NUPIC Market customers: Duke Energy, Enercon, Atomic Energy of Canada and Energy Northwest and that upon information and belief, these customers "switched over to ETAP." *Id.* ¶ 106. However, it does not specifically allege that the OSI—Etap Agreement was the reason that Plaintiff lost these four customers. Further, the SAC does not allege that the agreement prevented NUPIC market customers from switching to Plaintiff's products.

The SAC alleges that a 2013 term sheet documenting key provisions in the agreement required Etap's Standard License Agreement to include "specific wording . . . that OSI products that a customer purchased under the ETAP/OSI arrangement could be used by the customer solely in conjunction with the Etap products." *Id.* ¶ 87. It alleges that the OSI—Etap Agreement includes a "contractually imposed penalty" because if a customer with a product sold under this arrangement wanted to purchase a competitor's Grid D and M Product, "such customer would need to purchase a duplicative **[*56]** copy of the OSI or Etap software." *Id.* ¶ 312. However, there is no allegation that OSI would not provide access to OSI's historian software to customers who opted to use products other than those provided by Etap. Thus, even if the agreement prohibits customers that purchased OSI products under the Etap/OSI arrangement from using those products with non-Etap software, there is no allegation that OSI refused to meet customer demand for OSI historian software that interacts with non-Etap software.

* * *

For the foregoing reasons, the SAC fails plausibly to allege that Plaintiff is foreclosed from competition in a relevant market by any of the alleged exclusive dealing arrangements among the Defendants.

(4) Harm to Competition

Defendants next argue that the SAC fails plausibly to allege harm to competition. In general, "[e]xclusive dealing will generally only be unlawful where the market is highly concentrated, the defendant possesses significant market power, and there is some element of coercion present." *ZF Meritor, 696 F.3d at 284*. Defendants contend that, for several reasons, the SAC fails to present plausible allegations that are sufficient to meet this standard. *First*, it does not sufficiently allege that either **[*57]** Schneider or OSI was coerced to enter the alleged exclusive dealing arrangements. *Second*, it does not adequately allege that Etap, the rival supplier of power grid design and maintenance products, has significant market power. *Third*, there are no allegations that Schneider or OSI cannot readily terminate the agreements. *Fourth*, the SAC does not allege why Plaintiff cannot make sales to non-Schneider EMS platform distributors with its software products. *Finally*, the allegations that competition more generally has been harmed by the alleged exclusive agreements are conclusory.

(a) Coercion and Ease of Termination

"[C]ourts tend to be skeptical of [exclusive dealing] claims because it is not in the long-term interest of the company that grants the 'exclusive deal' to drive out of business competitors of the grantee." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 66 (1st Cir. 2004)*. Courts generally require a showing of coercion, because "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought." *Barry Wright Corp., 724 F.2d at 236*. Without a showing that one of the parties was coerced to enter an agreement or that there was similar anticompetitive conduct, an exclusive dealing agreement **[*58]** may function simply as legal competition on the merits. *See PNY Techs., Inc. v. SanDisk Corp., 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *6 (N.D. Cal. July 2, 2014)* ("PNY's assertion that SanDisk's agreements constitute exclusive dealing based on the fact that retailers have entered into and continually renew contracts with SanDisk is not plausible because PNY has not pleaded (beyond naked assertions) facts showing that it failed to win contracts despite offering better terms or that SanDisk somehow thwarted its efforts to secure business through conduct other than competition on the merits."). "That a manufacturer has a longstanding exclusive relationship with a retailer does not mean that their agreement constitutes actionable exclusive dealing." *Id.*; *see also id.* ("Absent allegations of predatory pricing or some other anticompetitive conduct, that is the essence of competition.").

Further, "the case law generally supports the contention that exclusive contracts of short duration that are readily terminable do not run afoul of the antitrust laws." *Pro Search Plus, 2013 U.S. Dist. LEXIS 107895, 2013 WL 3936394, at *2*. "[T]he short duration and easy terminability of . . . agreements negate substantially their potential to foreclose competition." *Omega, 127 F.3d at 1163* (footnote omitted). "If the contracts at issue are short-term or easily terminated, 'a competing manufacturer **[*59]** need only offer a better product or a better deal' to get contracts of its own." *PNY Techs., 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *4* (quoting *Omega, 127 F.3d at 1164*).

The SAC does not allege any terms in the challenged agreements that make them expressly or de facto exclusive. Similarly, the SAC does not allege any conduct by Etap that compelled Schneider or OSI to enter into these agreements, or other allegations to support a claim that the agreements were entered as a result of coercion. Nor does the SAC allege that Schneider or OSI cannot terminate any of the agreements to which each is a party, if for example, Plaintiff offers Schneider or OSI a more attractive arrangement. The allegations do not plausibly show that these agreements were entered for reasons other than to advance the business interests of Schneider and OSI. Therefore, the allegations are not sufficient to support the inference that Etap engaged in anticompetitive conduct. Further, the allegations as to the absence of a valid business reason for not partnering with Plaintiff are conclusory.[3] For all of these reasons, the SAC does not plausibly allege coercion or inability to terminate as to the agreements.

(b) Antitrust Injury and Antitrust Standing

Antitrust injury requires "(1) **[*60]** unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co., 190 F.3d 1051, 1055 (9th Cir. 1999)*. "The antitrust laws, however, were enacted for 'the protection of competition not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*; *see also* *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 n.8, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the per se rule and rule-of-reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury."). To state a claim for a violation of the Sherman Act, the SAC must plausibly allege that the Defendants' conduct caused harm to competition, not just to Plaintiff.

The SAC alleges that Plaintiff suffered harmed as a result of the two challenged agreements. It alleges that since the OSI—Etap Agreement was entered, Plaintiff has lost four NUPIC customers. *Id.* ¶¶ 106, 310. It further alleges that "Power Analytics has been damaged by loss of past and future sales and profits, the inability to develop economies of scale to permit it to compete in the market, and inability to offer new and **[*61]** innovative products." *Id.* ¶ 348.

The SAC also alleges that the two agreements have had the effect of "locking out" and harming competition in the alleged relevant markets. For example, it alleges that the Schneider—Etap Agreement has harmed competition by "excluding lower cost, and more efficient and innovative Grid D and M products offered by competing component suppliers" and "raising the total cost of ownership for EMS Platform purchasers, and blocking technological advancements that would improve efficiency and safety of end users' facility grids." SAC ¶¶ 193, 197. It alleges that the OSI—Etap Agreement has harmed competition in the NUPIC Grid Design Market because it has "deprived the market of the critical level of contestable sales opportunities leaving no incentive for firms to undertake the initial and recurring expense and effort" associated with NUPIC audits. *Id.* ¶¶ 360-61. It also alleges that Etap's conduct has harmed customers and potential customers in the NUPIC Grid Design Market and the NUPIC Real Time Market. *Id.* ¶ 366. Defendants contend that these allegations are conclusory. Plaintiff disagrees, and argues that these allegations plausibly plead injury to competition. **[*62]**

As an initial matter, it is the allegations concerning harm to competition that are material, not those concerning the claimed harm to Plaintiff from the alleged misconduct in violation of the Sherman Act. *PNY Techs., Inc., 2014 U.S. Dist. LEXIS 90649, 2014 WL 2987322, at *10* ("The crux of an exclusive-dealing case is the allegation that

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[3] Plaintiff contends that allegations of coercion are not required to state a claim under *Section 1*. It argues that because Defendants realized "substantial financial gains" from their horizontal agreements with each other, this "negate[s] any need to allege coercion or that the illegal agreement was not easily terminable." This characterization of the agreements as horizontal is not persuasive. "Restraints imposed by agreement between competitors have traditionally been denominated horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*. The SAC alleges that the OSI—Etap Agreement is "not a vertical agreement" but instead an agreement between "two sellers of Grid D and M Products into the NUPIC Markets." *Id.* ¶ 79. This allegation is inconsistent with other allegations in the SAC, including that Plaintiff was a "supplier of Grid D and M Products [to OSI] before the implementation of the ETAP OSI agreement." *Id.* ¶ 92. Similarly, the SAC alleges that the Schneider—Etap Agreement is "not a vertical agreement," but instead an agreement "between two sellers of components in a bundle offered to EMS Platform customers, where one of the two suppliers controls the contents of the bundle and has substantial market power." *Id.* ¶ 184. This allegation is inconsistent with other allegations in the SAC, including that "component suppliers are wholly reliant upon platform suppliers [in the EMS Platform Market]" and "restricting or limiting the inclusion in or availability to the [EMS] platform forecloses competitive suppliers of individual components." *Id.* ¶ 129.

competitors are shut out of the market. It is not enough to point to supposed 'direct evidence of competitive harm' that cannot be attributed to the claimed exclusion."). The allegations in the SAC regarding harm to competition are conclusory. *See, e.g.* *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1078-79 (11th Cir. 2004)* (allegations regarding harm to competition conclusory where the complaint alleged that the defendant's conduct "caused injury to competition by limiting alternatives available to advertisers, performers and the listening audience" and "will continue to affect prices for advertisements, the quality of programming, and the prices for advertisers' products").

The SAC does not allege that the Schneider—Etap Agreement has actually caused an increase in prices in the EMS Platform Market. Nor does it allege in non-conclusory terms that the OSI—Etap Agreement has caused any potential competitors not to seek NUIC certification of their grid design and real time products. It also **[*63]** does not plausibly allege that Etap's conduct has harmed customers and potential customers in the NUPIC Grid Design Market and the NUPIC Real Time Market. Moreover, it alleges that in the EMS Platform Market, "Schneider competes with other suppliers of turnkey EMS Platforms" such as Eaton, Siemens, GE, ABB, Honeywell and other smaller competitors. *Id.* ¶ 141. The SAC does allege that Eaton is not a "viable alternative" to Schneider from the perspective of component suppliers like Plaintiff. *Id.* The premise of this claim is that Eaton has "its own suite of grid design and monitoring and modeling software and would therefore have no incentive to offer its customers a competitive alternative." *Id.* Whether Eaton has an incentive to partner with Plaintiff does not address the lack of competition in the EMS Platform Market.

Defendants argue that because the SAC does not plausibly allege antitrust injury, Plaintiff has not shown that it has antitrust standing. Thus, they contend that Plaintiff does not have standing to recover for harms in markets in which it does not compete. They argue that even a competitor that alleges lost sales does not necessarily have antitrust standing because "[i]t **[*64]** is not enough that the plaintiff's claimed injury flows from the unlawful conduct. An antitrust injury must flow from that which makes defendants' acts unlawful." *Am. Ad Mgmt., 190 F.3d at 1056* (internal quotation marks and alterations omitted). For example, "[c]ompetitors who challenge a rival's price-fixing are often unable to show injury." *Id.*; *see also id.* (competitors suffer antitrust injury and have antitrust standing when price-fixing is predatory). This is because "[w]hen prices are not predatory, any losses flowing from them cannot be said to stem from an anticompetitive aspect of the defendant's conduct. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Atl. Richfield Co., 495 U.S. at 340-41* (footnote and internal quotation marks omitted).

These principles apply to exclusive dealing claims. *Id. at 340* ("We have adhered to this principle regardless of the type of antitrust claim involved."). A party has antitrust standing when the challenged, anticompetitive conduct targeted the plaintiff in an attempt to limit or eliminate its participation in the relevant market. *See, e.g.*, *NicSand, Inc. v. 3M Co., 507 F.3d 442, 457 (6th Cir. 2007)* (en banc) (competitor does not have antitrust standing when challenging exclusive **[*65]** dealing, but, "[w]hat we have said here does not mean that a potential competitor may never bring an antitrust claim for exclusive dealing. Had the large retailers and [the defendant] conspired to eliminate [the plaintiff] from the market, that would be another matter. And should [the defendant] use these contracts and its current market dominance to establish unreasonable barriers to entry in the future, a potential competitor might have a legitimate antitrust claim"); *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 275 (3d Cir. 1999)* (antitrust standing when surgeon with a private practice alleged that hospital-defendants conspired to eliminate him from the market by entering into exclusive dealing with other surgeons as well as engaging in various predatory acts such as circulating defamatory remarks about his patient care skills and revoking his courtesy privileges at a hospital); *id.* ("In sum, we hold that Angelico has standing. This is not a case, however, in which we grant standing to a competitor who was simply harmed by strong competition. Rather, Angelico has asserted facts indicating that he was harmed by a conspiracy with an illegal anticompetitive intent."); *ZF Meritor, LLC, 696 F.3d at 288* (antitrust standing where long-term exclusive dealing agreements were made **[*66]** not in response to customer demand but a preemptive step to block potential competition from the plaintiff's new joint venture).

* * *

For the foregoing reasons, the SAC does not plausibly state a claim for violation of *Section 1* of the Sherman Act. Accordingly, the Motions are **GRANTED** as to the *Section 1* claim and it is **DISMISSED**, without prejudice.

b) Sherman Act *Section 2*

The SAC alleges that Etap violated *Section 2* of the Sherman Act through its acts of monopolization and attempted monopolization in the NUPIC Grid Design Market. SAC ¶¶ 352-68. *Section 2* applies to "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. "There are three essential elements to a successful claim of *Section 2* monopolization: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Allied Orthopedic Appliances, 592 F.3d at 998* (internal quotation marks omitted). "To demonstrate attempted monopolization a plaintiff must prove '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and **[*67]** (3) a dangerous probability of achieving monopoly power.'" *John Doe 1 v. Abbott Labs., 571 F.3d 930, 933 n.3 (9th Cir. 2009)* (quoting *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008))*.

Etap and OSI contend that the *Section 2* claim is deficient for the same reasons discussed above as to the *Section 1* claim. They also contend that Plaintiff has not sufficiently alleged that Etap had the intent to monopolize the NUPIC Grid Products Market. Plaintiff responds that the SAC plausibly alleges all elements of a *Section 2* claim because it alleges that Etap has a 97% share of the NUPIC market, and that it attained and maintained such market power by entering into an exclusionary agreement with OSI "with a purpose to kill competition." Plaintiff also contends that the SAC sufficiently alleges antitrust injury. Plaintiff further argues that the SAC plausibly alleges a claim for attempted monopolization because it alleges that Etap acted with the specific intent to achieve the aforementioned exclusion of Plaintiff, thereby harming competition.

For the same reasons discussed earlier with respect to the *Section 1* claim, the SAC fails plausibly to allege a relevant market or anticompetitive conduct that caused antitrust injury sufficient to state a claim under *Section 2*. Further, the attempted monopolization is deficient for another reason; it fails adequately **[*68]** to allege that Defendants' willfully acquired monopoly power or had the specific intent to do so. As part of its opposition to the Motions, Plaintiff relies on the allegation in the SAC that an Etap employee sent an email to colleagues in which the employee stated "We need to kill such competition from these companies. (EDSA, Cyme, DigSilent, PSSE in particular)" after learning about Plaintiff's patented real time product. SAC ¶¶ 32-35. However, "'[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.'" *Aerotec Int'l, 836 F.3d at 1184* (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. "By its very terms, *§ 2* of the Sherman Act regulates anti-competitive conduct, not merely anticompetitive aspirations or an independent decision on terms of dealing with a competitor." *Id.* The SAC does not contain any allegations of willfulness or specific intent that, if established, would constitute more than "anticompetitive aspirations."

For the foregoing reasons, the SAC fails plausibly to allege a violation of *Section 2* of the Sherman Act. Therefore, the Motions are **GRANTED** as to this claim and it is **DISMISSED**, without prejudice.

2. State Law Claims

a) The Cartwright Act

The Cartwright Act "generally **[*69]** outlaws any combinations or agreements which restrain trade or competition or which fix or control prices . . . and declares that, with certain exceptions, every trust is unlawful, against public policy and void." *In re Cipro Cases I & II, 61 Cal. 4th 116, 136, 187 Cal. Rptr. 3d 632, 348 P.3d 845 (2015)* (quoting *Pacific Gas & Elec. Co. v. Cty. of Stanislaus, 16 Cal. 4th 1143, 1147, 69 Cal. Rptr. 2d 329, 947 P.2d 291 (1997)* (internal citations omitted)). "The analysis under California's ***antitrust law*** mirrors the analysis under federal law because the Cartwright Act . . . was modeled after the Sherman Act." *Cty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*; *see also* *Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1092 (9th Cir. 2000)* ("Our disposition of [the plaintiff's] Sherman Act claims disposes of its claims under the California Cartwright Act. The Cartwright Act is patterned after the Sherman Act, and 'federal cases interpreting the Sherman

Act are applicable to problems arising under the Cartwright Act.'" (quoting *Marin Cty. Bd. of Realtors, Inc. v. Palsson, 16 Cal. 3d 920, 925, 130 Cal. Rptr. 1, 549 P.2d 833 (1976)* (en banc)).

The parties agree that Plaintiff's Cartwright Act claim rises or falls with those it has brought under the Sherman Act. For the same reasons the SAC does not plausibly allege a claim against any Defendant under the Sherman Act, it does not plausibly allege a claim under the Cartwright Act.

Accordingly, the Motions are **GRANTED** as to this claim and it is **DISMISSED**, without prejudice.

b) North Carolina UDTPA Claim

The UDTPA claim is premised on Defendants' alleged violations **[*70]** of *Sections 1* and *2* of the Sherman Act. "In order to state a claim under the UDTPA, a plaintiff must show that (1) the defendant committed an unfair or deceptive act or practice; (2) the action in question was in or affecting commerce; and (3) the act proximately caused injury to the plaintiff. Whether conduct is unfair or deceptive is a legal issue for the court to decide." *Ellis v. Louisiana-Pacific Corp., 699 F.3d 778, 787 (4th Cir. 2012)* (citation and internal quotation marks omitted).

The SAC states that the UDTPA claim relies on the same allegations as the Sherman Act claims. As noted in the Prior Order, the reliance in the UDTPA claim on the antitrust claims is insufficient because those claims are not adequately pleaded.

Because no viable claims have been alleged that can form the basis for the UDTPA claim, the Motions are **GRANTED** as to this claim and it is **DISMISSED**, without prejudice.

c) California Unfair Competition Law

California's Unfair Competition Law ("UCL") prohibits unfair competition, which includes "any unlawful, unfair or fraudulent business act or practice . . . ." *Cal. Bus. & Prof. Code § 17200*. The purpose of the UCL "is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *McGill v. Citibank, NA, 2 Cal. 5th 945, 954, 216 Cal. Rptr. 3d 627, 393 P.3d 85 (2017)* (quoting *Kasky v. Nike, Inc., 27 Cal. 4th 939, 949, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002)* (internal quotations **[*71]** omitted).

Defendants argue that the SAC fails to state a plausible claim under the UCL because this claim is derivative of Plaintiff's Sherman Act claims. Plaintiff does not disagree with this premise. For the same reasons the SAC does not plausibly allege a claim under the *Section 1* or *Section 2* of the Sherman Act, it does not plausibly allege a claim under the UCL.

Accordingly, the Motions are **GRANTED** as to this claim and it is **DISMISSED**, without prejudice.

d) Tortious Interference with Prospective Economic Advantage

"In order to maintain an action for tortious interference with prospective advantage, Plaintiff must show that Defendants induced a third party to refrain from entering into a contract with Plaintiff without justification. Additionally, Plaintiff must show that the contract would have ensued but for Defendants' interference." *DaimlerChrysler Corp. v. Kirkhart, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286 (2002)*. "[E]ven where there is actual interference, a motion to dismiss should be granted where the interference is justified or privileged." *Cobra Capital, LLC v. RF Nitro Commc'ns, Inc., 266 F. Supp. 2d 432, 439 (M.D.N.C. 2003)*. Thus, to prevail on a tortious interference with prospective economic advantage claim, a plaintiff must demonstrate that the defendant "acted with malice and for a reason not reasonably related to the protection of a legitimate business **[*72]** interest . . . ." *Id.* (citations omitted).

Defendants argue that the SAC has not alleged facts that if established would show that Defendants acted with malice or without justification. Plaintiff responds that the SAC states a plausible tortious interference claim because it alleges that Plaintiff has lost specific customers to Etap as a result of Defendants' efforts to exclude Plaintiff from the NUPIC Grid Design Market, the NUPIC Real Time Market and the EMS Platform Market.

The SAC alleges that Plaintiff "had reasonable opportunity" to sell its products in the EMS Platform Market, the four end-user markets, the NUPIC Grid Design Market and the NUPIC Real Time Market. SAC ¶ 377. It alleges that Defendants "intentionally interfered" with Plaintiff's ability to sell and service its products in those markets. Further, it alleges that such interference caused Plaintiff "to lose sales to at least the following entities with whom Power Analytics had pre-existing commercial relations: Duke Energy, Enercon, Atomic Energy of Canada and Energy Northwest." It also alleges that Defendants' conduct harmed Plaintiff "in the form of lost contracts, lost sales and profits, and lost opportunities to **[*73]** expand its business with purchasers and operators of Power Grids." *Id.* ¶ 378-80.

An assessment of the aforementioned allegations in the SAC shows that it does not plausibly state a claim for tortious interference with economic advantage. The SAC does not identify any specific contract with which Defendants allegedly interfered. Although it alleges that Plaintiff has "lost sales" to four commercial entities with which it had ongoing commercial relations, the SAC does not allege how these losses were caused by Defendant's conduct. Moreover, the allegation that Defendants "intentionally interfered" with Plaintiff's ability to compete in the relevant markets is conclusory.

Thus, the SAC does not allege that Defendants acted with malice or for purposes unrelated to a legitimate business interest when they allegedly interfered with Plaintiff's pre-existing commercial relations with the four commercial entities. *See Cobra Capital, 266 F. Supp. 2d at 439* (dismissing the plaintiff's complaint because it contained "no factual allegations that would raise an inference of malice or an illegitimate business interest on the part of the [RF Micro]" in determining that a business opportunity with plaintiff was not in its economic interest). **[*74]**

For the foregoing reasons, the Motions are **GRANTED** as to this claim and this claim is **DISMISSED**, without prejudice.

e) Conspiracy Claim

The SAC does not plausibly allege a claim for civil conspiracy. The supporting allegations are conclusory and state little more than the legal elements of such a tort. *See* SAC ¶¶ 381-86. Further, to the extent that this claim is premised on the alleged violations of *Section 1* of the Sherman Act or the other claims addressed above, it fails for the same reasons identified as to those claims.

For the foregoing reasons, the Motions are **GRANTED** as to this claim and this claim is **DISMISSED**, without prejudice.

IV. <u>Conclusion</u>

For the reasons stated in this Order, the Motions are **GRANTED** without prejudice. Any amended complaint shall be filed no later than December 21, 2017.

IT IS SO ORDERED.

Ass'n of Am. Physicians & Surgeons v. Am. Bd. of Med. Specialites

United States District Court for the Northern District of Illinois, Eastern Division

December 13, 2017, Decided; December 13, 2017, Filed

No. 14-cv-02705

Reporter

2017 U.S. Dist. LEXIS 205845 *; 2017-2 Trade Cas. (CCH) P80,223

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., Plaintiff, v. AMERICAN BOARD OF MEDICAL SPECIALITES, Defendant.

Subsequent History: Dismissed by *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties, 2020 U.S. Dist. LEXIS 173853, 2020 WL 5642941 (N.D. Ill., Sept. 22, 2020)*

Prior History: *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties, 2014 U.S. Dist. LEXIS 45077 (D.N.J., Apr. 2, 2014)*

Core Terms

certification, patients, Boards, restraint of trade, medical staff, recertification, allegations, competitors, output, prices, Sherman Act, medical care, specialty, negligent misrepresentation, relevant market, anticompetitive, nationwide, licensed, effects, anti trust law, consumers, medicine

Counsel: **[*1]** For Association of American Physicians & Surgeons, Inc., Plaintiff: Andrew Layton Schlafly, LEAD ATTORNEY, Andrew L. Schlafly, Attorney at Law, Far Hills, NJ; Zachary M. Bravos, Bravos & DiCola, Wheaton, IL.

For American Board of Medical Specialties, Defendant: Jack R. Bierig, LEAD ATTORNEY, Sidley Austin LLP (Chicago), Chicago, IL; Jeffery Soos, Saiber LLC, Newark, NJ; Steven Joseph Horowitz, Sidley Austin LLP, Chicago, IL.

Judges: Andrea R. Wood, United States District Judge.

Opinion by: Andrea R. Wood

Opinion

MEMORANDUM OPINION

Plaintiff Association of American Physicians & Surgeons, Inc. ("AAPS") has sued Defendant American Board of Medical Specialties ("ABMS"), alleging restraint of trade in violation of *Section 1 of the Sherman Act* and negligent misrepresentation in connection with ABMS's program for recertification known as the ABMS Maintenance of Certification® program. Before the Court is ABMS's renewed motion to dismiss both claims pursuant to *Federal Rule of Civil Procedure 12(b)(6)* (the "Motion") (Dkt. No. 30). For the reasons stated below, the Court finds that AAPS has failed to state a claim with respect to either count and thus grants the Motion.

BACKGROUND

As set forth in the Complaint,[1] AAPS is a membership organization of thousands of practicing physicians **[*2]** in virtually all specialties. (Compl. ¶ 4, Dkt. No. 1.) ABMS is a nonprofit entity that serves as the umbrella organization for twenty-four medical specialty boards (the "Member Boards"). (*Id.* ¶¶ 5, 11.) Each of the Member Boards certifies physicians in a given medical specialty if the physician voluntarily seeks certification, completes an accredited medical residency program in the specialty, passes an examination administered by the Member Board, and otherwise complies with the Member Board's requirements for certification. (ABMS Br. at 1, Dkt. No. 31.) The Member Boards are to be distinguished from the official medical boards of the states, which determine the fitness of physicians to practice medicine. (Compl. ¶ 19, Dkt. No. 1.) Certification by a Member Board is a voluntary process and is not required to be licensed to practice medicine—a patient has the right to seek the medical care of any physician licensed to practice medicine (whether certified or not). (*Id.* ¶ 20.)

Although a physician certified by a Member Board was originally certified for life, ABMS and its Member Boards came to recognize the need for periodic recertification given that the state-of-the-art **[*3]** in each medical specialty evolved rapidly and a physician's knowledge of a particular specialty could deteriorate over time. (ABMS Br. at 2, Dkt. No. 31.) As such, in addition to initial certification, ABMS and its Member Boards offer a program for recertification known as the ABMS Maintenance of Certification® ("MOC") program. (*Id.*) Like certification, participation in the MOC program is not required in order to be licensed to practice. (*See* Compl. ¶ 20, Dkt. No. 1.) The MOC program has four basic components: (1) maintenance of a valid license to practice medicine and adherence to guidelines of the Member Board calling for professionalism and honorable personal conduct; (2) regular participation in educational and self-assessment activities that meet specialty-specific standards set by each Member Board; (3) successful completion of an examination; and (4) evaluation of the care provided to patients, and identification and application of strategies to improve that care. (ABMS Br. at 2-3, Dkt. No. 31; *see also* Compl. ¶ 34, Dkt. No. 1.)

In November 2009 and subsequently, ABMS and several Member Boards obtained the agreement of The Joint Commission, a private company that accredits more **[*4]** than 20,000 health care organizations and hospitals, that hospitals must enforce requirements against physicians for renewal of their medical staff privileges. (Compl. ¶¶ 13-14, Dkt. No. 1.) To comply with The Joint Commission's requirements, many hospitals impose parts or all of the MOC program against physicians as a condition of having hospital medical staff privileges. (*Id.* ¶ 15.)

The choice not to participate in the MOC program has affected physicians in the United States, including members of AAPS. (*Id.* ¶¶ 50-51.) For example, in 2011, an AAPS member identified as "J.E." was excluded from the medical staff of SMC, a hospital in New Jersey, because he chose not to participate in the MOC program. (*Id.* ¶¶ 29, 32, 43-44.) J.E. had been on the SMC medical staff for twenty-nine years and had been certified by a Member Board. (*Id.* ¶¶ 30-31.) He was told by SMC in 2011, however, that he would have to comply with recertification requirements under the MOC program to remain on its medical staff. (*Id.* ¶ 32.) Due to the expense and time required for recertification, J.E. chose not to comply. (*See id.* ¶¶ 34-43.) As a result, he was not allowed to remain on SMC's medical staff, and patients **[*5]** cannot be treated by J.E. when taken by emergency to SMC. (*Id.* ¶¶ 44-45.)

AAPS has filed a two-count Complaint alleging (1) restraint of trade in violation of *Section 1 of the Sherman Act*, and (2) negligent misrepresentation. With respect to Count I, AAPS alleges that ABMS has restrained trade in connection with the MOC program. (*Id.* ¶¶ 57-70.) In particular, AAPS claims that ABMS has restrained trade by: (a) seeking and obtaining agreements with the Member Boards to impose formal recertification requirements as part of the MOC program, (b) seeking and obtaining agreement by The Joint Commission to require enforcement by hospitals of formal recertification requirements, (c) inducing health insurance companies and plans to exclude physicians who do not purchase and comply with the MOC program, (d) requiring recertification by younger physicians while exempting older physicians, and (e) acting in concert with the Member Boards to seek an

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[1] For purposes of deciding the Motion, the Court accepts the allegations of the Complaint as true and draws all permissible inferences in AAPS's favor. *See, e.g., Active Disposal, Inc. v. City of Darien, 635 F.3d 883, 886 (7th Cir. 2011)*.

endorsement by the Federation of State Medical Boards of "maintenance of licensure" to impose the MOC program as a requirement of licensure by state medical boards. (*Id.* ¶¶ 57-62.) AAPS argues that the relevant service market consists of medical care provided **[*6]** by physicians to hospitalized patients and that the relevant geographic market is nationwide. (*Id.* ¶¶ 27-28.) According to AAPS, ABMS's actions have no legitimate purpose, reduce the supply of physicians available to treat patients, and limit patients' access to their own physicians. (*Id.* ¶¶ 63-66.)

With respect to Count II, AAPS alleges that certain statements of ABMS are false and have deceived physicians and the public. (*Id.* ¶¶ 78-91.) The statements at issue consist of: (a) a statement on an ABMS website that doctors who participate in the MOC program "are voluntarily part of a rigorous process that continually assesses and enhances their medical knowledge, judgment, professionalism, clinical techniques, and communication skills;" (b) a statement on an ABMS website that "you can count on quality patient care" from doctors who are Board Certified; (c) ABMS's use of phrases such as "Not Meeting MOC Requirements" to describe physicians who do not participate in the MOC program, and (d) inviting patients to search on the names of individual physicians to see if they have complied with the MOC program. (*Id.* ¶¶ 78-81, 82.) AAPS argues that ABMS's statements "create the false impression **[*7]** that [the MOC program] is indicative of the medical skills of physicians, and that as a result physicians who decline to purchase [ABMS's] product are likely to be less competent" and "falsely imply[] that physicians who decline to participate or who do not fully complete the program are somehow less competent physicians." (*Id.* ¶¶ 81-82.)

DISCUSSION

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)*. To survive a *Rule 12(b)(6)* motion, a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. While the Complaint need not include detailed factual allegations, there "must be enough to raise a right to relief above the speculative level." *Id. at 555*. The plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *McReynolds v. Merrill Lynch & Co., 694 F.3d 873, 885 (7th Cir. 2012)* (internal citations and quotation marks omitted) (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*. In addition, "although the complaint's factual allegations are accepted as true **[*8]** at the pleading stage, allegations in the form of legal conclusions are insufficient to survive a *Rule 12(b)(6)* motion." *Id.* Furthermore, "a party may plead itself out of court by either including factual allegations that establish an impenetrable defense to its claims or by attaching exhibits that establish the same." *Massey v. Merrill Lynch & Co., 464 F.3d 642, 650 (7th Cir. 2006)*.

I. Count I — Restraint of Trade in Violation of *Section 1* of the Sherman Act

Section 1 of the Sherman Act states, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To state a claim for a *Section 1* violation, AAPS must plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (*i.e.*, an agreement); (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury. *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012)*. The Court's analysis focuses on the second and third factors.

A. A Resultant Unreasonable Restraint of Trade in a Relevant Market

AAPS must sufficiently plead that ABMS's actions have caused an unreasonable restraint of trade in a relevant market. "[T]he determination of whether a restraint is unreasonable must focus on the competitive effects of challenged behavior **[*9]** relative to such alternatives as its abandonment or a less restrictive substitute." *Id.*

(internal quotation marks and citation omitted). There are three categories of analysis that are used to determine whether actions have anticompetitive effects—*per se*, quick-look, and Rule of Reason. *Id.* Here, AAPS has alleged that ABMS's actions constitute a *per se* violation of the Sherman Act and that, alternatively, ABMS's actions constitute a violation of the Sherman Act under the Rule of Reason by unreasonably restraining competition in the relevant market (which ABMS alleges is medical care provided by physicians to hospitalized patients nationwide). (Compl. ¶¶ 27-28, 69-70, Dkt. No. 1.)

The *per se* rule "is employed when a practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. . . . Under the per se framework, a restraint is deemed unreasonable without any inquiry into the market context in which the restraint operates." *Agnew, 683 F.3d at 336* (internal quotation marks and citation omitted). By contrast, under the Rule of Reason framework,

> the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given **[*10]** market within a given geographic area. As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing. If the plaintiff meets his burden, the defendant can show that the restraint in question actually has a procompetitive effect on balance, while the plaintiff can dispute this claim or show that the restraint in question is not reasonably necessary to achieve the procompetitive objective.

Id. at 335-36 (internal citations omitted).

1. ***Per Se*** Restraint of Trade

AAPS has alleged no facts supporting a *per se* restraint of trade, merely stating in a conclusory manner that ABMS's "agreements and concerted actions are a *per se* violation of *Section 1* of the Sherman Act because they are plainly anticompetitive, like a group boycott of a supplier; [ABMS's] foregoing actions tend to restrict competition and decrease output with respect to medical services in the relevant market." (Compl. ¶ 69, Dkt. No. 1.) AAPS has not alleged any type of agreement suggesting a *per se* unlawful restraint, such as a horizontal agreement among competitors **[*11]** to fix prices or to divide markets. *See* *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, or to divide markets. Resort to *per se* rules is confined to restraints, like those mentioned, that would always or almost always tend to restrict competition and decrease output. To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects and lack ... any redeeming virtue") (internal citations and quotation marks omitted; omission in original). There is no basis to infer that the type of restraint AAPS alleges would be invalidated in all or almost all instances under the Rule of Reason and, as such, the *per se* rule is not appropriate in this case. *Id. at 886-87*; *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)* ("[P]recedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors."); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Adver. Ass'n, Inc., 672 F.2d 1280, 1286 (7th Cir. 1982)* ("[W]here the 'group boycott' under challenge does not involve a direct effort to influence the supply of, or demand for, a competitor's product, per se treatment may not be appropriate. . . . In the instant case, plaintiff has made no showing that membership in the defendant Association is necessary (or even desirable) to compete effectively as a Datsun dealer."). **[*12]**

2. Rule of Reason

AAPS's claim also fails under the Rule of Reason analysis. "Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason." *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)*, *as amended on denial of reh'g* (Jan. 11, 1995). AAPS has not alleged facts sufficient to suggest that ABMS has sufficient market power to cause a restraint of trade. There are no factual allegations that ABMS's activities have cut back output in the market or driven up prices to consumers—particularly as ABMS certification is a voluntary process, failure to be certified does not render a physician unable to practice medicine. *Id.* (explaining that it is "hard to see how the [defendant psychiatric board's] activities could amount to an exercise of market power, which entails cutting back output in the market and thus driving up prices to consumers" where "plaintiffs already are sellers in the market for psychiatric services [and] turning down their applications for certification does not remove their output from the market and therefore does not raise prices to consumers") (internal citation omitted).

AAPS's proffered definition of the market as medical care provided by physicians to ***hospitalized*** patients nationwide **[*13]** (as opposed to simply medical care nationwide) does not save its claim—AAPS has not alleged that the MOC program is required by all (or even a significant portion of) hospitals nationwide. Moreover, AAPS has alleged no facts showing that ABMS has the ability to control hospitals nationwide or coerce hospitals to force physicians to participate in the MOC program. In fact, AAPS's own words suggest the opposite—for example, according to AAPS, "[t]o comply with The Joint Commission's requirements, ***many*** hospitals impose ***parts or all*** of the MOC program against physicians as a condition of having hospital medical staff privileges." (Compl. ¶ 15, Dkt. No. 1 (emphasis added).) Likewise, AAPS asserts that "The Joint Commission ***does*** require that all hospital department chairs be board certified ***or otherwise complete the equivalence of the board certification***, and those department chairs can be ***expected*** to impose the same requirement on their staff." (AAPS Resp. at 12, Dkt. No. 36 (first emphasis in original).) Similarly, The Joint Commission document relied on by AAPS states that "[t]he hospital . . . establishes criteria that determine a practioner's ability to provide patient care, treatment, and services **[*14]** . . . [including] [c]urrent licensure ***and/or certification, as appropriate***." (*Id.*; Dec. of Jakob Halpern in support of ABMS Mot. to Dismiss or Transfer at MS-28, Dkt. No. 11-8 (emphasis added).) That is, hospitals may or may not impose parts or all of the MOC program as a requirement for medical staff privileges, hospital chairs may or may not be board certified, and hospital criteria for physicians may or may not include certification. Thus, according to AAPS's own words, even working in supposed concert with The Joint Commission, ABMS has failed to force hospitals to require certification of its physicians by ABMS or a Member Board.[2] Accordingly, AAPS has not sufficiently pleaded that ABMS has caused a restraint of trade. *Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 398 (7th Cir. 1989)* (finding no restraint of trade when the organization alleged to have violated ***antitrust law*** had "no authority over hospitals, insurers, state medical societies or licensing boards, and other persons who might be able to govern the performance of surgery").

Nor has AAPS sufficiently pleaded that the alleged restraint is unreasonable. "[I]t is commonplace, and often very useful, for organizations to recommend quality standards . . . or adopt them as part of a certification process **[*15]** . . . . Merely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as 'unreasonable' under the Sherman Act." *DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 57 (1st Cir. 1999)*. More would be needed to conclude that any restraint is unreasonable, such as the use of standards setting as a predatory device by some competitors to injure others (for example, by "showing that the standard was deliberately distorted by competitors of the injured party . . . through lies, bribes, or other improper forms of influence, in addition to a further showing of market foreclosure."). *Id. at 57-58*.

B. An Accompanying Injury

It is not sufficient for AAPS to allege any injury—AAPS must allege "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [ABMS's] acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Because the purpose of the Sherman Act is to protect consumers from injury that results from diminished competition, AAPS "must allege, not only an injury to himself, but an injury to the market as well." *Agnew, 683 F.3d at 335* (quoting *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir.1984))*.

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[2] AAPS's allegations regarding health insurers fare no better. According to AAPS, ABMS has worked "to induce health insurers to 'use Board Certification by an ABMS Member Board as an essential tool to assess physician credentials within a given medical specialty.'" (Compl. ¶ 16, Dkt. No. 1.) AAPS has not pleaded facts plausibly suggesting that ABMS has authority over any insurance companies sufficient to cause a restraint of trade.

AAPS claims that ABMS's "actions injured and continue to injure competition by causing anticompetitive effects within the relevant market for services provided by physicians, thereby limiting **[*16]** patients' access to ***their own physicians***." (Compl. ¶ 65, Dkt. No. 1 (emphasis added).) This is not the type of injury protected by the antitrust laws. *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc., 196 F.3d 818, 825 (7th Cir. 1999)* ("To recover under the antitrust laws, the plaintiff must show that its injury flows from that which makes the conduct an antitrust problem: higher prices and lower output.") AAPS has not alleged any reduction in the output of medical care (*e.g.*, that patients have been denied treatment or were treated by unqualified doctors); nor has AAPS alleged that ABMS's actions have resulted in an increase in the cost of medical care. *Wagner v. Magellan Health Servs., Inc., 121 F. Supp. 2d 673, 681-82 (N.D. Ill. 2000)*.

AAPS also claims that a particular doctor, J.E.,[3] and other doctors have been harmed by being excluded from the medical staff of hospitals. (Compl. ¶¶ 29, 50, Dkt. No. 1.) However, "[t]he antitrust laws . . . were enacted for 'the protection of competition not competitors.'" *Brunswick, 429 U.S. at 488* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. There is no antitrust injury when the harm alleged is harm to the business of one competitor (or a group of competitors)—the injury must be to the market. *Frantzides v. Northshore Univ. HealthSystem Faculty Practice Assocs., Inc., 787 F. Supp. 2d 725, 732 (N.D. Ill. 2011)*. This is particularly true here, as ABMS's actions do not impact whether physicians are licensed to practice—*i.e.*, whether their services are available **[*17]** in the market; the impact is solely on whether physicians can offer their services in certain hospitals. *Sanjuan, 40 F.3d at 251* (affirming district court's dismissal of antitrust claim, explaining that "[w]hen challenged, plaintiffs revealed that they want to show injury ***to producers***" and that "plaintiffs already are sellers in the market for psychiatric services; turning down their applications for certification does not remove their output from the market and therefore does not raise prices to consumers"). As AAPS admits, even for J.E., failure to comply with recertification requirements has not removed him from the market—he "continues to practice in good standing in New Jersey." (Compl. ¶ 48, Dkt. No. 1.)

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For these reasons, AAPS has failed to state a claim for restraint of trade in violation of *Section 1 of the Sherman Act* and ABMS's Motion is granted with respect to Count I.[4]

II. Count II — Negligent Misrepresentation

As the Court finds that AAPS has failed to state a claim for restraint of trade in violation of *Section 1* of the Sherman Act, the Court need not reach the merits of AAPS's claim for negligent misrepresentation. *See* *28 U.S.C.A. § 1367(c)(3)* ("The district courts may decline to exercise supplemental jurisdiction over a claim . . . [if] the district court has dismissed **[*18]** all claims over which it has original jurisdiction."). The Court may exercise its discretion to consider the merits of the claim, however, and does so here in the interests of judicial economy and in light of the ease of resolution of the claim. *Hansen v. Bd. of Trustees of Hamilton Se. Sch. Corp., 551 F.3d 599, 607 (7th Cir. 2008)* ("[W]hile a district court may relinquish its supplemental jurisdiction if one of the conditions of *§ 1367(c)* is satisfied, it is not required to do so. Supplemental jurisdiction is a doctrine of discretion, and its 'justification lies in considerations of judicial economy, convenience and fairness to litigants.'") (internal citations omitted).

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[3] J.E.'s exclusion from one particular hospital does not constitute an antitrust injury. *BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n, 36 F.3d 664, 669 (7th Cir. 1994)* ("A staffing decision does not itself constitute an antitrust injury.").

[4] Because the Court finds that AAPS has failed to state a claim for restraint of trade in violation of *Section 1* of the Sherman Act, it need not address ABMS's argument that AAPS has failed to plead sufficient facts to establish a conspiracy.

To establish a claim for negligent misrepresentation,[5] AAPS must plead facts plausibly suggesting that: (1) ABMS made a false statement of material fact; (2) ABMS was careless or negligent in ascertaining the truth of the statement; (3) ABMS induced AAPS to act; (4) AAPS acted in reliance on the truth of ABMS's statement; (5) AAPS's reliance caused it to suffer damages; and (6) ABMS had a duty to communicate accurate information. *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP, 475 F.3d 824, 833-34 (7th Cir. 2007)*. None of the statements identified in AAPS's Complaint comprise a "false statement of material fact." In fact, some of the statements—such as ABMS's use of phrases like "Not Meeting MOC Requirements" **[*19]** to describe physicians who do not participate in the MOC program and inviting patients to search the names of individual physicians to see if they have complied with the MOC program—are simply true statements.

The statements that are not simply true statements—such as a statement on an ABMS website that doctors who participate in the MOC program "are voluntarily part of a rigorous process that continually assesses and enhances their medical knowledge, judgment, professionalism, clinical techniques, and communication skills," and a statement on an ABMS website that "you can count on quality patient care" from doctors who are Board Certified —are expressions of opinion that cannot form the basis of a negligent misrepresentation claim. *Lagen v. Balcor Co., 274 Ill. App. 3d 11, 653 N.E.2d 968, 973, 210 Ill. Dec. 773 (Ill. App. Ct. 1995)* ("[T]he basis of a negligent misrepresentation claim must be a statement of fact; expressions of opinion are not actionable."); *cf.* *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor, 295 Ill. App. 3d 567, 692 N.E.2d 812, 816, 229 Ill. Dec. 823 (Ill. App. Ct. 1998)* ("We hold that Arbor's comments regarding Farrell's intelligence, innovativeness and industrious nature represent mere opinion and, therefore, cannot form the basis of an action for fraudulent misrepresentation.").[6]

For these reasons, AAPS has failed to state a claim for negligent misrepresentation and ABMS's Motion is **[*20]** granted with respect to Count II.

CONCLUSION

For the foregoing reasons, the Court grants the Motion pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. The dismissal is without prejudice, however, and AAPS will be permitted an opportunity to file an amended complaint that cures the deficiencies discussed in this Memorandum Opinion.

Dated: December 13, 2017

ENTERED:

/s/ Andrea R. Wood

Andrea R. Wood

United States District Judge

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[5] The Complaint invokes the Court's supplemental jurisdiction as to AAPS's claim for negligent misrepresentation. (Compl. ¶ 7, Dkt. No. 1.) As this case was transferred to the Northern District of Illinois for improper venue pursuant to *28 U.S.C. § 1406(a)*, the choice of law rules of Illinois apply. *Koutsoubos v. Casanave, 816 F. Supp. 472, 474-75 (N.D. Ill. 1993)* ("[W]here an action was improperly filed in the transferor court, the transferee court should apply its own state's choice of law rules rather than those of the transferor's state.") In this case, however, the parties have not raised a conflict of laws issue, and the Court will apply Illinois law to the substantive aspects of AAPS's negligent misrepresentation claim. *McCoy v. Iberdrola Renewables, Inc., 760 F.3d 674, 684 (7th Cir.)* *reh'g denied*, *769 F.3d 535 (7th Cir. 2014)* ("When no party raises the choice of law issue, the federal court may simply apply the forum state's substantive law.").

[6] Because the Court finds that AAPS has failed to allege that ABMS made a false statement of material fact, it need not address AAPS's argument that ABMS has failed to allege reasonable reliance.

Hosp. Auth. of Metro. Gov't v. Momenta Pharms., Inc.

United States District Court for the Middle District of Tennessee, Nashville Division

December 14, 2017, Filed

No. 3:15-1100

Reporter

2017 U.S. Dist. LEXIS 205747 *; 2017 WL 6381434

THE HOSPITAL AUTHORITY OF METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, d/b/a/ NASHVILLE GENERAL HOSPITAL, v. MOMENTA PHARMACEUTICALS, INC. and SANDOZ, INC.

Prior History: *Hosp. Auth. of Metro. Gov't v. Momenta Pharms., Inc., 2016 U.S. Dist. LEXIS 136004 (M.D. Tenn., Sept. 29, 2016)*

Core Terms

purchaser, futile, enoxaparin, indirect, Defendants', amended complaint, allegations, unjust enrichment, consumers, amend, fraudulent concealment, personal jurisdiction, antitrust, motion to dismiss, entities, damages, proposed amended complaint, district court, proposed class, deny a motion, class member, reside, class certification, indirectly, discovery, accruing, generic, merits, propose an amendment, cause of action

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

HN1[] **Standards of Review, Abuse of Discretion**

Fed. R. Civ. P. 15(a) states that leave to amend a pleading should be freely given when justice so requires. While the moving party ought to be afforded an opportunity to test its claim on the merits, one or more of the following conditions may negate this directive: undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of the proposed amendment. The determination as to whether justice requires permission to amend the pleading is within the district court's sound discretion.

Civil Procedure > Parties > Joinder of Parties > Permissive Joinder

HN2[] **Joinder of Parties, Permissive Joinder**

Fed. R. Civ. P. 20(a)(1)(A), *(B)* states that additional plaintiffs may be joined to a pending action if such plaintiffs assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and any question of law or fact common to all plaintiffs will arise in the action.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] **Pleadings, Amendment of Pleadings**

The United States Court of Appeals for the Sixth Circuit has made clear that any analysis of the futility of proposed amendments is equivalent to the analysis undertaken as part of a *Fed. R. Civ. P. 12(b)(6)* motion. A proposed amendment is futile only if it could not withstand a *Rule 12(b)(6)* motion to dismiss.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] **Pleadings, Amendment of Pleadings**

There is some conceptual difficulty presented when the primary basis for a party's opposition to the filing of an amended pleading is that the pleading is futile, i.e. that it fails to state a claim upon which relief can be granted. A magistrate judge cannot ordinarily rule on a motion to dismiss under *28 U.S.C.S. § 636(b)(1)(A)*, and denying a motion for leave to amend on grounds that the proposed new claim is legally insufficient is, at least indirectly, a ruling on the merits of that claim. Rather than determining the actual legal sufficiency of the new claim, in many cases it will suffice to determine if there is a substantial argument to be made on that question and, if so, to allow the amended pleading to be filed with the understanding that a motion to dismiss for failure to state a claim may follow.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

HN5[] **In Rem & Personal Jurisdiction, In Personam Actions**

There must be an affiliation between the forum and the underlying controversy for a court to exercise specific personal jurisdiction over a defendant.

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > In Personam Actions

Governments > Legislation > Statutory Remedies & Rights

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

HN6[] **In Rem & Personal Jurisdiction, In Personam Actions**

Where a federal statute authorizes nationwide service of process, and the federal and state claims derive from a common nucleus of operative fact, the district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Doing Business

HN7[] **Clayton Act, Jurisdiction**

Section 12 of the Clayton Act, the antitrust statute, provides for nationwide personal jurisdiction in the case of corporate defendants.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN8[] **Supplemental Jurisdiction, Pendent Claims**

In providing jurisdiction over a cause of action involving enforcement of a federal right, Congress has granted the district courts power to consider state law claims provided they had a nucleus of pertinent facts in common with a substantial federal claim.

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN9[] **Clayton Act, Defenses**

In an antitrust lawsuit, the cause of action accrues and the accompanying limitation period commences each time a defendant commits an act that injures the plaintiff's business. When a plaintiff alleges a continuing antitrust violation, the cause of action accrues each time a plaintiff is injured by an act of the defendants. However, even in the event of an alleged continuing violation, an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act. Such an overt act involves both a new and independent act that is not merely a reaffirmation of a previous act and that inflicts new and accumulating injury on the plaintiff.

Antitrust & Trade Law > Clayton Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] **Clayton Act, Defenses**

Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, e.g., each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.

Governments > Legislation > Statute of Limitations > Tolling

HN11[] **Statute of Limitations, Tolling**

To establish fraudulent concealment, a party must plead and prove: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

HN12[] **Pleadings, Amendment of Pleadings**

Granting leave freely under *Fed. R. Civ. P. 15* reinforces the principle that cases should be tried on their merits rather than the technicalities of pleadings.

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN13[] **Class Members, Named Members**

A class representative must possess the same interest and suffer the same injury as the class members.

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Judges: BARBARA D. HOLMES, United States Magistrate Judge.

Opinion by: BARBARA D. HOLMES

Opinion

MEMORANDUM AND ORDER

Presently pending is Plaintiff's motion for leave to file an amended complaint. *See* Docket Entry **[*2]** No. ("DE") 140. For the reasons that follow, Plaintiff's motion is GRANTED.[1]

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[1] Although the Sixth Circuit has not addressed whether a motion to amend is a dispositive or non-dispositive motion, most of the district courts in the Sixth Circuit, including this court, consider an order on a motion to amend to be non-dispositive. *See, e.g., Gentry v. Tenn. Bd. of Judicial Conduct, 2017 U.S. Dist. LEXIS 83215, 2017 WL 2362494, at *1 (M.D. Tenn. May 31, 2017)* ("Courts have uniformly held that motions to amend complaints are non-dispositive matters that may be determined by the magistrate judge and reviewed under the clearly erroneous or contrary to law standard of review ...") (citations omitted); *Chinn v. Jenkins, 2017 U.S. Dist. LEXIS 48258, 2017 WL 1177610 (S.D. Ohio March 31, 2017)* (order denying motion to amend is not dispositive); *Young v. Jackson, 2014 U.S. Dist. LEXIS 120528, 2014 WL 4272768, at *1 (E.D. Mich. Aug. 29, 2014)* ("A denial of

I. PROCEDURAL BACKGROUND[2]

Plaintiff Nashville General Hospital ("Plaintiff" or "NGH") filed its initial complaint on October 14, 2015. *See* DE 1. The complaint involved four separate counts against Defendants Momenta Pharmaceuticals, Inc. ("Momenta") and Sandoz, Inc. ("Sandoz") (collectively referred to as "Defendants") under the *Sherman Act*, which included allegations of implementation of unreasonable restraints on trade, monopolization, a conspiracy to monopolize, and attempts to monopolize. DE 1 at P¶ 81-104. The alleged *Sherman Act* violations centered on the role of Momenta and Sandoz in producing and distributing enoxaparin, a generic version of the drug Lovenox®. *Id.* at ¶¶ 11-13, 19, 26. The complaint was filed on behalf of both Plaintiff and a nationwide class of persons and entities, pursuant to *Fed. R. Civ. P. 23(a)* and *(b)*, that purchased enoxaparin from Defendants or non-party Sanofi-Aventis ("Aventis"), who brought Lovenox® to market in the United States, beginning on September 21, 2011. *Id.* at ¶¶ 20, 75.

In response to the initial complaint, Defendants jointly filed a motion to transfer the case to the District **[*3]** of Massachusetts (DE 58) and a motion to dismiss (DE 65), and Momenta additionally filed a separate motion to dismiss or transfer for improper venue. DE 62. On September 29, 2016, a Report and Recommendation was entered in which the undersigned Magistrate Judge recommended that each motion be denied. DE 114. Defendants subsequently filed both joint and separate objections to the Report and Recommendation. DE 117, 119. On March 21, 2017, the District Judge issued a Memorandum Opinion that adopted in part and declined to adopt in part the Report and Recommendation. DE 134. As a result of the District Judge's holding, Plaintiff's claims for declaratory and injunctive relief were permitted to proceed but Plaintiff's claim for damages was dismissed. *Id.* at 16. This was based on a finding that Plaintiff did not have standing to seek damages under the so-called "indirect purchaser rule," derived from the Supreme Court's holding in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which bars recovery of antitrust damages from Defendants based on Plaintiff's purchase of enoxaparin from a non-party drug wholesaler, McKesson Corporation ("McKesson"), and not directly from Defendants. *Id.* at 8-14. Plaintiff filed the instant motion for leave to amend thereafter. **[*4]** DE 140.

II. ANALYSIS

Plaintiff states that its proposed amended complaint makes three fundamental changes: (1) the addition of a new representative plaintiff identified as the American Federation of State, County and Municipal Employees District Council 37 Health & Security Plan ("DC 37"); (2) the amendment of the claims in the initial complaint to include claims filed under various state antitrust and consumer protection laws that permit indirect purchaser standing; and (3) the addition of substantive allegations pertaining to Defendants' conspiratorial conduct. DE 141 at 5.[3] The amended complaint asserts claims for damages under the statutes of 30 different states and the District of Columbia, referred to as the "Indirect Purchaser Jurisdictions,"[4] that allow indirect purchasers such as NGH, DC 37, and the proposed class of plaintiffs to recover damages, thus circumventing the federal bar of such claims. *Id.*

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a motion to amend is a nondispositive order."); *Hira v. New York Life Ins. Co., 2014 U.S. Dist. LEXIS 70861, 2014 WL 2177799, at **1-2 (E.D. Tenn. May 23, 2014)* (magistrate judge's order on motion to amend was appropriate and within his authority because motion to amend is non-dispositive); *United States v. Hunter, 2013 U.S. Dist. LEXIS 155203, 2013 WL 5280251, at *1 (S.D. Ohio Oct. 29, 2013)* (stating that a magistrate judge's orders denying petitioner's motions to amend a petition pursuant to *28 U.S.C. § 2255* were non-dispositive).

[2] The factual background involved in this matter is discussed in detail in the undersigned's previous Report and Recommendation (DE 114) and the subsequent memorandum of the Chief District Judge (DE 134). This memorandum and order therefore discusses only those facts necessary to address the pending motion.

[3] Plaintiff filed a motion to file the amended complaint under seal, which was denied. *See* DE 152.

[4] Plaintiff identifies these 31 jurisdictions as the following: Alabama, Arizona, Arkansas, California, the District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wisconsin. DE 141 at 8, n.5.

Plaintiff asserts that the class it now seeks to represent is comprised of "those end-payers who could bring an indirect claim under their own state's [repealer] laws." *Id.*

A. Legal Standard

HN1[] *Rule 15 of the Federal Rules of Civil Procedure*, which governs the Court's consideration of the pending motion, states that leave to amend **[*5]** a pleading should be "freely given when justice so requires." *Fed. R. Civ. P. 15(a)*. The reason behind such policy is "to reinforce the principle that cases 'should be tried on their merits rather than the technicalities of pleadings.'" *Moore v. City of Paducah, 790 F.2d 557, 559 (6th Cir. 1986)* (quoting *Tefft v. Seward, 689 F.2d 637, 639 (6th Cir. 1982))*. However, the Supreme Court has indicated that while the moving party "ought to be afforded an opportunity to test [its] claim on the merits," one or more of the following conditions may negate this directive: undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, or futility of the proposed amendment. *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962)*. Nevertheless, the determination as to whether justice requires permission to amend the pleading is within the district court's "sound discretion." *Moore, 790 F.2d at 559* (internal citations omitted).

HN2[] *Rule 20* is also implicated by Plaintiff's motion and states that additional plaintiffs may be joined to a pending action if such plaintiffs "assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences," and "any question of law or fact common to all plaintiffs will arise in the action." *Fed. R. Civ. P. 20(a)(1)(A)*, *(B)*. **[*6]** Such permissive joinder of claims is encouraged as "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties ...." *Thompson v. Janssen Pharms., Inc., No. 15-cv-2558, 2015 U.S. Dist. LEXIS 183578, 2015 WL 12844456, at *1 (W.D. Tenn. Dec. 21, 2015)* (quoting *United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966))*.

B. Defendants' Opposition

The crux of Defendants' opposition focuses on the alleged futility of Plaintiff's proposed amendments.***HN3***[] The Sixth Circuit has made clear that any analysis of the futility of proposed amendments is equivalent to the analysis undertaken as part of a *Rule 12(b)(6)* motion. *See* *Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417, 421 (6th Cir. 2000)* ("[A] proposed amendment is futile only if it could not withstand a *Rule 12(b)(6)* motion to dismiss."). The policy behind the futility argument is to prevent the expenditure of unnecessary effort and resources by both the parties and the court. *See, e.g.,* *Matlock v. Rose, 731 F.2d 1236, 1240-41 (6th Cir. 1984)* ("[T]he concern for judicial economy, under the circumstances of this case, is particularly advanced through the futility doctrine."). However, judicial economy is only served in this case if the undersigned concludes, and the District Judge concurs, that denial of Plaintiff's motion to amend is required, since, as made clear in their responsive brief, Defendants plan to file a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* if the current motion is granted. **[*7]** *See* DE 148 at 9, n.1. While the Court does not in any way view Defendants' candid statements regarding their planned course of litigation as deliberately coercive, this posture inevitably effectuates such an end.

Other courts in this circuit have commented on the inelegant nature of the futility argument in such a context:

> ***HN4***[] There is some conceptual difficulty presented when the primary basis for a party's opposition to the filing of an amended pleading is that the pleading is futile, *i.e.* that it fails to state a claim upon which relief can be granted. A Magistrate Judge cannot ordinarily rule on a motion to dismiss, *see* *28 U.S.C. § 636(b)(1)(A)*, and denying a motion for leave to amend on grounds that the proposed new claim is legally insufficient is, at least indirectly, a ruling on the merits of that claim .... Consequently, rather than determining the actual legal sufficiency of the new claim, in many cases it will suffice to determine if there is a substantial argument to be made on that question and, if so, to allow the amended pleading to be filed with the understanding that a motion to dismiss for failure to state a claim may follow.

*Durthaler v. Accounts Receivable Mgmt., Inc., No. 2:10-cv-1068, 2011 U.S. Dist. LEXIS 121573, 2011 WL 5008552, at *4 (S.D. Ohio Oct. 20, 2011)*. *See* **[*8]** *also* *Vanburen v. Ohio Dep't of Pub. Safety, No. 2:11-cv-1118, 2012 U.S. Dist. LEXIS 160907, 2012 WL 5467526, at *4 (S.D. Ohio Nov. 9, 2012)* (holding that due to this "procedural roadblock," the better course would be to allow amendment of the complaint with the understanding that a motion to dismiss may follow filing of the amended complaint); *Research Inst. at Nationwide Children's Hosp. v. Trellis Bioscience, LLC, No. 2:15-cv-3032, 2017 U.S. Dist. LEXIS 63108, 2017 WL 1487596, at *3 (S.D. Ohio Apr. 26, 2017)* (same). Indeed, "it is usually a sound exercise of discretion to permit the claim to be pleaded and to allow the merits of the claim to be tested before the District Judge by way of a motion to dismiss." *Durthaler, 2017 U.S. Dist. LEXIS 63108, 2011 WL 5008552, at *4*. *See also* *Greenwald v. Holstein, No. 2:15-cv-2451, 2016 U.S. Dist. LEXIS 192242, 2016 WL 9344297, at *5 (S.D. Ohio Feb. 3, 2016)* (same).[5] With such guidance in mind, the Court turns to the merits of Defendants' opposition to the motion.

(1) Personal Jurisdiction

Defendants contend that the addition of DC 37 as a plaintiff to the instant lawsuit would be futile because the Court lacks personal jurisdiction with respect to any claims that could be asserted by DC 37. DE 148 at 9. DC 37 is described as a "health and welfare benefit plan located in New York covering New York public sector employees, retirees, and their families wherever they reside, and is New York's largest public employee union." DE 141 at **[*9]** 7. Defendants emphasize, however, that the proposed amended complaint contains no allegation that DC 37 purchased enoxaparin in Tennessee, reimbursed its union members for enoxaparin in Tennessee, or was otherwise injured in Tennessee. DE 148 at 19. Defendants also rely on the recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, in which the Supreme Court reaffirmed that ***HN5***[] "there must be an affiliation between the forum and the underlying controversy, principally" for a court to exercise specific personal jurisdiction over a defendant.[6] *137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 918, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011))* (internal quotations omitted).

Plaintiff responds that DC 37's claims are appropriately before this Court based on the doctrine of pendent personal jurisdiction, which holds that ***HN6***[] "where a federal statute authorizes nationwide service of process, and the federal and state claims 'derive from a common nucleus of operative fact' ... the district court may assert personal jurisdiction over the parties to the related state law claims even if personal jurisdiction is not otherwise available." *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 23 F. Supp. 2d 796, 805 (N.D. Ohio 1998)* (quoting *Gibbs, 383 U.S. at 725, 86 S. Ct. 1130*). The Court has previously determined that ***HN7***[] *Section 12 of the Clayton Act*, the antitrust statute at issue in the instant **[*10]** matter, provides for nationwide personal jurisdiction in the case of corporate defendants such as Sandoz and Momenta. *See* DE 114 at 38-39; DE 134 at 6. The issue, therefore, is whether the Court may exercise pendent personal jurisdiction with respect to the state law claims brought under the 31 "Indirect Purchaser Jurisdictions" named in the proposed amended complaint.[7]

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[5] This approach is also the most conceptually and intellectually consistent with the view that motions to amend are non-dispositive proceedings.

[6] Plaintiff does not assert that DC 37 is subject to general personal jurisdiction in the instant matter, as such an exercise involves a court's ability "to hear any and all claims against [foreign (sister-state or foreign-country) corporations] when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State.'" *Goodyear, 564 U.S. at 919, 131 S. Ct. 2846* (internal citation omitted).

[7] Counsel for Defendants suggested during oral arguments that pendent personal jurisdiction should not apply in the instant case because neither the Supreme Court nor the Sixth Circuit has formally adopted the use of such jurisdiction. This contention is unpersuasive in light of the use of pendent personal jurisdictions in numerous other courts in this circuit, as well as recognition of this principle by the Sixth Circuit. *See, e.g.,* *Beautytuft, Inc. v. Factory Ins. Ass'n, 431 F.2d 1122, 1128 (6th Cir. 1970)* (affirming the district court's exercise of pendent personal jurisdiction); *Capitol Specialty Ins. Corp. v. Splash Dogs, LLC, 801 F. Supp. 2d*

HN8[] In providing jurisdiction over a cause of action involving enforcement of a federal right, "Congress granted the district courts power also to consider state law claims provided they had a nucleus of pertinent facts in common with a substantial federal claim." *Iron Workers, 23 F. Supp. 2d at 805* (quoting *Hargrave v. Oki Nursery, Inc., 646 F.2d 716, 719 (2nd Cir. 1980))*. Here, despite Defendants' correct observation that the *Fifth Amendment* limits a court's ability to exercise jurisdiction over a non-resident defendant (DE 148 at 18), the Court takes its cue from the *Iron Workers* decision in finding that such a "nucleus of pertinent facts in common" with the pending federal claim exists in this matter:

> The Supreme Court has yet to address the scope of due process protection under the *Fifth Amendment* in the jurisdictional context. Since the Sixth Circuit also has yet to address this precise issue, the Court will follow the view that *Fifth Amendment* due **[*11]** process is satisfied when the defendant in question resides in the United States and a statute provides for nationwide service of process .... Because this Court has personal jurisdiction over the defendants under the [] antitrust claims, and because the state law claims alleging a conspiracy to sell and market tobacco derive from a common nucleus of operative facts with the federal claims, the Court need not reach the question of whether personal jurisdiction with respect to the state law claims is otherwise available .... Accordingly, the Court finds that it has jurisdiction over Defendants ... as to both the federal and state law claims contained in the Amended Complaint.

Iron Workers, 23 F. Supp. 2d at 805-06. There is at least a substantial argument to be made as to jurisdiction, and the Court therefore declines to find futility on this ground.

(2) Statute of Limitations

(a) Accrual of cause of action

Defendants additionally allege that the proposed amended complaint is futile because any potential claim asserted by DC 37 is barred by the relevant statute of limitations, which requires a plaintiff to file its antitrust action "within four years after the cause of action accrued." *15 U.S.C. § 15b*.[8] Defendant states that any claims asserted **[*12]** by NGH or DC 37 and all proposed state law claims began accruing in January of 2012, when non-party Amphastar was permitted to begin selling enoxaparin, thus rendering time-barred any claims brought after February of 2016. DE 148 at 22-23.[9] Plaintiff responds by first arguing that such claims did not begin accruing in January of 2012 because Plaintiff alleges damages "through the present," and that even if such claims had begun accruing in January of 2012, the statute of limitations was tolled by both Defendants' fraudulent concealment of their actions and the discovery rule, the latter of which holds that "accrual occurs when the plaintiff discovers that he has been injured and who caused the injury." *Med. Ctr. at Elizabeth Place v. Premier Health Partners, No. 3:12-cv-26, 2016 U.S. Dist. LEXIS 192269, 2016 WL 9460026, at *14 (S.D. Ohio Oct. 6, 2016)* (quoting *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006))* (internal quotations omitted).

HN9[] In an antitrust lawsuit, the cause of action accrues and the accompanying limitation period commences "each time a defendant commits an act that injures the plaintiff's business." *In re Southeastern Milk Antitrust Litig., 555 F. Supp. 2d 934, 946-47 (E.D. Tenn. 2008)* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971))*. When a plaintiff alleges a continuing antitrust violation, the cause of action "accrues each time a plaintiff is injured by an act of the defendants." *Barnosky Oils, Inc. v. Union Oil Co. of*

657, 668 (S.D. Ohio 2011) ("The Court has little difficulty applying this concept here."); *Bennett v. Steiner-Liff Iron & Metal Co., 714 F. Supp. 895, 897 (M.D. Tenn. 1989)* (noting that pendent jurisdiction "is a matter for the discretion of the court").

[8] Defendants also note that most of the state law claims proffered in the amended complaint are similarly subject to four-year statutes of limitation. DE 148 at 22-23, n.9.

[9] Amphastar's role in the current case is discussed in detail in previous opinions from both the undersigned and the Chief District Judge. *See* DE 114, 134.

California, 665 F.2d 74, 81 (6th Cir. 1981). However, even in the event of **[*13]** an alleged continuing violation, "an overt act by the defendant is required to restart the statute of limitations and the statute runs from the last overt act." Peck v. Gen. Motors Corp., 894 F.2d 844, 849 (6th Cir. 1990) (internal citation omitted). Such an overt act involves both "a new and independent act that is not merely a reaffirmation of a previous act" and that "inflict[s] new and accumulating injury on the plaintiff." Southeastern Milk, 555 F. Supp. 2d at 947 (internal citation omitted).

Here, Plaintiff alleges ongoing harm in light of the "supracompetitive prices resulting from Defendants' conspiracy." DE 153 at 13 (citing to DE 143 at ¶¶ 71, 74, 76, 79, and 83). The fact that Amphastar was finally permitted to begin selling generic enoxaparin in January of 2012 does not necessarily mean that the instant cause of action began accruing at that time. The proposed amended complaint alleges, among other things, that the wholesale price of generic enoxaparin did not begin to decline until May of 2012 and subsequently "began plummeting" in 2014, until which time Plaintiff claims to have paid "hundreds of millions of dollars in overcharges." DE 143 at ¶¶ 74-75. As noted by the Supreme Court:

> **HN10**[] ***Antitrust law*** provides that, in the case of a "continuing violation," say, a price- fixing **[*14]** conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 1990, 138 L. Ed. 2d 373 (1997) (internal citations omitted). Such a price-fixing conspiracy is alleged in the amended complaint, with overpayments occurring well past Amphastar's entry into the market in January of 2012. Indeed, Plaintiff seeks to represent specific individuals and entities that bought Lovenox® or generic enoxaparin "from September 21, 2011, *through the present* ...." DE 143 at ¶ 83 (emphasis added). The Court finds that there is substantial merit to Plaintiff's contention that the claims in the proposed amended complaint are timely, and such claims are therefore not futile for purposes of the pending motion to amend.

(b) Fraudulent concealment

With respect to alleged fraudulent concealment, Defendants argue that Plaintiff has failed to plead fraudulent concealment with the requisite level of particularity under Fed. R. Civ. P. 9(b).[10] **HN11**[] To establish fraudulent concealment, a party must **[*15]** plead and prove: (1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts. Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975). Although Plaintiff's allegations here of fraudulent concealment are not extensive, the Court declines to hold that the possibility of fraudulent concealment is futile at this early stage of litigation. *See* Jones v. TransOhio Sav. Ass'n, 747 F.2d 1037, 1043 (6th Cir. 1984) ("We are unprepared to hold, prior to any discovery on the issue, that Appellants can prove no set of facts consistent with these allegations sufficient to toll the statute of limitations. Appellants are entitled to have their cause tried on the merits if they can prove that the doctrine of fraudulent concealment should be applied to their case."). *Cf.* In re Packaged Ice Antitrust Litig., 723 F. Supp. 2d at 1018 ("[W]here there is a dispute as to the issue of fraudulent concealment, the question is one for the jury.") (quoting Dry Cleaning & Laundry Institute of Detroit, Inc. v. Flom's Corp., 841 F. Supp. 212, 216 (E.D. Mich. 1993)).

In numbered paragraphs 2 and 3 of the amended complaint (DE 143), Plaintiff alleges that Defendants secretly manipulated the generic drug approval process to further their monopolization scheme. Plaintiff's allegations of secrecy and concealment **[*16]** by Defendants continue throughout at least numbered allegations 36 through 55. These same allegations also describe the fraudulent concealment as the failure of Momenta's experts to self-disclose conflicts of interest as required by the USP, the scientific organization that sets (among other things) drug standards enforced by the FDA. Further, it is entirely plausible that the only required due diligence in discovery of

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[10] This position was advanced by Defendants during oral arguments.

the facts of Defendants' conduct is reliance on the self-reporting rules of the USP, as alleged in Plaintiff's proposed modified numbered allegation 27 and new numbered allegation 71 (see DE 159).[11] The Court finds that there is a substantial argument that the amended complaint (with the proposed additional allegations) plausibly, and therefore sufficiently, alleges affirmative acts of fraudulent concealment. For that reason, the Court declines to deny the motion to amend as futile.[12]

(3) Standing

Defendants argue that Plaintiff's proposal to represent a "nationwide class" under the laws of 31 different jurisdictions is futile because NGH and DC 37, who reside for purposes of this motion in Tennessee and New York, respectively, lack standing to assert claims on behalf **[*17]** of individuals from the other 29 jurisdictions. DE 148 at 23. Defendants rely on a case from the Eastern District of Michigan in which the court noted that to establish standing in a class action suit, the "named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *In re Packaged Ice Antitrust Litig., 779 F. Supp. 2d 642, 657 (E.D. Mich. 2011)* ("*Packaged Ice II*") (quoting *Lewis v. Casey, 518 U.S. 343, 357, 116 S. Ct. 2174, 2183, 135 L. Ed. 2d 606 (1996)*). The court ultimately held that the named plaintiffs in that case, which consisted of indirect purchasers that resided in California, Florida, Indiana, Michigan, and New York, lacked standing to assert claims pursuant to the laws of 26 additional states in which none of them resided or suffered the injury in question. *Id. at 657-58*.

Plaintiff does not dispute the *Packaged Ice II* holding, instead arguing that the Court's analysis should be guided by an earlier decision in which the Sixth Circuit held that once standing has been established with respect to a named plaintiff, the issue of "whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the **[*18]** additional criteria encompassed in *Rule 23 of the Federal Rules of Civil Procedure*." *Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998)* (internal citation omitted).[13] Plaintiff contends that Defendants confuse the issue of standing with the adequacy of class representation and argues that, in accordance with *Fallick*, the ability of NGH and DC 37 to seek relief on behalf of the unnamed class members residing in the remaining 29 state jurisdictions should be determined as part of the class certification process and not a motion to dismiss (or a motion to amend). DE 153 at 14-15.[14] The Court agrees.

Weighing in favor of Plaintiff's argument is a case from the Northern District of Ohio, in which the district court, applying *Fallick*, discussed standing and class certification as part of a motion to dismiss in a similar scenario involving indirect purchaser plaintiffs seeking relief under the consumer protection statutes of twenty different state jurisdictions:

> This Court would similarly confuse Article III standing and *Federal Civil Rule 23*'s requirements if it would, at this stage, dismiss all state-law claims but those of the jurisdictions in which the named Indirect Purchaser Plaintiffs reside, or to which they are connected. Both the named Indirect Purchaser Plaintiffs and **[*19]** the absent members of the putative class identify the same general cause for their injuries: the alleged price-fixing

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[11] An order directing that Plaintiff's notice of additional allegations (DE 159) be unsealed is entered separately. *See also* DE 158 and DE 162. The Court has considered Defendants' response to the supplemental allegations, and for the reasons herein, does not find that the arguments made by Defendants compel denial of the motion to amend.

[12] The Court further notes that the tolling argument based on fraudulent concealment may be academic to the extent that it is simply an alternative to Plaintiff's contention that the amended complaint is not untimely because of alleged ongoing antitrust violations, a contention with which the Court concurs as discussed herein.

[13] Plaintiff also notes that the district court in *Packaged Ice II* failed to consider the *Fallick* decision in its opinion. DE 153 at 16.

[14] As discussed *supra*, the futility analysis is the equivalent of a *Rule 12(b)(6)* analysis. *See* *Rose, 203 F.3d at 421 (6th Cir. 2000)* ("[A] proposed amendment is futile only if it could not withstand a *Rule 12(b)(6)* motion to dismiss.").

> and customer allocation conspiracy. The named Indirect Purchaser Plaintiffs merely seek relief for themselves under the statutes of the jurisdictions in which they reside, and seek similar relief for absent class members under the antitrust and consumer protection statutes of each such class member's state. Properly understood, neither plaintiff grouping seeks relief for themselves under the laws of a foreign state jurisdiction. The [amended complaint] contains a mixture of state-law claims *only* because the Indirect Purchaser Plaintiffs bring this suit as a proposed class action.

In re Polyurethane Foam Antitrust Litig., 799 F. Supp. 2d 777, 806 (N.D. Ohio 2011) (emphasis in original). Similarly, the Court follows the *Fallick* decision in concluding that the current standing dispute, which has been raised by Defendants in response to a motion for leave to amend a complaint, would be more appropriately addressed following a ruling on class certification. *See* *In re Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 1:14-MD-2508, 2015 U.S. Dist. LEXIS 121620, 2015 WL 5166014, at *19 (E.D. Tenn. June 24, 2015)* ("If the Court were to decide the standing issue at this juncture on the basis that the named plaintiffs do not reside in some of **[*20]** the states under whose laws they bring claims on behalf of the class, it would not be giving due appreciation to the complex nature of Article III standing in class actions and the nuances of class certification."); *see also* *In re Auto. Parts Antitrust Litig., No. 12-MD-02311, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *11 (E.D. Mich. June 6, 2013)* ("[T]he Court finds the better path is to defer this issue until the class certification stage."). The Court therefore rejects Defendants' futility arguments as to standing for purposes of this motion to amend.

(4) The Purported Class

Defendants assert that Plaintiff's attempt to "rewrite its class definition" to include indirect purchasers of enoxaparin from 31 different jurisdictions is both futile and unduly prejudicial. DE 148 at 26-27.[15] Defendants argue that neither NGH nor DC 37 fit within their proposed class of plaintiffs because: (a) neither entity indirectly purchases enoxaparin "for their own use and not for resale" as described in the proposed class (DE 143 at ¶¶ 82-83), with NGH instead reselling enoxaparin through the NGH pharmacy and DC 37 reimbursing its members for their use of enoxaparin; and (b) the interests of the indirect purchasers, such as NGH, the end-payors, such as DC 37, and the actual **[*21]** consumers of enoxaparin all conflict, a scenario that Defendants contend "will plunge this case into chaos." DE 148 at 27-29.

Defendants' arguments again broach precisely the types of issues that are better suited for a class certification determination (or at the very least a *Rule 12(b)(6)* analysis). This point is perhaps best accentuated by the dearth of case law cited by Defendants involving a district court's denial of a motion to amend a complaint based on proposed changes to a class definition. The Court acknowledges that Defendants have cited one such decision from the Eastern District of New York, *Pierre v. JC Penney Co.*, in which a motion to amend was denied, to support their argument that futility has served as a basis for courts to deny motions seeking leave to amend a complaint to include a redefined class of proposed plaintiffs. DE 148 at 27. The facts in that case, however, are distinguishable from the instant matter, including the significant difference that the district court had already allowed the plaintiffs in *Pierre* to amend their complaint on two occasions. *Pierre, No. 03-4782, 2006 U.S. Dist. LEXIS 6471, 2006 WL 407553, at *1 (E.D.N.Y. Feb. 21, 2006)*.[16] The court ultimately held that the third amended complaint proposed by

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[15] Defendants also argue (*see* DE 163) that Plaintiff is definitionally excluded from its own proposed new class (*see* DE 159) because the class excludes persons who transacted in generic enoxaparin or Lovenox® for purposes of resale, and the motion to amend must therefore be denied as futile. First, the Court agrees with Plaintiff that there is a reasonable construction of this class definition (*see* DE 166); namely, that Plaintiff is not excluded from the class, but can only claim damages for transactions where Plaintiff dispenses to patients at its own cost, which was previously alleged by Plaintiff (*see* DE 143 at ¶ 11). The Court further concurs that this is a semantics issue at best; nevertheless, to address Defendants' strained interpretation of the class definition, the Court will permit insertion of the word "only" in Plaintiff's class exclusion, as proposed by Plaintiff. *See* DE 166 at 2, n.1. Finally, for all of the reasons stated herein, the Court finds that Defendants' arguments about the propriety of the class do not compel a finding of futility for purposes of a motion to amend.

the *Pierre* plaintiffs, which sought **[*22]** to add new causes of action, utterly failed to state an actionable claim under *42 U.S.C. § 1981*, thus rendering the proposed amendments futile. *2006 U.S. Dist. LEXIS 6471, [WL] at *4*. Even then, the court denied the motion without prejudice to allow the plaintiff an opportunity to seek amendment of the proposed class. *2006 U.S. Dist. LEXIS 6471, [WL] at *6-7*. This is far from analogous to the facts at issue here.

Defendants claim that the proposed amended complaint's class definition fails to cover Plaintiff because it seeks to encompass all individuals and entities residing in the United States that indirectly purchased enoxaparin "for their own use and not for resale." DE 143 at ¶¶ 82-83. Defendants note that Plaintiff identified itself in the original complaint as an entity that buys enoxaparin and "dispenses the drugs to hospital patients or re-sells them through the NGH pharmacy." DE 1 at ¶ 11. However, even if the Court chose to hold Plaintiff to its original complaint, that initial definition does not definitively--and especially not at this stage of this proceeding--exclude Plaintiff from seeking damages based on its dispersal of enoxaparin to patients at NGH, sometimes at its own cost (DE 143 at ¶ 11), separate from its resale of enoxaparin through its pharmacy. Regardless, **[*23]** such parsing of definitions is not appropriate at this stage of litigation in light of the liberal pleading standard set forth by *Rule 15*. *See* *Broughton v. St. John Health Sys., 246 F. Supp. 2d 764, 775 (E.D. Mich. 2003)* ("***HN12***[] Granting leave freely under *Rule 15* 'reinforce[s] the principle that cases should be tried on their merits rather than the technicalities of pleadings.'") (quoting *Tefft, 689 F.2d at 639*).

Defendants' argument with respect to DC 37 is similarly unpersuasive. Defendants employ semantic dexterity to contend that DC 37 does not fit within the proposed class definition because DC 37, as a health and welfare benefit plan, does not "use" enoxaparin as described in the proposed class definition. DE 148 at 28. Yet the amended complaint defines DC 37 as an entity that "indirectly purchased, paid, and reimbursed for Lovenox® and/or generic enoxaparin intended for consumption by its members, retirees, and their families[.]" DE 143 at ¶ 12. The proposed class definition with respect to indirect purchasers includes "[a]ll persons and entities that ... indirectly purchased ... for their own use and not for resale Lovenox® or generic enoxaparin." *Id. at ¶ 83*. This appears to cover an entity that indirectly purchases the subject drugs and distributes them to its own members.

HN13[] A class representative **[*24]** must "possess the same interest and suffer the same injury as the class members." *Reid v. White Motor Corp., 886 F.2d 1462, 1471 (6th Cir. 1989)* (quoting *East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 1896, 52 L. Ed. 2d 453 (1977))* (internal quotations omitted). The amended complaint makes clear the allegation that DC 37, as an indirect purchaser, paid overcharges for Lovenox® and enoxaparin as a result of Defendants' monopolization efforts. *See* DE 143 at ¶¶ 3, 81, 119. The fact that DC 37 did not physically ingest these drugs, which appears to be the primary component of Defendants' argument, does not negate DC 37's involvement in indirectly purchasing them for subsequent use by their members. The Court also finds support for its determination in the decision in *In re Nexium Antitrust Litigation*, cited in Plaintiff's brief (DE 153 at 20-21), in which the First Circuit affirmed a district court's certification of a similarly described class with named plaintiffs who were "union health and welfare funds that reimburse plan members for prescription drugs," which consisted of "[a]ll persons or entities in the United States and its territories who purchased or paid for some or all of the purchase price for Nexium or its ABrated generic equivalents ... for consumption by themselves, their families, or their members, employees, **[*25]** insureds, participants or beneficiaries[.]" *777 F.3d 9, 13-14 (1st Cir. 2015)*.

Defendants' additional assertion that Plaintiff's proposed class definition is untenable due to potential conflicts between putative class members is similarly unavailing. Citing *In re Warfarin Sodium Antitrust Litig., 391 F.3d 516 (3d Cir. 2004)*, Defendants seamlessly claim that DC 37, NGH, and consumers are "fundamentally different groups that, at a minimum, require separate counsel and representatives to ensure adequate representation." DE 148 at 28. This, however, is a shallow interpretation of the Third Circuit's ruling, which actually rejected the very argument regarding class member conflict that Defendants in the instant case have proffered:

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[16] Notably, counsel for the plaintiffs failed to even appear for oral arguments on the motion for leave to amend the complaint. *Pierre, 2006 U.S. Dist. LEXIS 6471, 2006 WL 407553, at *1*.

> [W]e reject Appellants' contention that the interests of the class members were in conflict in such a way that the District Court abused its discretion in certifying a single class including several types of injured plaintiffs. As the District Court found, the named parties, who included consumers and [third party payors], as well as consumers from the indirect purchaser states, all shared the same goal of establishing the liability of DuPont, suffered the same injury resulting from the overpayment for warfarin sodium, and sought essentially the same damages **[*26]** by way of compensation for overpayment .... Although some courts have created subclasses of class action plaintiffs where there are conflicts of interest among class members ... we do not believe that this was required in this case. Appellants have only asserted, rather than established, an inherent conflict among consumers and between consumers and [third party payors].

Warfarin Sodium, 391 F.3d at 532-33. The fact that the Third Circuit viewed favorably the presence of separate counsel for the consumers and third party payors does not amount to a mandate that such separate representation exist in every class action suit. This alone is sufficient to overcome any assertion by Defendants that Plaintiff's proposed amendment in this regard is futile. *See* *id. at 533* ("Appellants have only asserted, rather than established, an inherent conflict among consumers and between consumers and [third party payors].").

Defendants further argue that NGH has abandoned its previous position as a direct purchaser and now seeks to improperly fundamentally change the nature of this case by shoehorning indirect purchaser claims into the lawsuit, thus causing undue prejudice to Defendants. DE 148 at 29-31. Defendants cite several cases in support of **[*27]** this position, although none support denial of a motion to amend in a case involving facts similar to those currently before the Court. *See* *Town of Lexington v. Pharmacia Corp. Solutia, No. 12-cv-11645, 2015 U.S. Dist. LEXIS 36814, 2015 WL 1321448, at *4 (D. Mass. Mar. 24, 2015)* (denying motion to file amended complaint that changed theory of case from defendants' failure to regulate levels of polychlorinated biphenyls in schools to defendants' negligence in using contaminated caulk that allegedly caused increased levels of polychlorinated biphenyls); *Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc., 156 F.3d 49, 51 (1st Cir. 1998)* (affirming district court's denial of motion to amend complaint that was filed near the close of discovery period, which had been extended on three previous occasions, and added a new defendant); *Davis v. Lenox Hill Hosp., No. 03-cv-3746 DLC, 2004 WL 1926086, at *4 (S.D.N.Y. Aug. 31, 2004)* (denying motion to amend that was filed after the close of class discovery); *Bissell Homecare, Inc. v. PRC Indus., No. 1:13-cv-1182, 2014 U.S. Dist. LEXIS 104294, 2014 WL 3756131, at *16 (W.D. Mich. July 31, 2014)* (finding that a motion to amend the complaint that was not filed until after the opposing party's motion to dismiss for lack of personal jurisdiction was pending, and several months "after the basis of the amendment was or should have been known to Plaintiff based on Defendant's Answer," should **[*28]** be denied); *National Union Fire Ins. Co. v. Continental Illinois Corp., 113 F.R.D. 527, 531 (N.D. Ill. 1986)* (denying defendant's motion to join excess insurers as counterclaim defendants under *Fed. R. Civ. P. 13(h)*); *Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)* (affirming district court's denial of motion to amend complaint that sought to change action from enforcement of an Indian tribe's sovereign power under federal common law to new federal claims involving the *Racketeer Influenced and Corrupt Organizations Act*, criminal depredation and trespass statutes, and claims brought pursuant to *42 U.S.C. § 1985*); *Mississippi Ass'n of Cooperatives v. Farmers Home Admin., 139 F.R.D. 542, 542-43 (D.D.C. 1991)* (denying motion to amend complaint in a case brought under the *Freedom of Information Act* in which "the bulk of the documents" sought by the subject plaintiffs had already been provided before plaintiffs moved to add new parties and claims involving alleged civil rights violations and the *Administrative Procedure Act*).

In contrast, the proposed amended complaint in the instant matter continues to assert antitrust violations committed by Defendants, but now focuses on statutes from 31 jurisdictions that permit "indirect purchaser" standing, thus purportedly curing the defect contained in the original complaint that precluded Plaintiff from seeking damages pursuant to *Illinois Brick*. This is a far cry from "plung[ing] this case into chaos," as Defendant **[*29]** claims. DE 148 at 29. Of note, Plaintiff reports that Defendants "have propounded no affirmative discovery and no expert work has occurred." DE 153 at 19. Defendants' assertion of undue prejudice at this stage of litigation rings hollow, and the Court therefore finds no compelling reason to deny the motion to amend as either futile or unduly prejudicial based on the class certification issues.

(5) Unjust Enrichment

Defendants finally argue that Plaintiff's unjust enrichment claim is futile and thus subject to dismissal solely because the amended complaint does not specify which of the unjust enrichment laws from the various states are being invoked. DE 148 at 31. Defendants again rely on the *Packaged Ice II* decision, in which the district court dismissed the "undifferentiated unjust enrichment claims" proffered by indirect purchasers because such claims "did not identify the states under whose laws they brought their claims." *779 F. Supp. at 667-68* (citing *In re Chocolate Confectionary Antitrust Litig., 602 F. Supp. 2d 538, 587 (M.D. Pa. 2009))*.

There is support for Defendants' argument that Plaintiff's failure to identify any of the laws under which its unjust enrichment claims might proceed warrants dismissal of such claims. *See* *Auto. Parts, 2013 U.S. Dist. LEXIS 80338, 2013 WL 2456612, at *31* (holding that the indirect purchaser plaintiffs' "failure to identify **[*30]** the unjust enrichment laws of any particular jurisdiction subjects the causes of action to dismissal"). However, given the liberal standard contained in *Fed. R. Civ. P. 15(a)*, the Court finds that dismissal is not appropriate based on the alleged futility of the proposed unjust enrichment claim. The Court finds persuasive the course taken in the *Chocolate Confectionary* decision, which is cited favorably in *Packaged Ice II*, and in which the district court provided the subject plaintiffs an opportunity to amend their complaint to identify the laws under which their proposed unjust enrichment claims would proceed. *See* *Chocolate Confectionary, 602 F. Supp. 2d at 587 (M.D. Pa. 2009)* ("The ... plaintiffs will be permitted to pursue these [unjust enrichment] claims in the form of a second amended complaint provided, however, that they clearly identify the state jurisdictions invoked therein."). The Court also relies on the district court's decision in *In re Static Random Access Memory (SRAM) Antitrust Litig., 580 F. Supp. 2d 896 (N.D. Cal. 2008)*, another case cited favorably in both the *Packaged Ice II* opinion and Defendants' brief (DE 148 at 31-32), which similarly permitted the subject indirect purchaser plaintiffs to cure this defect. *See* *SRAM, 580 F. Supp. 2d at 910* ("[T]he Court dismisses Plaintiffs' unjust enrichment claim with leave to amend. If Plaintiffs re-plead this claim, they must **[*31]** identify which State's or States' law they rely upon."). For all of these reasons, the Court finds that permitting Plaintiff to modify its proposed amended complaint to identify the unjust enrichment claims by state, rather than denying amendment at all, is the most consistent with *Fed. R. Civ. P. 15*.

III. CONCLUSION

Based on the foregoing, Plaintiff's motion for leave to file an amended complaint (DE 140) is GRANTED, with the additional allegations described in Plaintiff's notice filed on September 15, 2017 (DE 159), and the additional modification that Plaintiff specify the state laws under which it asserts its unjust enrichment claims. Plaintiff shall file this amended complaint within seven (7) days of the date of entry of this Order. Defendant shall have 28 days after the filing of the amended complaint to answer or otherwise respond.[17]

Any party objecting to this memorandum opinion and order may seek review by way of a "motion for review" in accordance with Local Rule 72.02(b), which must be filed within fourteen (14) days after service of this memorandum and order.

It is SO ORDERED.

/s/ Barbara D. Holmes

BARBARA D. HOLMES

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[17] Although the Court previously entered an order (DE 139) allowing Defendants thirty days from entry of any order granting the motion to amend to file an answer or other response, that order did not necessarily contemplate that further modification of the amended complaint might be directed. Additionally, given that the Federal Rules of Civil Procedure generally compute time in increments of seven (7) days, the time for Defendants to respond is amended to allow for a 28-day (rather than a 30-day) response. *See also* *Fed. R. Civ. P. 15(a)(3)*.

United States Magistrate Judge

FTC v. Sanford Health

United States District Court for the District of North Dakota

December 15, 2017, Decided; December 15, 2017, Filed

Case No. 1:17-cv-133

Reporter

2017 U.S. Dist. LEXIS 215937 *; 2017-2 Trade Cas. (CCH) P80,269

Federal Trade Commission and State of North Dakota, Plaintiffs, vs. Sanford Health, Sanford Bismarck, and Mid Dakota Clinic, P.C., Defendants.

Subsequent History: Affirmed by *FTC v. Sanford Health, 926 F.3d 959, 2019 U.S. App. LEXIS 17741 (8th Cir. N.D., June 13, 2019)*

Prior History: *FTC v. Sanford Health, 2017 U.S. Dist. LEXIS 227240 (D.N.D., Oct. 30, 2017)*
In re Sanford Health, 2017 FTC LEXIS 93 (Fed. Trade Comm'n, June 21, 2017)

Core Terms

merger, provider, proposed transaction, patients, adult, healthcare, insurers, post-merger, network, relevant market, effects, leverage, pediatricians, service line, health insurance plan, general surgeon, Guidelines, buyer, bargaining, substitutes, negotiate, reimbursement rate, anticompetitive, plaintiffs', savings, consummated, geographic, employees, clinic, concentration

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For Medica Health Plans, Party added for the purpose of filing pleadings pursuant to protective order, Movant: Christopher M. Proczko, LEAD ATTORNEY, Mark A. Jacobson, Lindquist & Vennum LLP, Minneapolis, MN.

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Judges: Alice R. Senechal, United States Magistrate Judge.

Opinion by: Alice R. Senechal

Opinion

MEMORANDUM OF DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

Alleging that a proposed transaction between two healthcare **[*3]** providers—Sanford Health/Sanford Bismarck and Mid Dakota Clinic, P.C.—would substantially lessen competition and cause significant harm to consumers, the Federal Trade Commission and the State of North Dakota brought this action to preliminarily enjoin consummation of the proposed transaction pending an FTC administrative hearing. The administrative hearing is currently scheduled to begin on January 17, 2018.[1]

The parties stipulated to entry of a temporary restraining order, under which the proposed transaction cannot be closed until five business days after the court rules on the plaintiffs' motion for a preliminary injunction. (See Doc. #7).

Pursuant to *28 U.S.C. § 636(c)*, all parties consented to jurisdiction of a magistrate judge. (Doc. #39). Beginning on October 30, 2017, the undersigned magistrate judge held a four-day evidentiary hearing on the motion for a preliminary injunction.[2] At that hearing, the court received over 1600 exhibits—all admitted pursuant to stipulation by all parties—and heard testimony from sixteen witnesses. Following conclusion of the hearing, the parties submitted proposed findings of fact and conclusions of law. The court's review of documents received into evidence has been **[*4]** limited to those portions of the documents addressed during hearing testimony or cited in the parties' proposed findings of facts and conclusions of law.

The plaintiffs contend that the pending transaction would unlawfully lessen competition among four physician service lines—adult primary care physician (PCP) services, pediatrician services, obstetrician/gynecologist (OB/GYN) physician services, and general surgeon services—in the Bismarck-Mandan, North Dakota, Metropolitan Statistical Area (Bismarck-Mandan area), which includes the counties of Burleigh, Morton, Oliver, and Sioux. The defendants argue that the plaintiffs' position does not adequately consider the impact of a powerful buyer—Blue Cross Blue Shield of North Dakota (BCBSND). The defendants assert that the presence of that powerful buyer would preclude any anticompetitive effects that might otherwise result from the proposed transaction and that the proposed transaction would benefit consumers in the Bismarck-Mandan area.

[1] At the time of the preliminary injunction hearing, the administrative hearing was scheduled to begin on November 28, 2017, within the five-month period provided by *16 C.F.R. § 3.11(b)(4)*. The administrative law judge has since granted an extension to January 17, 2018.

[2] Because some of the testimony concerned sensitive and confidential business information of the defendants and of third parties, portions of the hearing were not open to the public. For the same reason, certain of the exhibits have been sealed and are not available to the public. Portions of this decision have been redacted to preserve that confidentiality.

Having fully considered the hearing testimony, the exhibits as described above, and the briefs of the parties, the court makes the following findings of fact and conclusions of law. In doing so, however, **[*5]** the court notes that its determinations cannot all be "neatly categorized as either findings of fact or conclusions of law." *FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 335 (3rd Cir. 2016)*.

FINDINGS OF FACT

I. Sanford, MDC, and Third-Party Medical Facilities

1. Sanford is a not-for-profit, vertically integrated healthcare system which operates in nine states and in three foreign countries. An integrated healthcare system is one comprised of both hospital services and physician services and which sometimes also includes insurance companies and research and education components. (Tr-3, p. 9). Most of Sanford's facilities are located in North Dakota, South Dakota, and Minnesota. As a result of its recent acquisitiveness, Sanford's system now includes 45 hospitals, 289 clinics, more than 1,300 physician employees, and approximately 26,700 non-physician employees. (PX 4198, p. 7; PX 4128, p. 12; PX 8139, p. 1). Kelby Krabbenhoft, Sanford CEO, described Sanford's strategies as based on a premise that larger integrated healthcare systems are more successful in providing quality care. Sanford describes itself as a physician-driven organization, which benchmarks itself against other nationally recognized healthcare systems that it considers its primary competitors. **[*6]** (JX 0028, pp. 21-22, 31; Tr-3, pp. 22-27).

2. Sanford entered the North Dakota healthcare market in 2009 when it acquired Meritcare—an integrated healthcare system—in Fargo. (PX 6000, p. 17). In 2012, Sanford entered the healthcare market in Bismarck through its acquisition of an integrated healthcare system—MedCenter One—now known as Sanford Bismarck. (DX 2011, p. 11). Sanford's Bismarck-Mandan operations now include a 217-bed acute care hospital, eight primary care clinics, and several specialty clinics. (Doc #11, pp. 7-8; Doc. #25, p. 5). In the Bismarck-Mandan area, Sanford employs approximately 160 physicians. Its Bismarck-Mandan physician employees include 37 adult PCPs, five pediatricians, eight OB/GYN physicians, and four general surgeons. Sanford is the largest non-government employer in the Bismarck-Mandan area, as well as the largest non-government employer in the state of North Dakota. (PX 6000, p. 18; PX 8143, p. 1; Tr-3, pp. 10-11). In 2016, Sanford generated approximately [TEXT REDACTED BY THE COURT] in total revenue in North Dakota, approximately [TEXT REDACTED BY THE COURT] of which it generated through its Bismarck-Mandan operations. (DX 6004, p. 4).

3. MDC is a multispecialty **[*7]** for-profit physician group owned by approximately 53 of the approximately 60 physicians who practice there. (Doc. #11, p. 8; Doc. #27, p. 5). MDC's physicians include 23 adult PCPs, six pediatricians, eight OB/GYN physicians, and six general surgeons. Id. MDC also employs nineteen nurse practitioners and physician assistants as advanced practice providers (APPs). MDC operates only in Bismarck, where it has nine clinics in five locations and an ambulatory surgery center. (DX 6002, pp. 1-2). During fiscal 2016, MDC generated in revenue. Id. at 2.

4. Catholic Health Initiatives (CHI) operates the only other acute care hospital in the Bismarck-Mandan area—CHI St. Alexius—which CHI acquired in 2014. CHI operates in eighteen states, in which it employs approximately 4,300 physicians and advanced practice clinicians.[3] In Bismarck-Mandan, CHI employs approximately 88 physicians; its physician employees include five adult PCPs but no OB/GYN physicians, pediatricians, or general surgeons. (PX 3009, pp. 1-2, 4-5). Apart from the five PCPs, CHI St. Alexius's physician employees primarily work as hospitalists and in other hospital-based specialities. Id. at 3. CHI's five PCPs practice at a clinic **[*8]** in Mandan, id. at 2, but [TEXT REDACTED BY THE COURT]. Physicians currently practicing in Mandan will [TEXT REDACTED BY THE COURT].

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[3] See Catholic Health Initiatives, "Overview 2016," http://www.catholichealthinitiatives.org/documents_public/Overview%20Brochure/2 016%20Overview%20Brochure.pdf; Catholic Health Initiatives, "Financial Report 2016," http://chiannualreport.net/pdf/Financial-Report.pdf .

5. For a number of years, MDC and CHI St. Alexius have had a referral relationship. MDC is the largest source of referrals for inpatient admissions at CHI St. Alexius, with MDC referrals accounting for [TEXT REDACTED BY THE COURT] of the inpatient admissions. MDC's primary care physicians frequently refer their patients to CHI St. Alexius specialists. Id. MDC and CHI together own PrimeCare, a physician-hospital entity which negotiates and contracts with health insurance plans on behalf of its members, including MDC's physicians. (DX 6034; PX 3009, p. 7; Tr-1, p. 82). MDC and CHI have professional services agreements under which, for example, MDC general surgeons provide coverage for trauma cases at CHI St. Alexius. The president of CHI St. Alexius, Kurt Schley, described the services of MDC and CHI St. Alexius as complementing each other. (Tr-1, p. 81).

6. In the Bismarck-Mandan area, approximately ten primary care physicians practice with entities other than Sanford, MDC, or CHI. Of those ten, six are employed by the University of North Dakota Center **[*9]** for Family Medicine (UND-CFM). (PX 3009, p. 2). Apart from those employed by Sanford, MDC, or CHI, only one OB/GYN physician and one pediatrician practice in the Bismarck-Mandan area. There are no general surgeons in the Bismarck-Mandan area apart from those practicing at Sanford or MDC. (Tr-1, p. 92).

II. Health Insurance Plans

7. BCBSND is the largest health insurer operating in the Bismarck-Mandan area and is also the largest health insurer operating in the state of North Dakota as a whole. BCBSND is a not-for-profit mutual insurance company. It currently insures approximately [TEXT REDACTED BY THE COURT] persons in the state—approximately [TEXT REDACTED BY THE COURT] covered through employer group plans and approximately [TEXT REDACTED BY THE COURT] covered through individual plans or Medicare supplement plans. In the Bismarck-Mandan area, approximately [TEXT REDACTED BY THE COURT] persons are covered by BCBSND commercial health insurance plans. (PX 3014, p. 2).

8. BCBSND has participation agreements with every general acute care hospital in North Dakota and with 98% of the physicians practicing in the state. Id. In the Bismarck-Mandan area, BCBSND has participation agreements with **[*10]** both general acute care hospitals (Sanford and CHI) and with 99% of the practicing physicians. Id. at 3.

9. BCBSND offers both "fully insured" and "self-insured" plans. Under self-insured plans, employers collect premiums from their employees and pay the full cost of employees' healthcare, with employers bearing the risk that healthcare costs might exceed premiums. Under self-insured plans, an employer pays BCBSND for administration of its employees' claims. By contrast, under fully-insured plans, BCBSND collects premiums from employers and pays the cost of the employees' healthcare, with BCBSND bearing the risk that healthcare costs might exceed premiums. (Doc. #62-1, p. 4).

10. In the Bismarck-Mandan area, BCBSND markets "point of service plans" and "preferred provider plans." In its point of service plans, a subscriber must choose to affiliate with either Sanford or PrimeCare. Physicians practicing with the chosen entity are considered to be "in-network" for the subscriber. Absent a referral, subscribers have higher out-of-pocket costs for care received from non-network physicians than for care received from in-network physicians. (Tr-1, p. 259). Employers receive a [TEXT REDACTED **[*11]** BY THE COURT] by choosing point of service plans because the provider networks in those plans are more narrow. Approximately [TEXT REDACTED BY THE COURT] persons in the Bismarck-Mandan area, including [TEXT REDACTED BY THE COURT], are enrolled in one of the BCBSND point of service plans. Id. at 296.

11. BCBSND recently began offering a value-based program to primary care providers. Provider participation in the program is voluntary. Under the value-based program, BCBSND examines an insured's claims and "attributes" the insured to the provider considered most likely responsible for that insured's primary care. Providers receive a "care management fee" based on the number of insureds attributed to the provider. BCBSND then analyzes certain quality-based metrics of patient care. Dependent on results of that analysis, a provider may receive a "shared savings" payment from BCBSND. Both Sanford Bismarck and MDC currently participate in the value-based program. Sanford's Fargo region also participates in the value-based program. At Sanford's request, contracts for its participation in the two regions are separate, [TEXT REDACTED BY THE COURT]. (PX 3014, pp. 9-11; Tr-1, pp. 251-55; Tr-3, pp. **[*12]** 162-64).

12. Sanford also operates a health insurance plan—Sanford Health Plan (SHP)—which sells health insurance in four states, including North Dakota. SHP covers approximately [TEXT REDACTED BY THE COURT] insureds in North Dakota. (PX 4255, p. 1). In 2015, through a competitive bid process, Sanford was awarded a contract with the North Dakota Public Employees Retirement System (NDPERS). Sanford had bid on the NDPERS contract twice before. For many years prior to 2015, BCBSND held the NDPERS contract. The current Sanford/NDPERS contract runs through 2019 and covers approximately 66,000 members in North Dakota. (DX 6000, p. 11; DX 6005, p. 2; PX 4255, p. 1). In addition to state employees, NDPERS covers employees of some political subdivisions within the state. Recently, the City of Fargo entered into a contract under which the City's employees will be covered by BCBSND rather than through NDPERS as they are currently. (Tr-1, p. 298). In North Dakota, SHP has approximately [TEXT REDACTED BY THE COURT] members, including those covered under the NDPERS contract and North Dakota's Medicaid expansion program. (JX 0009, p. 12).

13. The parties dispute whether the NDPERS contract should be **[*13]** considered as commercial insurance or as a hybrid commercial/government program. Regardless of whether the NDPERS contract is considered a commercial plan, SHP is the second-largest commercial insurer in the state. (PX 6000, p. 120).

14. SHP markets "narrow network" products in the Bismarck-Mandan area—to individuals and employers, Medicare recipients, and Sanford employees—which do not include MDC as a network provider. Plans with narrower provider networks are typically priced lower than plans which include more provider options. (JX 0026, pp. 13-14; JX 0004, pp. 220-21; JX 0007, pp. 22-23, 27-78; JX 0009, pp. 25-26). **15**. Medica, a regional health insurance company, is the third-largest commercial health insurer in the Bismarck-Mandan area, with approximately [TEXT REDACTED BY THE COURT] members in that area. (Tr-1, p. 190). Medica currently has provider network agreements with both Sanford and PrimeCare. In July 2017, Medica and Sanford signed a [TEXT REDACTED BY THE COURT] contract, [TEXT REDACTED BY THE COURT]. (JX 0083; Tr-1, pp. 190-91).

III. Proposed Transaction

16. In 2015, MDC offered itself for sale by requesting purchase proposals from two entities—CHI and Sanford. Both CHI **[*14]** and Sanford submitted proposals, and MDC's shareholders initially voted to accept CHI's proposal. In February 2016, MDC and CHI signed a Letter of Intent (LOI) for CHI's purchase of MDC. (DX 4008). But, on March 28, 2016—three days before the LOI's deadline for doing so—CHI gave written notice of its termination of the LOI and discontinued negotiations for purchase of MDC. The decision to terminate the LOI was made at CHI's corporate level, not by local administrators. (JX 0016, p. 114).[4] In terminating the LOI, CHI stated it did so because of [TEXT REDACTED BY THE COURT]. (DX 4079).

17. After CHI terminated the LOI, MDC reinitiated discussions with Sanford. On August 22, 2016, Sanford and MDC signed a term sheet for Sanford's purchase of MDC. The term sheet provides for Sanford's purchase of all MDC practice assets, MDC's real estate and other tangible assets, and retention loans for MDC physicians who join Sanford after consummation of the transaction. It also provides for Sanford's acquisition of real estate and other assets owned by Mid Dakota Medical Building Partnership, an entity which leases a building to MDC. On approximately June 19, 2017, Sanford and MDC signed a stock **[*15]** purchase agreement. The total value of the proposed Sanford/MDC transaction is approximately [TEXT REDACTED BY THE COURT]. (JX 0042, p .1).

18. The FTC, together with the North Dakota Attorney General, investigated the proposed transaction for eight months. The FTC's work included taking testimony via investigational hearing. Three days after Sanford and MDC

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[4] JX 0016, p. 114 refers to the conventionally filed exhibit; the document also appears in the electronic docket as JX 0016, p. 30. (See Doc. #131-7).

signed the stock purchase agreement, the FTC and the State initiated this action. On that same day, the FTC initiated an administrative proceeding on the antitrust merits. (Doc. #11, p. 10).

19. Subsequent to Sanford and MDC signing their term sheet in August 2016, there were discussions between MDC and CHI St. Alexius [TEXT REDACTED BY THE COURT]. After the FTC announced its challenge to the transaction, Schley sent an email to CHI St. Alexius staff members. That email—authored at least in part at CHI's corporate headquarters—expressed CHI's support of the FTC's action and referred to the proposed transaction as harming the community by increasing physician fees, reducing quality, and eliminating choice. (DX 3010).

20. MDC physicians were angered and offended by Schley's email. [TEXT REDACTED BY THE COURT] testified that, during **[*16]** a July 5, 2017 meeting with [TEXT REDACTED BY THE COURT], [TEXT REDACTED BY THE COURT] told him that the [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT] testified that he responded that he would testify truthfully. [TEXT REDACTED BY THE COURT] denied telling that [TEXT REDACTED BY THE COURT], and [TEXT REDACTED BY THE COURT] considers it to be [TEXT REDACTED BY THE COURT]. Handwritten notes which [TEXT REDACTED BY THE COURT] made during the July 5th meeting were received into evidence, as was an email he sent to his superiors at [TEXT REDACTED BY THE COURT] and to [TEXT REDACTED BY THE COURT] counsel later that day. The email summarizes [TEXT REDACTED BY THE COURT] perspectives on the meeting. (PX 7040; PX 7099).

21. Schley testified that CHI [TEXT REDACTED BY THE COURT]. But, MDC representatives testified that MDC would no longer have an interest in merging with CHI because of CHI's termination of the LOI and because the Schley email had deteriorated the relationship between MDC and CHI.

IV. Two Stage Healthcare Competition

22. This case is focused on patients covered by commercial health insurance, i.e., those patients not covered by government programs such as Medicare and **[*17]** Medicaid. Most patients covered by commercial health insurance obtain their coverage through their employer or through a family member's employer. Commercial health insurers—rather than patients who receive the services—are typically the direct purchasers of healthcare services. Commercial insurers and healthcare providers enter into contracts which set rates and other terms under which the insurers reimburse the providers for services provided to patients. (PX 6000, pp. 22-23; Tr-2, pp. 50-52, 60-61). In analyzing potential anticompetitive effects of a merger involving healthcare entities, it is therefore necessary to consider the merger's likely impact on commercial health insurers.

23. Healthcare providers compete for commercially insured patients in two stages. In the first stage, healthcare providers compete to be included as "in-network" providers in the plans which commercial insurers offer to their customers. Commercial insurance plans typically incentivize their insureds to use in-network providers by providing less coverage for care that insureds receive from out-of-network providers. In the second stage, healthcare providers compete with other in-network providers to attract **[*18]** patients. (Tr-2, pp. 51-52; PX 6000, pp. 22-23).

A. First-Stage Competition

24. At the first stage of competition, healthcare providers and commercial insurers negotiate reimbursement rates and non-monetary reimbursement terms. Non-monetary terms include, e.g., length of an agreement or time frames for reimbursement. Reimbursement rates are the most significant negotiated terms, but non-monetary terms are also important to the healthcare providers. (Tr-1, pp. 172-73; JX 0007, p. 35; PX 6000, p. 23).

25. The parties' experts testified about both "bargaining leverage" and "bargaining power," though their use of the terms was not completely congruent. The plaintiffs' economic expert, Dr. Seth Sacher, refers to the strength of a parties' position in a negotiation as that party's bargaining leverage. (Tr-2, p. 54). He distinguishes bargaining leverage from bargaining power, which he also refers to as bargaining skill. He considers bargaining power/skill to include factors that make one a good negotiator, such as patience, preparation, experience, and risk aversion. Id. at

55. Dr. Sacher testified that a merger of healthcare entities increases the bargaining leverage of the merged entity and **[*19]** decreases the bargaining leverage of the payer but does not impact bargaining power of either party. Id. at 57.

26. The defense expert, Dr. Robert Town, states that, though often used interchangeably in common parlance, bargaining leverage and bargaining power have distinct meanings in the "standard provider-payer bargaining model." (DX 6000, p. 23). Dr. Town refers to bargaining leverage as the degree of difficulty a commercial payer would have in marketing a network without the provider and bargaining power as determining whether providers can exploit their bargaining leverage into higher reimbursement rates. Id.

27. Experts for both sides agreed that each side's bargaining leverage determines the reimbursement and non-monetary terms to which the commercial insurers and healthcare providers agree. Each side's bargaining leverage is dependent on that party's "walk-away point," i.e., how well off each party would be if the healthcare provider were not included in the commercial insurer's network. The better off a party would be without an agreement, the better its walk-away point, and the greater its bargaining leverage. (Tr-2, p. 54; Tr-4, p. 110; PX 6000, pp. 25-27; PX 6003, p. 8). **[*20]**

28. A merged provider has increased bargaining leverage, dependent on (1) the market share of the merging providers in an area, (2) the extent to which health-plan subscribers regard the merging parties as close substitutes, and (3) the subscribers' perceptions of non-merging providers as ineffective substitutes. Experts for both sides agreed that the proposed transaction would give a post-merger Sanford increased bargaining leverage. (Tr-2, pp. 99-100, 103-04; Tr-4, p. 112; PX 6000, pp. 25-28).

29. When negotiating inclusion in a commercial insurer's network, a healthcare provider's walk-away point is determined by whether the insurer's subscribers would continue to seek care from that provider if the provider were not included in the commercial insurer's network. An insurer's walk-away point is determined by the value of the insurer's network to its insureds if the provider were not included in the insurer's network. (PX 6003, pp. 8-9; Tr-4, pp. 110-11; Tr-2, p. 53).

30. From a commercial insurer's perspective, the marketability of a health insurance plan depends largely on the insureds' ability to access a variety of quality in-network healthcare services that are geographically convenient. **[*21]** All else being equal, the more geographically convenient and high quality providers included in a health insurance plan, the more marketable that plan is to potential purchasers. (Tr-1, pp. 169-70, 230-31; PX 3014, p. 3). Currently, a network including either Sanford or MDC physicians in the four physician service lines at issue can support a marketable health insurance product in the Bismarck-Mandan area. (See JX 0009, p. 26; JX 0003, p. 12). BCBSND considers Sanford and MDC as alternatives to each other for insurance plan networks in the Bismarck-Mandan area for each of the four physician service lines at issue. (Tr-1, p. 243). Consequently, during contract negotiations, a commercial insurer can currently credibly threaten to exclude either Sanford or MDC from its Bismarck-Mandan provider network. (PX 3014, p. 7; PX 3016, p. 3).

31. One factor influencing a commercial insurer's bargaining leverage is the number of alternative healthcare providers in a geographic area. The fewer the number of alternative providers in the area, the greater the bargaining leverage of a large provider over a commercial insurer. If a large provider is no longer included in a commercial insurer's network **[*22]** in a geographic area with few alternatives, subscribers may choose to purchase insurance from another insurer. (Tr-1, pp. 174-77, 255-56; Tr-3, p. 173; PX 3014, pp. 5-6).

B. Second-Stage Competition

32. In the second stage of healthcare competition, in-network providers compete with each other to attract patients. Within a health insurance plan, there is little variance in out-of-pocket costs to patients receiving care from in-network providers, i.e., one insured receiving services from one network provider will have out-of-pocket costs equivalent to those of another insured receiving the same services from a competing network provider if both patients are insured by the same plan. Consequently, second-stage competition generally focuses on non-monetary factors which include, e.g., clinic hours, convenience of location, available services, technology, and quality. (Tr-2, pp. 58-59; Tr-3, pp. 80, 82; Tr-4, p. 141).

33. Witnesses testifying for both sides agreed that competition among providers improves the quality of services that patients receive and results in better patient outcomes. (JX 0014, p. 25; JX 0021, pp. 60-61; JX 0028, pp. 46, 187-88). More convenient access to providers is **[*23]** of benefit to patients. More convenient access helps providers attract and retain patients. One provider's improvements in convenient patient access may prompt a competing provider to also make its services more conveniently accessible to patients. (JX 0022, p. 35).

V. Physician Service Markets

34. Adult PCPs provide healthcare services to patients age 18 and over. Adult PCPs include board-certified family medicine physicians, internal medicine physicians, and general practice physicians. Adult PCPs are typically adult patients' first point of contact for healthcare, and they typically see patients in a clinic setting. Services provided by adult PCPs include physical exams, wellness visits, basic medical procedures, treatment of common illnesses and injuries, and long-term management of chronic conditions. Adult PCP services typically do not include invasive surgical procedures; rather, adult PCPs typically refer their patients to other healthcare specialists for those procedures. (Tr-1, pp. 83, 233; JX 0021, p. 8; JX 0011, p. 33).

35. Hearing testimony addressed whether physicians in other service lines could be substituted for adult PCPs in developing a marketable health insurance plan. **[*24]** Hospitalists—physicians whose training is focused on treating hospitalized patients—do not examine or treat patients in an out-patient setting. In constructing a marketable health insurance plan, hospitalists could therefore not be substituted for adult PCPs. Although some women utilize OB/GYN physicians as their primary provider, OB/GYN physicians are generally seen as complementary to adult PCPs and not as substitutes for adult PCPs. OB/GYN physicians do not see male patients. OB/GYN physicians could not be substituted for adult PCPs in constructing a marketable health insurance plan. Neither could pediatricians be substituted for adult PCPs in a marketable health insurance plan since pediatricians typically treat patients under age 18 and adult PCPs typically treat patients over age 18. (JX 0004, p. 34; Tr-1, pp. 86-87; JX 0014, p. 9).

36. While APPs provide some of the same services as adult PCPs, a health insurance plan that included APPs but excluded adult PCPs would not be marketable in the Bismarck-Mandan area. APPs are not trained to provide all of the services that adult PCPs provide. Though patients in more rural areas might accept APPs as their primary providers, Bismarck-Mandan **[*25]** residents often prefer an adult PCP over an APP for their primary care. (Tr-1, pp. 85, 181-82, 235-36).

37. Plaintiffs' expert economist, Dr. Sacher, analyzed the percentage of spending for "evaluation and management" visits in the Bismarck-Mandan area. His analysis demonstrates that approximately 74% of spending for adult PCP services, but only 26% of spending for specialists, falls into that category. Dr. Sacher also analyzed data which shows that approximately 6% of patients in the Bismarck-Mandan area received primary care services from an APP, while approximately 80% exclusively saw adult PCPs for "evaluation and management" visits. (PX 6000, pp. 32, 35-36, 49, 52-53, 214; Tr-2, pp. 69-70). Dr. Sacher's analysis confirms that neither specialist physicians nor APPs can be considered substitutes for adult PCPs in constructing a marketable health insurance plan network in the Bismarck-Mandan area.

38. Representatives of each of the three primary commercial insurers—BCBSND, SHP, and Medica—all agreed that an insurance plan's network must include adult PCPs in order to be marketable in the Bismarck-Mandan area. (PX 3014, p. 8; Tr-1, p. 179; Tr-3, pp. 185-86). Hearing testimony confirmed **[*26]** that a health insurance plan that did not include adult PCPs would not be valuable to an employer who provides health insurance coverage to its employees. (Tr-2, p. 162).

39. Currently, both Sanford and MDC offer adult PCP services. In the Bismarck-Mandan area, Sanford's adult PCPs provide 34.4% of the adult PCP services and MDC's adult PCPs provide 51.3% of the adult PCP services.

Post-merger, Sanford would provide 85.7% of the adult PCP services in the Bismarck-Mandan area, CHI would provide 7.9%, and the other providers would each provide 2% or less of the adult PCP services. (PX 6000, p. 164).

40. Pediatricians typically treat patients younger than age 18. Some family medicine physicians also treat patients in that age group, but many families prefer that their children receive medical care from a pediatrician. Families who choose family medicine physicians as their children's primary physician expect to have access to in-network pediatricians for more complex problems. (Tr-1, pp. 88-89, 234; JX 0002, pp. 19-20). Dr. Sacher's analysis demonstrates that nearly 80% of well-child visits for children age 14 and under in the Bismarck-Mandan area are performed by pediatricians. That data **[*27]** confirms a strong consumer preference for in-network access to services of pediatricians. (PX 6000, pp. 41, 216).

41. In constructing a marketable health insurance plan network, pediatric hospitalists could not be substituted for pediatricians since pediatric hospitalists do not treat patients in a clinic setting. There was no evidence that physicians in any other service line could be substituted for pediatricians in constructing a marketable health insurance plan network in the Bismarck-Mandan area. (Tr-1, pp. 89-90).

42. Representatives of each of the three primary commercial insurers—BCBSND, SHP, and Medica—all agreed that an insurance plan's network must include pediatricians in order to be marketable in the Bismarck-Mandan area. (Tr-1, pp. 179-80, 234; JX 0028, p. 50). Hearing testimony confirmed that an employer purchasing health insurance coverage for its employees in the Bismarck-Mandan area expects a plan's network to include pediatricians. (Tr-2, p. 163).

43. Currently, both Sanford and MDC offer pediatrician services in the Bismarck-Mandan area, with respective market shares of 34% and 64.6%. Post-merger, Sanford would provide 98.6% of the pediatrician services in the Bismarck-Mandan **[*28]** area. The only other provider of pediatrician services, UND-CFM, would have the remaining market share. (PX 6000, p. 170).

44. OB/GYN physicians provide services focused on prenatal care, management of labor and delivery, well-woman visits, contraception, management of menopause, diagnosis of gynecological cancers, and evaluation and treatment of various other diseases of female patients. Although adult PCPs and APPs provide some of the same services as OB/GYN physicians, OB/GYN physicians perform gynecological and obstetrical surgeries and provide complex obstetrical care that adult PCPs and APPs are not trained to perform. (JX 0014, p. 7; Tr-2, pp. 10-13; JX 0004, pp. 38-39).

45. There was no evidence that physicians in any other service line could be substituted for OB/GYN physicians in developing a marketable health insurance plan network. While general surgeons may perform some of the same procedures as OB/GYN physicians, they are not trained to provide the specialized care to female patients that OB/GYN physicians provide. Nor do laborists provide services of the same scope as OB/GYN physicians; laborists' services are only hospital based.

46. Representatives of each of the three **[*29]** primary commercial insurers—BCBSND, SHP, and Medica—all agreed that an insurance plan's network must include OB/GYN physicians in order to be marketable in the Bismarck-Mandan area. (Tr-1, pp. 180-81, 234-35; JX 0028, p. 51). Hearing testimony confirmed that an employer purchasing health insurance coverage for its employees in the Bismarck-Mandan area expects that a plan's network would include OB/GYN physicians. (Tr-2, p. 163). Female employees—and female family members of employees—who are of child-bearing age expect in-network access to OB/GYN physicians.

47. Dr. Sacher's analysis compared claims for services of adult PCPs in the Bismarck-Mandan area to those of OB/GYN physicians and demonstrated that OB/GYN physicians perform significantly more surgeries than adult PCPs and that OB/GYN physicians perform almost 98% of gynecological surgeries.

48. Currently, both Sanford and MDC offer OB/GYN physician services. Their respective market shares are 23.9% and 75.1%. The only other OB/GYN physician services available in Bismarck-Mandan are at UND-CFM. Dr. Jan Bury, one of the OB/GYN physicians currently practicing at MDC, will not practice at Sanford if the merger is consummated; she will **[*30]** either retire or practice at CHI St. Alexius. Assuming Dr. Bury would not practice at

Sanford and would not retire, a post-merger Sanford would control 84.6% of the OB/GYN physician services in the Bismarck-Mandan area. (PX 6000, pp. 78 n.4, 173; Tr-2, p. 23).

49. General surgeons typically perform surgeries involving organ systems from the sternum to the abdomen, including hernia repairs, gallbladder removals, colonoscopies, bowel resections, and appendectomies. General surgeons receive referrals from adult PCPs, pediatricians, and OB/GYN physicians for services that the referring physician is not able to provide. The services provided by general surgeons are distinct from the services provided by gastroenterologists, orthopedic surgeons, vascular surgeons, and cardiothoracic surgeons. (Tr-1, pp. 92, 236; JX 0021, p. 6; JX 0010, pp. 67-68). There is no evidence that any other physicians would be viable substitutes for general surgeons in developing a marketable health insurance plan network in the Bismarck-Mandan area.

50. Dr. Sacher's analysis of claims data shows that less than 5% of spending in the Bismarck-Mandan area for adult PCP services involves surgical procedures while 80% **[*31]** of spending for general surgeon services involves surgical procedures. His analysis also demonstrates that, although gastroenterologists and general surgeons perform some of the same procedures on organs of the digestive system, the services performed by gastroenterologists are primarily diagnostic in nature, and the services performed by general surgeons are more invasive and more diverse. (Doc. #6000, pp. 46-49, 219).

51. Representatives of each of the three primary commercial insurers—BCBSND, SHP, and Medica—all agreed that an insurance plan's network must include general surgeons in order to be marketable in the Bismarck-Mandan area. (Tr-1, pp. 180-81, 236; JX 0028, p. 51). Hearing evidence confirmed that an employer purchasing health insurance coverage for its employees in the Bismarck-Mandan area would consider in-network general surgeons an important component of a health insurance plan. (PX 3008, p. 6).

52. Of the general surgeon services in the Bismarck-Mandan area, Sanford currently provides 36.1% and MDC provides 63.7%. Post-merger, Sanford would be the only entity providing general surgeon services in the Bismarck-Mandan area. (PX 6000, p. 175).

VI. Definition of Relevant [*32] Market

53. In antitrust analysis, a relevant market identifies a set of products or services and a geographic area of competition in which to analyze the potential effects of a proposed transaction. The purpose of market definition is to identify options available to consumers.

54. The parties' principal dispute is the proper definition of a relevant market, specifically whether BCBSND's dominance should be considered in defining that market or whether it should instead be considered only as a defense.

55. For reasons discussed below,[5] this court finds it appropriate to consider BCBSND's dominance as a defense rather than as part of the market definition process.

56. The plaintiffs' proposed relevant market definition is derived from application of a hypothetical monopolist test (HMT). The HMT is an iterative process that begins by identifying a candidate market and then asking whether a hypothetical monopolist of that candidate market could profitably impose at least a "small but significant nontransitory increase in price" (SSNIP) over particular products or services. A SSNIP is typically considered to be five percent. If a hypothetical monopolist would find it profitable to **[*33]** impose at least a SSNIP in that candidate market, the conditions of the HMT are satisfied and the candidate market is considered the relevant market for purposes of antitrust analysis. If conditions of the HMT are not satisfied, the candidate market is expanded and the same analysis is applied to the expanded market. The process continues until conditions of the HMT are satisfied. (PX 6000, pp. 29-30; Tr-2, pp. 61-65; Tr-4, p. 91).

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[5] See infra, Conclusions of Law, Section III, Definition of Relevant Market.

57. Courts often use the HMT in defining relevant markets for purposes of antitrust analysis. *United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 51 (D.D.C. 2011)*. The Merger Guidelines issued by the FTC and the United States Department of Justice endorse use of the HMT. U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines §§ 4.1.1-4.1.3 (2010).

58. It is appropriate to use the HMT to define the relevant market in this case.

59. In healthcare merger cases, other courts have defined relevant markets in terms of specific types of physician services. See *Saint Alphonsus Med. Cent.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 (9th Cir. 2015)*; *Woman's Clinic, Inc. v. St. John's Health Sys., Inc., 252 F. Supp. 2d 857, 867 (W.D. Mo. 2002)*. That approach is appropriate for this case.

60. A relevant product market definition may be based on a distinct category of customers. *FTC v. Advocate Health Care Network, 841 F.3d 460, 468 (7th Cir. 2016)*. The plaintiffs' proposed market definition includes only commercial insurers, to the exclusion of government payers—Medicare **[*34]** and Medicaid. There is no evidence that contracting with government payers involves the two-stage competition described above. The process of providers reaching agreements with BCBSND is not so similar to that involved in contracting with government providers that government providers should be included as customers in the relevant market. This court finds it appropriate to consider a relevant market limited to a distinct category of customers—commercial health insurance plans.

61. Since the purpose of market definition is to identify options available to consumers, the definition focuses on consumers' ability to substitute products or sellers in areas outside the geographic area in order to defeat a price increase—an inquiry referred to as "demand-side" substitution. In analyzing a healthcare merger, the demand-side substitution inquiry must be done in the context of the two-stage competition model, where the immediate purchasers of physician services are commercial insurers. Because they are the immediate purchasers of physician services, it is logical to consider the process by which commercial insurers build provider networks.

62. Since commercial insurers market their products to **[*35]** health insurance plan purchasers, the insurers must consider the needs and preferences of their insureds—employers, employees, and employees' families. (PX 6000, pp. 25-26; Tr-2, pp. 60-61; Tr-4, p. 112). When the HMT is employed in analyzing a healthcare merger, the inquiry is whether a hypothetical monopolist of a candidate physician services market (or a candidate geographic market) could negotiate a SSNIP from commercial insurers. (Tr-2, pp. 61-62; PX 6000, p. 31).

63. The geographic market definition considers "where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." *United States v. Phila. Nat'l Bank, 374 U.S. 321, 357, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963)*.

64. The Merger Guidelines support use of the HMT to define a geographic market, and other courts have endorsed that approach. See Horizontal Merger Guidelines § 4.2; *Advocate Health, 841 F.3d at 468-73*. Dr. Town agreed that, if one were going to define a geographic market in this situation, use of the HMT—or SSNIP—test would be an appropriate method for doing so. (Tr-4, p. 112). It is appropriate to use the HMT to define the geographic market for this case.

65. The Bismarck-Mandan area includes the cities of Bismarck and Mandan and smaller communities within the surrounding 40 to 50 mile radius. **[*36]** The population of the Bismarck-Mandan area is approximately 130,000, with approximately 93,000 of those people living within either Bismarck or Mandan. The cities closest to Bismarck and Mandan (Minot, Dickinson, and Jamestown) are each between 90 and 110 miles away. Clinics within the Bismarck-Mandan area are almost all within an eight-mile radius of central Bismarck. (PX 3002, p. 2; PX 6000, pp. 55, 235).

66. Both MDC and Sanford Bismarck consider their primary geographic market to be the area encompassing the four counties that the plaintiffs include in their proposed definition of the relevant market. (JX 0012, pp. 202-03; JX 0007, p. 31). Dr. Sacher's quantitative analysis confirms that patients residing within the Bismarck-Mandan area prefer to receive healthcare services within that area, (PX 6000, pp. 62, 64, 70, 155), and the defendants do not question that fact. A health insurance plan that did not include Bismarck-Mandan area adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services would not be marketable in the Bismarck-Mandan area. The relevant geographic market is the Bismarck-Mandan area—Burleigh, Morton, Oliver, and Sioux Counties. **[*37]**

67. The plaintiffs established that commercial health insurers would accept a hypothetical monopolist's SSNIP rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services.

68. The relevant market is adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services sold to or provided to commercial insurers and their members in the Bismarck-Mandan area.

VII. Market Shares, Market Concentration, and Presumptive Competitive Harm

69. A merger that significantly increases market shares and market concentration is presumed to be unlawful under *Section 7* of the *Clayton Act*. *Phila. Nat'l Bank, 374 U.S. at 363*. Market concentration, in the antitrust context, can be measured through the Herfindahl-Hirschman Index (HHI). "The HHI is calculated by summing the squares of the individual firms' market shares, and thus gives proportionately greater weight to the larger market shares." Horizontal Merger Guidelines § 5.3 (footnote omitted). The Guidelines provide for consideration of both the post-merger HHI and the increase in HHI (defined as twice the product of **[*38]** the market shares of the merging firms) which results from the merger. Under the Guidelines, an HHI above 2500 demonstrates a highly concentrated market, and a merger resulting in an HHI increase of over 200 is presumed likely to enhance market power. Id.

70. Dr. Sacher calculated the following HHIs and changes in HHIs:

Service Line	Pre-merger HHI	Post-merger HHI	Change in HHI
Adult PCPs	3,891	7,422	3,531
Pediatricians	5,333	9,726	4,393
OB/GYN	6,211	7,363	1,152
General Surgery	5,362	9,964	4,602

(PX 6000, p. 150). The defendants did not challenge the HHI calculations. In each of the four physician service lines, existing services in the Bismarck-Mandan area are currently highly concentrated and would be even more highly concentrated if the proposed transaction were consummated.

71. The defendants presented no evidence countering Dr. Sacher's conclusion that the proposed transaction would significantly increase market concentration in each of the four physician service lines. The post-merger HHIs demonstrate a highly concentrated market in each of the four physician service lines. The change in HHI in each of the four service lines exceeds the Merger Guidelines' threshold for presumption that the proposed **[*39]** transaction is likely to enhance market power.

72. Based on the HHI evidence of market concentration, the proposed transaction is presumptively unlawful in each of the four physician service lines. See *Penn State Hershey, 838 F.3d at 346-47*; *ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559, 568 (7th Cir. 2014)*.

VIII. Competitive Effects

A. Interfirm Diversion, Upward Pricing Pressure, and Willingness to Pay

73. In addition to the HHI evidence that leads to a presumption of illegality, the plaintiffs presented evidence that the proposed transaction would substantially lessen competition in each of the four physician service lines included in the relevant market. That evidence included analysis of interfirm diversion ratios, "upward pricing pressure" or UPP, and "willingness to pay" or WTP.

74. Both qualitative and quantitative analyses demonstrate that Sanford and MDC are close competitors in the Bismarck-Mandan area. Hearing testimony and exhibits show that each of the two entities views the other as its primary competitor. (See PX 4150, p. 4; Tr-2, p. 21; Tr-3, p. 81; PX 5174, p. 2; PX 5162, pp. 6-7; PX 5238, p.1). Sanford and MDC follow each other's changes in patient services, such as clinic locations, weight loss programming, and sports physicals. (JX 0011, p. 37; PX 4084, p. 23; PX 5157).Further, **[*40]** Sanford and MDC track each other's marketing and advertising and have responded to each other's advertising with advertising of their own. (PX 5168, p. 2; PX 4020, pp. 3-4; PX 5145, p. 1; PX 4099, p. 3; PX 5177, p. 3).

75. The plaintiffs' expert performed quantitative analyses which confirmed that Sanford and MDC are close competitors in the Bismarck-Mandan area in each of the four relevant physician service lines. He analyzed "interfirm diversion ratios" between the two entities—the percentage of a provider's patients that, if their provider were no longer available, would switch to the other provider. Dr. Sacher's interfirm diversion ratio analysis confirmed that Sanford patients in the Bismarck-Mandan area regard MDC as their "next best option," and vice versa. Dr. Sacher's analysis further showed that Sanford and MDC compete with each other more closely than either competes with any other entity. (PX 6000, pp. 87, 198-202; Tr-2, pp. 90-93). The defendants' expert agreed that patients view Sanford and MDC as substitutes for each other. (Tr-4, p. 113). The diversion ratios that Dr. Sacher calculated—which the defendants did not contest—are significantly higher than those in other **[*41]** cases in which a healthcare merger was enjoined. See *Saint Alphonsus, 778 F.3d 775*.

76. Dr. Sacher also considered UPP. His UPP analysis assessed the incentive of a post-merger Sanford to increase prices due to "internalization of substitution." (Tr-2, p. 94). Currently, if an MDC patient switches to Sanford because MDC is no longer in the network of the patient's health insurance plan, MDC would lose the profits it would otherwise have derived from serving that patient. Post-merger, if a patient switches from a former MDC physician to a Sanford physician, there would be no lost profits because the substitution would have been "internalized." The greater the value of the internalized substitution, the greater the incentive to increase price. (Tr-2, pp. 93-96).

77. Dr. Sacher's UPP analysis considered the interfirm diversion ratios between Sanford and MDC together with their incremental profit margins. He used financial information provided by Sanford and MDC to determine their incremental profit margins, together with his estimates of interfirm diversion ratios, and concluded that the proposed transaction is likely to result in a UPP of 6% to 22%. Those percentages equate to $16 million to $27 million annually. **[*42]** (PX 6000, p. 91; Tr-2, pp. 93-97).

78. Dr. Sacher also employed a WTP analysis, which measures the value patients place on having a particular provider in their insurer's network. He concluded that the proposed transaction would significantly increase WTP in each of the four physician service lines included in the relevant market. (Tr-2, pp. 98-102). The greater the value of the internalized substitution, the greater the incentive to increase price. Id. at 93-96. The WTP increases confirm the closeness of competition between Sanford and MDC and confirm that no other providers are close substitutes in any of the four relevant physician service lines.

B. Impacts on Second-Stage Competition

79. The plaintiffs contend that, in addition to anticompetitive price effects, the proposed transaction will negatively impact non-price competition. Sanford and MDC currently compete with each other to attract patients through changes in services. (Tr-3, pp. 80-83; PX 5206, pp. 1-2). Sanford and MDC currently compete to attract patients by investments in new technologies. (JX 0002, p. 57; Tr-2, pp. 18-19; PX 4283, pp. 2-3; JX 0048, p. 1; PX 4067, p. 2). Sanford and MDC currently compete with each other **[*43]** by making changes to improve patient access and patient convenience. (Tr-4, pp. 193-95; PX 4028, p. 3; PX 5181, p. 1; PX 5190, p. 5; JX 0010, p. 46; PX 5249, p. 2; PX 5181, p. 2).

80. There is no evidence that the quality of patient care provided by any MDC physician or by any Sanford physician would decline as a result of the proposed transaction.

81. As Krabbenhoft acknowledged, "[C]ompetition . . . . keeps you always ascribing and aspiring to provide a better product at a more competitive price[,] . . . . [and] adds another level of intensity . . . and focus to that effort." (Tr-3, p. 38). The proposed transaction would eliminate the second-stage competition that currently exists between Sanford and MDC to provide better services at a more competitive price.

IX. Efficiencies and Synergies

82. The defendants contend that the proposed transaction will generate efficiencies and synergies which will improve services to consumers in the Bismarck-Mandan area and that those efficiencies and synergies will counteract any anticompetitive effects of the proposed transaction.

83. In late 2016 and early 2017, the defendants prepared a document titled "Stronger Together: Synergy," which they describe **[*44]** as "a summary of merger-specific synergies identified through a collaborative process between Sanford and MDC clinical and administrative personnel." (Doc. #132, p. 69; Tr-3, pp. 218-219, 232; DX 2061). A group of Sanford and MDC employees participated in the collaborative process, but "Stronger Together" was written primarily by counsel. (Tr-3, p. 231).

84. The plaintiffs characterize "Stronger Together" as a "high-level discussion of theoretical gains . . . created after the parties decided to merge." (Doc. #131, p. 68). They argue that Sanford and MDC have not presented verifiable, merger-specific efficiencies.

85. Sanford witnesses described the organization's ethical philosophy of "promises made, promises kept." (Tr-3, pp. 16, 84). Following its acquisitions of healthcare facilities in Bismarck, Fargo, and other communities, Sanford made significant financial investments in those facilities, as it had said it would when the acquisitions were finalized. Sanford advances its "proven track record of achieving efficiencies." (Doc. #132, p. 8).

86. Sanford's counsel engaged Deloitte to analyze and quantify the efficiencies and synergies identified in "Stronger Together," and Deloitte **[*45]** presented its work in a document titled "Efficiency Summary." (DX 4018). In performing its analysis, Deloitte had access to competitively sensitive information of both Sanford and MDC, which the parties cannot share with each other prior to consummation of the transaction.

87. Deloitte's report identified annual efficiencies of [TEXT REDACTED BY THE COURT] over the first three years after consummation of the proposed transaction and [TEXT REDACTED BY THE COURT] in one-time expenditures needed to achieve those efficiencies, resulting in estimated net efficiency savings of [TEXT REDACTED BY THE COURT] over the first three years and [TEXT REDACTED BY THE COURT] in annual savings after the first three years. (DX 4018, pp. 4, 6). The Deloitte report groups claimed efficiencies into three categories: clinical care, ancillary services, and non-clinical areas.

88. Most of the net savings which Deloitte predicted in clinical care fall under the federal "340B" program-a program which allows qualifying providers to purchase certain prescription drugs at lower prices. Deloitte predicted annual net savings of nearly [TEXT REDACTED BY THE COURT] under the 340B program, beginning in the third year **[*46]** after the transaction is consummated. Id. at 9. Deloitte recognized a delay in the savings to allow for consolidation of Sanford and MDC facilities necessary to administer outpatient drug infusion services. In calculating net savings, Deloitte used tentative estimates of the costs of consolidation of the infusion facilities. (Tr-2, pp. 203-04; Tr-4, pp. 21-26, 32-34; DX 4018, p. 9).

89. Currently, Sanford Bismarck qualifies for the 340B program, and MDC does not. The parties dispute whether the proposed transaction could result in Sanford Bismarck losing its current 340B qualification. As a Disproportionate Share Hospital (DSH), Sanford Bismarck's 340B qualification is based on the percentage of its patients who are of low income or who are Medicare beneficiaries. (Tr-3, pp. 128-29). The plaintiffs' expert testified that a shift of MDC patients from CHI St. Alexius to Sanford Bismarck could cause Sanford Bismarck to move from

DSH status to Rural Referral Center (RRC) status under the 340B program and that Sanford's status moving from DSH to RRC status could result in an approximate [TEXT REDACTED BY THE COURT] in its 340B savings. (PX 6001, pp. 17-18; Tr-2, pp. 197-200).

90. Deloitte's **[*47]** report did not analyze how the proposed transaction might impact Sanford Bismarck's DSH status. (Tr-2, pp. 200-01; Tr-4, p. 33). At the hearing, Martha Leclerc, Sanford's vice president of corporate contracting, testified about calculations she had made to challenge the plaintiffs' allegations that a shift in MDC patients to Sanford Bismarck could impact Sanford Bismarck's DSH status. She calculated that the DSH status would be at risk only if there were a 17.4% increase in patient volume and if none of that increase were attributable to admission of low-income or Medicare patients. (Tr-3, pp. 135-36). Sanford Bismarck does not have the physical facilities to absorb an increase in patient volume that large.

91. Leclerc performed her calculations between the date of her deposition and the date of her hearing testimony, and Sanford provided no documentation supporting the calculations. On rebuttal, a plaintiffs' expert testified that Leclerc's calculations had not described the DSH calculation formula correctly. (Tr-4, pp. 234-37; see also PDX 005-001). In response, the defendants cite the DSH formula that is available from the Centers for Medicare and Medicaid Services (CMS) website. **[*48]** (Doc. #132, p. 72). The formula set out on the CMS website appears consistent with testimony of the plaintiffs' expert witness. Given the lack of confirming documentation and the disputed application of the CMS formula, Sanford's calculations regarding potential for loss of its DSH status are not persuasive.

92. The expert whom plaintiffs retained to analyze the defendants' claimed efficiencies, Dr. Thomas Respess, testified about a change in a federal rule governing 340B reimbursements. Respess testified that the change, which became effective November 1, 2017, reduced reimbursements to 340B providers. (PX 6001, pp. 19-20; Tr-2, p. 202). Deloitte's analysis did not consider the rule change. The Deloitte consultant testified she had not done so because the rule change is not related to pricing of the purchasing of oncology drugs. (Tr-4, p. 34). The rule change affects the reimbursements for 340B drugs that hospitals receive, not the purchase price of those drugs. The Deloitte Report analyzed only the savings from drug purchasing, but did not analyze reduced reimbursements. Id. at 32-34. Hearing evidence does not establish whether the rule change would impact net 340B savings to a post-merger **[*49]** Sanford.

93. The defendants assert the recent 340B rule change will facilitate pass-through of 340B discounts to Medicare and to Medicare beneficiaries. Medicare and its beneficiaries are not within the relevant market.

94. Because any 340B savings resulting from the proposed transaction would not arise in any of the physician service lines at issue, because the impact of the recent rule modification is not well defined, because Deloitte did not consider possible impact of the merger on Sanford's 340B status, and because they have not sufficiently shown that any 340B savings would be passed through to healthcare consumers, the defendants have not met their burden as to the claimed 340B efficiencies.

95. Deloitte's projected net savings also included approximately [TEXT REDACTED BY THE COURT] in laboratory costs. But, that projection did not consider that MDC recently entered into a contract for reference laboratory services with a third party or that MDC had estimated approximately [TEXT REDACTED BY THE COURT] in annual savings as a result of that contract. (PX 5263, p. 1; DX 4018, p. 18; PX 5276, p. 2; Tr-4, pp. 28-29, 36). Deloitte's consultant testified at the hearing that, after learning **[*50]** of that contract, Deloitte "prepared an analysis that overlays those new prices on top of what we had calculated, and the figures would be reduced by about [TEXT REDACTED BY THE COURT]," (Tr-4, p. 37), but did not explain why savings would be less than MDC had estimated.

96. In the non-clinical areas, Deloitte projected the proposed transaction would lead to costs savings related to physician recruiting, revenue cycle services, information technology, electronic medical records, and infrastructure. But, the magnitude of those projections is small in relation to the defendants' estimated 340B savings, and implementation of any savings in those non-clinical areas would require significant expenditures. Deloitte's projections in these areas are based only on defendants' estimates-Deloitte did not independently verify those estimates. (JX 0007, p. 2; JX 0069, p. 2; JX 0070, p. 2; JX 0013, pp. 73-74; DX 4018, pp. 5, 22-34).

97. The defendants have not demonstrated monetary efficiencies in non-clinical areas sufficient to overcome the anticompetitive effects of the proposed transaction.

98. Even if all of the claimed monetary efficiencies were considered merger-specific and verifiable, they **[*51]** would be insufficient to offset the price increase predicted by Dr. Sacher's UPP analysis. (PX 6000, pp. 96-98; Tr-2, pp. 112-114).

99. In addition to the 340B program, Sanford and MDC asserted a number of quality efficiencies. Their asserted quality efficiencies include (1) Imagenetics, a program integrating genetic medicine into primary care; (2) embedding behavioral health therapists into primary care clinics; (3) cancer care trials and cancer care outreach to communities outside the Bismarck-Mandan area; (4) a combined and customized electronic medical record (EMR) system; and (5) recruitment of subspecialists to the Bismarck-Mandan area. The plaintiffs contend that some of the claimed efficiencies are already available at both Sanford and MDC and that others could be attained independent of the proposed transaction. (PX 6002, pp. 4-5; Tr-2, pp. 252-64).

100. The plaintiffs do not contest that the claimed quality efficiencies, if implemented, would in fact result in increased quality of care for patients in the Bismarck-Mandan area.

101. This court finds the claimed quality efficiency in the Imagenetics program to be merger-specific, but the defendants have not demonstrated that the **[*52]** other claimed quality efficiencies are merger specific.

102. The claimed quality efficiencies must be considered in light of the Merger Guidelines and case law interpreting those guidelines. Under the guidelines, the lesser the adverse competitive effects, the greater the weight ascribed to efficiencies. "Efficiencies almost never justify a merger to monopoly or near-monopoly." Horizontal Merger Guidelines § 10; see also *Saint Alphonsus, 778 F.3d at 790*; *FTC v. ProMedica Health Sys., Inc., No. 3:11-cv-47, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *57 (N.D. Ohio Mar. 29, 2011)*. Given that the proposed transaction would result in near-monopoly, the claimed quality efficiencies are insufficient to overcome the presumption of illegality.

X. BCBSND as a Powerful Buyer

103. There is no question that BCBSND is a powerful buyer in the Bismarck-Mandan area and throughout the state. Various documents in the record show its statewide share of the commercial health insurance market is between 55% and 65%.[6] (PX 4318, p. 9; PX 4308, p. 4; DX 6000, p. 17).

104. Over the last several years, BCBSND's market share has declined. In the Bismarck-Mandan area, BCBSND currently has approximately [TEXT REDACTED BY THE COURT] insureds, down from approximately in [TEXT REDACTED BY THE COURT] 2014. Statewide, since 2014, BCBSND has experienced a [TEXT REDACTED BY THE **[*53]** COURT] decline in numbers of insureds under commercial health plans. (DX 6000, p. 17). In the Bismarck-Mandan area, since 2014, BCBSND has experienced a [TEXT REDACTED BY THE COURT] decline in numbers of insured under its commercial health plans. (Tr-1, p. 257). A significant portion of the decline is attributable to BCBSND having lost the NDPERS contract to SHP, but BCBSND recently lost other large employer groups to other commercial insurers. (DX 6000, pp. 17-18; Tr-1, p. 258). The defendants acknowledge that BCBSND's market share has declined as a result of SHP's entry into the commercial health insurance market. (PX 4308, p. 4; DX 6000, pp. 17-18).

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[6] Inconsistencies in the evidence of BCBSND's commercial insurance market share is due, at least in part, to differing views of whether NDPERS should be considered commercial insurance.

105. If a provider serves patients in more than one geographic region in North Dakota, BCBSND enters into a [TEXT REDACTED BY THE COURT] participation agreement with that provider. BCBSND and Sanford have a [TEXT REDACTED BY THE COURT] participation agreement. (PX 3014, p. 5) Sanford prefers to enter into payer agreements that cover all facilities within its entire system. (Tr-3, pp. 145-46).

106. Generally, BCBSND uses a statewide uniform base fee schedule, though its reimbursement rates are higher for some of the more rural facilities **[*54]** with which it contracts. BCBSND has deviated from the statewide fee schedule in response to "provider-specific" requests and providers' demonstrated need. [TEXT REDACTED BY THE COURT] (Tr-1, p. 287).

107. Chelsey Matter, BCBSND's Director of Provider Partnerships and Analytics, testified about the process BCBSND uses for contracting with network providers. BCBSND endeavors to set reimbursement rates adequate to "make sure the providers can continue to offer services in North Dakota." Id. at 255, 280. [TEXT REDACTED BY THE COURT] Id. at 262-65, 256, 281, 292.

108. In its interactions with providers, BCBSND [TEXT REDACTED BY THE COURT] Id. at 291. But, a provider offering "a whole lot of services to a lot of [BCBSND] members" or a provider offering the only "super specialist that many [BCBSND] members need" has greater leverage in establishment of the fee schedule. Id. at 255-56.

109. With Sanford as the largest provider in the state, BCBSND consults with Sanford "on a very regular basis." (Tr-3, p. 178). Sanford is [TEXT REDACTED BY THE COURT]. (See Tr-1, p. 256).

110. Though the defendants contend that BCBSND does not truly negotiate with providers, in various documents in the record, **[*55]** defendants have characterized their interactions with BCBSND as "negotiation." Those documents demonstrate several recent instances in which BCBSND [TEXT REDACTED BY THE COURT]. (See PX 4081, pp. 1, 3, 5; PX 4075, pp. 1-2; PX 4156, p. 1; PX 4080, p. 1). When BCBSND moved to a different methodology for inpatient reimbursement, there was [TEXT REDACTED BY THE COURT] which resulted in BCBSND making adjustments to create a "buffer to transition into the new methodology." (Tr-1, pp. 256-57). In May 2016—after CHI terminated the LOI and before Sanford and MDC signed the term sheet—Leclerc sent an email discussing Sanford's acquisition of Great Plains Clinic in Dickinson, North Dakota, which had been a part of PrimeCare. The email referenced the clinic's transition from PrimeCare and stated, [TEXT REDACTED BY THE COURT] (PX 4227, p. 1).

111. When contracting for its provider networks in the Bismarck-Mandan area, BCBSND does not consider CHI a viable alternative to either Sanford or MDC since CHI does not offer services sufficient to meet the needs of BCBSND's insureds in that area. BCBSND could not construct a marketable health plan in the Bismarck-Mandan area if it did not include a post-merger **[*56]** Sanford. (Tr-1, pp. 244, 246-47).

112. BCBSND is concerned about the proposed transaction because a post-merger Sanford would control a large portion of the four physician service lines in the Bismarck-Mandan area so that Sanford "could really present [BCBSND] with an ultimatum" if it chose to. Id. at 261. Matter testified that, if Sanford were to request a rate increase and threaten to terminate its network agreement with BCBSND if the increase were not granted, BCBSND would have to choose between agreeing to the increase or no longer offering health plans in the Bismarck-Mandan area.

113. BCBSND expects an immediate increase in Sanford's bargaining leverage if the proposed transaction is consummated, including leverage to seek favorable terms in its value plan agreement with BCBSND. Id. at 260-62, 274.

114. If BCBSND were to agree to a rate increase in response to a post-merger demand from Sanford, that would result in increased premiums for BCBSND customers. An increase in Sanford's reimbursement rates would also [TEXT REDACTED BY THE COURT]. Self-insured employer groups would see an immediate increase in their costs if BCBSND acceded to a post-merger Sanford demand for a reimbursement **[*57]** rate increase. Id. at 261-63, 299.

115. Additionally, BCBSND is concerned that, if Sanford were to terminate its network agreement with BCBSND, patients in the Bismarck-Mandan area would have an option of coverage under SHP, and if BCBSND increased reimbursements to Sanford in response to an ultimatum, SHP could offer lower premiums than BCBSND. Id. at 263.

116. Leclerc testified that Sanford would not present an ultimatum to BCBSND because Sanford cannot afford to terminate its statewide agreement with BCBSND, which accounts for a large percentage of Sanford's revenue in North Dakota and is the largest payer to the Sanford system as a whole. As Leclerc described, BCBSND is important to Sanford and Sanford is important to BCBSND. (Tr-3, pp. 32, 183). Krabbenhoft testified that Sanford would not, and credibly could not, present an ultimatum that threatened Sanford's termination of its provider agreement with BCBSND. Id. at 160-61.

117. Sanford has not indicated it would demand higher reimbursements from BCBSND if the proposed transaction is consummated. (Tr-1, p. 273).

118. In forming his opinions about the proposed transaction, Dr. Sacher considered BCBSND's share of the commercial health **[*58]** insurance market, but that did not "assuage[] [his] competitive concerns." (Tr-2, p. 103). In Dr. Sacher's opinion, because there would be no good alternatives to a post-merger Sanford in the Bismarck-Mandan area, BCBSND would have no choice but to negotiate higher prices and "other unfavorable terms" with Sanford. Id. at 104.

119. The defendants' economic expert, Dr. Town, opines that, in North Dakota, there is no relationship between provider concentration and BCBSND reimbursement rates. Dr. Town analyzed statewide BCBSND claims data and found "no statistically significant positive relationship between market concentration and BCBS-ND's rates." (DX 6000, p. 32). Dr. Town also opines that there is no relationship between bargaining leverage—or WTP—and BCBSND reimbursement rates in North Dakota. Id.

120. Dr. Town's analysis focused on data from two other areas of North Dakota—Minot and Grand Forks—where there is one dominant—near monopoly—healthcare provider in each area. Dr. Town considered the Minot and Grand Forks areas as "natural experiment[s]," opining that, [TEXT REDACTED BY THE COURT], there is no reason to believe that the proposed transaction would result in BCBSND increasing **[*59]** reimbursement rates to a post-merger Sanford in the Bismarck-Mandan area. (Tr-4, pp. 92-98).

121. Altru has a near monopoly on healthcare services in the Grand Forks area. [TEXT REDACTED BY THE COURT]

122. BCBSND's response [TEXT REDACTED BY THE COURT] shows that a near-monopoly provider has leverage in negotiations with BCBSND.

XI. Proposed Transaction's Impact on Medica and Self-Insured Employer

123. Michael Lenz, who until August 2017 was Medica's vice president of strategic initiatives, testified that the proposed transaction "would substantially increase Sanford's leverage" in negotiations with Medica, likely resulting in Sanford's post-merger ability to demand more favorable reimbursement rates and reimbursement terms. (Tr-1, p. 223). Medica has a system-wide contract with Sanford, covering all of Sanford's providers in each of the states in which Medica offers commercial health insurance plans. Id. at 174. Lenz testified that increased reimbursement rates paid to a post-merger Sanford would result in higher costs to Medica and in consequent higher costs to its employer groups. Id. at 185.

124. Because Medica cannot construct a marketable provider network in the Bismarck-Mandan area **[*60]** without the current Sanford system, Medica could not now credibly threaten to walk away from negotiations with Sanford. See id. at 183-84.

125. If the proposed transaction is consummated, Medica would not be able to offer a marketable health insurance plan in the Bismarck-Mandan area that did not include a post-merger Sanford. See id. at 178. Lenz testified that, because of its additional leverage in the Bismarck-Mandan area, a post-merger Sanford would be able to secure higher reimbursement rates from Medica "for the broader agreement." Id. at 184.

126. Lenz testified about impacts of healthcare facility mergers he had observed in other markets and that he had seen changes in referral patterns resulting from those mergers. In his experience with healthcare facility mergers in other locations, Lenz has never seen any cost savings passed along to consumers through lower reimbursement rates. Id. at 187.

127. The defendants contend that the proposed transaction would cause no adverse effects to Medica during the [TEXT REDACTED BY THE COURT] of the Sanford/Medica agreement and that impacts on Medica after [TEXT REDACTED BY THE COURT] will be negligible and offset by efficiencies and by CHI's **[*61]** expansion in the Bismarck-Mandan area.

128. Lenz testified about the [TEXT REDACTED BY THE COURT] rate agreement between Sanford and Medica, which sets parameters of reimbursement rates. He testified that the agreement [TEXT REDACTED BY THE COURT]. Id. at 190.

129. Lenz testified that the agreement [TEXT REDACTED BY THE COURT]. Id. One of the plaintiffs' experts, Dr. Ashish Jha, testified that physician concentration leads to more referrals for invasive and costlier procedures. (Tr-4, p. 238).

130. There is no evidence that, post-merger, any MDC physician or any Sanford physician would make decisions about patient referrals based on a patient's insurance coverage.

131. A Medica document captioned [TEXT REDACTED BY THE COURT] The defendants contend that document demonstrates that Medica's costs would decrease as a result of the proposed transaction. (Doc. #132, p. 42). Because that document did not account for post-merger practice pattern changes or differences in the charge master, and given the small number of Medica's insureds in the Bismarck-Mandan area and limited time period analyzed, the document is not useful in analyzing impacts of the proposed transaction. (See Tr-1, pp. 202, **[*62]** 220).

132. Leclerc, who was involved in negotiating the [TEXT REDACTED BY THE COURT] rate agreement, testified that the agreement's [TEXT REDACTED BY THE COURT]

133. The defendants contend that, after the agreement ends in [TEXT REDACTED BY THE COURT], Medica's relatively small share of the Bismarck-Mandan commercial health insurance market would preclude Sanford from obtaining higher reimbursement rates from Medica. Leclerc testified that Sanford [TEXT REDACTED BY THE COURT] Id. at 149-51.

134. Dr. Town's analysis estimated an [TEXT REDACTED BY THE COURT] increase in Medica's spending in the Bismarck-Mandan area after the current agreement ends. (DX 6001, pp. 63-64).

135. The Sanford/Medica [TEXT REDACTED BY THE COURT] agreement does not protect against post-merger rate increases after [TEXT REDACTED BY THE COURT].

136. The plaintiffs also presented testimony of Kari Reichert, vice president of people services at National Information Solutions Cooperative (NISC). NISC is a member-owned technology provider with approximately 1200 employees, 475 of whom are located in Mandan. NISC provides a self-insured health plan to its employees, contracted through United Healthcare. United Healthcare, **[*63]** in turn, contracts with Medica, so NISC employees have access to providers in Medica's provider network.

137. [TEXT REDACTED BY THE COURT] (See Tr-2, pp. 166-67).

138. NISC is concerned that [TEXT REDACTED BY THE COURT]. Further, NISC is concerned that [TEXT REDACTED BY THE COURT]. Id. at 158-59, 169-70, 172, 182-84.

XII. New Entry or Expansion

139. Entry or expansion of competitors into a market may be sufficient to counteract anticompetitive effects of a proposed merger. Horizontal Merger Guidelines § 9; *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 54-58 (D.D.C. 1998)*. But, to ameliorate the lost competition, entry or expansion must be timely, likely, and sufficient.

140. The defendants contend that, if the merger is consummated, there would nonetheless be strong healthcare competition in the Bismarck-Mandan area. They assert that CHI St. Alexius has the "incentive, ability, and intent" to compete with a postmerger Sanford in each of the four physician service lines at issue. (Doc. #83-2, p. 38). Further, the defendants assert that CHI, as the fourth-largest healthcare system nationwide, will be a "much stronger competitor" to Sanford than MDC is currently. Id. The plaintiffs respond that CHI St. Alexius's expansion would not be timely, likely, or **[*64]** sufficient to counter competitive harm.

141. At the hearing, Krabbenhoft testified that, in a community the size of Bismarck-Mandan, a healthcare monopoly would be "a bad thing." (Tr-3, p. 38). He acknowledged that, if CHI St. Alexius did not have physicians in each of the four service lines at issue, there would be no real viable competition for a post-merger Sanford in the Bismarck-Mandan area. Id. at 42-43. Krabbenhoft opined that the CHI organization would be capable of recruiting and realigning physicians to timely increase its presence in the Bismarck-Mandan area. Id. at 30.

142. Data presented at the hearing described recent physician recruitment of Sanford, MDC, and CHI in the Bismarck-Mandan area. Challenges to physician recruitment include the area's geographic location, its perceived adverse weather conditions, and lack of OB/GYN and pediatrics residency programs in North Dakota. (JX 0022, pp. 37-38). It is more difficult to recruit physicians who do not have prior connections to the area. (Tr-1, pp. 106-07). Because of call coverage requirements for OB/GYN physicians, pediatricians, and general surgeons, it is difficult to recruit to groups of fewer than four physicians in **[*65]** each of those specialties. (JX 0028, pp. 54-55; Tr-2, pp. 24-25).

143. At the hearing, Schley estimated that it would take [TEXT REDACTED BY THE COURT] for CHI St. Alexius to recruit enough adult PCPs to replace those who would be lost to a Sanford/MDC merger and that it might take up to [TEXT REDACTED BY THE COURT] to establish the recruited adult PCPs' reputations, to open sufficient clinic space, and to establish a patient base large enough to replace the adult PCP services currently provided at CHI St. Alexius by MDC physicians. (Tr-1, p. 108). As to pediatrician services, Schley estimated a similar timeframe to recruit and establish a practice sufficient to compete with a post-merger Sanford. Id. at 114-16, 148. Further, a general surgery practice is dependent on a referral base of adult PCPs, making it difficult for an independent general surgeon to establish a practice in the Bismarck-Mandan area. (JX 0011, p. 39; JX 0027, pp. 23, 49).

144. As to OB/GYN services, Schley testified about Dr. Bury possibly joining CHI St. Alexius, though that is not a definite plan. CHI St. Alexius has provided a stipend to Dr. Bury's daughter for completion of her medical education, and Dr. Bury **[*66]** testified that she would love to have her daughter join her in practice at CHI St. Alexius. Both Schley and Dr. Bury testified about the difficulty of recruiting an OB/GYN physician to a group of fewer that four physicians because of call coverage concerns, and both estimated it would take at [TEXT REDACTED BY THE COURT] years to recruit enough OB/GYN physicians and another [TEXT REDACTED BY THE COURT] to build a patient base sufficient to compete with a post-merger Sanford. (Tr-1, pp. 116-118; Tr-2, pp. 23-25, 35-36, 40; JX 0014, pp. 31-33, 39).

145. Schley testified that [TEXT REDACTED BY THE COURT]. (Tr-1, pp. 109-110; JX 0027, pp. 26, 42).

146. Other than adult PCPs, CHI St. Alexius would need to establish new physician service groups to compete with a post-merger Sanford in the physician service lines at issue, making it difficult to recruit physicians for those services. (JX 0027, pp. 41-42; JX 0030, pp. 32-33).

147. Because of the differences in their training and practice, the hospitalists currently employed by CHI St. Alexius [TEXT REDACTED BY THE COURT]. (See Tr-1, pp. 109-11). Further, locum tenens physicians are not good substitutes for employed physicians because of their **[*67]** cost and because patients prefer employed physicians with a local reputation. See id. at 120-21.

148. [TEXT REDACTED BY THE COURT]

149. Post-merger, physicians currently practicing at MDC would likely refer more patients to Sanford rather than to CHI St. Alexius. The anticipated decline in referrals to CHI St. Alexius would indeed incentivize and motivate CHI to add physicians in the four service areas. But, hearing evidence did not establish that the Bismarck-Mandan area's population is sufficient to support a significant increase in total numbers of physicians in each of the four service lines.

150. Hearing evidence does not demonstrate that CHI would be able to recruit enough physicians to replace the MDC physicians currently referring to CHI St. Alexius. CHI's potential expansion therefore cannot be considered timely, likely, or sufficient to counter the anticompetitive effects of the proposed transaction.

151. To establish a new independent practice in any of the four physician service lines in the Bismarck-Mandan area would require large start-up expenditures. And, significant time would be required to build a patient base large enough to be competitive with a post-merger Sanford. **[*68]** No evidence suggests that any new provider has the ability or resources to enter the Bismarck-Mandan area market in any of the four relevant physician service lines. (PX 3018, p. 7; PX 3006, pp. 9-10).

152. The defendants have not established that any new entry or expansion would be timely, likely, or sufficient to counteract the near-monopoly that would result from the proposed transaction.

XIII. MDC's Viability

153. MDC asserts that sale of its practice, so as to align itself with an integrated healthcare system, is necessary to maintain financial viability. Although its recent financial performance has been strong, MDC's strategic review has projected declining revenues, specifically in ancillary services. Ancillary services are those not provided by physicians, including things such as MDC's ambulatory surgery center and laboratory. MDC's ancillary service revenue dropped 7% from 2014 to 2016, and MDC projects another 20% decline by 2020. (JX 0011, p. 18; Tr-4, pp. 164, 166-67). MDC has experienced a decrease in physician productivity, which its president attributes to some more experienced physicians nearing retirement and newer physicians preferring fewer work hours. But, MDC's **[*69]** president testified that there are "plenty of patients" for MDC physicians who desire to increase their productivity. (Tr-4, pp. 165-66, 200-02).

154. In connection with its attempts to sell, MDC engaged two consultants—HDH Advisors and Wipfli. Wipfli provided a valuation opinion of MDC's facilities, and HDH Advisors assessed the value of MDC's goodwill. Sanford and MDC used the HDH and Wipfli opinions in determining the financial terms of the proposed transaction. HDH and Wipfli both projected a positive future for MDC with an increasing demand for its services and an outlook for better reimbursements. (PX 5244, p. 17; JX 0045, p. 28; Tr-3, pp. 55-60; Tr-4, pp. 168-69, 189-90).

155. MDC's revenues increased during each of the last three years, and its 2016 financial performance showed increases in billed and collected revenues over the prior year. MDC physicians have historically earned more than the national average; in 2016, their compensation was about [TEXT REDACTED BY THE COURT]. (JX 0012, p. 16; PX 4192, p. 29; Tr-4, p. 164).

156. Various quality metrics show that MDC provides high quality patient care. (Tr-4, pp. 243-45; PX 6002, pp. 35-42; Tr-1, pp. 301-02).

157. MDC has strategies **[*70]** for moving forward if the proposed transaction is not consummated. (PX 5167).

158. The record includes statements of MDC shareholders demonstrating a desire to sell motivated by current high share value rather than because of concerns over MDC's viability. (PX 5224, p. 1; PX 5284, p. 1; JX 0029, pp. 33-35; JX 0012, p. 47).

159. Dr. Seifert testified that MDC has a limited physician recruitment budget and that MDC anticipates difficulty recruiting physicians to replace those nearing retirement. (Tr-4, pp. 165-66). The plaintiffs countered with evidence that MDC hired eighteen physicians over 5 1/2 years to replace seventeen physicians who left MDC, recruited three physicians in 2017, recently signed a general surgeon to an employment contract, and hired three physicians away from Sanford in the last four years. (JX 0024, pp. 48-49; JX 0010 pp. 30-31, 33-34, 37). The Deloitte consultant assumed, based on MDC's history, that it would recruit seven physicians per year absent the proposed transaction. (Tr-4, p. 38). The defendants did not establish that MDC's viability is endangered by physician recruitment difficulties.

160. Courts have, in rare cases, recognized a "weakened competitor" defense **[*71]** to a merger challenge, but the defendants have not made sufficient showing to consider it here. See *ProMedica, 749 F.3d at 572*; *FTC v. Nat'l Tea Co., 603 F.2d 694, 700 (8th Cir. 1979)*. MDC's current financial status is strong. There is no evidence that it would "imminently depart" from the market if the merger were not consummated, as was apparent in the National Tea case on which the defendants rely. See *603 F.2d at 701*.

161. Evidence questioning MDC's long term viability is not sufficient to counteract anticompetitive effects of the proposed transaction.

XIV. Defendants' Acknowledgment of Antitrust Risk and Alleged Admission of Weakness

162. Various MDC personnel expressed concern that the proposed transaction would be bad for the community because of elimination of competition and patient choice. Physicians formerly associated with Sanford and MDC made similar statements. Statements of [TEXT REDACTED BY THE COURT] questioned whether a sale to Sanford would violate antitrust laws, more so than a sale to CHI. (PX 5180; PX 5179; PX 5183, p. 2; PX 5205; PX 5221, p. 2; JX 0029, p. 41; JX 0014, p. 30; PX 5119, p. 6; JX 0030, p. 27; PX 3019, pp. 1-2; PX 3017, pp. 2-3). In its proposed term sheet to Sanford, MDC [TEXT REDACTED BY THE COURT]. (DX 2013, p. 5).

163. The statements by MDC **[*72]** personnel referenced above show that some MDC personnel recognized that the proposed transaction would have anticompetitive effects. Further, the defendants entered into the proposed transaction knowing that it raised significant concerns under antitrust laws. See *ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *50* (finding that defendants entered into that transaction "with full knowledge of the applicable antitrust laws").

164. The plaintiffs contend that [TEXT REDACTED BY THE COURT] July 5, 2017 statements to [TEXT REDACTED BY THE COURT]—[TEXT REDACTED BY THE COURT]—constitutes witness tampering that should be considered an admission of weakness of defendants' case. [TEXT REDACTED BY THE COURT] denies any attempt to influence [TEXT REDACTED BY THE COURT] testimony, and the defendants suggest it may be that both [TEXT REDACTED BY THE COURT] (Doc. #132, p. 20).

165. The court finds [TEXT REDACTED BY THE COURT] description of the conversation more credible than [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT] account of the conversation is confirmed by his contemporaneously written notes and by the email that he sent to counsel and his superiors later the same day. And, the statements which [TEXT REDACTED BY THE COURT] attributes **[*73]** to [TEXT REDACTED BY THE COURT] are consistent with what others described about [TEXT REDACTED BY THE COURT] communication style. (PX 5315, p. 1; PX 5318, p. 4; PX 5219, p. 2; PX 5307, p. 1; Tr-2, pp. 31-34).

CONCLUSIONS OF LAW

I. Jurisdiction and Venue

1. The FTC is authorized by law to bring this action. *15 U.S.C. § 18*. The Attorney General of North Dakota has authority to bring this action on behalf of the State of North Dakota. *15 U.S.C. § 26*; *N.D. Cent. Code §§ 32-06-02*, *51-08.1-07 to -08*, and *51-15-07*. This court has subject matter jurisdiction under *15 U.S.C. §§ 53(b)* and *26*; *28 U.S.C. §§ 1331*, *1337*, and *1345*.

2. The defendants are engaged in—and at all relevant times have been engaged in—activities in or affecting commerce as that term is defined by *15 U.S.C. §§ 12* and *44*. Defendants transact business in this district and are subject to personal jurisdiction in this district. Venue is proper. *28 U.S.C. § 1391(b)-(c)*; *15 U.S.C. § 53(b)*. The parties having consented to jurisdiction of a magistrate judge, this court has jurisdiction to issue a preliminary injunction under *15 U.S.C. § 53(b)*.

II. Preliminary Injunction Standard

3. The plaintiffs allege violation of the Clayton Act, *Section 7*, which provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject **[*74]** to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (emphasis added). Determination of a *Section 7* violation is an adjudicatory function vested in the FTC. But, *Section 13(b)* of the *FTC Act* authorizes a district court to grant a preliminary injunction if, "weighing the equities and considering the Commission's likelihood of ultimate success," an injunction would be in the public interest. *15 U.S.C. § 53(b)*. The only question addressed to this court is whether the status quo is to be preserved until the FTC completes its adjudicatory function. *FTC v. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976)*. It is not the function of this court to determine whether the antitrust laws are "about to be violated." FTC v. Whole Foods Mkt., Inc. *548 F.3d 1028, 1035, 383 U.S. App. D.C. 341 (D.C. Cir. 2008)* (quoting *Food Town Stores, 539 F.2d at 1342*). That determination is left to the FTC. Id.

4. *Section 13(b)* sets forth two factors to determine whether a preliminary injunction should be issued: (1) the likelihood that the FTC will ultimately succeed on the merits and (2) a balance of the equities. **[*75]** *ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *53*.

5. In considering the likelihood that the FTC will succeed on the merits, a court weighs the probability that the FTC will prove that the effect of the proposed transaction may be to substantially lessen competition. The Eighth Circuit has stated that, to prevail on a motion for a preliminary injunction, the FTC "must raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation, and determination by the FTC in the first instance and ultimately by the Court of Appeals." *FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1051 (8th Cir. 1999)*. A showing of "fair or tenable chance of success on the merits" is not sufficient. Id.

6. *Section 7*'s inclusion of the phrase "may be substantially to lessen competition" demonstrates a legislative concern with probabilities rather than certainties. *Brown Shoe Co. v. United States, 370 U.S. 294, 323, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. To establish a *Section 7* violation, a plaintiff need not demonstrate actual anticompetitive practices, though it must show more than "ephemeral possibilities." *ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *52* (quoting *United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974))*. It is the FTC's burden to show that loss of competition is a "sufficiently probable and imminent result of a merger or acquisition," but the FTC is not required to show that the challenged transaction will lessen competition. **[*76]** *FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 35 (D.D.C. 2009)* (internal quotation marks and citation omitted). *Section 7* is intended to prevent anticompetitive mergers before they create anticompetitive harm. *Phila. Nat'l Bank, 374 U.S. at 362*.

7. Courts commonly employ a burden-shifting analysis in evaluating the FTC's likelihood of success on the merits. The first step is to determine whether the plaintiffs have made a prima facie showing that the transaction would lead to undue concentration in the relevant product and geographic markets. If the plaintiffs make that prima facie showing, the transaction is presumed illegal and the burden then shifts to the defendants to show that the prima facie case "inaccurately predicts the relevant transaction's probable effect on future competition." *United States v. Baker Hughes Inc., 908 F.2d 981, 991, 285 U.S. App. D.C. 222 (D.C. Cir. 1990)*. If the defendants sufficiently rebut the presumption of illegality, the burden of producing additional evidence of anticompetitive effects shifts back to the FTC. *H & R Block, 833 F. Supp. 2d at 72*. The FTC has the burden of persuasion at all times.

8. In weighing the equities under *Section 13(b)*, the court considers whether a preliminary injunction is in the public interest. "The principal public equity weighing in favor of issuance of preliminary injunctive relief is the public interest in effective enforcement of the antitrust laws." *FTC v. H.J. Heinz Co., 246 F.3d 708, 726, 345 U.S. App. D.C. 364 (D.C. Cir. 2001)* (citation **[*77]** omitted). Courts recognize that, if the FTC shows a likelihood of success on the merits, the equities favor issuance of a preliminary injunction. If a merger proceeds and the FTC later finds it to be unlawful, it is difficult to restore competition to its pre-merger state. *FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1085-86, 214 U.S. App. D.C. 254 and n.31 (D.C. Cir. 1981)*. As to private equities, they "do not outweigh effective enforcement of the antitrust laws. When the [FTC] demonstrates a likelihood of ultimate success, a counter showing of private equities alone would not suffice to justify denial of a preliminary injunction barring the merger." *Id. at 1083*.

III. Definition of Relevant Market

9. The parties' principal dispute is the proper definition of a relevant market, specifically whether the dominance of BCBSND should be considered in defining that market or whether BCBSND's dominance should instead be considered only as a defense.

10. The defendants have not propounded an alternative relevant market definition and have no obligation to do so. Rather, the defendants contend that the plaintiffs' proposed market definition is erroneous in not accounting for BCBSND having "all the bargaining power" by virtue of its dominance in the commercial insurance market and its practice of using statewide **[*78]** reimbursement rates. In the plaintiffs' view, the dominance of BCBSND should be considered only after the plaintiffs have established that the proposed transaction is presumptively illegal.

11. The plaintiffs' proposed relevant market definition is derived from application of the HMT. The defendants contend the plaintiffs' model is inadequate for this case and propound a "merger simulation model," asserting it more appropriately accounts for the dominance of BCBSND in the commercial insurance market in North Dakota.

12. As described above,[7] the HMT is an iterative process that courts often use in defining relevant markets for purposes of antitrust analysis, and the Horizontal Merger Guidelines endorse its use. See *H & R Block, 833 F. Supp. 2d at 51*; Horizontal Merger Guidelines §§ 4.1.1-4.1.3.

13. The merger simulation model, as described by the defendants, involves two steps. The first step is to "determine if a measure for bargaining leverage (willingness to pay) has any relationship to price in the market." (Doc. #132, p. 26). The second step is to "calculate how much the merger will increase bargaining leverage and then use the relationship calculated in the first step to simulate how much price will increase **[*79]** post transaction." Id. at 27. According to Dr. Town, if there is a relationship between bargaining leverage and price, the merger simulation model will predict a price increase. (Tr-4, pp. 74-76). The defendants assert that framework has

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[7] See supra, Findings of Fact, Section VI, Definition of Relevant Market.

been widely adopted, including its use in ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *24, in which Dr. Town—the defendants' expert in this case—served as an expert for the FTC.

14. The defendants contend the plaintiffs' model does not adequately consider realities of North Dakota's health insurance market and that the plaintiffs' position elevates theory over reality. In support of their position, the defendants quote the FTC's acting chair, Maureen Ohlhausen, who at a recent symposium stated, "We frequently need to go beyond market shares and structural presumptions and really understand the dynamics of the markets we're evaluating." (Tr-1, p. 44). But, as the plaintiffs counter, Chair Ohlhausen supported the FTC's initiation of an enforcement action in this case. (Tr-4, pp. 259-60).

15. There exists no universal method for defining a relevant market. Rather, the defined market must be "relevant to the particular legal issue at hand." H & R Block, 833 F. Supp. 2d at 51 n.8. In a merger case, a relevant product market is the line of **[*80]** commerce in which competition may be substantially lessened because of the merger. Phila. Nat'l Bank, 374 U.S. at 355-56; Brown Shoe, 370 U.S. at 324-25. Interchangeability between a product—or service—and possible substitutes for it determine the outer boundaries of a relevant market. "Determining the limits of a relevant product market requires identifying the choices available to customers." Se. Mo. Hosp. v. C.R. Bard, Inc., 642 F.3d 608, 613 (8th Cir. 2011).

16. The defendants cite language of the FTC's decision in In re ProMedica Health System, Inc., No. 9346, 2012 FTC LEXIS 293, 2012 WL 1155392, at *13 (FTC June 25, 2012), where the Commission stated that "evidence of competitive effects can often inform market definition." The quoted language followed the FTC's discussion of the traditional burden-shifting framework and recognized burden-shifting as "a flexible analytical framework rather than an airtight rule." Id. In the end, however, the FTC used the traditional burden-shifting framework in that case and found a Section 7 violation. The defendants also cite Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 596-98 (8th Cir. 2009) and describe that case as having rejected a market narrowed to commercial payers for hospital services. (Doc. #83-2, p. 15). But, Little Rock Cardiology was not a Section 7 enforcement matter; it was a restraint-of-trade claim brought by a "shut-out supplier" under the Sherman Act, and the court specifically distinguished it from prior cases involving Section 7 claims. Id. at 598.

17. In support **[*81]** of their argument that BCBSND's dominance should be considered when defining the relevant market, the defendants cite an FTC decision which adjudicated a consummated merger to be in violation of Section 7. In re Evanston Nw. Healthcare Corp., No. 9315, 2007 FTC LEXIS 210, 2007 WL 2286195 (FTC Aug. 6, 2007). Specifically, they note the FTC's language regarding a "fundamental relationship between market definition and competitive effects analysis in unilateral effects cases involving differentiated product markets." 2007 FTC LEXIS 210, [WL] at *49. The defendants argue that the Commission's Evanston decision shows that actual price impact on commercial payers is pertinent to market definition.

18. In his "initial decision," the Evanston administrative law judge discussed the consummated merger's impact on an insurer which had a significant market share and a "very strong bargaining position." In re Evanston Nw. Healthcare Corp., No. 9315, 2005 FTC LEXIS 146, 2005 WL 2845790, at *138 (FTC Oct. 20, 2005), vacated in part, 2007 FTC LEXIS 95, 2007 WL 2286196. The ALJ considered post-merger evidence that price increases had not been imposed on that insurer but nonetheless found that the merged entity had "gained market power though the merger." Id. The Commission's decision characterized the insurer's market power as a possible reason that there had not been post-merger price increases. Evanston, 2007 FTC LEXIS 210, 2007 WL 2286195, at *52. Since Evanston involved a consummated merger and did not consider a powerful buyer's **[*82]** market share at the market definition stage, it does not lead the court to conclude that BCBSND's dominance should be considered in defining a relevant market.

19. In the absence of case law supporting the defendants' position that BCBSND's dominance should be considered in defining a relevant market, application of a traditional burden-shifting framework—considering BCBSND's dominance as a defense rather than as part of the market definition process—is appropriate. See Chi. Bridge & Iron Co. N.V. v. FTC, 534 F.3d 410, 423-24, 439-40 (5th Cir. 2008); Cardinal Health, 12 F. Supp. 2d at 52-61. This is consistent with a powerful buyer's position being analyzed in rebuttal of the government's prima facie case since market definition is an element of a prima facie case. **IV. Application of HMT**

20. The plaintiffs base an exclusion of government payers from the market definition on government payers not negotiating reimbursement rates with providers. (Doc. #71-2, p. 12, n.8). The defendants contend that BCBSND does not truly negotiate reimbursement rates and that there is, therefore, no logical basis for excluding government payers from the definition of the relevant market. (Doc. #83-2, p. 15 n.5).

21. The plaintiffs cite to several cases in which the relevant market focused on commercial health insurers to the **[*83]** exclusion of government payers. *FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1075 (N.D. Ill 2012)*; *Advocate Health, 841 F.3d at 468*; *ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *8-9*. It does not appear exclusion of government payers was disputed in any of those cases, and the defendants have not cited any healthcare merger cases in which government payers were included in the relevant market. Commercial health insurance plans effectively channel consumer preferences and are therefore an appropriate subject of the HMT. See *Penn State Hershey, 838 F.3d at 342*. This court concludes it is appropriate to consider a relevant market limited to a distinct category of customers—commercial health insurance plans.

22. The relevant service markets in which to analyze competitive effects of the proposed transaction are adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services which are sold or provided to commercial insurers and their members in the Bismarck-Mandan area.

23. The plaintiffs established that commercial health insurers would accept a hypothetical monopolist's SSNIP rather than market a health insurance plan in the Bismarck-Mandan area that did not include Bismarck-Mandan area physicians providing adult PCP services, pediatrician services, OB/GYN services, and general surgeon services.

24. The relevant geographic market **[*84]** is "the area in which consumers can practically turn for alternative sources of the product [or service] and in which the antitrust defendants face competition." *OSF Healthcare, 852 F. Supp. 2d at 1076* (quoting *Tenet Health, 186 F.3d at 1052*). The Bismarck-Mandan area satisfies the HMT and constitutes a relevant geographic market for each of the four physician service lines.

V. Market Shares and Market Concentration

25. A merger that significantly increases market shares and market concentration is presumed to be unlawful under *Section 7*. *Phila. Nat'l Bank, 374 U.S. at 363*.

26. In each of the four physician service lines, as measured by the HHI, existing services in the Bismarck-Mandan area are currently highly concentrated and would be even more highly concentrated if the merger were consummated. The changes in HHI in each of the four physician service lines are well above the Merger Guidelines' threshold for presumption that the proposed transaction is likely to enhance market power.

27. Based on the HHI evidence of market concentration, the proposed transaction is presumptively unlawful in each of the four physician service lines. See *Penn State Hershey, 838 F.3d at 346-47*; *ProMedica, 749 F.3d at 568*.

VI. Competitive Effects

28. Transactions that eliminate direct competition between two entities are likely to result in anticompetitive effects. *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 61 (D.D.C. 2015)*; Horizontal **[*85]** Merger Guidelines § 6. If a merger "eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage," the merger is likely to cause competitive harm. Horizontal Merger Guidelines § 8.

29. The proposed transaction will eliminate current competition between Sanford and MDC for adult PCP services, pediatrician services, OB/GYN physician services, and general surgeon services in the Bismarck-Mandan area and, so, is likely to harm competition in each of those distinct service markets. See *Whole Foods, 548 F.3d at 1043*. **VII. Rebutting the Presumption of Illegality**

30. Since the plaintiffs have established that the proposed transaction is presumptively illegal, the burden shifts to the defendants to produce evidence that clearly shows that no anticompetitive effects are likely in order to overcome the plaintiffs' prima facie case. See *Phila. Nat'l Bank, 374 U.S. at 363*.

A. Efficiencies and Synergies

31. In analyzing a proposed transaction under *Section 7*, the Eighth Circuit has directed that evidence of enhanced efficiency be considered in the context of the competitive effects of the merger. *Tenet Health, 186 F.3d at 1054-55*. Efficiencies resulting from a merger can rebut a presumption of illegality if they are demonstrated to be merger-specific and are independently **[*86]** verifiable. *Sysco, 113 F. Supp. 3d at 82*. The Merger Guidelines consider "whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers." Horizontal Merger Guidelines § 10. Additionally, claimed efficiencies must be passed through to consumers. *Saint Alphusnus, 778 F.3d at 790*; *FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991)*.

32. In support of their assertion that 340B savings should not be considered because cancer care services are not within the relevant market, the plaintiffs cite to the Merger Guidelines statement that efficiencies justifying a transaction must be "of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market." Horizontal Merger Guidelines § 10 (emphasis added). In Tenet Health, the Eighth Circuit found the government had not sufficiently established a well-defined market but also stated that the district court may have properly rejected the efficiencies defense but should "nonetheless have considered evidence of enhanced efficiency in the context of the competitive effects of the merger." *186 F.3d at 1054*. Tenet Health did not, however, involve a challenge to alleged efficiencies as being outside the defined relevant market.

33. The defendants counter that to apply a market specificity requirement **[*87]** "makes no sense in a merger involving an integrated healthcare system acquiring a multi-specialty clinic, both of which enable patients to obtain services in multiple areas based on their needs." (Doc. #83-2, p. 45). They assert any 340B savings should be considered fungible benefits to the patient population as a whole.

34. The Supreme Court has not specifically recognized an efficiencies defense in a *Section 7* case. Recent opinions of other circuit courts appear to limit that defense, including by closely analyzing the relationship between the claimed efficiencies and the relevant market. "It is not enough to show that the merger would allow [the merged entity] to better serve patients. [*Section 7*] focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate." *Saint Alphonsus, 778 F.3d at 791* (citing *Univ. Health, 938 F.2d at 1222*). See also *Miss. River Corp. v. FTC, 454 F.2d 1083, 1089 (8th Cir. 1972)*.

35. When an efficiencies defense is recognized, a defendant has the burden to show that the claimed efficiencies are merger-specific and to demonstrate that they are independently verifiable. *H.J. Heinz, 246 F.3d at 721-22*.

36. Under the guidelines, the lesser the adverse competitive effects, the greater the weight ascribed to efficiencies. "Efficiencies **[*88]** almost never justify a merger to monopoly or near-monopoly." Horizontal Merger Guidelines § 10; see also *Saint Alphonsus, 778 F.3d at 790*; *ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *57*. Given that the proposed transaction would result in near-monopoly, the claimed monetary and quality efficiencies are insufficient to overcome the presumption of illegality.

B. Powerful Buyer Defense

37. Evidence of BCBSND's bargaining leverage is properly considered when analyzing competitive effects and not as part of the definition of a relevant market. See *Chi. Bridge & Iron, 534 F.3d at 423-24*; *Cardinal Health, 12 F. Supp. 2d at 45-52*.

38. Sanford and MDC contend that BCBSND is such a powerful buyer that a post-merger Sanford could not negotiate higher reimbursement rates from BCBSND. The plaintiffs assert that a "powerful buyer defense" is limited to two situations not present here—(1) where a buyer is able to use its leverage to sponsor entry or vertically integrate and (2) where there are alternative suppliers post-merger, and a buyer is able to obtain lower prices from suppliers. (Doc. # 71-2, p. 26). The agency guidelines address powerful buyers:

> The Agencies consider the possibility that powerful buyers may constrain the ability of the merging parties to raise prices. . . . However, the Agencies do not presume that the presence of powerful buyers **[*89]** alone forestalls adverse competitive effects flowing from the merger. Even buyers that can negotiate favorable terms may be harmed by an increase in market power. The Agencies examine the choices available to powerful buyers and how those choices likely would change due to the merger. Normally, a merger that eliminates a supplier whose presence contributed significantly to a buyer's negotiating leverage will harm that buyer. . . . Furthermore, even if some powerful buyers could protect themselves, the Agencies also consider whether market power can be exercised against other buyers.

Horizontal Merger Guidelines § 8.

39. The defendants have not met either of the common applications of a "powerful buyer defense"—(1) a buyer's ability to use its leverage to sponsor entry or vertically integrate or (2) where there are alternative suppliers post-merger, a buyer is able to obtain lower prices from suppliers. See id.

40. Although Sanford advances its ethical precept of "promises made, promises kept," the defendants cite no case in which similar statements were considered as part of an antitrust analysis. To the extent the defendants urge that principle shows that Sanford does not intend to demand **[*90]** higher reimbursement rates from BCBSND if the proposed transaction is consummated, the court notes that the plaintiffs are not required to prove an intent to do so. See *United States v. Bazaarvoice, Inc., No. 13-CV-00133, 2014 U.S. Dist. LEXIS 3284, 2014 WL 203966, at *11 (N.D. Cal. Jan. 8, 2014)* (stating that "intent is not an element of a *Section 7* violation"); *Cardinal Health, 12 F. Supp. 2d at 67* (pledge to maintain current prices for three years could not rebut likelihood of anticompetitive effects).

41. In light of BCBSND testimony that it would be forced to agree to increase reimbursements to a post-merger Sanford and evidence that BCBSND has agreed to modify contract terms [TEXT REDACTED BY THE COURT], the powerful buyer defense is insufficient to overcome the plaintiffs' prima facie case.

C. Impact on Medica

42. Private agreements, such as the [TEXT REDACTED BY THE COURT] contract between Sanford and Medica, are rarely considered in antitrust analysis. In Penn State Hershey, the appellate court rejected use of a private contract to define the geographic market, noting that such private agreements could hamper effective enforcement of antitrust laws. *838 F.3d at 343-44*. Commonwealth v. Partners Healthcare System, Inc. held that a time limited price cap was inadequate in the context of a consent judgment because it did not directly address loss of competition. *No. SUCV2014-02033-BLS2, 2015 Mass. Super. LEXIS 4, 2015 WL 500995, at *22-24 (Mass. Super. Ct. Jan. 30, 2015)*. The **[*91]** Sanford/Medica [TEXT REDACTED BY THE COURT] agreement is insufficient to ameliorate the competitive harm that would result from the proposed transaction.

43. The defendants acknowledge that, after the [TEXT REDACTED BY THE COURT] contract expires, Medica's spending in the Bismarck-Mandan area would increase as a result of the proposed transaction. ***Antitrust law*** does not recognize a de minimus exception.

D. Entry or Expansion into the Market

44. Entry or expansion of competitors into a market may ameliorate anticompetitive effects of a proposed merger if entry or expansion is timely, likely, and sufficient. Horizontal Merger Guidelines § 9; *Cardinal Health, 12 F. Supp. 2d at 54-58*.

45. Hearing evidence does not demonstrate that CHI would be able to recruit enough physicians to timely replace the MDC physicians currently referring to CHI St Alexius. Physician recruitment challenges constitute a high entry barrier, reducing the possibility that market expansion would ameliorate the reduced competition resulting from the proposed transaction. *Saint Alphonsus, 778 F.3d at 788*. CHI's potential expansion therefore cannot be considered timely, likely, or sufficient to counter the anticompetitive effects of the proposed transaction.

46. The defendants have not established **[*92]** that any new entry or expansion is timely, likely, or sufficient to counteract anticompetitive effects of the proposed transaction.

E. MDC Viability and Alleged Admission of Weakness

47. Courts have, in rare cases, recognized a "weakened competitor" defense to a merger challenge, but the defendants have not made sufficient showing to consider it here. See *ProMedica, 749 F.3d at 572*; *Nat'l Tea Co., 603 F.2d 694, 700 (8th Cir. 1979)*. MDC's current financial status is strong. There is no evidence that it would "imminently depart" from the market if the merger were not consummated as was apparent in the National Tea case on which the defendants rely. See *603 F.2d at 701*.

48. The plaintiffs argue that [TEXT REDACTED BY THE COURT] July 5, 2017 statements should be considered an admission by MDC of the weakness of its case. In support of their position, the plaintiffs cite *Great American Insurance Co. v. Horab, 309 F.2d 262 (8th Cir. 1962)*. Great American Insurance, a case tried to a jury, presented a question of admission of evidence that a party had attempted to interfere with service of process. The plaintiff argued that the attempted interference was an admission of the "false and fraudulent nature" of the defendant's insurance claims. *Id. at 264*. The trial court excluded the evidence, and the appellate court found that exclusion was not an abuse of **[*93]** discretion. Though affirming exclusion of the evidence, the Eighth Circuit stated that generally, in a civil case, "evidence that a litigant, or [the litigant's] agent, has attempted to influence or suppress a witness is receivable as an admission or as an indication of the litigant's consciousness that [the litigant's] case is weak or unfounded." Id. Great American Insurance appears to be the only Eighth Circuit decision addressing evidence of alleged witness tampering in a civil case. Catipovic v. Turley, a recent opinion of a district court in this circuit, discussed the issue extensively, though in the context of a pretrial motion seeking to keep the evidence from the jury. *68 F. Supp. 3d 983, 1003-08 (N.D. Iowa 2014)*.

49. While [TEXT REDACTED BY THE COURT] statements can be seen as an admission of his perception that the defendants' case was weak, that admission adds little to the court's analysis. There is no suggestion that [TEXT REDACTED BY THE COURT] statements were prompted by the MDC board or by any Sanford representative. The court instead considers [TEXT REDACTED BY THE COURT] denial of the statements as impacting credibility of his testimony.

VIII. Equities

50. The defendants argue that public equities weigh against **[*94]** an injunction because, if an injunction is granted and upheld on appeal, the defendants intend to abandon the proposed transaction. Thus, from the defendants' perspective, an injunction would "permanently deprive the public of the benefits of the transaction." (Doc. #83-2, p. 55). The defendants further argue that, even assuming harm from consummation of the transaction, no harm could "realistically materialize prior to the administrative resolution of this case." Id. at 56.[8]

51. Where the FTC has demonstrated a likelihood of success on the merits, no court has denied a *Section 13(b)* motion for a preliminary injunction based on weight of the equities. There is a strong public interest in effective enforcement of the antitrust laws and in the FTC having the ability to order effective relief if it succeeds in an

[8] Though not addressed at the hearing, in their proposed conclusions of law, the defendants describe their intent that Sanford and MDC maintain their own facilities, with MDC remaining a separate corporate subsidiary of Sanford. Id.

administrative proceeding. See *H.J. Heinz, 246 F.3d at 726-27*; *Sysco, 113 F. Supp. 3d at 86*; *ProMedica, 2011 U.S. Dist. LEXIS 33434, 2011 WL 1219281, at *60*. The court cannot conclude that what the defendants describe as public benefits are sufficient reason to deny the motion.

Conclusion

The court has fully considered the hearing testimony and those portions of exhibits referenced during the hearing or in the parties' proposed findings of fact and conclusions of law. Though mindful that it is not this court's **[*95]** task to determine the merits of the matter, the court concludes there are questions going to the merits that are so serious, substantial, difficult, and doubtful as to make them fair ground for thorough investigation and determination by the FTC.

The court concludes that the FTC is likely to succeed in proving that the proposed transaction may substantially lessen competition in each of the four relevant physician service lines sold to commercial insurers in the Bismarck-Mandan area. Additionally, the public equities favor preliminarily enjoining the proposed transaction. The plaintiffs' motion for a preliminary injunction is therefore **GRANTED**.

JUDGMENT SHALL BE ENTERED ACCORDINGLY.

Dated this 15th day of December, 2017.

/s/ Alice R. Senechal

Alice R. Senechal

United States Magistrate Judge

Hu Honua Bioenergy v. Hawaiian Elec. Indus.

United States District Court for the District of Hawaii

December 19, 2017, Decided; December 19, 2017, Filed

Civ. No. 16-00634 JMS-KJM

Reporter
2017 U.S. Dist. LEXIS 208236 *; 2017-2 Trade Cas. (CCH) P80,233; 2017 WL 6499238

HU HONUA BIOENERGY, LLC, a Delaware Limited Liability Company, Plaintiff, vs. HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawaii Corporation; HAWAIIAN ELECTRIC COMPANY, a Hawaii Corporation; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaii Corporation; NEXTERA ENERGY, INC., a Florida Corporation; HAMAKUA ENERGY PARTNERS, L.P., a Hawaii Limited Partnership, Defendants.

Subsequent History: Superseded by *Hu Honua Bioenergy, LLC v. Hawaiian Elec. Co., 2018 U.S. Dist. LEXIS 8835 (D. Haw., Jan. 19, 2018)*

Dismissed by, in part, Motion denied by, in part, Without prejudice *Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus., 2018 U.S. Dist. LEXIS 192162 (D. Haw., Nov. 9, 2018)*

Prior History: *Hu Honua Bioenergy, LLC v. Hawaiian Elec. Indus., 2017 U.S. Dist. LEXIS 223820 (D. Haw., July 6, 2017)*

Core Terms

antitrust, monopolize, Electric, alleges, conspiracy, Island, termination, wholesale, Merger, energy, power plant, competitor, qualifying, motion to dismiss, power generation, monopoly, electric utility, anti trust law, facilities, cancellation, consumers, fuel, restraint of trade, generation, plant, state-law, damages, prices, costs, fails

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Judges: J. Michael Seabright, Chief United States District Judge.

Opinion by: J. Michael Seabright

Opinion

ORDER GRANTING IN PART DEFENDANTS NEXTERA ENERGY, INC.'S AND HAMAKUA ENERGY PARTNERS, L.P.'S MOTIONS TO DISMISS, ECF NOS. 73 & 95, WITH LEAVE TO AMEND

I. INTRODUCTION

Plaintiff Hu Honua Bioenergy, LLC ("Hu Honua") contracted with Defendant Hawaii Electric Light Company, Inc. ("HELCO") to build an independent power plant run on biomass to supply energy to HELCO on the Big Island of Hawaii. Given problems with the construction contractor and other labor issues, Hu Honua was unable to complete the facility on time. After unsuccessful negotiations to extend deadlines, HELCO cancelled the contract.

Hu Honua filed this suit contending that HELCO's cancellation was, among other things, the result of an illegal conspiracy in violation of antitrust laws. The suit alleges federal antitrust and related state-law claims **[*3]** against HELCO; Hawaiian Electric Company, Inc. ("HECO"); Hawaiian Electric Industries, Inc. ("HEI"); NextEra Energy, Inc. ("NextEra"); and Hamakua Energy Partners, L.P. ("HEP"). It also alleges that HELCO breached the contract by refusing to extend deadlines under the contract's terms.

The court now addresses Motions to Dismiss brought by NextEra and HEP under *Federal Rule of Civil Procedure 12(b)(6)*. ECF Nos. 73, 95. Based on the following, the Motions are GRANTED in part. The federal antitrust claims are DISMISSED as to NextEra and HEP, with leave to amend. The Motions are DENIED without prejudice as to the state-law claims against NextEra and HEP. Hu Honua may file a Second Amended Complaint by January 29, 2018.

II. BACKGROUND

A. Factual Background

Hu Honua's 96-page First Amended Complaint ("FAC"), ECF No. 27, describes the structure of the electric utility market in Hawaii — in particular, on the island of Hawaii (the Big Island)—and alleges in detail a scheme (although ultimately deficiently, at least as to its antitrust claims) whereby HELCO's cancellation of the contract not only breached certain of its terms but was also part of a conspiracy or conspiracies among NextEra, HEP and the other Hawaiian Electric Defendants **[*4]** [1] to monopolize or restrain trade in violation of antitrust laws.

After suit was filed, Hu Honua and the Hawaiian Electric Defendants reached a settlement in conjunction with a renegotiated contract for Hu Honua to complete its biomass power plant. ECF No. 122. Consummation of that settlement is awaiting final completion of the approval process involving the Hawaii Public Utilities Commission ("PUC").[2] Perhaps because of that settlement, the Hawaiian Electric Defendants have not moved to dismiss the FAC. (Earlier, they filed a motion seeking to compel arbitration, but asked the court to hold that motion in abeyance, pending consummation of the settlement, ECF No. 126). Because only NextEra and HEP have moved to dismiss, the court focuses on setting forth the essential factual allegations against them. That is, the court need not (and does not) reiterate all the details alleged in the lengthy FAC as to the Hawaiian Electric Defendants, but describes

[1] The court sometimes refers to HELCO, HECO, and HEI collectively as the "Hawaiian Electric Defendants."

[2] The PUC has approved the renegotiated contract, and construction of the facility is ongoing, although the final settlement with the Hawaiian Electric Defendants is awaiting disposition of a related state-court appeal of the PUC-approval. *See* ECF No. 122.

those facts necessary to put the claims against NextEra and HEP into proper context. And some of the relevant factual allegations are set forth later, in the appropriate discussion sections analyzing particular claims. For present purposes, **[*5]** the court assumes as true any well-pleaded factual allegations set forth in the FAC.

1. The Basic Structure of the Electric Utility Market in Hawaii

Unlike on the continental United States—where states and utilities may utilize large interconnected, interstate power grids comprised of high-voltage transmission lines—each island in the State of Hawaii has its own isolated grid and power supplies. FAC ¶¶ 14-16. HECO is such an electric utility providing electricity to consumers on the island of Oahu; likewise, HELCO is the electric utility providing electricity to the Big Island. *Id.* ¶ 17. (Although not a defendant, Maui Electric Company ("MECO") powers the islands of Maui, Lanai, and Molokai. *Id.*[3]) HEI is a holding company, with HECO as one of its subsidiaries. In turn, HELCO and MECO are subsidiaries of HECO. *Id.* ¶¶ 3-5.

Power supplied to electric utilities (which utilities then provide to retail consumers) is divided into two basic categories: "firm power" and "intermittent power." *Id.* ¶ 18. "Firm power" (generated by fossil fuels, geothermal, biomass, and similar sources) is power that is intended always to be available during "the period covered by a guaranteed commitment to deliver." **[*6]** *Id.* In contrast, "intermittent" power consists of sources such as wind or solar that are not always available, "with output controlled by the natural variability of the energy resource rather than power dispatched based on system requirements." *Id.*

Much of Hawaii's power currently comes from fossil fuels. "77% of Hawaii's electricity is generated by petroleum, making the State's utility the most oil dependent in the country. All of the petroleum consumed in the State is generated from crude oil imported from South East Asia and other off-shore locations." *Id.* ¶ 11. And so, "[t]o mitigate the risk of dependence on foreign fuel sources, the Hawaii state government policies and legislation have sought to place greater emphasis on the development of renewable energy resources[.]" *Id.* ¶ 13. "[I]n June 2015, the Hawaii Legislature amended Hawaii's Renewable Portfolio Standard statute to require Hawaii to move towards achievement of 100% renewable energy by 2045." *Id.*

HELCO serves approximately 85,000 customers on the Big Island. *Id.* ¶ 21. "HELCO currently owns fossil fuel plants that generate in excess of 65% of the [Big] Island's dispatchable firm electrical capacity." *Id.* Specifically, it **[*7]** "owns and operates six oil-fired power generation plants, accounting for 184 MW [(megawatts)] of firm power capacity[.]" *Id.* ¶ 28. "In addition to its own fossil fuel plants, HELCO purchases firm power generation capacity [and electrical energy] from HEP, which owns a 60 MW fossil-fuel combined cycle power plant, pursuant to a 1997 Power Purchase Agreement." *Id.* ¶ 22. "HEP is one of only two independent power producers ('IPPs') on the Island of Hawaii that provides firm power generating capacity." *Id.* ¶ 23. The other is Puna Geothermal Venture "whose power capacity is 34.6 MW, only part of which is firm." *Id.*

"HELCO is compensated differently for the power that it generates itself through the power plants that it owns versus the power that it purchases from IPPs." *Id.* ¶ 32. "In fact, as a result of HELCO's ability to recover its capital costs, and an annual fixed rate of return on those costs, HELCO receives more revenue through the rates paid by its customers for the sale of power that HELCO generates from running its own units than from the power it purchases from IPPs." *Id.*

"In Hawaii, IPPs must sell power to a public utility because Hawaii's utilities have not permitted the use of **[*8]** their grids for the 'wheeling' or transmission of power to power purchasers, and because it would be economically impractical for IPPs to build their own transmission and distribution system." *Id.* ¶ 24. "As a result, HELCO is not only the monopoly retail seller of electricity on the Island of Hawaii, but also the monopoly owner of electricity transmission and distribution infrastructure and monopoly purchaser of wholesale electricity." *Id.*

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[3] The island of Kauai is served by Kauai Island Utility Cooperative, which is an entity not related to any of the Defendants.

2. The Hu Honua Power Purchase Agreement

In May 2012, Hu Honua entered into a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity ("the Hu Honua PPA" or "the Contract") with HELCO under which Hu Honua would develop an independent power plant on the Hamakua Coast of the Big Island, with a renewable biomass fuel source (e.g., eucalyptus trees) of firm power. *Id.* ¶¶ 1, 34, 38. "The trees were to be 100% locally grown and harvested on a sustainable rotational basis and would have provided an important means to reduce Hawaii's dependence on imported fossil fuels." *Id.* ¶ 34.

Hu Honua's power plant would supply HELCO with "no less than 10 MW of electricity capacity at all times," with the facility having a "maximum 'Available Capacity' **[*9]** of approximately 30 net MW." *Id.* ¶ 46. Hu Honua began construction in late October 2012, but was unable to complete the facility by the end of 2015, as contemplated by the Hu Honua PPA, because of disputes with its construction contractor, labor union issues, and related litigation. *Id.* ¶ 51, 58.[4] After unsuccessful negotiations between Hu Honua and HELCO to extend milestone dates as provided in the Hu Honua PPA (where milestone-date extension requests "shall not be unreasonably withheld," *id.* ¶ 42), HELCO cancelled the Contract on March 1, 2016. *Id.* ¶ 60.

3. NextEra's Proposed Merger with HEI, and HELCO's Proposed Purchase of HEP's Power Plant

Meanwhile, two other relevant things happened: First, "the proposed merger" — on December 3, 2014, NextEra, which is a large Florida-based utility holding company, and HEI entered into an Agreement and Plan of Merger (the "NextEra/HEI Merger Agreement" or "Merger Agreement") under which HEI subsidiaries HELCO and HECO would become wholly-owned subsidiaries of NextEra. *Id.* ¶¶ 6, 52.[5] And second, "the proposed purchase" — on December 23, 2015, HECO and HELCO publicly disclosed that HELCO would purchase HEP's 60 MW fossil-fuel power plant for over **[*10]** $88 million. *Id.* ¶¶ 22, 91.[6]

"Article V of the Merger Agreement addresses certain issues relating to HECO's conduct of its and its subsidiaries' business during the pendency of the merger. Among other things, Article V prohibited HECO from engaging in

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[4] HEP provides a listing from Hawaii state court records of "28 different legal actions against Hu Honua during this time period, including one that resulted in Hu Honua losing control of the facility until it paid a stipulated judgment." ECF No. 95-1, Mem. at 8-9 (citing Egesdal Decl., Ex. D, ECF No. 95-6). Although the court has not reviewed the substance of these actions, the court takes judicial notice of the existence and number of state court actions. *Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001)*. And, according to the FAC, "Hu Honua's disputes with its former construction contractor and the labor union jurisdiction dispute caused an irretrievable loss of time . . . [such that] Hu Honua realized that it would not be able to achieve two milestone[] dates set forth in the PPA[.]" FAC ¶ 58.

[5] The Merger Agreement required approval by the PUC. But after several months of hearings, the PUC rejected the Merger Agreement on July 15, 2016. *See, e.g.*, Kathryn Mykleseth, *PUC Rejects NextEra's Purchase of Hawaiian Electric, Honolulu Star-Advertiser*, July 15, 2016 (*available at* http://www.staradvertiser.com/2016/07/15/business/businessbreaking/puc-rejects-nexteras-purchase-of-hawaiian-electric/(last visited Dec. 15, 2017).

[6] On May 4, 2017, the PUC rejected HELCO and HECO's application to approve the purchase of HEP's facility. *See* Egesdal Decl., Ex. B., ECF No. 95-4 (*In re Hawaiian Electric Co. (Hawaii P.U.C. May 4, 2017) (Decision and Order No. 34536, 2017 Haw. PUC LEXIS 236)*). The court takes judicial notice of publicly-available decisions of the PUC. *See, e.g., Bartolotti v. Maui Mem'l Med. Ctr., 2015 U.S. Dist. LEXIS 98121, 2015 WL 4545818, at *3 (D. Haw. July 28, 2015)* ("The court may 'take judicial notice of 'matters of public record[,]' 'as long as the facts noticed are not 'subject to reasonable dispute.'"') (quoting *Intri—Plex Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007))*; *id.* ("'Matters of public record that may be judicially noticed include records and reports of administrative bodies,' and documents filed with courts, 'both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.'") (quoting *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)* & *United States v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992))*.

several activities without NextEra's prior consent." *Id.* ¶ 56. Specifically, "§ 5.01(a)(xii) provides that HECO/HELCO shall not:

> (1) enter into, terminate or amend in any material respect any material Contract,
> (2) consent to any extension or continuation of any material Contract . . . or
> (3) waive any material right on any material Contract[.]"

FAC ¶ 56.[7] Based on this consent provision, Hu Honua alleges that NextEra "exercised total control over HECO's/HELCO's conduct of their important business actions and material agreements, including the fate of Hu Honua's PPA." *Id.*

As for HELCO's proposed purchase of the HEP power plant, Hu Honua alleges that its biomass facility "would have been a direct competitor to the HEP Power Plant in the supply of wholesale electricity capacity to HELCO." *Id.* ¶ 90. Hu Honua alleged "[o]n information and belief, HELCO planned to acquire the HEP Power Plant in order to further HELCO's strategy to increase its monopoly over power generation on the Island of Hawaii." *Id.* ¶ 92. "On information and belief, HELCO favors its own power generation instead of purchasing power from Hu Honua, because HELCO generates more profit by owning its own power generation." *Id.* And, as for HEP's motivation, it alleges that

> HEP had its own reasons for wanting the Hu Honua PPA terminated. As early as 2012, HEP recognized that the proposed Hu Honua Facility was a direct competitive threat. On September 19, 2012, it filed a motion to intervene in the Commission's docket for HELCO's Application for Approval of the **[*12]** Hu Honua PPA, which it vigorously opposed on the grounds that "[t]he introduction of the proposed Hu Honua plant would, according to [the] HELCO plan outlined in its application, reduce the HEP Plant's dispatch." In sum, HEP, as the operator of the largest power plant on the Island, attempted unsuccessfully to exclude Hu Honua as a competitor in the power generation market. It was presented with another opportunity three years later to accomplish that objective. Hu Honua is informed and believes, and on that basis alleges, that HEP participated in and supported the termination of Hu Honua's PPA, as alleged [in the FAC].

Id. ¶ 99.[8]

4. Hu Honua Files This Action

After HELCO cancelled the Hu Honua PPA in March of 2016 (and after the PUC rejected the proposed NextEra/HEI Merger Agreement in July 2016), Hu Honua filed the original Complaint in this action on November 30, 2016, ECF No. 1. It filed the FAC on January 27, 2017, ECF No. 27, alleging the following counts:

- Count One — Violation of Section Two of the Sherman Act, *15 U.S.C. § 2* (attempted monopolization, conspiracy to monopolize, and monopolization) against the Hawaiian Electric Defendants and NextEra;

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[7] Paragraph 5.01(a) of the Merger Agreement also provides that such consent "shall not be unreasonably withheld, conditioned or delayed." ECF No. 73-3 at 5, Merger Agreement at 38. And Paragraph 5.01(c) reads in part:

> No Control of [HEI's] Business. [NextEra] acknowledges and agrees that (i) nothing contained in this Agreement is intended to give [NextEra], directly or indirectly, the right to control or direct the operations of [HEI] or an [HEI] Subsidiary **[*11]** prior to the Effective Time and . . . prior to the Effective Time, [HEI] shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and [HEI's] Subsidiaries' respective operations.

ECF No. 73-3 at 10, Merger Agreement at 43.

[8] HEP challenges the FAC's allegation that it "vigorously opposed" Hu Honua's application, pointing to a public document (a 2012 "Statement of Position" before the Hawaii PUC) stating in part: "HEP does not take a position as to the prudence of approving the power purchase agreement. . . . Rather, HEP's position is that if the Commission *does* approve the Hu Honua PPA, it should not do so without requiring that HELCO adequate[ly] consider and plan to deal with the excess generating capacity that the Hu Honua asset would add[.]" Egesdal Decl. Ex. D at 2, ECF No. 95-3 at 3.

• Count Two — Violation of Section One **[*13]** of the Sherman Act, *15 U.S.C. § 1* (conspiracy to restrain trade) against all Defendants;
• Count Three — Breach of Contract against HELCO;
• Count Four — Promissory Estoppel against HELCO;
• Count Five — Breach of the Covenant of Good Faith and Fair Dealing against HELCO;
• Count Six — Breach of Fiduciary Duty against HELCO;
• Count Seven — Tortious Interference with Contract against NextEra;
• Count Eight — Unfair Competition in Violation of HRS Chapter 480 against All Defendants;
• Count Nine — Declaratory Relief against HELCO; and
• Count Ten — Conversion against HELCO.

FAC at 69-93. Hu Honua claims it was damaged "in the amount of its investment of $120 million in the plant, plus lost profits of $435 million." *Id.* ¶ 1. It seeks treble damages and attorney fees, among other injunctive relief. *Id.* at 94-95.

Hu Honua alleges that HELCO's cancellation of the Hu Honua PPA was illegal under the Sherman Act in two ways. First, it alleges that, in conjunction with the proposed Merger Agreement, NextEra conspired with Hawaiian Electric Defendants to monopolize the market for wholesale firm power on the Island of Hawaii, in violation of *15 U.S.C. § 2*. FAC ¶¶ 135-55. Second, it alleges that HEP (with the proposed purchase by HELCO of HEP's power plant), **[*14]** NextEra and the Hawaiian Electric Defendants conspired to restrain trade in the market for wholesale firm power on the Big Island, in violation of *15 U.S.C. § 1*. *Id.* ¶¶ 156-65.

B. Procedural History

On February 16, 2017, the Hawaiian Electric Defendants filed a Motion to Compel Arbitration, ECF No. 33, which was set for hearing on May 22, 2017. But on May 12, 2017, the Hawaiian Electric Defendants notified the court of the preliminary settlement between them and Hu Honua, and the hearing was continued until August 7, 2017, to allow the Hawaii PUC to consider the renegotiated Hu Honua PPA. ECF No. 76, 77.

NextEra filed its Motion to Dismiss on May 3, 2017, ECF No. 73, and HEP filed its Motion on June 2, 2017, ECF No. 95. The Motions were also set for hearing on August 7, 2017. (Discovery has been stayed pending a ruling on these Motions. ECF Nos. 59, 105.) Hu Honua filed its Oppositions on July 17, 2017, ECF Nos. 108-09, and Replies were filed on July 24, 2017, ECF Nos. 112-13. On July 17, 2017, the Hawaiian Electric Defendants filed short joinders in both Motions to Dismiss. ECF Nos. 106-07.

The August 7, 2017 hearing was continued to allow further time for PUC approval of the renegotiated Hu Honua/HELCO **[*15]** PPA, ECF Nos. 115, 117, and was later rescheduled for November 6, 2017, upon request by the parties. ECF No. 119. The court then granted a request to hold the Hawaiian Electric Defendants' Motion to Compel Arbitration in abeyance, pending finalization of the settlement, ECF No. 126.[9] The court, however, proceeded to hear the Motions to Dismiss on November 6, 2017.

III. STANDARD OF REVIEW

A. *Rule 12(b)(6)*'s Plausibility Standard

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[9] Given the pending settlement between Hu Honua and the Hawaiian Electric Defendants, the court is likewise deferring ruling on the joinders by Hawaiian Electric Defendants. For administrative purposes, as discussed at the November 6, 2017 hearing, the joinders are DENIED as MOOT without prejudice. ECF No. 127.

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Such a dismissal is proper "'based on the lack of a cognizable legal theory or the absence of sufficient facts alleged.'" UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 718 F.3d 1006, 1014 (9th Cir. 2013) (quoting Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)).

In resolving a Rule 12(b)(6) motion, the court "accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light most favorable to the non-moving party." *Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 784 (9th Cir. 2012)* (quoting Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)). But a "formulaic recitation of the elements of a cause of action" will not defeat a motion to dismiss. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Twombly, 550 U.S. at 570). This tenet—that the court must accept as true all of the allegations contained in the complaint—"is inapplicable **[*16]** to legal conclusions." *Id.* Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing Twombly, 550 U.S. at 555).

B. The Antitrust Context

"The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting Twombly, 550 U.S. at 557). Determining plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679 (citation omitted). And in analyzing these principles in the *antitrust* context, *Twombly* recognized that "proceeding to antitrust discovery can be expensive," 550 U.S. at 558, and reiterated that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* (quoting Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)).

Thus, although *Twombly* did not impose a heightened pleading standard for antitrust conspiracy cases, 550 U.S. at 569 n.14, in this context "[a]llegations of facts that could just as easily suggest rational, legal business **[*17]** behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1049 (9th Cir. 2008) (citing Twombly, 550 U.S. at 553-58 & n.5); *see also* Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1130 (9th Cir. 2015) ("We cannot, however, infer an anticompetitive agreement when factual allegations 'just as easily suggest rational, legal business behavior.'" (quoting Kendall, 518 F.3d at 1049)). "[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (citations omitted). And so, "[w]hen considering plausibility, courts must also consider an 'obvious alternative explanation,' for defendant's behavior." Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014) (quoting Iqbal, 556 U.S. at 682).

C. General Principles

Rule 12(b)(6) review is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. Nevertheless, courts may "consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003). Courts may also "take into account 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading.'" Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1160 (9th Cir. 2012) (quoting Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005) (brackets **[*18]** omitted)).

When a complaint is dismissed, the court "'should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts.'" *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (en banc) (quoting *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995))*. Leave to amend "is properly denied, however, if amendment would be futile." *Carrico v. City & Cty. of S.F., 656 F.3d 1002, 1008 (9th Cir. 2011)*.

IV. DISCUSSION

A. Count One (Monopolization) Fails to State a Plausible Claim Against NextEra

Section 4 of the Clayton Act allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages and costs of suit. *15 U.S.C. § 15(a)*. Count One asserts such a claim against each of the Hawaiian Electric Defendants and NextEra based upon alleged violations of *§ 2* of the Sherman Act, which makes it illegal for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]" *15 U.S.C. § 2*. Hu Honua claims that "HELCO's, along with HECO's and HEI's, conduct and practices as described [in the FAC], and as controlled by NextEra, were undertaken for the purpose and have had the effect of monopolizing the market for firm generation **[*19]** of electricity on the Island of Hawaii." FAC ¶ 137. It alleges that "NextEra entered into a contract, combination, or conspiracy with HELCO in furtherance of HELCO's unlawful monopolizing and attempting to monopolize the relevant market in violation of *Section 2*," FAC ¶ 138, where "the relevant market" is "the market for wholesale firm baseload power generation on the Island of Hawaii." FAC ¶ 139.[10]

A *§ 2* monopolization claim has three essential elements: "'(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.'" *Name.Space, Inc., 795 F.3d at 1131* (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010))*. "Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 506 (9th Cir. 2010)* (quoting *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008))*. And "[t]o prove a conspiracy to monopolize in violation of *§ 2*, [a plaintiff] must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust **[*20]** injury." *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)* (citation omitted).

1. The FAC Fails to State a Claim for Monopolization and Attempted Monopolization Against NextEra

NextEra argues that any monopolization and attempted monopolization claims against it fail at the outset because — as a power producer in *Florida*—it was never a competitor with Hu Honua in the wholesale firm baseload power generation market on the *island of Hawaii. See, e.g., Name.Space, Inc., 795 F.3d at 1131* ("Because [defendant] is not a competitor in any of the three markets, they cannot serve as the basis for a *§ 2* monopoly claim.") (citing *Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty., 791 F.2d 755, 759 (9th Cir. 1986)* ("The gravamen of a *section 2* claim is the deliberate use of market power by a competitor[.]") (other citation omitted)); *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)* ("'[T]he party alleging the injury must be either a consumer

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[10] As set forth previously, the Hawaiian Electric Defendants did not file a motion to dismiss (having instead filed joinders in NextEra's and HEP's Motions). Again — because the court has held any motions by the Hawaiian Electric Defendants in abeyance pending the settlement between Hu Honua and the Hawaiian Electric Defendants — this Order focuses on the FAC's allegations against NextEra and HEP. That is, the court is not specifically ruling on whether any claims (antitrust or otherwise) are stated (or not) as to the Hawaiian Electric Defendants.

of the alleged violator's goods or services or a competitor of the alleged violator[.]'") (quoting *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987))*; *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1075 (11th Cir. 2004)* ("There is no question that [defendant] does not participate in the Spanish-language radio market. Thus, [defendant] cannot *attempt* to monopolize that market.") (emphasis added) (cited with approval in *Name.Space, Inc., 795 F.3d at 1131*).

In response, Hu Honua clarifies that it "only asserts a claim for *conspiracy* to monopolize against NextEra." ECF No. 109, Opp'n at 34-35 n.8 (emphasis added). In any event, the FAC **[*21]** fails to allege a prerequisite (competitor in the same market) to a *§ 2* monopolization or attempted monopolization claim against NextEra. Accordingly, Count One, to the extent it alleges *§ 2* claims for monopolization or attempted monopolization against NextEra, is DISMISSED with prejudice. The court thus focuses on whether the FAC adequately alleges a conspiracy to monopolize as to NextEra.

2. Allegations of Conspiracy to Monopolize Against NextEra Also Fail

a. No specific intent to monopolize

NextEra initially challenges the conspiracy to monopolize claim by focusing on the third element of a *§ 2* conspiracy — "the specific intent to monopolize." *Paladin Assocs., Inc., 328 F.3d at 1158*. NextEra argues that, just because it agreed to merge with HEI and then approved HELCO's termination of Hu Honua's PPA, the conspiracy claim fails because the FAC lacks any facts that, even if true, would plausibly establish that NextEra specifically intended to monopolize the wholesale firm power generation market on the Island of Hawaii. *See* *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1437 n.8 (9th Cir. 1995)* ("To prove a conspiracy to monopolize, Rebel must show that the independent dealers had the specific intent to conspire to monopolize; it is not enough to show that the dealers merely agreed to go along with ARCO's **[*22]** pricing."); *see also, e.g., Syufy Enters. v. Am. Multicinema, Inc., 793 F.2d 990, 1000 (9th Cir. 1986)* ("Nor is there any showing that any of the distributors shared with Syufy a common purpose in monopolizing the hardtop theater market in the San Jose area.").

In response, Hu Honua contends that NextEra's specific intent to monopolize can be inferred from the FAC's allegations that HELCO "has an incentive to favor its own generation over that of competitor power generation," FAC ¶ 142, and that incentive is shared by NextEra as part of its own business strategy. ECF No. 109, Opp'n at 33. Hu Honua emphasizes the FAC's allegations that, during the same time-frame as the proposed NextEra/HEI Merger Agreement, HECO (1) terminated three pending solar power purchase agreements on Oahu (similarly to HELCO's cancellation of Hu Honua's PPA), and (2) submitted plans to the Hawaii PUC to convert some power plants on Oahu to liquefied natural gas, FAC ¶¶ 128, 131, where NextEra also has natural gas assets, and planned to "help HECO execute on plans to bring liquid natural gas to Hawaii" with the merger. FAC ¶ 55 (citation omitted).

But even assuming the FAC adequately alleges that the *Hawaiian Electric Defendants* possessed or sought a monopoly in the relevant power production **[*23]** market, there are no facts pled that would suggest *NextEra* specifically intended to monopolize that market, merely by consenting to HELCO's termination of the Hu Honua PPA. *See* *Rebel Oil Co., 51 F.3d at 1438 n.8* ("[I]t is not enough to show that [a defendant] merely agreed to go along."); *Syufy Enters., 793 F.2d at 1000* ("[A] supplier who licenses a product to another does not join the licensee in a conspiracy to monopolize merely because the licensee turns around and exploits the license for its own monopolistic purposes.").

In this regard, it is not enough to suggest—as Hu Honua does—that NextEra shared a motive to increase prices or profits with a similar strategy. *See, e.g.,* *In re Baby Food Antitrust Litig., 166 F.3d 112, 133 (3d Cir. 1999)* (rejecting argument, in a price-fixing context, that a motive to achieve higher prices could demonstrate conspiracy because if that were true "every company in every industry would have such a 'motive.'"). "Motivation to enter a conspiracy is never enough to establish a traditional conspiracy." VI Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 1411 (4th ed. 2017).[11]

b. No antitrust injury

More important, even if the FAC alleged enough factual content to support an inference that NextEra specifically intended to **[*24]** monopolize the market for wholesale firm power on the Big Island, the *§ 2* conspiracy claim nevertheless fails for lack of the fourth element — "causal antitrust injury." *Paladin Assocs., Inc., 328 F.3d at 1158*. To establish such injury, Hu Honua must allege facts that show "(1) unlawful conduct, (2) causing an injury to [Hu Honua], (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)* (quoting *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999))*. The inquiry focuses on injury to "competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*; *see also Paladin Assocs., Inc., 328 F.3d at 1158* ("Where the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury."). This requirement stems from "the principle that the antitrust laws' prohibitions focus on protecting the competitive process and not on the success or failure of individual competitors." *Cascade Health Sols., 515 F.3d at 902* (citations omitted).

Applying these principles, the FAC's allegations of harm to the "competitive process" in the market for wholesale firm power on the Big Island are implausible. Notably, as alleged in the FAC, Hu Honua's biomass power plant was a "Qualifying Facility under the federal Public Utility Regulatory Policies Act ("PURPA")[.]" FAC ¶ 45. As **[*25]** such a facility, "Hu Honua was entitled to receive special rate and regulatory treatment." *Id.* (Indeed, the Hu Honua PPA was negotiated under a *waiver* by the PUC from its competitive bidding framework. FAC ¶ 49).

PURPA was enacted in 1978, among other reasons, to "ensure sustained long-term economic growth by shifting the nation's reliance on oil and gas to more abundant domestically produced fuels." *Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1371 (N.D. Ga. 1986)* (citation omitted). To support development of non-traditional generating facilities, PURPA and its implementing regulations

> require electric utilities (a) to sell electric energy and capacity to qualifying facilities upon request, (b) to purchase electric energy and capacity from qualifying facilities and (c) to make all necessary interconnections with any qualifying facility in order to accomplish the aforementioned purchases and sales provided that each qualifying facility pay its share of the interconnection costs.

Id. at 1372 (footnotes omitted). PURPA's "regulations mandate that an electric utility offer a qualifying facility built after the enactment of PURPA a purchase rate equal to, but no more than, the utility's 'full avoided costs.'" *Id.* (citations and footnote omitted); *see also Schuylkill Energy Res., Inc. v. Penn. Power & Light Co., 113 F.3d 405, 411 (3d Cir. 1997)* ("Pursuant **[*26]** to regulations promulgated . . . under the authority of PURPA, PP&L is required to purchase electric energy from SER."). The Hu Honua PPA contained such power-purchase provisions. *See* FAC ¶ 46.

Effectively, then, Hu Honua does not (or would not) "compete" in the power production market with its qualifying facility, and thus competition could not be harmed by termination of its PPA (even if the FAC otherwise states a claim for breach of contract against HELCO). As *Greensboro Lumber Co.* explained

> In establishing PURPA . . . Congress did not intend to place qualifying facilities in competition with public utilities. To the contrary, Congress has sought to encourage the development of qualifying facilities by insulating them from competition. Qualifying facilities are not authorized under PURPA to sell at retail.

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[11] Furthermore, as analyzed in detail when the court considers Count Two to follow in discussion section B.2.a, the FAC's allegations that NextEra totally controlled HELCO's decisions after the Merger Agreement lack plausibility and thus cannot form the basis of NextEra's specific intent to monopolize.

643 F. Supp. at 1373 (citation omitted); *see also* *Schuylkill Energy Res., 113 F.3d at 415* (finding no antitrust injury for PURPA power-producer, primarily because "state and federal laws prohibit [plaintiff] from competing in the relevant market"); *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194, 1207 (W.D.N.Y. 1995)* (finding no likelihood of an antitrust injury at a preliminary injunction stage, reasoning in part that "[t]he PPA, which [PURPA-producer] Kamine is attempting to enforce, was not created as **[*27]** a result of market forces or a competitive process; it is a creature of a statutory scheme [(PURPA)] set up for reasons that have nothing to do with competition *per se*"); *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 969 F. Supp. 907, 915 (D.N.J. 1997)* (finding no antitrust injury in action brought by PURPA-producer, reasoning that "Defendant's actions may have caused injury to plaintiff, but they did not cause injury to competition in a defined market [and was] not the sort of injury the antitrust laws were meant to prevent"), *rev'd on other grounds*, *159 F.3d 129 (3d Cir. 1998))*. "PURPA was created as a vehicle to reduce the nation's dependency on foreign oil and to conserve energy, not to foster competition." *Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1204*.[12]

Hu Honua attempts to distinguish this authority by arguing that it is not claiming harm to competition in the *retail* market (i.e., energy to consumers who pay HELCO for electricity), but rather harm to competition in the wholesale market for firm power to HELCO.[13] But Hu Honua is largely not a competitor with HELCO in that market either—Hu Honua would have been HELCO's *supplier*, with HELCO in turn providing electricity to retail rate-paying consumers. *See* *Schuylkill Energy Res., 113 F.3d at 415* (rejecting argument that defendant's policy of favoring its owned-power producers over an independent producer could **[*28]** harm competition because "[plaintiff] is not [defendant's] *competitor*—it is [defendant's] *supplier*").

The court also recognizes that HELCO is also a supplier to itself (through HELCO-owned power plants). But it is difficult to find plausible harm to competition from Hu Honua in that limited "market," even considering that HEP also provides wholesale power with its independent fossil-fuel **[*29]** power plant. Indeed, the cases cited previously also found no antitrust injury where independent power producers also claimed harm in wholesale markets. *Greensboro Lumber Co.* reasoned that,

> [I]n the wholesale market, PURPA establishes a guaranteed price which is equal to, or greater than, the price that would be received in a competitive market. In addition to providing a guaranteed price to qualifying

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[12] The court is not suggesting that, just because Hu Honua's facility was a qualifying facility under PURPA, the antitrust laws can never apply. *See* *16 U.S.C. § 2603(1)* ("Nothing in this Act or in any amendment made by this Act affects — (1) the applicability of the antitrust laws to any electric utility[.]"). Rather, "while PURPA was not intended to *protect* utilities from the reach of the antitrust laws, neither was it meant to *create* antitrust liability where none existed previously. In short, PURPA was designed to be antitrust-neutral." *Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1204*. And, in this instance, "[h]owever consonant with PURPA's aims it may be to shield a [qualifying facility] like [plaintiff's] from price competition, that end is not something that the antitrust laws were designed to protect." *Id. at 1205*.

[13] Nevertheless, the FAC's allegations of antitrust injury rely in significant part on harm to retail consumers. Specifically, the FAC alleges that:

> HELCO's anticompetitive acts have caused substantial economic injury to Hu Honua and have also injured competition in the relevant markets by, inter alia, foreclosing, lessening, and eliminating potential competition *and depriving consumers from securing lower rates paid for power*.

FAC ¶ 151 (emphasis added).

> The aforesaid conduct of HELCO has produced antitrust injury to Hu Honua, competition, and consumers, and unless enjoined by this Court, will continue to produce at least the following anticompetitive, exclusionary and injurious effects upon competition in interstate commerce:
>
> (a) competition for the wholesale generation of power on the Island of Hawaii has been substantially and unreasonably restricted, lessened, foreclosed, and eliminated, *and consumers will be forced to pay supra-competitive prices for power as a result*;

FAC ¶ 152 (emphasis added).

> facilities, PURPA also provides a guaranteed market for the power generated by qualifying facilities by making it a requirement that utilities purchase available energy and capacity from qualifying facilities before buying power from anywhere else; *no amount of price cutting or other competition can change this result*.

643 F. Supp. at 1373 (emphasis added). "In general, qualifying facilities produce a component which is used by public utilities and consume utility service; but, they are not competitors of public utilities." *Id.; see also* *Schuylkill Energy Res., 113 F.3d at 416-17*; *Kamine/Besicorp Allegany, 908 F. Supp. at 1203-05*. *But cf.* *Long Lake Energy Corp. v. Niagara Mohawk Power Corp., 700 F. Supp. 186, 188 (S.D.N.Y. 1988)*.

Additionally, the primary "antitrust injury" that Hu Honua alleges from the purported loss of competition for wholesale generation of power — "consumers will be forced to pay supra-competitive prices for power as a result," FAC ¶ 152(a) — is not only speculative **[*30]** (depending upon an assumption, for example, that "fossil fuel costs on the Island of Hawaii could exceed $250 per barrel by 2037 and over $300 per barrel by 2045," FAC ¶ 122) but is also largely controlled by the Hawaii PUC. *See* *HRS § 269-16(a)* ("All rates, fares, charges, classifications, schedules, rules, and practices made, charged, or observed by any public utility or by two or more public utilities jointly shall be just and reasonable and shall be filed with the public utilities commission."); *HRS § 269-16.22* ("All power purchase costs, including costs related to capacity, operations and maintenance, and other costs that are incurred by an electric utility company, arising out of power purchase agreements that have been approved by the public utilities commission and are binding obligations on the electric utility company, shall be allowed to be recovered by the utility from the customer base of the electric utility company through one or more adjustable surcharges, which shall be established by the public utilities commission."). This alleged injury "is simply too speculative to permit relief under the antitrust laws." *City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 269 (3d Cir. 1998)*; *see also* *Schuylkill Energy Res., 113 F.3d at 414* ("[W]hether and to what extent [the utility] maintains an artificially high **[*31]** rate base [by favoring its own facilities] is not within the purview of the antitrust laws," and "[d]epriving consumers of 'energy sources' is not, however, cognizable antitrust injury.").

"[T]he Sherman Act does not attack every monopoly." *Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547 (9th Cir. 1991)* (citations omitted). That is, "[t]he antitrust laws tolerate both efficient monopolies and natural monopolies." *Id. at 548* (citation omitted). "Government regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for difficulties posed by natural monopolies." *Id.* (citations omitted). And here, Hu Honua has alleged anticompetitive behavior in a highly regulated industry. This context is important.

The court is not suggesting that PUC involvement *necessarily* immunizes any of the Defendants from antitrust laws, but "the structure of [a] regulated industry" may create a "lack of antitrust standing." *West Penn Power Co., 147 F.3d at 269* (acknowledging that regulated industries such as utilities are not exempt from antitrust laws under *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, but finding no antitrust injury in a suit challenging aspects of a merger between two electric utilities controlled by the Pennsylvania Public Utility Commission). *West Penn Power Co.* reasoned **[*32]** in part that "the comprehensive regulatory framework significantly restricts the nature of the competition which is permitted." *Id. at 263*.

In actuality, then—as most of the FAC alleges, *see, e.g.*, FAC ¶¶ 38-51, 58-89, 101-126, 166-184—this is little if anything more than a breach of contract action between Hu Honua and HELCO. The fundamental dispute revolves around HELCO's alleged breach of the Hu Honua PPA by unreasonably withholding milestone-date extensions, or otherwise wrongfully terminating that contract. FAC ¶¶ 60, 65, 110-11, 168-71. "As the First Circuit has observed, '[s]ome antitrust cases are intrinsically hopeless because . . . they merely dress up in antitrust garb what is, at best, a business tort or contract violation.'" *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1087 (11th Cir. 2016)* (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 69 (1st Cir. 2004))*. And this is such a case.

Like *Schuylkill Energy Resources*, "[t]he fundamental dispute between [Hu Honua] and [HELCO] concerns the interpretation of the Power Purchase Agreement . . . and should be resolved pursuant to common-law contract principles," not through the antitrust laws. *113 F.3d at 418*. Like *Kamine/Besicorp Allegany L.P.*, "whether [HELCO] has breached the PPA or not, [Hu Honua] has not sufficiently demonstrated an *antitrust* injury[.]" *908 F. Supp. at 1208*. And like *Crossroads* ***[*33]*** *Cogeneration*, "[HELCO's] actions may have caused injury to plaintiff, but they did not cause injury to competition in a defined market. This is not the sort of injury the antitrust laws were meant to prevent." *969 F. Supp. at 915*.

Moreover, outside the utility context, Ninth Circuit authority is also on point — Hu Honua "has [at best] suffered a breach of contract, not an antitrust injury." *Orion Pictures Distrib. Corp. v. Syufy Enters., 829 F.2d 946, 949 (9th Cir. 1987)* (reasoning that, where duties were fixed by "contractual commitment" prior to the alleged anticompetitive behavior, "competition was no longer a factor in determining [defendant's] obligation," such that "[plaintiff's] injury does not reflect the anticompetitive effect of [defendant's] alleged monopolization.") (internal quotation marks omitted). As NextEra points out, ECF No. 73-1, Mot. at 24, the "antitrust" damages Hu Honua seeks ("the loss of revenue and profits that would otherwise have been earned from wholesale power generation on the Island of Hawaii," "the loss of market share," loss of "invested capital in its 50% completed Facility," FAC ¶¶ 154-55) appear to be the same damages it seeks in Count Three for breach of contract. *See* FAC ¶ 172.

In short, the claim fails for lack of antitrust injury. Count One **[*34]** is dismissed as to NextEra.

B. Count Two (Restraint of Trade) Fails to State a Plausible Claim Under *15 U.S.C. § 1* Against Either NextEra or HEP

Count Two seeks treble damages under *15 U.S.C. § 15(a)* against all Defendants based on alleged violations of *§ 1* of Sherman Act, *15 U.S.C. § 1*, which prohibits conspiracies "in restraint of trade or commerce." To state such a claim, "[a plaintiff] must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall, 518 F.3d at 1047* (citation omitted). And, to reiterate, "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Id. at 1049*.

Count Two alleges, in pertinent part, that "the coordinated and collective actions of Defendants HELCO, HECO, HEI, NextEra, and HEP have had the purpose and effect of eliminating or substantially restricting competition **[*35]** in the market for wholesale firm power generation and raising the price of power above competitive levels by eliminating sources of less expensive power where HELCO is required to dispatch lower cost sources." FAC ¶ 159. "These arrangements have had, and continue to have, the effect of unreasonably restraining competition in the market for wholesale firm power generation on the Island of Hawaii." *Id.* ¶ 160.

1. No Antitrust Injury

Count Two fails (against both NextEra and HEP) for the same primary reason that Count One fails — lack of antitrust injury (the third element reiterated in *Kendall*, a conspiracy that "actually injures competition"). *See, e.g., Am. Ad Mgmt., Inc., 190 F.3d at 1055* (requiring antitrust injury in a *§ 1* action). That is, antitrust injury is required for both a *§ 1* claim and a *§ 2* claim. *See, e.g., Glen Holly Entm't, Inc., 343 F.3d at 1007-08*. Stated differently, "causal antitrust injury . . . is an element of all antitrust suits brought by private parties seeking damages under *Section 4* of the Clayton Act." *Rebel Oil, 51 F.3d at 1433* (citation omitted). The previous analysis explaining the lack of such injury for a *§ 2* claim applies equally to the *§ 1* claim here, which alleges the same "antitrust injury" as Count One, FAC ¶ 162, including "inflated prices for power, and consumers [being] forced **[*36]** to pay supra-competitive prices for power."

In this regard, HEP adds another persuasive reason for lack of the requisite harmful effect on competition. The FAC alleges facts indicating that the Hu Honua PPA offered *higher* prices than other "competition," and was terminated by HELCO after Hu Honua failed to meet HELCO's demand for sufficient price reductions when seeking contract-deadline extensions. FAC ¶¶ 64, 67-71. Termination of a higher priced supplier, without more, is not antitrust injury.

According to the FAC, because Hu Honua's PPA was cancelled, Hu Honua stands to lose profits of $435 million over a 20-year PPA term. FAC ¶ 165. But "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. And if Hu Honua did not present a "lower-cost alternative," damage from cancellation of its contract for nonperformance is not antitrust injury. *See, e.g.,* *Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 977 (6th Cir. 2000)* (finding no antitrust injury, reasoning in part that marketplace competitors "must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative").

2. A Lack of Plausibility

[*37] Count Two is deficient for another reason as well—fundamentally, it fails to allege a plausible illegal "contract, combination, or conspiracy" to restrain trade.

a. The § 1 claim against NextEra

As to NextEra, Hu Honua bases its conspiracy theory on allegations that NextEra controlled the HEI Defendants after the NextEra/HEI Merger Agreement. Specifically, the FAC alleges that, after the Merger Agreement was signed, NextEra controlled HELCO's decision regarding termination of the Hu Honua PPA, and HECO's termination of three solar power projects on Oahu. *See, e.g.*, FAC ¶¶ 63, 132-34.

These allegations of control, however, are insufficient to establish a *§ 1* conspiracy claim as to NextEra. Hu Honua relies on the Merger Agreement itself. FAC ¶ 56; *See* Pl.'s NextEra Opp'n at 26-27; ECF No. 109 at 35-36 (arguing that "Hu Honua unquestionably connects NextEra to Defendants' scheme. . . . The Merger Agreement alone connects NextEra"). In particular, it bases the control allegation on express language in the Merger Agreement that required NextEra's "prior written consent" before HEI, HECO, or HELCO could, among other things, "(1) enter into, terminate or amend in any material respect any material Contract, **[*38]** [or] (2) consent to any extension or continuation or any material Contract[.]" FAC ¶ 56; NextEra Mot., Ex.A, ECF No. 73-3 at 5, 9. But that Merger Agreement also specifically *precludes* such control by NextEra. *See* ECF No. 73-3 at 10 (paragraph 5.01(c) ("No Control of [HEI's] Business. [NextEra] acknowledges and agrees that (i) nothing contained in this Agreement is intended to give [NextEra], directly or indirectly, the right to control or direct the operations of [HEI] or an [HEI] Subsidiary prior to the Effective Time and . . . prior to the Effective Time, [HEI] shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and [HEI's] Subsidiaries' respective operations."). And the FAC fails to allege *facts* indicating that NextEra violated that preclusive language.[14]

Moreover, NextEra could not have withheld consent to HELCO's actions without good reason because, under § 5.01(a), NextEra's prior written consent "shall not be unreasonably withheld, conditioned or delayed." ECF No. 73-3 at 5. Rather than establishing unbridled control by NextEra (and its joinder in an illegal conspiracy), the contract itself establishes no more than NextEra's **[*39]** routine consent in *HELCO's* decision. That is, the FAC "just as easily suggests rational, legal business behavior" by NextEra, rather than an illegal conspiracy to restrain trade. *See* *Kendall, 518 F.3d at 1049* ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

The FAC's allegations of control by NextEra also lack plausibility given the "obvious alternative explanation" in the FAC that HELCO cancelled the Hu Honua PPA because of Hu Honua's own nonperformance. *See* *Eclectic Props.*

[14] NextEra explains that these types of material-change provisions (which prevent a company from making significant changes to material contracts during the pendency of a merger) are standard terms which protect the parties' legitimate interests in a pre-merger context. *See* NextEra Mot. at 16-17, ECF No. 73-1.

E., LLC, 751 F.3d at 996 (requiring a court to consider an "obvious alternative explanation," when assessing plausibility). The FAC itself details such obvious reasons for HELCO's termination. FAC ¶ 51. Specifically, "[d]uring the construction [of its facility], disputes arose with the Facility construction contractor that became insoluble." *Id.* Hu Honua became involved in extensive litigation with its contractor and vendors, and a separate labor union dispute. *Id.* "[T]he construction contract and labor disputes, together with corresponding financing interruptions, caused an extended loss of time and delayed the **[*40]** completion of construction of the Hu Honua facility[.]" *Id.* "Hu Honua's disputes with its former construction contractor and the labor union jurisdiction dispute caused an irretrievable loss of time in the construction of the Hu Honua Facility. As a result, Hu Honua realized that it would not be able to achieve two milestone[] dates set forth in the PPA[.]" FAC ¶ 58.

Also unavailing is Hu Honua's argument that the FAC's allegations are sufficient under *Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011)*. *Starr* held that "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, *both of which are plausible*, plaintiff's complaint survives a motion to dismiss under *Rule 12(b)(6)*." *Id. at 1216* (emphasis added). Although Hu Honua's theories are not impossible (at least at this stage of the litigation), they are not *plausible*, which is what *Twombly/Iqbal* requires. *See, e.g., In re Century Aluminum Co. Secs. Litig., 729 F.3d 1104, 1108 (9th Cir. 2013)* (distinguishing *Starr* because "[h]ere, [unlike in *Starr*,] plaintiffs' explanation is merely *possible* rather than plausible. To render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation.") (citing *Iqbal, 556 U.S. at 678*); *Eclectic Props E., LLC, 751 F.3d at 997* ("Applying *Twombly, Iqbal, Starr* ***[*41]*** , and *Century* . . . Plaintiffs have not made the kind of factual allegations that 'nudg[e] their claims across the line from conceivable to plausible.'") (citing *Twombly, 550 U.S. at 570*)).

b. The § 1 claim against HEP

Similarly, the FAC lacks a plausible conspiracy theory as to HEP. The FAC alleges that "[a]s early as 2012, HEP recognized that the proposed Hu Honua facility was a direct competitive threat" and that "as the operator of the largest power plant on [Hawaii] Island . . . [HEP] attempted unsuccessfully to exclude Hu Honua as a competitor in the power generation market [when HELCO applied to the PUC for the approval of the original Hu Honua PPA in 2012]." FAC ¶ 99. "Hu Honua is informed and believes, and on that basis alleges, that HEP participated in and supported the termination of Hu Honua's PPA [in 2015.]" *Id.* But this allegation is deficient as it offers no facts indicating what HEP might have done to "participate[] in and support[] the termination." *See Kendall, 518 F.3d at 1047* ("[T]o allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a defendant seeking to respond to allegations of a conspiracy **[*42]** an idea of where to begin.") (quoting *Twombly, 550 U.S. at 565 n.10*).

What's more, the FAC also alleges—in support of its monopolization claim against HELCO—that in 2015 HELCO and HEP agreed for HELCO to acquire HEP's fossil fuel plant for some $88 million. FAC ¶¶ 91-97. That is, HEP was *exiting* the very wholesale power market from which it allegedly sought to eliminate Hu Honua. Whatever these allegations might mean as to HELCO, they are inconsistent as to *HEP's* participation in a conspiracy to restrain trade as to Hu Honua. As HEP argues, "HEP's decision to sell [its] Hamakua Facility in 2015 and exit the relevant market removes any economic incentive for HEP to conspire to terminate the Hu Honua PPA [in 2016.]" HEP Opp'n at 20, ECF No. 95-1 at 27. That is, the FAC's conspiracy theory as to HEP makes no "economic sense." *Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998)* ("Antitrust claims must make economic sense") (citing *Eastman Kodak Co. v. Image Tech. Servs. Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*).

In response, Hu Honua offers an implausible explanation that is not pled in the FAC. It claims that HEP wanted to remove Hu Honua from the wholesale firm power market so that HEP's power plant would become more valuable when selling it. Opp'n at 12-13, ECF No. 108 at 20-21. But nothing in the FAC indicates HEP knew, when it entered into **[*43]** the agreement for HELCO to acquire HEP's facility (in 2015), that HELCO would later (in 2016) terminate the Hu Honua PPA. And, even assuming HEP would want to increase its facility's selling price, why would HELCO be part of that conspiracy to pay more for HEP's facility? Again, the theory makes no economic sense. *See* *Adaptive Power Sols., LLC, 141 F.3d at 952*.

And, as with the *§ 1* claim as to NextEra, the claim as to HEP lacks plausibility when considering the "obvious alternative explanation" pled in the FAC that HELCO terminated the Hu Honua PPA for lack of performance by Hu Honua, and Hu Honua's subsequent refusal to meet HELCO's terms in renegotiating the PPA. *See* *Eclectic Props. E., LLC, 751 F.3d at 996*. Whether or not the FAC adequately alleges that HELCO breached the PPA in unreasonably refusing to approve Hu Honua's requests to extend milestones, there is no plausible antitrust conspiracy theory pled as to NextEra. There are no facts in the FAC suggesting that HEP's decision to sell to HELCO was anything but a rational business decision. *See* *Kendall, 518 F.3d at 1049*.[15]

C. State Law Counts Against NextEra and HEP

Count Seven asserts state-law antitrust or unfair competition claims against all Defendants under HRS chapter 480. Similarly, Count Eight asserts a state-law claim **[*44]** for Tortious Interference with Contract against NextEra. But because the court has dismissed the federal antitrust claims as to NextEra and HEP (and the suit was not based on diversity jurisdiction), the court intends to dismiss both of the state-law claims without prejudice under *28 U.S.C. § 1367(c)(3)* ("The district courts may decline to exercise supplemental jurisdiction over a claim under *subsection (a)* [regarding Article III jurisdiction] if — . . . the district court has dismissed all claims over which it has original jurisdiction[.]"). *See* *Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997)* (en banc) ("[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.").[16]

But it is premature to dismiss these state-law claims because, under the present procedural posture (where all claims as to the Hawaiian Electric Defendants have been held in abeyance), the Hawaiian Electric Defendants still remain in the action with federal claims against them. That is, the court cannot exercise its discretion under *§ 1367(c)* until it "has dismissed all claims over which it has original jurisdiction." Accordingly, the court DEFERS ruling on Counts Seven **[*45]** and Eight until the conditional settlement as to the Hawaiian Electric Defendants is completely finalized. For administrative purposes, the court DENIES — without prejudice — NextEra's and HEP's Motions to Dismiss as to Counts Seven and Eight.

V. CONCLUSION

Hu Honua's federal antitrust claims lack plausibility as to both NextEra and HEP. The Motions to Dismiss are GRANTED as to Counts One and Two, and those claims are DISMISSED without prejudice. Because the court DEFERS ruling on the state-law claims, the Motions as to Counts Seven and Eight are DENIED without prejudice. The court will allow Hu Honua an opportunity to file a Second Amended Complaint that cures the FAC's deficiencies, if it believes it can do so. *See* *Lopez, 203 F.3d at 1130*. A Second Amended Complaint (or a statement indicating that a Second Amended Complaint will not be filed) is due by **January 29, 2018**.

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[15] Given that Count Two fails as to HEP for lack of antitrust injury and lack of a plausible conspiracy theory, the court need not reach HEP's alternative argument that its acts are shielded from antitrust scrutiny by the *Noerr-Pennington* or State Action Doctrines.

[16] It is unlikely that the chapter 480 antitrust claims could otherwise survive. *See* *HRS § 480-3* ("This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes[.]"); *Int'l Healthcare Mgmt. v. Haw. Coalition for Health, 332 F.3d 600, 609 (9th Cir. 2003)* ("[Plaintiff's] state antitrust claims fail for the same reasons as their federal claims because Hawaii antitrust statutes are interpreted 'in accordance with judicial interpretations of similar federal antitrust statutes.'") (quoting *HRS § 480-3*). Nevertheless, the court has not fully analyzed the state-law allegations to determine whether the FAC states a claim under chapter 480.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, December 19, 2017.

/s/ J. Michael Seabright

J. Michael Seabright

Chief United States District Judge

[In re EpePen ((Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig.](#)

United States District Court for the District of Kansas

December 21, 2017, Decided; December 21, 2017, Filed

MDL No: 2785; Case No. 17-md-2785-DDC-TJJ

Reporter
2017 U.S. Dist. LEXIS 209710 *; 2017-2 Trade Cas. (CCH) P80,241; 2017 WL 6524839

IN RE: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation (This Document Applies to the Sanofi case)

Prior History: *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., 2017 U.S. Dist. LEXIS 169541 (D. Kan., Oct. 13, 2017)*

Core Terms

alleges, rebates, asserts, payors, third-party, prices, market share, antitrust, formularies, anticompetitive conduct, deceptive, Sherman Act, contends, offering, competitor, monopolization, anti trust law, exclusionary, block, motion to dismiss, consumers, customers, launch, anticompetitive, price-cost, discounts, patients, factors, costs, epinephrine

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For Angie Nordstrum, (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Carly Bowersock, (NJ #17-2401 / KS #17-2451) Individually and on Behalf of All Others Similarly Situated, Plaintiffs: Brian D. Penny, LEAD ATTORNEY, **[*14]** PRO HAC VICE, Goldman Scarlato & Penny, PC, Conshohocken, PA; Damien J. Marshall, Duane L. Loft, LEAD ATTORNEYS, PRO HAC VICE, Boies, Schiller & Flexner, LLP - NY, New York, NY; Donald A. Ecklund, James E. Cecchi, LEAD ATTORNEYS, PRO HAC VICE, Carella, Byrne, Cecchi, Olstein, Brody & Agnello, PC, Roseland, NJ; Joseph Alm, LEAD ATTORNEY, Boies, Schiller & Flexner, LLP - DC, Washington, DC; Paul J. Geller, Stuart A. Davidson, LEAD ATTORNEYS, PRO HAC VICE, Robins Geller Rudman & Dowd LLP - FL, Boca Raton, FL.

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For Traci Brannon, (Plaintiff in Related Case #17-2497-DCCGLR), Lindsey Rizzo, (Plaintiff in Related Case #17-2497-DCCGLR), Jamie Herr, (Plaintiff in Related Case #17-2497-DCCGLR), Miscellaneous: Rex A. Sharp, Ryan C. Hudson, LEAD ATTORNEYS, Rex A. Sharp, PA, Prairie Village, KS.

For Express Scripts Holding Company, (Defendant in Related Case #17-2497-DCCGLR), Express Scripts, Inc., (Defendant in Related Case #17-2497-DCCGLR), Miscellaneous: William D. Beil, LEAD ATTORNEY, German May PC, Kansas City, MO.

For UnitedHealth Group, Inc., Defendant in Related Case #17-2497-DCC-GLR), OptumRx, Inc., (Defendant in Related Case #17-2497-DCCGLR), Miscellaneous: Bradley Joseph Schlozman, Mitchell L. Herren, LEAD ATTORNEYS, Hinkle Law Firm LLC - East Wichita Office, Wichita, KS.

For Judicial Panel on Multidistrict Litigation, Interested Party: Jeffrey N. Luthi, LEAD ATTORNEY, Clerk of the **[*19]** MDL Panel, Washington, DC.

Judges: Daniel D. Crabtree, United States District Judge.

Opinion by: Daniel D. Crabtree

Opinion

MEMORANDUM AND ORDER

On September 14, 2017, the court ordered that this MDL proceed on two separate tracks. Doc. 42. This Order affects just one of those tracks—the *Sanofi* case. Plaintiff Sanofi-Aventis U.S. LLC ("Sanofi") is a pharmaceutical company who purportedly competes with defendant Mylan, Inc. Sanofi filed a lawsuit against defendants Mylan, Inc. and Mylan Specialty, L.P. (collectively "Mylan") in the District of New Jersey on April 24, 2017. *Sanofi-Aventis U.S. LLC v. Mylan Inc., et al.*, Case No. 3:17-cv-02763-FLWTJB (D.N.J. Apr. 24, 2017), ECF 1 ("*Sanofi* Complaint"). The *Sanofi* Complaint alleges that Mylan engaged in a variety of anticompetitive conduct designed to prevent Auvi-Q®—a rival product once sold by Sanofi—from gaining access to the epinephrine autoinjector market, and designed to prevent consumers from acquiring Auvi-Q®. Sanofi asserts three claims against Mylan under *Section 2 of the Sherman Antitrust Act*. These claims assert: (1) monopolization through exclusive dealing; (2) deceptive conduct to further monopolization; and (3) an overall scheme to monopolize. Sanofi brings this **[*20]** action only for itself, and not on behalf of any other plaintiffs or putative class members.

On August 3, 2017, the Judicial Panel on Multidistrict Litigation transferred the *Sanofi* case and five others to our court for coordinated and consolidated proceedings. Doc. 1. Before transfer, while the case still was pending in New Jersey, Mylan had filed a Motion to Dismiss the *Sanofi* Complaint. Doc. 43. The motion seeks dismissal under *Federal Rule of Civil Procedure 12(b)(6)* for failing to state a claim. *Id.* After transfer, Sanofi filed in our court its Memorandum in Opposition to the Motion to Dismiss. Doc. 44. And, at the court's Initial Scheduling Conference on September 7, 2017, Sanofi asked the court to place its case on a separate track and decide the pending Motion to Dismiss the *Sanofi* Complaint. The court granted that request, designating the *Sanofi* case on a separate track and ordering Mylan to file any Reply to the pending Motion to Dismiss by October 6, 2017. *See* Doc. 42. Mylan filed its Reply consistent with the court's order. Doc. 57. Thus, the Motion to Dismiss is now fully briefed, and after carefully considering the arguments presented by the parties' filings, the court is prepared to rule. For the reasons explained **[*21]** below, the court grants Mylan's Motion to Dismiss the *Sanofi* Complaint in part and denies it in part.

I. Factual Background

The following facts are taken from the *Sanofi* Complaint. The court accepts the facts asserted in the *Sanofi* Complaint as true and views them in the light most favorable to plaintiff. *Burnett v. Mortg. Elec. Registration Sys., Inc., 706 F.3d 1231, 1235 (10th Cir. 2013)* (citing *Smith v. United States, 561 F.3d 1090, 1098 (10th Cir. 2009))*.

Anaphylaxis is a serious allergic reaction that has a rapid onset and may cause death. Anaphylaxis can result from allergic reactions to foods, pets, insects, or exposure to other allergens. Epinephrine is the recognized first-line treatment for anaphylaxis. One can administer a controlled dose of epinephrine during an anaphylactic episode using an epinephrine auto-injector ("EAI") drug device. Doctors thus recommend that patients at risk for anaphylaxis always carry a portable EAI drug device and have training about its use.

Since 2007, Mylan has marketed and distributed in the United States an EAI drug device known as the EpiPen®. The EpiPen® has been the number-one prescribed EAI drug device in the United States for over 25 years. Indeed, in December 2012, Mylan touted that EpiPen® "has been the number one prescribed epinephrine auto-injector for more than 20 years and constitutes **[*22]** more than 99% of the epinephrine auto-injector market." *Sanofi* Complaint ¶ 3. And, on August 1, 2013, Mylan reported to investors that the EpiPen® had a "93.3% market share." *Id.* ¶ 39.

An EAI drug device gains access to the market almost entirely through contracts with third-party payors—such as commercial insurance companies, pharmaceutical benefit managers, and state-based Medicaid agencies—because a significant majority of patients with prescription drug insurance coverage receive their benefits through third-party payors. From 2013 to 2015, commercial third-party payors accounted for about 71% of the EAI drug device market in the United States. During this same period, state-based Medicaid plans made up another 16% of the EAI drug market. So, from 2013 to 2015, almost 90% of the EAI drug device market in the United States consisted of commercial third-party payors and Medicaid plans.

For a competitor to enter and compete vigorously in the EAI drug device market, it is crucial that it have access to these third-party payors' drug formularies. Third-party payors use formularies to govern a drug's coverage. Commercial third-party payors commonly use tiered formularies, placing drugs **[*23]** on different tiers that establish the enrollee patient's co-pay and create incentives for the enrollee to prefer the lowest cost yet clinically effective drug. Most state-based Medicaid plans use a formulary that distinguishes only between drugs that are covered or not covered. If a drug is not covered under a third-party payor's formulary, the patient probably cannot access the product. Historically, third-party payors covered all available EAI drug devices at difference coverage tiers but, typically, they never excluded EAI drug devices from coverage altogether.

Also, it is common for pharmaceutical companies to provide rebates to third-party payors. In some circumstances, rebates can create a form of price competition that ultimately helps lower prices for end consumers, both for the costs that they pay for prescription drugs and what they pay for health insurance premiums. In some cases, a pharmaceutical company may offer rebates for exclusive coverage on a given third-party payor's drug formulary.

In 2013, Sanofi launched a competing EAI drug device in the United States known as Auvi-Q®. Auvi-Q®'s creators developed the product for patients who were not satisfied with the EpiPen®'s **[*24]** design and wanted something better. After its launch, Auvi-Q® garnered praise for its smaller size and shape that made it more likely that at-risk children and adults would carry their EAI drug device and have it available to treat anaphylaxis. As a result, Auvi-Q® gained traction quickly in the marketplace in the first few months after its launch.

Sanofi launched Auvi-Q® at price parity with EpiPen®. One of the reasons Sanofi chose this pricing point was to ensure that patients would have equal access to Auvi-Q® as they had for EpiPen®. Sanofi wanted to avoid giving formularies an incentive to provide preferential treatment to a lower-priced drug. Thus, Sanofi chose to offer Auvi-Q® at a price competitive with EpiPen®. In response to the competitive threat posed by Auvi-Q®, Mylan began erecting artificial barriers to consumers' access to and use of Auvi-Q® in the United States. Mylan did so in several ways.

First, shortly after Sanofi launched Auvi-Q®, Mylan began to offer large rebates (30% or higher) to third-party payors. But, Mylan expressly conditioned the rebates on exclusivity. That is, Mylan required the third-party payors to exclude Auvi-Q® from the formularies and only offer **[*25]** EpiPen® to their enrollees.[1] Using its monopoly market share and these large rebates, Mylan successfully coerced third-party payors to accept huge rebates in exchange for offering EpiPen® exclusively instead of foregoing those rebates and allowing Auvi-Q® to compete in the market.

According to Sanofi, Mylan subsidized its large exclusionary rebates by misclassifying the EpiPen® to the federal and state governments. By misclassifying the EpiPen®, Mylan paid substantially less in required rebates for

[1] Sanofi alleges that Mylan blocked Auvi-Q® from all third-party payor formularies. But on at least some formularies, Mylan allowed other EAI drug devices to remain, just not Auvi-Q®.

patients covered by Medicaid. And, with those savings, Mylan, in turn, was able to offer the large rebates to third-party payors conditioned on their excluding Auvi-Q®. Mylan also drove up EpiPen®'s price in the years leading up to Sanofi's launch of Auvi-Q®. Since 2007, EpiPen®'s price has increased by more than 500%. According to Sanofi, one purpose for the price increase was to help Mylan absorb the large conditional discounts it offered to third-party payors who excluded Auvi-Q®.

Sanofi could not match Mylan's large rebates unless it offered rebates in excess of its revenues from Auvi-Q®. That is, Sanofi would lose money on its sales of Auvi-Q® if it tried to compete against EpiPen® in **[*26]** the market. With its rebate program, Mylan successfully blocked Auvi-Q® from accessing almost 50% of the United States EAI drug device market. In some states, where the number of third-party payors who did not cover Auvi-Q® was over-represented, Auvi-Q® was blocked from an even higher percentage of the market.

Second, Mylan imposed contractual exclusivity provisions in its schools programs. Both Mylan and Sanofi had programs designed to provide free or discounted EAI drug devices to schools. But, unlike Sanofi, Mylan required schools taking part in its discounted EpiPen® program to certify in writing that the school would not purchase any products that compete with the EpiPen® within the next year. According to Sanofi, Mylan's contractual exclusivity term had one purpose: to prevent schools from having access to Auvi-Q®. Mylan later eliminated its school programs' exclusivity policy after the New York Attorney General and other legal commentators questioned whether it violated the antitrust laws.

Third, after the Auvi-Q® launch, Mylan started offering consumers $0 co-pay coupons for the EpiPen®. Sanofi also offered $0 co-pay coupons for Auvi-Q®. But, because of Mylan's rebate offers **[*27]** to third-party payors, most of Auvi-Q®'s coverage—even when it was on the same drug formulary with the EpiPen®—was at a less preferential tier. This typically meant the copay for an EpiPen® was $25 and the co-pay for Auvi-Q® was $50 to $75. As a result, Sanofi was forced to absorb two to three times the cost Mylan absorbed when offering the $0 co-pay to consumers. In this way, Mylan drove up Sanofi's costs to cover patients' co-pays.

Finally, Mylan created and spread misinformation about Auvi-Q® and its bioequivalence to EpiPen®, even though the United States Food & Drug Administration had determined that the epinephrine used in Auvi-Q® was bioequivalent to the EpiPen®'s epinephrine. Mylan also marketed physicians, contending that Auvi-Q® was not covered under third-party payors' formularies and suggesting that the decision to exclude Auvi-Q® from the formularies was based on clinical recommendation—and not Mylan's huge, conditional rebate offers.

In the first six months after Sanofi launched Auvi-Q®, Sanofi's market shares tracked its projected market shares. And, Auvi-Q®'s market share was poised to continue to grow. But, as a result of Mylan's conduct, Auvi-Q®'s market share decreased **[*28]** dramatically. By the end of 2013 and into 2014, Auvi-Q®'s market share was about half of its projected market share. And, by October 2015, Auvi-Q®'s national market share was less than half of what Sanofi had projected. But, in Canada, Auvi-Q® (known there as Allerject®) had a stronger performance, even though EpiPen® similarly dominated the Canadian EAI drug device market before Sanofi had launched the Allerject® there. In Canada, provincial authorities control drug formularies, the Allerject® was treated at parity with the EpiPen®, and the two devices were equally available for physicians to prescribe to consumers. By the end of 2013—its first year on the Canadian market—Allerject® exceeded its projections, growing to 21% market share. In 2014 and 2015, Allerject® continued to gain market share. It reached 25% market share by the end of 2014, and it peaked at 32% market share in 2015.

In October 2015, Sanofi undertook a voluntary recall of Auvi-Q® following reports of manufacturing issues with some devices. Sanofi never relaunched Auvi-Q®. Instead, in February 2016, Sanofi returned the rights in the drug to kaléo, inc. Sanofi asserts, though, that Mylan's conduct contributed to Sanofi's **[*29]** decision to forego its investment in Auvi-Q® and return its rights to kaléo, inc. Sanofi also alleges that Mylan's conduct cost it hundreds of millions of dollars in lost sales within the United States EAI drug device market.

II. Legal Standard

Fed. R. Civ. P. 8(a)(2) provides that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although this Rule "does not require 'detailed factual allegations,'" it demands more than "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" which, as the Supreme Court explained, "will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must assume that the factual allegations in the complaint are true. *Id.* (citing Twombly, 550 U.S. at 555). But, the court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* (quoting Twombly, 550 U.S. at 555). "'Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice'" to state a claim for relief. Bixler v. Foster, 596 F.3d 751, 756 (10th Cir. 2010) (quoting Iqbal, 556 U.S. at 678). Also, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citations omitted). **[*30]**

For a complaint to survive a motion to dismiss under Rule 12(b)(6), the pleading "must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" Iqbal, 556 U.S. at 679 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678 (citing Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting Twombly, 550 U.S. at 556); *see also* Christy Sports, LLC v. Deer Valley Resort Co., Ltd., 555 F.3d 1188, 1192 (10th Cir. 2009) ("The question is whether, if the allegations are true, it is plausible and not merely possible that the plaintiff is entitled to relief under the relevant law." (citation omitted)).

In the antitrust context, the Supreme Court observed in *Twombly* that "proceeding to antitrust discovery can be expensive." Twombly, 550 U.S. at 558 (applying the plausibility pleading standard to Sherman Act claims). So, courts must "'insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Id.* (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)). But, still, antitrust cases are not subject to a standard requiring "heightened fact pleading of **[*31]** specifics." Id. at 570. Instead, an antitrust Complaint must allege "only enough facts to state a claim to relief that is plausible on its face" sufficient to "nudge[] the[] claims across the line from conceivable to plausible." *Id.; see also* In re Urethane Antitrust Litig., 663 F. Supp. 2d 1067, 1074 (D. Kan. 2009) (explaining on a Rule 12(b)(6) motion to dismiss antitrust claims that "the Court must ensure that plaintiffs have alleged facts to support those elements sufficient to provide the 'heft' to show an entitlement to relief and to 'nudge' plaintiffs' claims over the line from mere[] possibility or speculation to plausibility" (quoting Twombly, 550 U.S. at 557, 570)).

The court's analysis, below, applies this governing standard to Mylan's Rule 12(b)(6) dismissal arguments.

III. Analysis

Mylan asserts that Sanofi's three claims under Section 2 of the Sherman Antitrust Act fail to state plausible claims for relief. "Section 2 of the Sherman Act prohibits actions by 'person[s] who shall monopolize, [or] attempt to monopolize . . . any part of the trade or commerce.'" Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1280 (10th Cir. 2012) (quoting 15 U.S.C. § 2). To state a claim under Section 2, a plaintiff must plead facts that, if true, make two elements plausible. They are: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or **[*32]** development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966).

Mylan's papers never assert that Sanofi has failed to allege the first element of a Sherman *§ 2* claim—*i.e.*, monopoly power in the relevant market. Indeed, the *Sanofi* Complaint alleges that the relevant product market is EAI drug devices, that this market has high barriers to entry, and that Mylan has monopoly power in that market with a share market exceeding 90%. *Sanofi* Complaint ¶¶ 39, 116, 123, 126-34. So, Sanofi has alleged facts sufficient to establish that Mylan possessed monopoly power in the relevant market, thus satisfying the first element of its Sherman *§ 2* claims.

Instead, Mylan asserts that Sanofi has not satisfied the second element of a Sherman *§ 2* claim. Specifically, Mylan argues that the Complaint fails to allege facts sufficient to make a plausible showing of Mylan's willful acquisition or maintenance of its monopoly power. Mylan thus asks the court to dismiss the *Sanofi* Complaint under *Federal Rule of Civil Procedure 12(b)(6)* for failing to state a claim. Mylan asserts five principal arguments in support of its request. The court addresses each argument, in turn, in subsections A through E, below.

A. Does the *Sanofi* Complaint [*33] State a Claim for Unlawful Exclusive Dealing Based on Mylan's Rebate Offers?

First, Mylan contends that the *Sanofi* Complaint fails to state a plausible Sherman Act claim based on Mylan's rebate offers. Mylan asserts two arguments to support its contention. First, Mylan contends that Sanofi's exclusive dealing claim fails as a matter of law because the Complaint never alleges that Mylan's rebates priced the EpiPen® below its costs to produce it. Second, Mylan argues that the *Noerr-Pennington* doctrine bars Sanofi's exclusive dealing claim to the extent Sanofi bases it on discounts or rebates offered to state or state agencies. The court addresses each argument separately. As explained below, the court finds Mylan's first argument unpersuasive. But the court agrees with Mylan's second argument.

1. The *Sanofi* Complaint alleges facts about Mylan's rebate offers to non-governmental third-party payors that plausibly state a claim for exclusive dealing in violation of the Sherman Antitrust Act.

Mylan asserts that Sanofi fails to state a claim for relief based on Mylan's rebate offers because the Complaint never alleges that Mylan's offers resulted in prices below the cost of production. Indeed, **[*34]** the Supreme Court has recognized that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (citation and internal quotation marks omitted). The Supreme Court has explained that "the exclusionary effect of prices above a relevant measure of cost . . . reflects the lower cost structure of the alleged predator, and so represents competition on the merits . . . ." *Id.* The Supreme Court thus has refused "[t]o hold that the antitrust laws protect competitors from the loss of profits due to such price competition" because such a ruling "would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." *Id.* And, "[t]he antitrust laws require no such perverse result." *Id.*

So, the Supreme Court requires a plaintiff in a predatory pricing case to allege two things: (1) that "the prices complained of are below an appropriate measure of its rival's costs;" and (2) that "the competitor had a reasonable prospect, or, under *§ 2 of the Sherman Act*, a dangerous probability, of recouping its investment in below-cost prices." *Id. at 222, 224* (citations omitted). Mylan argues that **[*35]** Sanofi's claim here fails as a matter of law because the Complaint never alleges facts capable of supporting the first requirement of this test—that Mylan's rebate offers resulted in prices that were below its costs to produce the EpiPen®.

Sanofi responds to Mylan's argument, asserting that this is not a predatory pricing case. Instead, Sanofi explains that its rebate claim is based on Mylan's allegedly unlawful exclusive dealing arrangements that, Sanofi contends, violate the Sherman Antitrust Act. Thus, Sanofi argues, the price-cost test does not apply here.

The Third Circuit addressed the question whether the price-cost test applies to an alleged anticompetitive rebate program in *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012)*.[2] *ZF Meritor* recognized that "a plaintiff's characterization of its claim as an exclusive dealing claim does not take the price-cost test off the table." *Id. at 275*. Instead, the price-cost test still may apply because "contracts in which discounts are linked to purchase (volume or market share) targets are frequently challenged as *de facto* exclusive dealing arrangements on the grounds that the discounts induce customers to deal exclusively with the firm offering the rebates." *Id.* So, "when price is the clearly predominant **[*36]** mechanism of exclusion, the price-cost test tells us that, so long as the price is above-cost, the procompetitive justifications for, and the benefits of, lowering prices far outweigh any potential anticompetitive effects." *Id.*

But the Third Circuit refused to apply the price-cost test in *ZF Meritor* because plaintiffs "did not rely solely on the exclusionary effect of [defendant's] prices" to support their exclusive dealing claim. *Id. at 277*. Instead, plaintiffs "highlighted a number of anticompetitive provisions" in the exclusive dealing agreements, including plaintiffs' allegation that defendant "used its position as a supplier of necessary products to persuade [customers] to enter into agreements imposing de facto purchase requirements of roughly 90% for at least five years, and that [defendant] worked in concert with [customers] to block customer access to Plaintiffs' products, thereby ensuring that Plaintiffs would be unable to build enough market share to pose any threat to [defendant's] monopoly." *Id.* The Third Circuit thus concluded that "price itself was not the clearly predominant mechanism **[*37]** of exclusion," and so the price-cost test did not apply to preclude plaintiffs' exclusive dealing claim. *Id.*

Applying *ZF Meritor*, other courts also have refused to apply the price-cost test to exclusive dealing claims when price itself was not the clearly predominant mechanism of exclusion. *See, e.g.*, *Dial Corp. v. News Corp., 165 F. Supp. 3d 25, 32 (S.D.N.Y. 2016)* (denying summary judgment against plaintiffs' exclusive dealing claim and holding that the price-cost test did not apply because price was not the "clearly predominant method of exclusion" but, instead, "the length of the exclusive contracts and their staggered terms may also foreclose competition"); *see also* *UniStrip Techs., LLC v. LifeScan, Inc., 153 F. Supp. 3d 728, 737 (E.D. Pa. 2015)* (holding that the price-cost test did not apply to plaintiff's exclusive dealing claim because plaintiff's Complaint never alleged that price was defendant's means of exclusion; instead, plaintiff based its exclusive dealing claim on defendant's allegedly anticompetitive predatory conduct through use of exclusive dealing arrangements preventing competitors from entering the market).

Here, viewing its allegations in the light most favorable to Sanofi, the court concludes that the Complaint does not rely "solely on the exclusionary effect of [Mylan's] prices" to support its exclusive **[*38]** dealing claim based on Mylan's rebate program. *ZF Meritor, 696 F.3d at 277*. The *Sanofi* Complaint alleges that Mylan leveraged its greater than 90% market share by offering unprecedented rebates to third-party payors (30% or higher) but expressly conditioned those rebates on excluding Auvi-Q®. *Sanofi* Complaint ¶¶ 6, 57. That is, in exchange for the large rebates, Mylan required the third-party payors to exclude Auvi-Q® from the drug formularies and offer only EpiPen® to enrollees. *Id.* ¶¶ 6, 59. The Complaint also alleges that Mylan specifically targeted Auvi-Q®, allowing some other EAI drug devices to remain on at least some third-party payors' formularies but requiring exclusion of Auvi-Q®. *Id.* ¶ 59. Sanofi alleges that no legitimate business reason existed for Mylan's deep conditional rebates other than its desire to block Auvi-Q® from the market. *Id.*

Sanofi alleges that Mylan's exclusive dealing agreements effectively blocked Auvi-Q® from nearly 50% of the EAI drug device market nationwide. *Id.* ¶¶ 6, 68. This percentage was even greater in some larger states. *Id.* ¶¶ 6, 68.

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[2] The parties do not cite, and the court has not found, any Tenth Circuit case law addressing when the price-cost test applies to an exclusive dealing claim based on a discount or rebate program. Our court has held that "an MDL transferee court applies the law of the circuit in which it sits." *In re Syngenta AG MIR 162 Corn Litig., No. 14-md-2591-JWL, 2016 U.S. Dist. LEXIS 135658, 2016 WL 5481997, at *1 n.1 (D. Kan. Sept. 29, 2016)* (first citing *Murphy v. FDIC, 208 F.3d 959, 965-66 (11th Cir. 2000)* (citing cases from the D.C., Second, Eighth, and Ninth Circuits); then citing *Murray Energy Corp. v. United States DOD (In re United States DOD), 817 F.3d 261, 272 (6th Cir. 2016)* (citing *Murphy* and following the other circuits)). And, although the transferor court's law is not binding precedent, it "merits close consideration" by the transferee court. *In re Korean Air Lines Disaster, 829 F.2d 1171, 1176, 265 U.S. App. D.C. 39 (D.C. Cir. 1987)*. The court thus closely considers the law of the Third Circuit (where the *Sanofi* case originated) when deciding this Motion to Dismiss.

Sanofi also alleges that Mylan's rebate program unlawfully raised Sanofi's costs of entry into the market. *Id.* ¶¶ 108-09. And, after Mylan **[*39]** successfully used its rebate program to block Auvi-Q® from the market, Sanofi contends Mylan "poisoned the well" with physicians by sending them misleading marketing materials that described EpiPen® as the "preferred" EAI device for 99% of patients while Auvi-Q® was "preferred" for just 2%. *Id.* ¶¶ 7, 98-99. But, in reality, these percentages were driven by Mylan's exclusionary rebates—not patient preferences. *Id.* ¶ 98.

The court thus concludes that the *Sanofi* Complaint alleges that Mylan's rebate program involved anticompetitive conduct—beyond pricing itself—that was designed to block customer access to Auvi-Q® and protect Mylan's monopoly in the EAI drug market. The price-cost test thus does not apply to Sanofi's exclusive dealing claim. *See* *Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168(MLC), 2014 U.S. Dist. LEXIS 46791, 2014 WL 1343254, at *23 (D.N.J. Mar. 28, 2014)* (explaining that *ZF Meritor* held that above-cost pricing does not preclude antitrust liability when the defendant "engaged in an otherwise unlawful exclusive dealing arrangement" because while "[p]rices are unlikely to exclude equally efficient rivals unless they are below cost, . . . exclusive-dealing arrangements can exclude equally efficient rivals because those rivals are never given the opportunity to compete" (citing *ZF Meritor, 696 F.3d at 278, 281)*);[3] *see also* *UniStrip Techs., 153 F. Supp. 3d at 737* (holding **[*40]** that the price-cost test does not apply when plaintiff's Complaint pleads "anticompetitive behavior rather than merely competitive pricing").

The court thus turns to consider a second question, *i.e.*, whether Sanofi has alleged a plausible Sherman Act claim based on Mylan's exclusive dealing arrangements. An exclusive dealing arrangement is "a contract between a manufacturer and a buyer that forbids the buyer from purchasing the contracted good from any other seller or that requires the buyer to take all of its needs in the contract good from that manufacturer." XI Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1800a, at 3 (3d ed. 2011); *see also* *Perington Wholesale, Inc. v. Burger King Corp., 631 F.2d 1369, 1374 (10th Cir. 1979)* (describing an exclusive dealing arrangement as one that "entails a commitment by a buyer to deal only with a particular seller."). Such an agreement "need not specifically require the buyer to forgo other supply sources if the practical effect is the same." *Perington Wholesale, 631 F.2d at 1374*; *see also* *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 326, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)* ("[E]ven though a contract does 'not contain specific agreements not to use the (goods) of a competitor' if 'the practical effect . . . is to prevent such use,' it comes within" the prohibition against exclusivity).

Our Circuit has explained that "[t]he **[*41]** antitrust vice of these arrangements is the foreclosure part of the market in which the seller competes by taking away the freedom of the buyer to choose from the products of competing traders in the seller's market." *Perington Wholesale, 631 F.2d at 1374*; *see also* *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 270 (3d Cir. 2012)* ("The primary antitrust concern with exclusive dealing arrangements is that they may be used by a monopolist to strengthen its position, which may ultimately harm competition." (citation omitted)).

But, "[e]xclusive dealing agreements are often entered into for entirely procompetitive reasons, and generally pose little threat to competition." *ZF Meritor, 696 F.3d at 270* (citing *Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 76 (3d Cir. 2010)* ("'[I]t is widely recognized that in many circumstances, [exclusive dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all.'") (quoting *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 8 (1st Cir. 2004))*). On the other hand, "'[e]xclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods[.]'" *Id.* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (O'Connor, J., concurring), *abrogated on other grounds by* *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (further citation omitted)). Also, "[e]xclusive dealing arrangements are of special concern when **[*42]** imposed by a monopolist." *Id. at 271* (quoting *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)* ("Behavior that otherwise might comply with ***antitrust law*** may be impermissibly exclusionary when practiced by a monopolist.")).

[3] Mylan contends that Sanofi has taken positions that are inconsistent with the ones it asserted in *Eisai*—a case where Sanofi was accused of violating the antitrust laws through its own use of loyalty-discount contracts. But, *Eisai* involved different facts and a different procedural posture than the ones presented here. Thus, Sanofi's arguments in *Eisai* are of no moment to the motion to dismiss in this case.

So, because exclusive dealing arrangements "may actually enhance competition, . . . they are not deemed per se illegal." *Perington Wholesale, 631 F.2d at 1374* (citing *Tampa Elec., 365 U.S. at 333*). Instead, courts apply the rule of reason to determine the legality of exclusive dealing arrangements. *ZF Meritor, 696 F.3d at 271* (citing *Tampa Elec., 365 U.S. at 327*); *see also* *McWane, Inc. v. F.T.C., 783 F.3d 814, 835 (11th Cir. 2015)* (explaining that the Eleventh Circuit has joined "the consensus that exclusive dealing arrangements are reviewed under the rule of reason." (citation and internal quotation marks omitted)).

Thus, to assert an exclusive dealing claim, a plaintiff must plead facts capable of supporting a finding or inference that the "probable effect" of "performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec., 365 U.S. at 327, 329*;[4] *see also* *Perington Wholesale, 631 F.2d at 1374* ("Thus, a complaining trader must allege and prove that a particular arrangement unreasonably restricts the opportunities of the seller's competitors to market their product.").

The Supreme Court has instructed lower courts "[t]o determine substantiality in a given case" by "weigh[ing] **[*43]** the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Tampa Elec., 365 U.S. at 329*. When considering whether the contract at issue in *Tampa Electric* tended to foreclose a substantial volume of competition, the Supreme Court considered several factors. *Id. at 334-35*. They included whether a seller with a dominant position exists in the market, whether the market has "myriad outlets with substantial sales volume," the prevalence in the industry of using exclusive contracts, the duration of the contract, and the existence of any pro-competitive justifications for the contract. *Id.*

Here, Mylan argues that Sanofi cannot proceed with an exclusive dealing claim based on a single product rebate (that is priced above cost) without alleging other exclusionary conduct that would impede a customer's ability to decline the rebate if a competitor—such as Sanofi—made a better offer. To state a viable **[*44]** exclusive dealing claim based on a rebate program, Mylan asserts, courts require a plaintiff to allege other exclusionary conduct that produces a substantial foreclosure of competition such as bundling or tying the rebates to the sale of other products,[5] or threatening to terminate supply,[6] or imposing long-term exclusivity agreements.[7] Mylan contends that

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[4] Although *Tampa Electric* involved a Clayton Act claim, courts also apply its analysis to exclusive dealing claims asserted under the *Sherman Act*. *See* *ZF Meritor, 696 F.3d at 327 n.26* ("In substance, the *Tampa Electric* standard for *Clayton Act Section 3* claims differs very marginally, if at all, from the fact-intensive rule-of-reason analysis that applies to this case under *Section 1 of the Sherman Act*."); *see also* *Tampa Elec., 365 U.S. at 335* ("We need not discuss the respondents' further contention that the contract also violates *§ 1* and *§ 2 of the Sherman Act*, for if it does not fall within the broader prescriptions of *§ 3 of the Clayton Act* it follows that it is not forbidden by those of the former.").

[5] *See, e.g.,* *United States v. Microsoft, Corp., 253 F.3d 34, 60, 70, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (affirming district court's decision holding that Microsoft's exclusive dealing contracts violated *§ 2 of the Sherman Act* where the government alleged "that Microsoft attempted to monopolize the browser market and unlawfully tied its browser to its operating system so as to foreclose competition in the browser market"); *UniStrip Techs., LLC v. LifeScan, Inc., 153 F. Supp. 3d 728, 740-41 (E.D. Pa. 2015)* (denying motion to dismiss where plaintiff alleged that defendant "engaged in exclusive dealing, in violation of several antitrust laws, and that this exclusive dealing consists of bundling schemes by which rebates are offered on the condition that multiple products from [defendant] are purchased"); *Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212, 1217, 1227-29 (D. Kan. 2013)* (denying motion to dismiss plaintiff's exclusive dealing claim based on contracts "which unlawfully tied the sale of sutures and endo products to the sale of other products in the med-surg basket").

[6] *See, e.g.,* *McWane, Inc. v. FTC, 783 F.3d 814, 819, 834-38 (11th Cir. 2015)* (finding a dominant producer of domestic pipe fittings engaged in unlawful exclusive dealing arrangements when it threatened to take away rebates and cut off supply for 12 weeks unless customers purchased all domestic pipe fittings exclusively from the producer); *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 277, 289 (3d Cir. 2012)* (concluding that sufficient evidence existed for a jury to find that defendant engaged in unlawful exclusive dealing when its contracts conditioned rebates, as well as continued product supply, on the customer's purchase of a specific percentage of defendant's product).

Sanofi never asserts any such exclusionary conduct here. Thus, Mylan argues, Sanofi fails to state a plausible exclusive dealing claim.

The court disagrees. As the court already has concluded above, the *Sanofi* Complaint sufficiently alleges exclusionary conduct in addition to Mylan's pricing to state a plausible exclusive dealing claim. Sanofi has alleged that Mylan leveraged its greater than 90% market share by offering unprecedented rebates to third-party payors (30% or higher) and specifically targeted Auvi-Q® for exclusion from the market by expressly conditioning the large rebates on excluding Auvi-Q® from third-party payors' drug formularies. Also, Sanofi alleges that Mylan had no legitimate business purpose for offering these large rebates but used the program, instead, to block a new entrant—Auvi-Q®—from **[*45]** the market and to protect its 90%-plus market share.

In *Dial Corp. v. News Corp.*, the Southern District of New York denied summary judgment against an exclusive dealing claim because the evidence showed that the length of the defendant's exclusive dealing contracts and their staggered terms may have foreclosed competition in the relevant market. *165 F. Supp. 3d 25, 32 (S.D.N.Y. 2016)*. The court also found that the defendant had "intentionally staggered the end dates of key contracts to prevent competitors from acquiring a 'critical mass' of retail distribution." *Id. at 31*. The court recognizes that *Dial Corp.'s* facts differ from the ones asserted by the *Sanofi* Complaint. Here, the Complaint alleges that third-party payors' coverage decisions "typically" last for only "one or two years." *Sanofi* Complaint ¶ 67. Also, the Complaint makes no allegations that Mylan staggered the terms of its rebate program in a way to foreclose competition. But, like *Dial Corp.*, Sanofi alleges that Mylan's rebate program blocked a competitor from entering and getting traction in the market. Here, Sanofi alleges that Mylan specifically targeted Auvi-Q®, blocking it from nearly 50% of the EAI drug device market nationwide and an even higher percentage **[*46]** in some larger states. One plausibly could infer from the facts alleged that Mylan intentionally and successfully prevented Auvi-Q® from developing a "critical mass" of customers that would allow them to compete against Mylan—the dominant player in the market with a market share that exceeded 90%.

Also, recognizing that *Tampa Electric* provides a "number of other factors which may be relevant to a rule of reason analysis in an exclusive dealing claim," our court has refused to "decide at the pleading stage that plaintiff had failed to plead adequate foreclosure levels" to state an exclusive dealing claim. *Suture Express, Inc. v. Cardinal Health 200, LLC, 963 F. Supp. 2d 1212, 1229 (D. Kan. 2013)*. The court reaches the same conclusion here. The question whether the alleged exclusive dealing arrangements foreclosed a substantial share of the market requires the court to weigh various factors, and that is not a proper function for the pleading stage. Instead, the court views the Complaint's allegations in the light most favorable to Sanofi. And, it concludes that Sanofi has alleged that Mylan's rebate program involved exclusionary conduct capable of supporting a finding or inference that the probable effect of Mylan's rebate program—conditioned on exclusivity—substantially foreclosed **[*47]** competition. Sanofi thus states a plausible exclusive dealing claim under the Sherman Act.

2. The *Noerr-Pennington* doctrine bars Sanofi's exclusive dealing claim premised on rebates offered to states or state agencies.

Mylan also asserts that Sanofi cannot allege an exclusive dealing claim based on discounts or rebates offered to state-based Medicaid agencies because the *Noerr-Pennington* doctrine bars those claims. "The *Noerr-Pennington* doctrine is drawn from the Supreme Court's opinions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* and *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*." *Tal v. Hogan, 453 F.3d 1244, 1257 n.13 (10th*

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[7] *See, e.g., E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 452-53 (4th Cir. 2011)* (reversing a district court's dismissal of a *Sherman Act § 2* claim because plaintiff sufficiently alleged that defendant's use of multi-year exclusive contracts constituted anticompetitive conduct and foreclosed competition in the market); *Dial Corp. v. News Corp., 165 F. Supp. 3d 25, 31-32 (S.D.N.Y. 2016)* (denying summary judgment against plaintiffs' exclusive dealing claim because "the length of the exclusive contracts and their staggered terms may also foreclose competition" and the evidence showed that defendant "intentionally staggered the end dates of key contracts to prevent competitors from acquiring a 'critical mass' of retail distribution").

Cir. 2006). The *Noerr-Pennington* doctrine "'exempts from antitrust liability any legitimate use of the political process by private individuals, even if their intent is to eliminate competition.'" Id. at 1259 (quoting Zimomra v. Alamo Rent-A-Car, Inc., 111 F.3d 1495, 1503 (10th Cir. 1997)). "The doctrine arises from the [Supreme] Court's conclusion that the Sherman Act was not intended to derogate the First Amendment right of citizens to petition the government for a redress of grievances." GF Gaming Corp. v. City of Black Hawk, 405 F.3d 876, 883 (10th Cir. 2005) (citing Noerr, 365 U.S. at 136-39).

The scope of the *Noerr-Pennington* doctrine depends "on the source, context, and nature of the anticompetitive restraint at issue." Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988). "*Noerr-Pennington* immunity does not apply if the purported effort to influence or obtain government action is in fact only an attempt to interfere with the business relationships **[*48]** of a competitor." Classic Commc'ns, Inc. v. Rural Tel. Serv. Co., Inc., 956 F. Supp. 910, 917 (D. Kan. 1997) (first citing Noerr, 365 U.S. at 144; then citing Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)). "This is the so-called 'sham' exception to the *Noerr-Pennington* doctrine." *Id.* The sham exception applies "when 'persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon.'" GF Gaming Corp., 405 F.3d at 884 (quoting City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)). "The exception thus 'involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all,' such as a defendant who files 'frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay.'" *Id.* (quoting City of Columbia, 499 U.S. at 380).

In *GF Gaming*, the Tenth Circuit held that plaintiff had failed to state Sherman Antitrust Act claims because it alleged antitrust injuries based on the outcome of defendants' lobbying activities—and not on the process of that lobbying activity. *Id.* Thus, the Tenth Circuit held, the *Noerr-Pennington* doctrine immunized the non-governmental defendants from liability based on their lobbying activities. Id.

The same reasoning applies here. Sanofi asserts that it has stated a plausible antitrust claim based on rebates offered to government agencies because Mylan—a private **[*49]** actor with no legislative or quasi-legislative authority—engaged in "anticompetitive efforts . . . to unlawfully maintain its EpiPen® monopoly." Doc. 41 at 26 (citing the *Sanofi* Complaint ¶¶ 7-8); *see also Sanofi* Complaint ¶ 67 (asserting that Mylan's "illegal conditional rebate scheme to exclude Auvi-Q® was successful" because "in most of [the states that manage their Medicaid drug formularies] Auvi-Q® was excluded."). These allegations accuse Mylan of using the *outcome* of a government process—*i.e.*, exclusion of Auvi-Q® from the drug formularies—*not the process itself* to harm a competitor. The *Noerr-Pennington* doctrine shields this very type of conduct from antitrust liability, even if Mylan, as a private actor, intended to eliminate competition. *See* GF Gaming, 405 F.3d at 884 (holding that conduct that "amounts to nothing more than lobbying of government officials . . . is immune from Sherman Act liability under the *Noerr-Pennington* doctrine" and "[e]ven if defendants' sole motive for petitioning the [government] officials was to injure competition, the conduct would still be protected by the *Noerr-Pennington* doctrine"); *see also* Tal, 453 F.3d at 1260 (holding that *Noerr-Pennington* immunity applied to preclude antitrust claims **[*50]** based on defendant's vigorous petitioning of government officials and rejecting plaintiff's argument that the doctrine does not apply to private entities as "clearly wrong" because "that is precisely for whom the immunity was created").

Sanofi argues, alternatively, that Mylan cannot invoke *Noerr-Pennington* immunity because Sanofi asserts that Mylan provided false and misleading information to federal and state governments misclassifying the EpiPen® as a non-innovator drug under Medicaid, allowing Mylan to pay substantially less in required rebates to Medicaid and enjoy savings that it then used to provide additional rebates conditioned on exclusivity. Sanofi contends that *Noerr-Pennington* does not provide immunity for these types of misrepresentations. Doc. 41 at 27 (first quoting Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1986) ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); then quoting Allied Tube, 486 U.S. at 499-500 ("unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations")).

But Sanofi's antitrust claims are not based on Mylan's alleged misrepresentations about the EpiPen®'s drug classification. Instead, Sanofi **[*51]** premises its rebate claims on Mylan's conduct offering rebates to federal and state governments in exchange for exclusivity. Sanofi never asserts that Mylan's alleged misclassification of the EpiPen® influenced a government agency's decision to agree to exclude Auvi-Q® in exchange for the rebates, or that the alleged misclassification otherwise affected a governmental agency's decision to participate in the exclusive rebate program. Instead, the conduct that Sanofi alleges to have violated the antitrust laws was Mylan's petitioning of federal and state governments to exclude Auvi-Q® from the drug formularies in exchange for rebates. As already noted, the *Noerr-Pennington* doctrine immunizes such conduct. The court thus dismisses Sanofi's exclusive dealing claims based on discounts or rebates provided to state-based Medicaid agencies because they are barred by the *Noerr*-*Pennington* doctrine. These claims fail to state a plausible claim for relief.

B. Does the *Sanofi* Complaint State a Claim for Relief Based on Mylan's Supposedly Deceptive Speech?

Mylan next asserts that Sanofi fails to state a plausible Sherman Act claim based on Mylan's allegedly deceptive speech. Mylan asserts that our **[*52]** Circuit has explained that the Sherman Act is concerned only with "'protection of competition or prevention of monopoly,'" but "not the vindication of general 'notions of fair dealing,' which are the subject of many other laws at both the federal and state level." *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1225 (10th Cir. 2009)* (quoting IIIB Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 770, at 190 (3d ed. 2008)). Thus, Mylan asserts, the antitrust laws afford no protection to Sanofi's claims based on purportedly deceptive speech.

But, *Four Corners* was a case involving a refusal to deal—not deceptive speech, like Sanofi's allegations here. *See* *Four Corners, 582 F.3d at 1222-25* (affirming summary judgment against plaintiffs' antitrust claims based on a hospital's refusal to deal with a physician). In contrast, other courts have recognized that deceptive speech can support Sherman Act claims because "in some cases, such defamation, which plainly is not competition on the merits, can give rise to antitrust liability, especially when it is combined with other anticompetitive acts." *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109 n.14 (3d Cir. 2010)*. *See also* *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)* (holding that plaintiff's allegations, "namely, that the defendants made fraudulent misrepresentations to advertisers and sham objections to a government licensing agency in order to **[*53]** protect their monopoly" constituted sufficiently anticompetitive conduct to support a Sherman Act claim); *National Asso. of Pharmaceutical Mfrs., Inc. v. Ayerst Laboratories, Div. of/and American Home Products Corp., 850 F.2d 904, 916 (2d Cir. 1988)* (reversing a district court's dismissal of a *Sherman Act § 2* claim based on defendant's publication of an allegedly false and misleading letter touting its product's superiority and told pharmacists never to dispense a generic drug because plaintiff's allegations were sufficient "to go forward with the discovery process to substantiate its claim"); *Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1249 (D. Utah 1999)* (holding that alleged misleading statements about the plaintiff's product viewed with other anticompetitive behavior supported a *Sherman Act § 2* claim sufficient to survive summary judgment).

In *West Penn Allegheny*, the Third Circuit recognized that "[a]nticompetitive conduct can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." *627 F.3d at 109* (citations and internal quotation marks omitted). And, "[f]or present purposes," the court held "anticompetitive conduct can include . . . making false statements about a rival to potential investors and customers." *Id.* (first citing *LePage's Inc. v. 3M, 324 F.3d 141, 153 (3d Cir. 2003)*; then citing *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 331 U.S. App. D.C. 226 (D.C. Cir. 1998)* (further citations omitted)). The Third Circuit listed **[*54]** several types of anticompetitive conduct that the *West Penn Allegheny* Complaint alleged, including that "on several occasions, [defendant] made false statements about [plaintiff's] financial health to potential investors, which caused [plaintiff] to pay artificially inflated financing costs on its debt." *Id. at 110*. Viewing the Complaint's allegations as a whole, the Third Circuit held that plaintiff plausibly had alleged anticompetitive conduct sufficient to state a *Sherman Act § 2* claim. *Id.*

Likewise, the *Sanofi* Complaint alleges that Mylan engaged in various anticompetitive conduct designed to block Auvi-Q® from the market, including making allegedly false and deceptive statements. These allegations include: (1) Mylan funded and promoted a misleading study entitled "Auvi-Q® versus EpiPen® Auto-Injectors: Failure to Demonstrate Bioequivalence of Epinephrine Delivery Based on Partial Area Under the Curve" intended to undermine the FDA's conclusion that Auvi-Q® demonstrated bioequivalence to the epinephrine in the EpiPen®; and (2) Mylan made misleading statements to physicians about Auvi-Q®'s exclusion from the marketplace and touted EpiPen® as the "preferred" brand, promoted Auvi-Q®'s status as **[*55]** "Not Covered" or "Excluded from Benefit" from third-party payors' drug formularies, and suggested that the decision to exclude Auvi-Q® from the formularies was based on clinical recommendation and not Mylan's huge, conditional rebate offers. *Sanofi* Complaint ¶¶ 93-98, 139. Sanofi alleges that it sustained harm from this allegedly deceptive speech. Sanofi asserts that Mylan's deceptive speech successfully blocked Auvi-Q® from the market. *Id.* ¶ 99. Sanofi also asserts that it incurred increased marketing costs to correct Mylan's misleading statements. *Id.* ¶ 140. And, Sanofi alleges that Mylan engaged in this deceptive conduct unlawfully to maintain its monopoly power in the EAI drug device market. *Id.* ¶ 139.

Mylan contends that these allegations fall short of pleading a plausible claim because a plaintiff asserting a monopolization claim based on misleading advertising must "'overcome a presumption that the effect on competition of such a practice was *de minimis*.'" *Ayerst Labs., 850 F.2d at 916* (quoting *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979))*. *Cf.* *Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168(MLC), 2014 U.S. Dist. LEXIS 46791, 2014 WL 1343254, at *36 (D.N.J. Mar. 28, 2014)* (describing defendant's argument as one asserting that a plaintiff generally cannot state a claim for deceptive sales practices under the antitrust laws because "such advertising is believed to have a *de minimis* ***[*56]*** effect on competition."). And, Mylan contends, Sanofi's allegations fail to overcome this presumption here. The court disagrees.

The *de minimis* presumption "is based on the perception that, while '[t]here is no redeeming virtue in deception, . . . there is a social cost in litigation over it,'" because "'the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances—and because the prevalence of arguably improper utterance is so great . . . .'" *Ayerst Labs, 850 F.2d at 916* (quoting III P. Areeda & D. Turner, ***Antitrust Law*** ¶ 738a, at 278-79 (1978)). A plaintiff may overcome the *de minimis* presumption "'by cumulative proof that the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.'" *Id.* (quoting Areeda & Turner, ***Antitrust Law*** ¶ 738a, at 279).

In *Ayerst*, the Second Circuit held that a district court had erred by dismissing a *Sherman Act § 2* claim. Plaintiff based its claim on an allegedly false and deceptive letter that defendant had sent **[*57]** to customers. The court found that plaintiff's Complaint alleged several of the factors required to overtake the *de minimis* presumption—including that the letter was clearly false, clearly material, and clearly likely to induce reasonable reliance. *Id.* But the court also agreed with defendant that plaintiff had not alleged other certain factors because the Complaint asserted that defendant sent the letter to pharmacists—persons likely to have knowledge about the subject matter—and that defendant only could have made the misrepresentations for a short time period. *Id. at 917*. Nevertheless, the court concluded that "several factors . . . cannot be adequately evaluated until the discovery process has moved forward to a greater extent than it has thus far." *Id.* The court thus held that the Complaint pleaded a *Sherman Act § 2* claim sufficient to survive *Rule 12(b)(6)* dismissal.

Viewing the facts alleged here in the light most favorable to Sanofi, the Complaint alleges several of the factors required to overcome the presumption that deceptive statements have a *de minimis* effect on competition. Sanofi alleges that Mylan circulated marketing materials containing false and misleading statements that caused customers **[*58]** to refrain from purchasing Auvi-Q®, produced hundreds of millions of dollars in lost sales for Sanofi, and erected artificial barriers preventing Auvi-Q® from entering the market. *Sanofi* Complaint ¶¶ 139-40. Like the *Ayerst* plaintiff, the court finds that Sanofi "should be allowed to go forward with the discovery process to substantiate its claim" that Mylan's allegedly deceptive speech violated *§ 2 of the Sherman Act*. The court recognizes that, like *Ayerst*, the Complaint does not allege facts capable of supporting all of the factors required to overtake the *de minimis* presumption. But, the court finds persuasive *Ayerst*'s conclusion that these factors require factual development through the discovery process. And, because the court cannot evaluate several of the factors adequately without the facts that discovery will manifest—or not—the court refuses to dismiss Sanofi's claim at the pleading stage. *See* Ayerst Labs., 850 F.2d at 917.

Mylan also asserts that Sanofi alleges that it "was able to successfully combat" Mylan's allegedly deceptive conduct in two ways. Doc. 57 at 27. First, Sanofi spoke with key thought leaders and key allergy advocacy groups to dispel any doubts about Auvi-Q®. *Id.* (citing *Sanofi* Complaint **[*59]** ¶ 94). Second, Sanofi secured support from physicians who preferred Auvi-Q® to the EpiPen® and wrote articles or letters to third-party payors supporting Auvi-Q®'s coverage on the drug formularies. *Id.* (citing *Sanofi* Complaint ¶ 100). Thus, Mylan contends, Sanofi's allegations differ from ones asserted by "nascent firm[s]" that have "no established customer base and typically lack[] the resources to answer the dominant firm's deception effectively." IIIB Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 782b, at 353 (4th ed. 2015).

Mylan's interpretation of the *Sanofi* Complaint stretches it beyond the point of reason. Sanofi never alleges that it "successfully" responded to Mylan's deceptive conduct with its outreach efforts. To the contrary, Sanofi alleges that Mylan's conduct blocked it from the market and resulted in significant sales losses. Sanofi also alleges that Mylan—a monopolist with a market share exceeding 90%—engaged in this deceptive conduct to block a new entrant to the market (Auvi-Q®) and thereby preserve its monopoly power. Considering these allegations along with the other anticompetitive conduct alleged in the Complaint as a whole, the court concludes that Sanofi **[*60]** has stated a plausible Sherman Act § 2 claim based on Mylan's alleged deceptive speech.

C. Does the *Sanofi* Complaint State a Claim for an "Overall Scheme" to Monopolize Violating Section 2 of the Sherman Antitrust Act?

Next, Mylan asserts that the *Sanofi* Complaint fails to allege facts sufficient to state a claim for an overall scheme to monopolize violating Sherman Act § 2.

A plaintiff may assert a plausible Sherman Act claim based on "one overarching claim of a § 2 violation." Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1309 (D. Utah 1999). *See also* In re: Lipitor Antitrust Litig., 868 F.3d 231, 274 (3d Cir. 2017), *petition for cert. filed* (U.S. Nov. 20, 2017) (Nos. 17-752, 17-771) (holding the district court erred by dismissing plaintiffs' allegations that defendant "participated in an overall scheme of monopolistic conduct" because plaintiff had asserted plausible allegations of various anticompetitive conduct); Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416, 425 (10th Cir. 1952) (affirming judgment against a patent holder for violating the Sherman Act because the patent holder's "infringement action and the related activities, of course, in themselves were not unlawful, and standing alone would not be sufficient to sustain a claim for damages which they may have caused, but when considered with the entire monopolistic scheme which preceded them . . . they may be considered as having been done **[*61]** to give effect to the unlawful scheme."); In re Neurontin Antitrust Litig., MDL No. 1479, 2009 U.S. Dist. LEXIS 77475, 2009 WL 2751029, at *15-17 (D.N.J. Aug. 28, 2009) (explaining that "[i]f an antitrust plaintiff can allege that a series of actions, when viewed together, were taken in furtherance and as an integral part of a plan to violate the antitrust laws, that series of actions may trigger antitrust liability as an overall scheme," and holding that plaintiffs "adequately stated a claim for monopolization and attempted monopolization on the basis of allegations that defendant [had] engaged in an overall scheme to monopolize").

Our Circuit instructs courts to view purported conduct supporting a Sherman Act § 2 violation based on an intent to create or maintain a monopoly "as a whole." Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509, 1522 n.18 (10th Cir. 1984), *aff'd* 472 U.S. 585, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985). The Circuit reasoned that each type of alleged anticompetitive conduct "need not be supported by sufficient evidence to amount to a § 2 violation. It is enough that taken together they are sufficient to prove the monopolization claim." *Id. See also* LePage's, Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003) (explaining that "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation" when determining whether a Sherman Act § 2 violation has occurred); Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048, 1109 (D. Colo. 2004) (explaining that "the individual aspects or events of a **[*62]** defendant's conduct viewed in isolation need not be supported by sufficient evidence to amount to a *section 2* violation for liability to exist. Rather, it is enough that the incidents taken together as a whole create sufficient evidence of attempted monopolization." (first citing *Aspen Highlands, 738 F.2d at 1522 n.18*; then citing II Phillip E. Areeda, Roger D. Blair, & Herbert Hovenkamp, ***Antitrust Law*** ¶ 310, at 147 (2d ed. 2000)).

Here, the *Sanofi* Complaint asserts that Mylan engaged in an overall scheme to monopolize the EAI drug device market. *Sanofi* Complaint ¶¶ 141-43. This alleged scheme included unlawful exclusive dealing and deceptive marketing—alleged anticompetitive conduct that the court already has concluded sufficiently states a plausible claim under the Sherman Act *§ 2*. *See supra* Parts III.A.1 & III.B. This Complaint also alleges that Mylan engaged in other anticompetitive conduct as part of an overall scheme designed to maintain its monopoly power in the relevant market. *Sanofi* Complaint ¶ 142. This alleged conduct includes Mylan's requirement that schools agree to stock EpiPens® exclusively in exchange for the opportunity to participate in Mylan's discounted EpiPen® program. *Id.* ¶¶ 7-8, 80-85, 142. It also includes **[*63]** Mylan's sharp increase of the EpiPen®'s price that—Sanofi contends—enabled Mylan later to offer larger rebates to payors conditioned on excluding Auvi-Q®. *Id.* ¶ 142. The alleged anticompetitive conduct also includes Mylan's touting of EpiPen®'s "preferred" formulary positions even when it didn't exclude Auvi-Q® entirely from third-party payors' coverage tiers. *Id.* ¶¶ 7, 109, 137, 142. In these circumstances, Sanofi contends, Auvi-Q®'s coverage was at less preferential tiers, which produced higher co-pay costs for consumers and increased Sanofi's costs for co-pay coupons. *Id.* The Complaint's allegations, viewed in Sanofi's favor and taken as a whole, allege anticompetitive conduct sufficient to state a plausible claim against Mylan for an overall scheme to monopolize violating Sherman Act *§ 2*.

D. Does the *Sanofi* Complaint Allege Harm to Competition?

Mylan next asserts that Sanofi fails to state plausible Sherman Act claims as a matter of law because the *Sanofi* Complaint fails to allege harm to competition. A plaintiff asserting an antitrust claim must allege an antitrust injury, as the Sherman Act defines this term. *Cohlmia v. St. John Med. Ctr., 693 F.3d 1269, 1280 (10th Cir. 2012)* (quoting *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006))*. "'The primary concern of the antitrust laws is the corruption **[*64]** of the competitive process, not the success or failure of a particular firm' or individual." *Id.* (quoting *Tal, 453 F.3d at 1258*). *See also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (stating that the "antitrust laws . . . were enacted for the protection of competition not competitors" (citation and internal quotation marks omitted)); *Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 960 (10th Cir. 1990)* (explaining that a challenged practice must adversely affect competition, not just the business of the plaintiff or another competitor). The antitrust laws thus require a plaintiff to allege "'an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Cohlmia, 693 F.3d at 1281* (quoting *Tal, 453 F.3d at 1253*).

So, to state a plausible Sherman Act claim, Sanofi must allege harm to competition, not just harm to its own business. *Id.; see also* *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994)* (requiring that an antitrust violation "must actually or potentially harm consumers"). This standard, on a motion to dismiss, requires an antitrust plaintiff to allege facts capable of supporting a finding or inference that the purported anticompetitive conduct produced increased prices, reduced output, or otherwise affected the quantity or quality of the product. *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (describing raised prices and reduced output as the "hallmarks of anticompetitive behavior"); **[*65]** *see also* *Cohlmia, 693 F.3d at 1281* (explaining that an antitrust plaintiff must show that the "'challenged conduct affected the prices, quantity or quality of goods or services, not just his own welfare.'" (quoting *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996))*.

Here, the *Sanofi* Complaint sufficiently alleges that Mylan's anticompetitive conduct resulted in increased prices to consumers. Since 2007, Sanofi alleges, Mylan—an entrenched monopolist with a market share exceeding 90%—has raised the price of the EpiPen® more than 500%, without losing its extraordinarily high market share. *Sanofi* Complaint ¶¶ 40, 91, 92. Sanofi asserts that Mylan's purpose for raising prices so sharply was to allow it to absorb the deep conditional discounts that it had given to third-party payors to exclude Auvi-Q® from the market. *Id.* ¶¶ 92, 142.

Mylan contends that Sanofi's allegations only assert that prices increased *before* any alleged exclusionary conduct. Indeed, the Complaint alleges that prices increased significantly from 2009 to 2013, but these increases occurred before Auvi-Q®'s launch in 2013. *Id.* ¶ 92. Mylan asserts that price increases can affect competition adversely only when they *result from* exclusionary conduct. Doc. 57 at 31 (citing *Blue Shield of Va. v. McCready, 457 U.S. 465, 482-83, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (explaining that "an increase **[*66]** in price *resulting from* a dampening of competitive market forces is assuredly one type of injury" that the antitrust laws redress (emphasis added) (further citations omitted)).

The court disagrees with Mylan's view of the law. The court's independent research has revealed no case holding that harm to competition must occur after—and not before—a defendant has completed its anticompetitive conduct. And Mylan has cited no such case. Sanofi alleges that Mylan engaged in a scheme to exclude Auvi-Q®—a new entrant to the EAI drug device market. This scheme involved Mylan imposing significant price increases in the years leading up to Auvi-Q®'s launch so that it later could absorb the deep conditional rebates offered to third-party payors to exclude Auvi-Q®. *Sanofi* Complaint ¶ 7 (alleging that Mylan engaged in a "scheme to deprive customers of access to Auvi-Q®" that included hiking the price of EpiPen® so that it later could offer large, conditional rebates: "With knowledge of when Sanofi could begin marketing Auvi-Q®, Mylan ran up the price of the EpiPen® substantially before the launch of Auvi-Q®. The significantly higher prices ensured that, once Mylan began to offer its new, large conditional **[*67]** rebates from the higher price level, third-party payors would (and did) find it practically impossible to refuse these rebates that Mylan leveraged across its virtual 100% share of the EAI drug device market."). Sanofi's allegations about Mylan's significant price increases allege harm to consumers sufficiently to state an antitrust injury.

Also, Mylan asserts that these allegations cannot assert a plausible antitrust injury because the "charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. It is true. "Simply possessing monopoly power and charging monopoly prices does not violate *§ 2*." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447-48, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*. Instead, the Sherman Act "targets 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Id.* (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. The *Sanofi* Complaint alleges conduct that could support such a *§ 2* violation. It asserts that Mylan implemented its steep price hikes to absorb the costs of providing deep, conditional rebates as part of a scheme to maintain its monopoly in the EAI drug market. *Sanofi* Complaint ¶ 7.

Sanofi also alleges that Mylan's conduct harmed **[*68]** innovation and reduced the quality of EAI drug devices available to consumers in the market. *See Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 318 (3d Cir. 2007)* (reversing a district court's dismissal of a *Sherman Act § 2* claim because the Complaint alleged specific anticompetitive conduct that "harmed competition and undermined innovation" in the market sufficient to state an attempted monopolization claim); *United States v. Visa U.S.A., Inc., 344 F.3d 229, 241 (2d Cir. 2003)* (affirming district court decision that defendants' exclusionary policies had harmed "product innovation and output"). The Complaint alleges that Mylan's anticompetitive conduct prevented customers from accessing Auvi-Q®—a new entrant to the market that "represented a novel and advanced EAI drug device." *Sanofi* Complaint ¶ 4. The Complaint describes Auvi-Q® as a new product "designed for the smartphone generation to be smaller and easier to carry than the EpiPen®." *Id.* It also "included voice instructions to help patients or caregivers to administer epinephrine during a highly stressful anaphylactic episode, when they may otherwise not have been trained to use the device or might be too panicked to read the written instructions on the device." *Id.* These allegations allege harm to competition sufficiently because, as Sanofi contends, Mylan's **[*69]** conduct prevented consumers from accessing a new and innovative product with allegedly better qualities than EpiPen®, the market's dominant product.[8]

Mylan also contends that Sanofi cannot allege harm to competition when the Complaint asserts that the exclusive dealing arrangements lasted no more than one or two years. *Sanofi* Complaint ¶ 67. For example, the Seventh Circuit recently affirmed summary judgment against an exclusive dealing claim, finding no evidence that the contracts at issue had an exclusionary effect "since most of the contracts expire every year or two, giving other [competitors, such as the plaintiff] a shot at obtaining the next contract . . . ." *Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 410 (7th Cir. 2017)*. But the Seventh Circuit also recognized that exclusive dealing arrangements can have "dire consequences" if they drive competitors into bankruptcy and thus out of the market. *Id.* And, duration is just one factor that courts consider when determining whether an exclusive dealing agreement harms competition. *See, e.g., McWane, Inc. v. FTC, 783 F.3d 814, 819, 834-38 (11th Cir. 2015)* (rejecting argument that an exclusive dealing arrangement could not harm competition because it was "short-term and voluntary" and, instead, the Circuit considered the "market realities" to determine **[*70]** whether the practical effect of the arrangement harmed competition); *Nilavar v. Mercy Health Sys. W. Ohio, 142 F. Supp. 2d 859, 878-88 (S.D. Ohio 2000)* (explaining that courts "have considered the duration of a contract to be one of many factors considered in determining whether a given exclusive contract is anti-competitive," and concluding that plaintiff's Complaint sufficiently had alleged an antitrust injury even though the contract's duration was short because "the term of the exclusive contract does not render the contract reasonable, when considered in light of the extent that the relevant market is foreclosed"). Here, although Sanofi alleges that the length of third-party payors' coverage decisions typically lasted one to two years, the court already has noted other facts that the *Sanofi* Complaint alleges and how they assert harm to competition sufficiently. These factual allegations include Mylan's targeting of Auvi-Q®, specifically, as part of an effort to block a new entrant from the EAI drug market, prevent it from developing a customer base, and maintain unlawfully its market share exceeding 90%.

At the pleading stage of this action, the allegations are sufficient to allege harm to competition in the EAI drug device market. These allegations of antitrust **[*71]** injury are sufficiently plausible to support Sanofi's Sherman Act *§ 2* claims.

E. Does the *Sanofi* Complaint Allege Causation?

Last, Mylan argues that Sanofi has failed to state a claim for relief because the Complaint never alleges that Mylan caused Sanofi's purported injuries. The Sherman Act requires an antitrust plaintiff to show that its injury was caused "by reason of" the defendant's anticompetitive conduct. *15 U.S.C. § 15(a)*. *See also Aspen Highlands, 738 F.2d at 1519 n.12* ("Of course, the fact of injury and damages suffered *by reason of a violation of the antitrust laws* must also be shown for a private litigant to recover on a claim of monopolization." (emphasis added)). Thus, an antitrust plaintiff must "establish that defendant's unlawful conduct caused plaintiff injury in its business or property . . . to recover under the antitrust laws." *Id. at 1522-23*. *See also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 126-27, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* (explaining that an antitrust plaintiff cannot shoulder its burden to prove an antitrust violation if the injury is "attributable to its lack of desire, its limited production capabilities, or to other factors independent of [the alleged] unlawful conduct").

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[8] Mylan asserts that Sanofi's cited cases differ from the facts alleged here because, in those cases, defendants prevented the product from reaching the market. The *Sanofi* Complaint alleges similar conduct. Although the Complaint never alleges that Mylan prevented Sanofi from soliciting third-party payors to purchase Auvi-Q®, the Complaint alleges that Mylan's exclusive dealing arrangements denied consumers access to Auvi-Q® because Mylan required third-party payors to exclude Auvi-Q® from the drug formularies, thus blocking Auvi-Q® from reaching a significant portion of the market. These allegations suffice to allege harm to competition. *See Visa U.S.A., 344 F.3d at 241* ("By excluding Amex and Discover [the third and fifth largest issuers of payment cards in the United States] from the market for outside card issuers, [defendants] effectively deny consumers access to products that could be offered only by a network in partnership with individual banks" and thus the district court did not err in "finding that competition has been harmed by the defendants' exclusionary rules.").

An antitrust plaintiff need not show that defendant's conduct was the exclusive cause of plaintiff's injury. [*Zenith Radio Corp., 395 U.S. at 114 n.9*] ("It is enough that **[*72]** the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury."). Instead, the "'causal connection [must be] sufficient to establish the violation as a substantial factor in the occurrence of damage.'" [*Motive Parts Warehouse v. Facet Enters., 774 F.2d 380, 389 (10th Cir. 1985)*] (quoting [*Reibert v. Atl. Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973))*].

Mylan's contention that Sanofi has failed to allege facts capable—if true—of establishing causation consists of two primary theories.

First, Mylan asserts, Sanofi made a unilateral and independent decision—not based on any of Mylan's conduct—to stop competing with Mylan for exclusive or preferred formulary status. But the plain language of the Complaint belies this characterization. Sanofi specifically alleges that it "ultimately decided to return the marketing rights for Auvi-Q® back to the creators of the device in part because of the artificial barriers to entry Mylan's conduct [had] erected." *Sanofi* Complaint ¶¶ 137, 140, 143. Sanofi also alleges that Mylan's conduct raised its costs of entry to the market. *Id.* ¶¶ 131, 134. And the Complaint asserts that Mylan's anticompetitive conduct caused Sanofi to lose hundreds of millions of dollars in sales **[*73]** in the $1 billion-plus U.S. EAI drug device market. Sanofi contends it would not have sustained these losses but for Mylan's unlawful acts. *Id.* ¶¶ 137, 140, 143.

The *Sanofi* Complaint also alleges facts about Auvi-Q®'s sales in Canada that could support a finding or inference that Mylan caused Sanofi's purported injuries. Sanofi alleges that Auvi-Q® (known in Canada as Allerject®) achieved a stronger performance in Canada, where Mylan did not market the EpiPen® and where the playing field was level with open access to drug formularies. *Sanofi* Complaint ¶¶ 9, 106, 107. Sanofi alleges that EpiPen® similarly dominated the Canadian EAI drug device market before Sanofi launched the Allerject® there. *Id.* ¶ 106. But, by the end of 2013 (its first year on the Canadian market), Allerject® exceeded its projections, growing to a 21% market share. *Id.* In 2014 and 2015, Allerject® continued to gain market share. *Id.* It reached a 25% market share by the end of 2014, and it peaked at a 32% market share in 2015. *Id.* Mylan alleges "that growth of Allerject® in Canada, and physician and patient enthusiasm for the device in Canada, illustrates Auvi-Q®'s sales potential where an entrenched competitor is **[*74]** not able to manipulate the market and tip the scales in its own favor." *Id.*

Mylan asserts that these allegations cannot plausibly support a finding or inference that Mylan caused Sanofi's purported injuries. Mylan contends that one cannot compare Auvi-Q®'s sales performance in Canada to those in the United States because the Complaint concedes that Mylan "does not market the EpiPen®" in Canada. *Id.* ¶ 9. The court does not understand this allegation to mean that Mylan does not sell the EpiPen® in Canada. Indeed, the Complaint alleges just the opposite. It alleges that "EpiPen® similarly dominated the Canadian EAI drug device market before Sanofi launched the Allerject®." *Id.* ¶ 106. Instead, the Complaint alleges that Mylan did not engage in the same anticompetitive conduct in Canada (*i.e.*, offering highly discounted rebates conditioned on exclusivity). *Id.* And Sanofi explains why Mylan could not offer such rebate programs in Canada: In Canada, provincial authorities control drug formularies. *Id.* So, Sanofi alleges, the Allerject® was treated at parity with the EpiPen® in Canada. *Id.* And the two devices were equally available for physicians to prescribe to consumers. *Id.*

The court recognizes **[*75]** that Sanofi's allegations are just that. In time, discovery may reveal that the Canadian market differed significantly from the U.S. market, and so it does not provide a proper comparison to infer causation. But accepting the allegations as true—as the court must at the pleading stage—Sanofi's comparison of Auvi-Q®'s sales in Canada to those in the United States plausibly asserts that Mylan's conduct caused Sanofi's alleged antitrust injuries. *See, e.g.,* [*United States v. Visa U.S.A., Inc., 344 F.3d 229, 241 (2d Cir. 2003)*] (holding the district court did not err by finding that competition was harmed by defendants' conduct because, among other things, the evidence showed total exclusion of two major competitors (Amex and Discover) from a segment of the market in the United States but, in the foreign markets (where no exclusivity rules applied) Amex successfully convinced banks that issued Visa cards also to issue Amex cards).

Mylan also takes issue with Sanofi's decisions about the way it marketed Auvi-Q®. Mylan contends that Sanofi could have competed with Mylan for exclusivity on the drug formularies but that it chose to refrain from demanding exclusivity and it never offered pricing to match Mylan's rebates. *Sanofi* Complaint ¶¶ 61, 66, 76. Mylan argues **[*76]** that Sanofi's decisions caused Sanofi's injuries—not Mylan's conduct. But, as Professors Areeda and Hovenkamp instruct, "dispositive weight should not be given to lists of possible alternative causes, which virtually any defendant can generate." IIA Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 338a, at 123 (4th ed. 2014). Instead, "[i]f the plaintiff's claim of causation is plausible, it should not be dismissed summarily merely because alternative causation stories are plausible as well." *Id.* The court thus refuses to dismiss Sanofi's claims at the pleading stage based on Mylan's arguments that alternative reasons caused the alleged injuries.

Second, Mylan argues that Sanofi was forced to exit the EAI drug device market—not because of Mylan's conduct—but because Sanofi recalled all of its Auvi-Q® devices from the market due to manufacturing issues. Indeed, the Complaint asserts that Sanofi undertook a "voluntary recall of Auvi-Q®" in October 2015, following reports of manufacturing issues. *Sanofi* Complaint ¶ 110. The Complaint also asserts, however, that recalls are not uncommon for pharmaceuticals. *Id.* ¶ 110 n.53. And, it alleges that Mylan likewise undertook a recall of **[*77]** EpiPens® in March and April 2017. *Id.*

Mylan disagrees that the Auvi-Q® recall was one common in the industry. Mylan argues that the Auvi-Q® recall was significant, citing press reports that, it contends, show the seriousness and unusual dimension of the recall. Mylan contends that this recall drove Sanofi to leave the market and not any alleged anticompetitive conduct by Mylan. Doc. 57 at 36. And, it asserts that the press reports contain Sanofi's real-time accounts of its reasons for leaving the market that conflict with its allegations in the Complaint that Mylan forced it to exit the market. *Id.*

These arguments merely foreshadow factual disputes that the court cannot resolve on a motion to dismiss. *See* *Iqbal, 556 U.S. at 679* (explaining, on a motion to dismiss, a court must "assume [the] veracity" of well-pleaded factual allegations "and then determine whether they plausibly give rise to an entitlement to relief"). At the pleading stage, Sanofi plausibly has alleged that Mylan caused its injuries, and that is all a plaintiff must do to survive a motion to dismiss.

IV. Conclusion

For reasons explained, the court grants Mylan's Motion to Dismiss in part. The court dismisses Sanofi's exclusive dealing claims **[*78]** based on discounts or rebates that Mylan offered to state or state agencies because the *Noerr-Pennington* doctrine bars them. The court denies Mylan's Motion to Dismiss in all other respects.

IT IS THEREFORE ORDERED BY THE COURT that defendants Mylan, Inc. and Mylan Specialty, L.P.'s Motion to Dismiss the *Sanofi* Complaint (Doc. 43) is granted in part and denied in part.

IT IS SO ORDERED.

Dated this 21st day of December, 2017, at Topeka, Kansas.

/s/ Daniel D. Crabtree

Daniel D. Crabtree

United States District Judge

End of Document

[IQ Dental Supply, Inc. v. Henry Schein, Inc.](#)

United States District Court for the Eastern District of New York

December 21, 2017, Decided; December 22, 2017, Filed

17-cv-4834 (BMC)

Reporter

2017 U.S. Dist. LEXIS 211070 *; 2017-2 Trade Cas. (CCH) P80,238; 2017 WL 6557482

IQ DENTAL SUPPLY, INC., Plaintiff, - against - HENRY SCHEIN, INC., PATTERSON COMPANIES, INC., BENCO DENTAL SUPPLY COMPANY, Defendants.

Subsequent History: Affirmed in part and vacated in part by, Remanded by *IQ Dental Supply, Inc. v. Henry Schein, Inc., 2019 U.S. App. LEXIS 14011 (2d Cir. N.Y., May 10, 2019)*

Core Terms

dental, manufacturers, antitrust, alleges, defendants', products, dentists, distributors, websites, boycott, damages, tortious interference, anticompetitive, enforcer, conspiracy, supplies, anticompetitive conduct, anti trust law, civil conspiracy, sites, sales, aiding and abetting, trade show, quotations, parties, calculating, remote, business relationship, boycotting, competitor

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Judges: Brian M. Cogan, United States District Judge.

Opinion by: Brian M. Cogan

Opinion

MEMORANDUM DECISION AND ORDER

COGAN, District Judge.

IQ Dental Supply, Inc. ("IQ") brings this suit against Henry Schein, Inc. ("Schein"), Patterson Companies, **[*2]** Inc. ("Patterson"), and Benco Dental Supply Company ("Benco"). IQ alleges that defendants — dental supply distributors — have engaged in an ongoing antitrust conspiracy by boycotting and attempting to destroy an online distribution platform run by a non-party, SourceOne Dental ("SourceOne") through which IQ sells dental products to dentists. IQ alleges unreasonable restraint of trade under the Sherman Act and corresponding state laws, as well as state common law claims for tortious interference with prospective business relations, civil conspiracy, and aiding and abetting.

The case is before me on defendants' motion to dismiss. For the reasons explained below, the motion is granted.

BACKGROUND

The facts described below are taken from plaintiff's pleadings and are presumed to be true for purposes of this motion.

IQ is a nation-wide distributor of dental supplies and equipment. IQ buys products from manufacturers and stores them in warehouses prior to their resale. Defendants are major distributors of dental supplies that together account for 80-90% of the relevant market (Schein 41%, Patterson 34%, Benco 10%). Defendants sell directly to dentists. Defendants do so primarily through on-the-ground **[*3]** regional sales representatives. In the United States, dental supplies and equipment are a $10 billion market. On average, dental practices use 100 or more different types of dental supplies on a monthly basis. Because consumer dentists can "one-stop-shop" with distributors, the vast majority of dental supplies and equipment are sold by manufacturers to wholesale distributors for reasons of efficiency, which in turn resell those supplies and equipment to dental professionals.

SourceOne, not a party to this suit, operates an "online distribution platform" through a series of e-commerce websites. Suppliers, such as IQ, sell dental supplies to dentists through those platforms. In addition to its own branded site, SourceOne operates state-specific websites in conjunction with state dental associations ("SDAs"). SourceOne does not supply or sell the products on its platforms; instead, it provides a mechanism for suppliers and dentists to interface. Suppliers who sell through SourceOne conduct transactions, fill orders, and ship the sold products directly to consumers. The suppliers then pay SourceOne a commission on each sale made through SourceOne's websites, and remit a commission to the **[*4]** SDAs for sales made on the state-specific sites. IQ claims that SourceOne offered dentists lower prices than those available through the traditional sales model employed by defendants.

The first SDA SourceOne site launched was sponsored by the Texas Dental Association (the "TDA") in October 2013, and was branded as "TDA Perks Supplies." It was followed shortly thereafter by websites sponsored by the Arizona Dental Association (the "AZDA") and the Nevada Dental Association.

IQ alleges that defendants saw SourceOne as a threat to their long-standing market position. In response, IQ claims that defendants engaged in coordinated anticompetitive conduct to drive SourceOne from the market. This conduct allegedly took three forms: first, IQ alleges that defendants pressured dental product manufacturers not to sell to IQ or through the SourceOne websites. Second, IQ alleges that defendants coordinated and agreed to threaten and implement boycotts of SDAs that worked with SourceOne. Third, IQ alleges that defendants boycotted dentists who purchased dental supplies through SourceOne websites.

As to the first prong of the conspiracy, IQ claims that defendants pressured manufacturers supplying distributors **[*5]** who sold through the SourceOne sites, with the ultimate aim of depriving SourceOne of products to list on its sites and consequently driving it out of business. Defendants, IQ alleges, could pressure the manufacturers by threatening them with the loss of their business if the manufacturers continued to sell to distributors who worked with SourceOne.

Initially, two suppliers, DDS and Arnold, provided the bulk of the products available on the TDA and AZDA SourceOne websites. IQ alleges that because of the success of defendants' alleged anticompetitive efforts, by April

2014, manufacturers had stopped selling to DDS and Arnold, and SourceOne's websites had lost access to thousands of supplies, including at least 75% of their formerly top-selling products.

For example, IQ alleges that DMG America, a dental manufacturer, withdrew permission for its products to be sold through SourceOne sites under pressure from Schein and Patterson. As a result of manufacturer withdrawals, and as defendants' allegedly intended, DDS and Arnold yielded to defendants' pressure and ended their relationships with SourceOne. IQ claims that a prospective replacement supplier, DHP Dental, told SourceOne that it was **[*6]** deterred from selling through SourceOne's websites after hearing about defendants' alleged boycott from dental manufacturers. In May 2014, after DDS and Arnold terminated their relationships with SourceOne, IQ signed a contract with SourceOne to offer dental supplies for sale to dentists through SourceOne's websites.

In its complaint, IQ provides four examples of defendants' alleged direct pressure on manufacturers to boycott IQ:

- In 2011, representatives from a Danaher Corporation subsidiary manufacturer called IQ about an incident when IQ sold a product to a buyer, who then attempted to sell the product overseas. IQ suspected that Danaher was looking for a reason to pull out of doing business with IQ — which it eventually did — and that this happened due to pressure from Schein.
- In March 2015, a representative from Tuttnauer, a dental manufacturer, advised IQ that if IQ continued selling Tuttnauer products through the TDA Perks website, it would pull its product line from IQ. IQ alleges that this threat was made under pressure from Schein.

- At a November 2015 New York dental association trade show, IQ displayed products manufactured by Air Technique Imaging ("ATI"). A representative **[*7]** from ATI directed IQ to remove the display, because he was "getting grief" from representatives from two different companies, which IQ later identified as Schein and Patterson, who were unhappy that ATI had permitted IQ to distribute its products. As a result, IQ claims that it had to stop promoting ATI's products at its booth.
- In 2016, a manager from KaVo Kerr, a major dental products manufacturer, told IQ that a Patterson representative had asked him to pull his products from IQ because of IQ's sale of products through TDA Perks Supplies.

IQ also alleges four occasions when manufacturers declined IQ's request to be a dealer for their product lines. One occurred in 2013; the rest in 2016. The complaint makes clear that at least three of these manufacturers had pre-existing distribution relationships. IQ alleges that each of these manufacturers declined IQ's proposals under pressure from one or more of defendants.

Turning to IQ's allegations of defendants' boycotts of SDAs, IQ claims that defendants coordinated and agreed to threaten and implement boycotts of SDAs that worked with SourceOne by skipping those SDAs' respective trade shows. The aim of these alleged boycotts was to punish **[*8]** SDAs that had partnered with SourceOne and simultaneously dissuade other SDAs from doing so. Trade shows contribute a substantial portion of SDAs' income. Historically, all three defendants had attended such shows. IQ claims that the alleged boycotts deterred many SDAs from sponsoring their own SourceOne websites, which limited the platform's growth, and, in turn, stifled IQ's profits.

IQ alleges that defendants specifically targeted trade shows in Texas and Arizona. IQ claims, for instance, that in October 2013, regional managers from Schein and Benco had a phone call, memorialized in an email, in which they discussed their shared interest in not attending the TDA trade show after the TDA launched its SourceOne affiliated site. The managers discussed reaching out to their counterpart at Patterson to get his support.

As to the AZDA trade show, IQ points to a July 2014 email from a Benco to a Patterson employee, stating, "[w]e are of the same mindset. It would be gratifying to see every distributor with a local presence make a unified statement on the AZDA's ill-conceived idea" to work with SourceOne. In another email that same month, a Benco employee wrote to a manufacturer, "I have communicated **[*9]** with our competition at Schein and Patterson and we are all of the same mind that we will not be supporting a competitor's [AZDA's] meeting next year."

IQ also alleges that defendants pressured manufacturers to boycott the trade shows. IQ claims, for instance, that in March 2014 dental vendors reported that they were told by both Patterson and Schein to avoid TDA Perks, or risk

Patterson and Schein "shelv[ing] their products nationwide." IQ also points to a November 2013 email in which a Schein employee wrote to a colleague about speaking with Patterson and Benco, and not giving the TDA "a dime." The other Schein employee responded writing, "I refuse to work with any manufacturer rep that sells through [SourceOne]. That's what every distributor should say. The manufacturers will get scared and pull out." IQ alleges that Schein, Patterson, and Benco together "pressured dozens of manufacturers to pull out of the AZDA show."

IQ claims that as a result of this alleged conduct, other SDAs were deterred from working with SourceOne. For example, IQ states that at a July 2014 dental meeting in Chicago, the Ohio Dental Association's representative was enthusiastic about partnering with SourceOne. However, **[*10]** the representative subsequently informed SourceOne that Schein and Patterson had threatened to "take action against the Ohio Dental Association if it proceeded with a SourceOne website." The partnership fizzled. According to IQ, the Virginia Dental Association, Colorado Dental Association, and Louisiana Dental Association all decided not to partner with SourceOne after considering the risk that doing so would jeopardize their relationships with defendants.

On the other hand, the Nevada Dental Association did launch a SourceOne website, and IQ argues that it did so because it does not put on a trade show, and thus had less exposure to defendants' retaliatory pressure. IQ concedes that recently, SDAs in Florida and Georgia have launched SourceOne sites, but claims that defendants have already inflicted their intended damage.

As the final prong of the conspiracy, IQ also alleges that defendants boycotted dentists who purchased dental supplies through SourceOne websites and from IQ by withholding essential maintenance services for those dentists' equipment.

In addition to defendants' three alleged anticompetitive attacks on SourceOne described above, IQ also describes an allegedly long-standing **[*11]** campaign (since at least as early as 2005) among defendants to fix the prices in the dental products market, with the aim of maintaining supracompetitive margins. IQ alleges that defendants' margins — purportedly at 35% or higher — are well above what would obtain in a competitive market, and that defendants worked to exclude from the market distributors willing to sell manufacturers' products at a lower margin.

To that end, IQ claims that when distributors willing to work at lower margins approached manufacturers to sell their products, the manufacturers reported that they had to decline to sell to them in the face of pressure from defendants. IQ alleges that absent coordinated conduct by all defendants, the price fixing would not have worked, as the manufacturers could simply have shifted their sales to another distributor.

IQ's allegations on this point are based in large part on a June 2008 meeting between sales representatives of distributors Archer & White and Dynamic Dental, which were attempting to sell products at a lower margin but which were allegedly stymied by a defendant-driven manufacturer boycott, led by Schein and Burkhart Dental Supply Company. At that meeting, the **[*12]** Schein and Burkhart representatives allegedly "offered to end the group boycott of Archer & White and Dynamic Dental" if both "agreed to maintain margins on the sales of their dental products between 32% and 34%, the then-prevailing margin" allegedly maintained by defendants.

In addition to this alleged anticompetitive conduct, IQ also claims that defendants engaged in a campaign to falsely disparage SourceOne and IQ and their products and services. IQ claims that defendants have misrepresented products sold by IQ as expired, counterfeit, altered, sold through unauthorized distribution channels, or otherwise unfit for their intended purpose. IQ claims that defendants made these comments to discourage dentists from buying from IQ.

As discussed above, IQ describes that its relationship with SourceOne entails it conducting its transactions, filling received orders, and shipping sold products directly to the dentists, without SourceOne's involvement beyond listing the goods on its sites. IQ pays SourceOne a commission on each sale. Since May 2014, IQ has sold approximately 90% of products sold on SourceOne's sites. IQ claims that but for defendants' conduct, the SourceOne platform would **[*13]** have spread nationwide, and, in turn, IQ's sales through the platform's various sites would have increased exponentially.

In 2015, SourceOne filed suit in this Court against Schein, Patterson, and Benco, alleging, *inter alia*, unlawful restraint of trade under the Sherman Act. SourceOne claimed that the three entered into a conspiracy to prevent its emergence as an effective competitor in the distribution and sale of dental supplies. Specifically, SourceOne alleged that Schein, Patterson, and Benco conspired to:

• boycott the TDA and AZDA after each association named SourceOne as an endorsed vendor of dental supplies;
• pressure other SDAs from entering similar agreements with SourceOne;
• pressure manufactures not to attend SDA conventions;
• pressure manufactures and other distributors not to provide products to SourceOne; and
• deny services to dentists who did business with SourceOne.

SourceOne alleged injury to itself and to competition and consumers. SourceOne has settled with Schein; Patterson and Benco currently have motions for summary judgment before this Court.

DISCUSSION

IQ argues that defendants' alleged group boycott constitutes unreasonable restraint of trade in violation of *Section 1* **[*14]** of the Sherman Act, *15 U.S.C. § 1*, the *Donnelly Act, N.Y. Gen. Bus. Law §§ 340 et seq.*; and the New Jersey Antitrust Act, *N.J.S.A. §§ 56:9-1 et seq* ("NJAA"). IQ also alleges state law tort claims.

A. Antitrust Standing

An antitrust plaintiff has to meet not only the familiar requirements of constitutional standing, but must also demonstrate at the pleading stage that it satisfies "antitrust standing." See *Daniel v. Am. Bd. of Emergency Med., 428 F.3d 408, 436-37 (2d Cir. 2005)*. "This standing requirement originates in the Supreme Court's recognition that, although *Section 4* of the Clayton Act appears to confer a broad private right of action for antitrust damages, Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Id. Instead, the antitrust laws are intended to provide a remedy for "injuries reflecting an anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 550 (S.D.N.Y. 2016)* (internal quotations omitted).

Accordingly, the Supreme Court has identified several factors to determine whether a plaintiff has antitrust standing. See *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters 459 U.S. 519, 529, 103 S. Ct. 897, 904, 74 L. Ed. 2d 723 (1983)*. The Second Circuit "has distilled these factors into two imperatives: we require a private antitrust plaintiff plausibly to allege (a) that it suffered a special kind of 'antitrust injury,' and (b) that it is a suitable plaintiff **[*15]** to pursue the alleged antitrust violations and thus is an 'efficient enforcer' of the antitrust laws." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 76 (2d Cir. 2013)* (internal quotations omitted). IQ does not satisfy either imperative.

1. Antitrust Injury

An "antitrust injury" is "an injury attributable to the anticompetitive aspect of the practice under scrutiny." *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 122 (2d Cir. 2007)*. Courts in the Second Circuit use a three-step test to determine if a plaintiff has sufficiently alleged antitrust injury. *Gatt Commc'ns, 711 F.3d at 76*.

At the first step, the party asserting that it has been injured by an illegal anticompetitive practice must "identify the practice complained of and the reasons such a practice is or might be anticompetitive." Id. (internal quotations and alterations omitted). At this stage, the Court evaluates if the plaintiff generally alleges anticompetitive conduct.

IQ alleges that defendants engaged in anticompetitive conduct in the market for dental supplies. That conduct allegedly included threatening manufacturers who sold through SourceOne via IQ with a boycott, threatening to boycott and allegedly boycotting various SDAs, and (although not developed in IQ's pleadings) boycotting dentists. IQ also alleges a years-long price-fixing campaign. The goal of this vast anticompetitive **[*16]** campaign was, allegedly, to force SourceOne out of business. IQ argues that with SourceOne, a "disruptive," low-cost innovator limited in its growth or forced out of business, altogether, consumers (dentists) would be forced to purchase through defendants, and would therefore be deprived of the choice of "high-quality" dental products at a lower cost through SourceOne.

The first step of the antitrust injury test does not require IQ to allege that it was the target or do more than it has here. Instead, IQ only has to allege that the conduct it describes is prohibited by the antitrust laws. It has met that threshold by alleging a series of boycotts designed to force a low-cost competitor out of the market, and by describing a price-fixing campaign.

At the second step, a court evaluating if an antitrust plaintiff has adequately alleged antitrust injury must identify "the actual injury the plaintiff alleges," by "look[ing] to the ways in which the plaintiff claims it is in a 'worse position' as a consequence of the defendant's conduct." Id. (internal quotations and alterations omitted).

First, as to the price fixing scheme, IQ cannot assert injury. It is black letter law that IQ cannot claim to be **[*17]** a competitor of defendants and also claim to have been injured by their imposition of supercompetitive prices on the market. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582-83, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("Nor can respondents recover damages for any conspiracy by petitioners to charge higher than competitive prices in the American market. Such conduct would indeed violate the Sherman Act, but it could not injure respondents: as petitioners' competitors, respondents stand to gain from any conspiracy to raise the market price.") (internal citations omitted); *Yong Ki Hong v. KBS Am., Inc., 951 F. Supp. 2d 402, 417-18 (E.D.N.Y. 2013)* ("[H]orizontal price-fixing schemes are illegal under the antitrust laws only because of the harm they may cause—increased prices—to *purchasers* of the product for which prices have been fixed." (internal quotations and alterations omitted)). As a competitor in the same market, IQ stood only to benefit from any price increase imposed by defendants.

Second, IQ cannot claim injury arising out of defendants' alleged boycott schemes. IQ's own complaint is fatal to it at this step. IQ alleges that by April 2014, "[d]efendants' tactics achieved their objectives," and DDS and Arnold "terminated their relationships with SourceOne." Thereafter, "SourceOne sought a replacement supplier." In May 2014, SourceOne approached IQ to work as its **[*18]** distributor, and "[a]fter brief negotiations, IQ signed a contract with SourceOne, "becom[ing] the predominant seller on the Websites." Step two of the injury analysis requires IQ to claim that it was put in a "worse position" as a consequence of defendants' conduct. But IQ admits that it only secured a potentially lucrative contract with SourceOne *because of defendants' alleged anticompetitive conduct*. The moment IQ made *a single sale* through SourceOne, it was in a better position than it otherwise would have been.

IQ, therefore, cannot plausibly assert that defendants' conduct prevented it from making as many sales through SourceOne as it otherwise might have; but for defendants' conduct, IQ would have made *no* sales through SourceOne, as DDS and Arnold would presumably still be SourceOne's distributors. Ironically, IQ benefited from defendants' allegedly anticompetitive conduct.

Accordingly, IQ has not alleged an antitrust injury, and the Court need not reach the third step of analysis, which would require determining if IQ's alleged injury flowed from the alleged anticompetitive scheme.[1]

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[1] IQ claims that antitrust standing by virtue of being a competitor of defendants and having suffered an antitrust injury. As a threshold matter, because IQ has not adequately alleged that it suffered an antitrust injury, this argument fails. However, even if IQ had alleged an antitrust injury, the case law does not stand for the proposition that antitrust standing follows antitrust injury as a matter of course. "[T]he Second Circuit has made clear [that] the notion that competitors have antitrust standing is 'oversimplified.'" *IBM v. Platform Solutions, Inc., 658 F. Supp. 2d 603, 610 (S.D.N.Y. 2009)*. Indeed, "a private antitrust plaintiff's

2. Efficient Enforcer

Even if IQ had alleged an antitrust injury, it could not demonstrate that it meets the second **[*19]** requirement for antitrust standing by showing that it would be an "efficient enforcer" of the antitrust laws. See *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc., 467 F.3d 283, 290 (2d Cir. 2006)* ("Even if a plaintiff adequately alleges an antitrust injury, it may still be held to lack standing."); *Balaklaw v. Lovell, 14 F.3d 793, 798 n.9 (2d Cir. 1994)* ("[A]n antitrust injury, while necessary to establish standing under *section 4* of the Clayton Act, may not always be sufficient to confer standing, because a party may have suffered antitrust injury but may not be a proper plaintiff under *§ 4* for other reasons." (internal quotations omitted)). On this basis alone, IQ lacks antitrust standing.

To determine if a plaintiff is an "efficient enforcer," courts look to:

> (1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries.

Id.

The weight given to each factor is case-specific. See *Daniel, 428 F.3d at 443* ("Similarly, the weight to be given the various factors will necessarily vary with the circumstances of particular **[*20]** cases."). However, the first factor (the directness or indirectness of the asserted injury), "must be met in every case." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1392, 188 L. Ed. 2d 392 (2014)*. "The purpose [of the efficient enforcer analysis] is to ensure that the statute is not read so broadly that any person who has been harmed by anti-competitive conduct, however remotely or indirectly, is granted a right to sue." *Daniel, 428 F.3d at 450*.

As discussed below, IQ only satisfies the first factor, and even there, only with respect to a subset of its allegations. Therefore, each of the efficient enforcer factors weigh against it.

The first efficient enforcer factor examines whether a plaintiff would be an efficient enforcer because it suffered a direct, rather than a remote, injury. "Evaluating the directness of an injury is essentially a proximate cause analysis that hinges upon whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *London Silver, 213 F. Supp. 3d at 552* (internal quotations omitted). Accordingly, in evaluating proximate cause, Courts look to

> whether the injury that resulted was within the scope of the risk created by the defendant's wrongful act; whether the injury was a natural or probable consequence of the conduct; whether there was a superseding or **[*21]** intervening cause; whether the conduct was anything more than an antecedent event without which the harm would not have occurred.

Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 412 (2d Cir. 2014) (internal alterations omitted).

IQ alleges that it was "denied access to numerous State markets and countless new customers, and as a result lost millions of dollars of profits that it otherwise would have made," because of defendants' successful efforts to stymie SourceOne's growth. As discussed above, defendants allegedly boycotted dentists, SDAs, and manufacturers. Only IQ's claims about defendants' pressure on manufacturers describe anticompetitive conduct that is sufficiently direct.

The pressure that IQ describes defendants exerting on dentists and SDAs, on the other hand, directly targeted SourceOne. There was no intermediate link in the causal chain between the anticompetitive conduct and effect.

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status as a competitor is not dispositive." *Dentsply Int'l Inc. v. Dental Brands for Less, LLC, No. 15 CIV. 8775, 2016 U.S. Dist. LEXIS 149139, 2016 WL 6310777, at *3 (S.D.N.Y. Oct. 27, 2016)* (internal quotations omitted). Courts in the Second Circuit "can ascertain antitrust injury only by identifying the anticipated anticompetitive effect of the specific practice at issue and comparing it to the actual injury the plaintiff alleges." *Port Dock, 507 F.3d at 122*.

Instead, defendants allegedly pressured dentists and SDAs to not buy from and partner with SourceOne, respectively. When dentists and SDAs yielded to defendants' alleged pressure, SourceOne lost business (some actual and some prospective).

However, the injury that IQ allegedly suffered from this conduct was conceptually different from that suffered by SourceOne. **[*22]** First, IQ's harm is at least one causal step removed from SourceOne's harm: IQ was only injured when SourceOne's sales declined, so its loss was, by definition, derivative of SourceOne's and therefore remote. Second, any harm suffered by IQ is best understood as incidental to that suffered by SourceOne. IQ was (presumably in proportion to its sales) no more impacted by defendants' conduct than was any other distributor that sold through SourceOne.

IQ describes, like in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, a category of injury that is an improper basis for an antitrust suit. There, the Supreme Court held that indirect purchasers of price-fixed goods, sold at an inflated price because of anticompetitive conduct, lacked standing to bring suit against the price-fixer. Here, IQ is analogously remotely situated as to the party allegedly engaging in anticompetitive conduct, and just as in Illinois Brick, its claimed injury necessarily passes through a middle-party.

On the other hand, IQ's allegations of direct pressure on dental manufacturers gives rise to IQ's only direct injury that is not impermissibly remote. IQ identifies itself as the "fulcrum" on which defendants levered anticompetitive force against SourceOne by pressuring **[*23]** manufacturers. In other words, by threatening manufacturers with the loss of their business if the manufacturers continued to sell to IQ, defendants allegedly used IQ as a necessary means to harm SourceOne. Boycott pressure always involves a target; here the target was IQ. IQ's injury was, as described, "a necessary step in effecting the ends of the alleged illegal conspiracy and the very means by which it is alleged that [defendants] sought to achieve [their] illegal ends." *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 159 (2d Cir. 2016)* (internal quotations omitted). With the manufacturer aspect of defendants' alleged anticompetitive scheme — and this aspect alone — IQ has alleged conduct that does not situate IQ at too far a remove from defendants' conduct.

As to the second efficient enforcer factor, there is not just one class of other parties whose self-interest would be expected to lead them to sue, but many. Implicit in the second factor "is recognition that not every victim of an antitrust violation needs to be compensated under the antitrust laws in order for the antitrust laws to be efficiently enforced" when other, better situated parties can be expected to bring suit against the same defendants. *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 779 (2d Cir. 2016)*.

Taking IQ's allegations to be true, it **[*24]** is clear that SourceOne — the obvious, express target of defendants' alleged conspiracy — is the party that would be most motivated and best situated to pursue an antitrust claim against defendants. In fact, SourceOne has done exactly that, by filing a suit that is currently pending in this Court. Indeed, as defendants noted, some of the paragraphs in IQ's complaint are strikingly similar to portions of SourceOne's earlier-filed complaint. Therefore, denying IQ standing in this suit is unlikely to leave defendants' alleged antitrust violations undetected, and, if found to have occurred, unremedied.

But SourceOne is hardly the only party that would be rationally motivated by self-interest to sue defendants for exactly the same conduct alleged here. Fatally for IQ, several of these other parties are more incentivized and better situated than IQ to pursue antitrust remedies.

First, certain of the SDAs impacted by defendants' alleged conspiracy are presumably well-motivated to sue. IQ claims that trade shows are a central part of the SDA business model. Given that defendants allegedly control 80-90% of the relevant market, boycotting certain SDA shows would likely have an outsized impact **[*25]** on the hosting SDAs that would incentivize them to pursue legal recourse.

Second, the manufacturers that defendants allegedly directly threatened are presumably highly motivated to bring suit. As to them, IQ's allegations present a textbook case of anticompetitive pressure.

Third, the dentists who allegedly suffer the consequences of a monopolized market, with resultant higher prices (as claimed by IQ's price-fixing allegations) and less choice, would also likely be highly incentivized to bring suit.

Finally, even if they were to encounter the same difficulty with other elements of the standing inquiry as does IQ, DDS and Arnold were the distributors who sold through SourceOne who actually suffered such anticompetitive pressure that they abandoned their relationship with SourceOne. If any party in IQ's specific situation were to be well-positioned to bring a suit, it would one that actually lost a valuable contract, as opposed to the party that gained one.

The existence of each of these more directly injured groups diminishes the justification for granting IQ — a much more remote party — antitrust standing.

As to the third efficient enforcer factor, IQ alleges highly speculative injuries. **[*26]** Although a degree of uncertainty is expected in calculating antitrust damages, highly speculative damages are not recoverable. See *Gelboim, 823 F.3d at 780*; see also *J. Truett Payne Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land.").

IQ's damages turn on lost business opportunities. IQ argues that thanks to defendants' conduct, it lost the profit from potential future sales that might have been made through presently nonexistent websites that SourceOne might have launched across the country in coordination with various SDAs. This theory is far too attenuated, resting on a series of tenuous and conjectural decisions that would have to be made by SourceOne, manufacturers, SDAs, dentists, and entities selling through SourceOne.

Because IQ's prospective damages are derived from "conjectural theories of injury and attenuated economic causality," any attempt at calculating IQ's damages "would mire [this Court] in intricate efforts to recreate the possible permutations in the causes and effects" of each alleged lost sale in each state and **[*27]** the predicate factual developments for each. *Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 14 (2d Cir. 1980)*. Given the layers of necessary factual inferences that IQ's damages claims require, the Court cannot simply set aside the damages determination for a later day without first addressing the question of whether they could ever be calculated at all.

IQ would ask this Court to construct an alternate universe, in which a myriad of discrete players with their own complex motivations and decision-making calculations would have aligned to create profitable opportunities for SourceOne and IQ. It would then ask the Court to calculate how much profit it lost. Notably, the remoteness of most of IQ's injuries from defendants' alleged conduct compounds their speculative nature. The number of variables that would need to be resolved to approximate any damages calculation highlights the challenge. Any award would, at a minimum, have to take into account: 1) the number of SDAs that would have partnered with SourceOne, and when they would have done so; 2) the commission rate that each would have demanded of SourceOne; 3) the commission rate that SourceOne would charge IQ if it expanded and increased its overhead costs; 4) the number of additional orders that **[*28]** would be placed in each state through SourceOne's websites, rather than from IQ's own website; and 5) the price that each manufacturer would charge IQ for its products in the future.

As it must, IQ acknowledges that its claim would require complex damage calculations. This conclusion is inescapable in light of the above analysis. IQ, however, argues that experts can later be left to resolve the issue. The Court is not convinced. The speculativeness of IQ's claimed damages militates strongly against the Court holding it to be an efficient enforcer.

Turning to the fourth efficient enforcer factor, the risk that other plaintiffs would be entitled to recover duplicative damages is significant — especially because SourceOne is already engaged in litigation against defendants, and has indeed settled with one. As the above discussion shows, SourceOne, SourceOne's distributors, manufacturers, SDAs, and dentists could all "be in a position to assert conflicting claims to a common fund." *AGC, 459 U.S. at 544*. Calculation of which entity is entitled to what would be rendered all the more difficult by the hypothetical nature of

IQ's claimed injuries (detailed above), and by the number of variables at play. Indeed, **[*29]** "[i]t is wholly unclear on this record how issues of duplicate recovery and damage apportionment can be assessed." *Gelboim, 823 F.3d at 780*.

The balance of the efficient enforcer factors weighs decidedly against IQ. Therefore, IQ has satisfied neither prong of the antitrust standing inquiry.

B. State ***Antitrust Law***

IQ's allegations of defendants' violations of New York and New Jersey state antitrust laws are also dismissed because of the failure of its federal claims.

"The Donnelly Act is patterned after the *Sherman Anti-Trust Act* [] and is generally construed in light of federal precedent." *Great Atl. & Pac. Tea Co. v. Town of E. Hampton, 997 F. Supp. 340, 352 (E.D.N.Y. 1998)*. The Second Circuit has held that there is "no reason...to interpret the Donnelly Act differently than the Sherman Act with regard to antitrust standing." *Gatt. Commc'ns, 711 F.3d at 81-82*.

Likewise,

> Substantively, the NJAA is "virtually identical" to the Sherman Act, and the New Jersey legislature "intended the [NJAA] as consistent with federal ***antitrust law***, and expressly provided that it 'be construed in harmony with ruling judicial interpretations of comparable Federal antitrust statutes and to effectuate, insofar as practicable, a uniformity in the laws.'

Bocobo v. Radiology Consultants of S. Jersey, P.A., 477 F. App'x 890, 896 (3d Cir. 2012).

C. State Law Claims

1. Choice of Law

Defendants have also moved to dismiss IQ's state law claims for tortious **[*30]** interference with prospective business relations, civil conspiracy, and aiding and abetting. The Court has dismissed IQ's federal question claims, but it retains jurisdiction over IQ's state law claims through its exercise of diversity jurisdiction under *28 U.S.C. § 1332*.

As a preliminary manner, the Court has to determine what state law applies. "Because this Court is sitting in diversity jurisdiction . . . New York choice of law principles govern." *Crescent Oil & Shipping Servs., Ltd. v. Phibro Energy, Inc., 929 F.2d 49, 52 (2d Cir. 1991)*. Under New York law, "the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws." *Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998)*.

The parties acknowledge that there is no conflict between New York and New Jersey law as to tortious interference. See *Treppel v. Biovail Corp., No. 03 CIV. 3002, 2004 U.S. Dist. LEXIS 20714, 2004 WL 2339759, at *8 (S.D.N.Y. Oct. 15, 2004)*, on reconsideration, *No. 03CIV3002, 2005 U.S. Dist. LEXIS 2737, 2005 WL 427538 (S.D.N.Y. Feb. 22, 2005)* ("With respect to tortious interference with prospective economic advantage, the laws of New York and New Jersey are nearly indistinguishable.").

Likewise, neither party claims a conflict between New York and New Jersey law as to aiding and abetting. The parties are correct; there is no difference between the standard as applied in both states. See *Ryan v. Hunton & Williams, No. 99-CV-5938, 2000 U.S. Dist. LEXIS 13750, 2000 WL 1375265, at *8 (E.D.N.Y. Sept. 20, 2000)* ("To establish a claim of aiding and abetting fraud under New York law, a plaintiff must establish (i) the **[*31]** existence of a violation by the primary wrongdoer; (ii) knowledge of this violation by the aider and abettor; and (iii) proof that the aider and abettor substantially assisted in the primary wrong."); *Morganroth & Morganroth v. Norris, McLaughlin & Marcus, P.C., 331 F.3d 406, 415 (3d Cir. 2003)* ("The elements of aiding and abetting are: (1) the commission of a wrongful act; (2) knowledge of the act by the alleged aider-abettor; and (3) the aider-abettor knowingly and substantially participated in the wrongdoing."). "Both jurisdictions look to the Restatement (Second) of Torts, which does not require wrongful intent by the third party, but only "that the third party knew of the breach of duty and participated in it." *Johnson v. Nextel Commc'ns, Inc., 660 F.3d 131, 142 (2d Cir. 2011)*; See *Pittman ex rel. Pittman v. Grayson, 149 F.3d 111, 122 (2d Cir. 1998)*; *Miller v. P.G. Lewis & Assoc., No. CIV 05-5641, 2007 U.S. Dist. LEXIS 6433, 2007 WL 316446, at *6 (D.N.J. Jan. 30, 2007)* ("New Jersey courts have recognized the Restatement of Torts as setting the standard for civil aiding and abetting liability."). Therefore, it is undisputed that New York law applies to each of those claims.

IQ, however, claims that New Jersey recognizes a tort of civil conspiracy, which New York does not, and that the Court should therefore conduct interest analysis and apply New Jersey law. IQ is mistaken. When confronted with this question, other courts in this Circuit have found that New York law applies.[2]

First, New York and New **[*32]** Jersey both treat civil conspiracy as a derivative claim: "[i]t is well settled that New York does not recognize an independent civil tort of conspiracy. While a plaintiff may allege, in a claim of fraud or other tort, that parties conspired, the conspiracy to commit a fraud...is not, of itself, a cause of action." *Gorbaty v. Wells Fargo Bank, N.A., No. 10-CV-3291, 2012 U.S. Dist. LEXIS 55284, 2012 WL 1372260, at *23 (E.D.N.Y. Apr. 18, 2012)*. As to New Jersey: "[t]he same is true of New Jersey." Id.; see also *Brown ex rel. Estate of Brown v. Philip Morris Inc., 228 F. Supp. 2d 506, 517, fn. 10 (D.N.J. 2002)* ("Civil conspiracy is not an independent cause of action, and conspiracy liability depends on the presence of an underlying finding of tort liability."); *Morganroth, 331 F.3d at 414-15* ("Mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime. Some act that is itself a tort must be committed by one of the parties in pursuance of the agreement." (internal citations omitted)); *Eli Lilly & Co. v. Roussel Corp., 23 F. Supp. 2d 460, 497 (D.N.J. 1998)* ("Thus, the conspiracy is not the gravamen of the charge, but merely a matter of aggravation, enabling the plaintiff to recover against all the defendants as joint tortfeasors. The actionable element is the tort which the defendants agreed to perpetrate and which they actually committed.").

Second, once a plaintiff adequately pleads an underlying tort, New York and New Jersey analyze that plaintiff's secondary civil conspiracy **[*33]** claim in a substantially similar manner. In New York, "[t]o establish [a] claim of civil conspiracy, [a plaintiff] must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *World Wrestling Fed'n Entm't, Inc. v. Bozell, 142 F. Supp. 2d 514, 532 (S.D.N.Y. 2001)*. New Jersey requires "substantially the same elements." *Treppel, 2004 U.S. Dist. LEXIS 20714, 2004 WL 2339759, at *8-9*; see *Morgan v. Union Cty. Bd. of Chosen Freeholders, 268 N.J. Super. 337, 364, 633 A.2d 985, 998 (App. Div. 1993)* ("A civil conspiracy is "a combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage."). "New York and New Jersey do not conflict in that each requires plaintiff to establish four elements in addition to the underlying tort." Id.

Accordingly, New York state law applies to all three of IQ's state law claims.

2. Tortious Interference

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[2] See *Treppel v. Biovail Corp., No. 03 CIV. 3002, 2004 U.S. Dist. LEXIS 20714, 2004 WL 2339759, at *8 (S.D.N.Y. Oct. 15, 2004)*, on reconsideration, *No. 03CIV3002, 2005 U.S. Dist. LEXIS 2737, 2005 WL 427538 (S.D.N.Y. Feb. 22, 2005)* ("Consequently, New Jersey's jurisprudence [regarding civil conspiracy] is not sufficiently developed to create a conflict with the law of another jurisdiction.").

Under New York law, "[t]o state a claim for tortious interference with prospective business relations, [a] plaintiff must allege that defendants interfered with business or economic relations **[*34]** between the plaintiff and a third party, either (1) with the sole purpose of harming the plaintiff; or (2) by dishonest, unfair or improper means." *S.O. Textiles Co. v. A & E Prod. Grp., a Div. of Carlisle Plastics, Inc., 18 F. Supp. 2d 232, 240 (E.D.N.Y. 1998)*. Such wrongful means "include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure..." *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 191, 406 N.E.2d 445, 428 N.Y.S.2d 628 (1980)*.

A tortious interference claim requires that "the defendant . . . interfere with the business relationship directly; that is, the defendant must direct some activities towards the third party and convince the third party not to enter into a business relationship with the plaintiff." *Piccoli A/S v. Calvin Klein Jeanswear Co., 19 F. Supp. 2d 157, 167 (S.D.N.Y. 1998)*. Furthermore, "[w]here there has been no breach of an existing contract, but only interference with prospective contract rights...plaintiff must show more culpable conduct on the part of the defendant." *NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp., Inc., 87 N.Y.2d 614, 621, 664 N.E.2d 492, 641 N.Y.S.2d 581 (1996)*. "Conduct that is not criminal or tortious will generally be lawful and thus insufficiently culpable to create liability for interference with prospective contracts or other nonbinding economic relations." *Carvel Corp. v. Noonan, 3 N.Y.3d 182, 190, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (2004)* (internal quotations omitted).

Additionally, "[i]f the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal **[*35]** or fraudulent conduct." *PPX Enters. v. Audiofidelity Enters., 818 F.2d 266, 269 (2d Cir. 1987)*. However, courts in this Circuit have held "that alleging violations of federal ***antitrust law*** and state statutory law should satisfy the pleading requirements for wrongful conduct." *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 334-35 (S.D.N.Y. 2003)*; see also *Cinema Vill. Cinemart, Inc. v. Regal Entm't Grp., No. 15-CV-05488, 2016 U.S. Dist. LEXIS 135941, 2016 WL 5719790, at *7 (S.D.N.Y. Sept. 29, 2016)*, aff'd, *No. 16-3484, 708 Fed. Appx. 29, 2017 U.S. App. LEXIS 18241, 2017 WL 4176223 (2d Cir. Sept. 21, 2017)*. The New York Court of Appeals has also held that where "unlawful restraint of trade is effected," a competitor can be held liable for interference with prospective contractual relations. *Guard-Life Corp., 50 N.Y.2d at 191, 428 N.Y.S.2d 628*. "[E]ven absent a finding of antitrust violations, certain degrees of economic pressure may be sufficiently wrongful to compel a finding of liability based on this cause of action." Id.; see also *Tech. Consortium, Inc. v. Digital Commc'ns Assocs., Inc., 757 F. Supp. 197, 200 (E.D.N.Y. 1991)*.

IQ alleges that defendants interfered with its prospective business relations. Because defendants' alleged conduct targeted prospective relations and was undoubtedly intended to at least in part benefit them, IQ must plead that defendants engaged in criminal or tortious behavior.

IQ's tortious interference claim fails for several reasons. First, although anticompetitive conduct may satisfy the requirement that IQ have suffered criminal or tortious behavior, IQ has not alleged a viable antitrust claim. Accordingly, it has not stated underlying criminal or tortious conduct on which to base **[*36]** its tortious interference claim. Second, just as antitrust standing analysis is intended, in part, to determine if a plaintiff claims injury too remote from the alleged anticompetitive conduct, a tort claim requires a similar proximate cause analysis. For the reasons discussed above (specifically, with regard to why IQ fails the first element of the efficient enforcer analysis), IQ cannot claim that defendants proximately caused its described injuries. To state a claim for tortious interference, IQ must allege instances of *direct* interference with its business relations, and apart from its claims regarding pressure on manufacturers, IQ does not describe any instances of direct interference. Furthermore, IQ's claims regarding manufacturer pressure can charitably be described as threadbare, at best. Third, allowing IQ's tortious interference claim to survive defendants' motion to dismiss would undermine well-developed antitrust jurisprudence. Courts conducting antitrust standing analysis do so to evaluate if an antitrust plaintiff is a proper plaintiff. They must dismiss those who are not. A significant judicial gatekeeping function is impaired if antitrust plaintiffs found to lack antitrust **[*37]** standing can circumvent this threshold pleading requirement by simply bringing a parallel state tort claim. IQ, which does not meet the antitrust standing requirements, should not be permitted to allege its antitrust claims under the guise of bringing a distinct state claim.

3. Civil Conspiracy and Aiding and Abetting

Under New York law, IQ's civil conspiracy and aiding and abetting claims are derivative of its claim for tortious interference. Because IQ's tortious interference claim is dismissed, so are these two tag-along claims.

CONCLUSION

IQ's antitrust claims are dismissed because it lacks antitrust standing. IQ's state law claims for tortious interference, civil conspiracy, and aiding and abetting are dismissed for failure to state a claim. The Clerk is directed to enter judgment accordingly.

SO ORDERED.

Digitally signed by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York

December 21, 2017

Helmerich & Payne Int'l Drilling Co. v. Schlumberger Tech. Corp.

United States District Court for the Northern District of Oklahoma

December 26, 2017, Decided; December 26, 2017, Filed

Case No. 17-CV-358-GKF-FHM

Reporter

2017 U.S. Dist. LEXIS 211447 *; 2017-2 Trade Cas. (CCH) P80,230; 2017 WL 6597512

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., Plaintiff, v. SCHLUMBERGER TECHNOLOGY CORPORATION, Defendant.

Subsequent History: Motion denied by *Helmerich & Payne Int'l Drilling Co. v. Schlumberger Tech. Corp., 2018 U.S. Dist. LEXIS 20037 (N.D. Okla., Feb. 7, 2018)*

Motion granted by, in part, Motion denied by, in part *Helmerich & Payne Int'l Drilling Co. v. Schlumberger Tech. Corp., 2018 U.S. Dist. LEXIS 51782 (N.D. Okla., Mar. 28, 2018)*

Core Terms

Non-Solicitation, License, rule of reason, software, restraint of trade, motion to dismiss, employees, solicitation, violates, declaratory judgment, relevant market, per se rule, allegations, profession, specialized, e-Bay, competes, hardware, purposes, parties, courts, hiring

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Judges: GREGORY K. FRIZZELL, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: GREGORY K. FRIZZELL

Opinion

OPINION AND ORDER

This matter comes before the court on the Motion of Defendant Schlumberger Technology Corporation to Dismiss Counts 3 and 4 of the First Amended **[*2]** Complaint [Doc. #66]. For the reasons discussed below, the motion is granted.

I. Background

This matter relates to a License Agreement between H&P and Omron Oilfield & Marine, Inc., concerning certain software developed for use in the oil industry. The License Agreement granted H&P a right to use and modify the software in the conduct of H&P's customary rig leasing service and business. *See generally* [Doc. #64-1]. Additionally, section 3 of the License Agreement included a non-solicitation provision, which stated:

> [H&P] and its Affiliates will not actively solicit any former (i.e., within two (2) years of their departure from [Omron] or its Affiliates) or current employee or individual contractor of [Omron] or its Affiliates or their predecessors for purposes of assisting [H&P] or its Affiliates in any manner in connection with developing hardware or software that competes with the Software or Licensor Hardware. Notwithstanding the foregoing, [H&P] and its Affiliates shall not be precluded from (i) hiring an employee who independently approaches them, or (ii) conducting general recruiting activities, such as participation in job fairs or publishing advertisements in publications or on Web sites **[*3]** for general circulation.

[Doc. #64-1, p. 5] ("Non-Solicitation Provision"). Omron was acquired by Schlumberger in June 2016.

H&P claims that, on June 16, 2017, Schlumberger wrongfully revoked the License Agreement based on H&P's alleged active solicitation of Schlumberger employees Fergus Hopwood and Philip Martin to develop competitive software. [Doc #64, ¶ 20]. As a result, on June 22, 2017, H&P initiated litigation in this court asserting four counts: (1) breach of contract; (2) declaratory judgment that the Non-Solicitation Provision, as interpreted by Schlumberger, violates Oklahoma's restraint of trade statute (*15 O.S. § 217*), the *Sherman Act* (specifically, *15 U.S.C. § 1*), and the Oklahoma Antitrust Reform Act (specifically *79 O.S. § 203(A)*); (3) violation of *§ 1* of the Sherman Act; and (4) violation of *§ 203(A) of the Oklahoma Antitrust Reform Act*. Schlumberger moved to dismiss H&P's Complaint and, on September 8, 2017, this court granted Schlumberger's motion to dismiss in part, denied the motion in part, and granted H&P the opportunity to amend. [Doc. #60].

On September 22, 2017, H&P filed the Amended Complaint, which asserts four counts: (1) breach of contract; (2) declaratory judgment that H&P has not violated **[*4]** the Non-Solicitation Provision, and that Schlumberger's attempted revocation of the License Agreement is invalid; (3) declaratory judgment that Schlumberger's interpretation of the Non-Solicitation Provision violates *§ 203(A)* of the Oklahoma Antitrust Reform Act; and (4) declaratory judgment that the Non-Solicitation Provision violates Oklahoma's restraint of trade statute. [Doc. #64]. Schlumberger moves to dismiss count three and count four of the First Amended Complaint pursuant to *Fed. R. Civ. P. 12(b)(6)*.

II. Motion to Dismiss Standard

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss a claim that "fail[s] to state a claim upon which relief can be granted." "To survive a motion to dismiss under *Rule 12(b)(6)*, a plaintiff must plead sufficient factual allegations 'to state a claim to relief that is plausible on its face.'" *Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 861 F.3d 1081, 1104 (10th Cir. 2017)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim is facially plausible 'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*. "Mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' are insufficient." *Estate of Lockett ex rel. Lockett v. Fallin, 841 F.3d 1098, 1107 (10th Cir. 2016)* (quoting *Twombly, 550 U.S. at 555*). "Dismissal is appropriate if the law simply affords no relief." *Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc., 680 F.3d 1194, 1202 (10th Cir. 2011)*.

When considering a *Rule 12(b)(6)* motion **[*5]** to dismiss, the court may consider "not only the complaint, but also the attached exhibits and documents incorporated into the complaint by reference." *Id. at 1201*.

III. Analysis

Schlumberger moves to dismiss count 3 and count 4 of the Amended Complaint. The court will separately consider each count.

A. Count 3 — Declaratory Judgment that Schlumberger's Interpretation of the Non- Solicitation Provision of the License Agreement and Revocation Violates *79 O.S. § 203(A)*

Section 203(A), title 79 of the Oklahoma statutes, part of the Oklahoma Antitrust Reform Act, declares "[e]very act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce within [Oklahoma] . . . to be against public policy and illegal." *79 O.S. § 203(A)*. The Oklahoma Supreme Court has interpreted *section 203(A)* to prohibit "only those acts that *unreasonably* restrain trade or commerce."[1] *Fine Airport Parking, Inc. v. City of Tulsa, 2003 OK 27, 71 P.3d 5, 10 (Okla. 2003)* (emphasis added).

"There are 'two main analytical approaches for determining whether a defendant's conduct unreasonably restrains trade: the per se rule and the rule of reason.'" *Buccaneer Energy (USA), Inc. v. Gunnison Energy Corp., 846 F.3d 1297, 1306 (10th Cir. 2017)* (quoting *Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1203 (10th Cir. 2006))*.[2] Courts apply a presumption in favor of the rule of reason. *Id.*

Pursuant to the rule of reason analysis, "only those acts, contracts, **[*6]** agreements or combinations which prejudice the public interest by unduly restricting competition, or unduly obstructing the due course of trade, or which injuriously restrain trade, are unlawful." *Beville, 39 P.3d at 759*. *See also* *Fine Airport Parking, Inc., 71 P.3d at 10* ("'The fundamental test of the reasonableness of an action, which, by its nature, restrains trade, is its effect on the public.'") (quoting *Krebsbach v. Henley, 1986 OK 58, 725 P.2d 852, 858 (Okla. 1986))*. Thus, the court must inquire as to "the extent to which challenged conduct harms competition and . . . then determine whether any such harm is nonetheless justified by countervailing procompetitive benefits." *Buccaneer Energy (USA), Inc., 846 F.3d at 1306*.

The *per se* analysis, on the other hand, applies only to those "'agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Id.* (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985))*. *See also* *Fine Airport Parking, Inc., 71 P.3d at 10* ("Restraint of trade that has a pernicious effect on competition is conclusively presumed unreasonable and a per se violation of the antitrust statutes."). That is, "[p]er se violations are restricted to those restraints 'that would *always or almost always* tend to **[*7]** restrict competition and decrease output,'" *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1119 (10th Cir. 2008)* (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)* (emphasis added) (internal citations omitted)), and, then, "only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886-87, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. Thus, courts have applied the *per se* analysis only to "recognized types of behavior with which the courts have substantial experience, including horizontal and vertical price-fixing agreements, group boycotts, market allocation, and certain

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[1] Unlike the Sherman Act, the federal anti-trust statute, which requires evidence of a conspiracy, the Oklahoma Antitrust Reform Act prohibits unilateral acts that unreasonably restrain trade. *See* *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1091 (10th Cir. 2006)* (explaining distinction).

[2] The Oklahoma Supreme Court looked to the interpretation of federal anti-trust statutes to determine what constitutes an unreasonable restraint of trade under *79 O.S. § 203*. *See* *Fine Airport Parking, Inc., 71 P.3d at 10*; *Beville v. Curry, 2001 OK 1, 39 P.3d 754, 759 (Okla. 2001)* ("The provisions of this state's antitrust statutes are similar to federal legislation, and interpretation of federal antitrust legislation provides assistance in interpreting the provisions of the Oklahoma statutes.").

types of tying agreements." *Mayfield SWD, L.L.C. v. Blevins, No. CIV-10-0467-HE, 2011 U.S. Dist. LEXIS 5617, 2011 WL 195656, at *5 (W.D. Okla. Jan. 19, 2011)*.

1. Appropriate Level of Analysis

The parties disagree as to the appropriate level of analysis. Schlumberger argues that the claim must be subject to the rule of reason analysis, [Doc. #66, pp. 6-7], while H&P asserts that the *per se* rule applies to its claim for declaratory judgment as to *79 O.S. § 203(A)*.[3] [Doc. #68, pp. 8-13]. The court concludes that the rule of reason, rather than the *per se* approach, is applicable to H&P's claim for declaratory relief as to *79 O.S. § 203(A)* for three reasons.

First, the conduct alleged in the Amended Complaint does not fall within the categories of behavior to which the *per se* rule has previously been applied **[*8]** because the Amended Complaint does not allege a horizontal or vertical price-fixing agreement in the traditional sense, a group boycott, common market allocation, or tying agreement.

Second, the court is not persuaded that unilateral conduct of the type alleged in this matter—specifically, a single entity's interpretation of a non-solicitation provision included in a broader license agreement—would be invalidated in all or almost all instances under the rule of reason. In *Champagne Metals*, the Tenth Circuit declined to apply the *per se* rule to unilateral conduct, stating that it "[was] not prepared to determine that the Oklahoma Supreme Court would hold this unilateral conduct to be a per se violation absent some guidance from that Court." *See* *Champagne Metals, 458 F.3d at 1092*. H&P has not directed this court to subsequent guidance from the Oklahoma Supreme Court to the contrary. The absence of precedential case law strongly indicates that the conduct alleged in the Amended Complaint is not of the recognized types of behavior with which the courts have substantial experience that would always or almost always tend to restrict competition and decrease output.[4]

Third, the court is not persuaded by the Ninth **[*9]** Circuit cases cited by H&P. H&P primarily relies upon a decision by the United States District Court for the Northern District of California—*United States v. eBay, Inc*.—in support of application of the *per se* rule. [Doc. #68, pp. 8-10 (citing *United States v. eBay, Inc., 968 F. Supp. 2d 1030 (N.D. Cal. 2013)]*. In *e-Bay, Inc.*, the court considered whether allegations that e-Bay and Intuit, Inc. executed a non-solicitation/no hire agreement pursuant to which both companies agreed that they would not hire from the other company "period" were subject to the *per se* rule or rule of reason. *Id. at 1038-40*. Although the complaint alleged that the non-solicitation agreement was subject to the *per se* rule as a naked restraint on trade, e-Bay argued that the agreement was ancillary to founder and Chairman of the Executive Committee of Intuit Scott Cook's service on the e-Bay board such that the rule of reason applied. *Id. at 1039* (noting "[w]hen a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies" (alteration in original) (quoting *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1155 (9th Cir. 2003))*. Thus, the rule determination required the court to decide whether the non-solicitation agreement **[*10]** was ancillary to a legitimate business purpose. *Id.* However, in that case, the court was unable to make that determination on a motion to dismiss, and deferred that decision until the parties provided the court sufficient factual evidence to support their contentions. *Id. at 1039-40*.[5]

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[3] Although H&P argues that either the per se analysis or quick look analysis applies, [Doc. #68, p. 8], H&P's briefing conflates the two analyses. [Doc. #68, pp. 8-12]. However, because the court concludes that the Anti-Solicitation Provision is not a "naked" restraint, the quick look analysis is inapplicable. *See* *Buccaneer Energy (USA), Inc., 846 F.3d at 1311* (indicating that a "quick look" analysis was appropriate "where the conduct at issue amounts to a 'naked' and effective restraint on price or output that carries 'obvious' anticompetitive consequence").

[4] Rather, courts that have considered no-hire agreements entered into upon the sale of a business have applied the rule of reason. *See, e.g.,* *Eichorn v. AT&T Corp., 248 F.3d 131, 143-44 (3d Cir. 2001)* (collecting cases).

[5] H&P also cites Philip Areeda and Herbert Hovenkamp's ***Antitrust Law*** for the proposition that "agreements 'among employers that they will not compete against each other for the services of a particular employee or prospective employee . . . are generally unlawful per se"). *See* [Doc. #68, p. 8 (citing Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 2013b (2013)]. However,

Here, H&P attached the License Agreement to its Complaint and, therefore, the License Agreement may be considered by the court. *See* *Commonwealth Prop. Advocates, LLC, 680 F.3d at 1202*. Based on the court's review, it is clear that the License Agreement is intended to grant H&P license to use, copy, modify and create derivate works of Omron's software, and define the rights and obligations of each party with respect to such grant. Pursuant to the Non-Solicitation Provision, the parties are precluded from actively soliciting employees of the other "for purposes of assisting Licensee or its Affiliates in any manner in connection with developing hardware or software that competes with the Software or Licensor Hardware." However, the Non-Solicitation Provision does not preclude the parties from hiring employees of the other who independently approach the hiring party or from conducting general recruiting activities. [Doc. #64-1, p. 5 ¶ 3]. Unlike **[*11]** in *e-Bay* where the pleadings included no indication that the non-solicitation agreement was ancillary to anything, the pleadings in this case make clear that the Non-Solicitation Provision is just one part of a larger business transaction between two independent parties.

Further, the Amended Complaint specifically alleges that Omron and H&P *do not compete* in the drilling rig power and control systems market. [Doc. #64, p. 4 ¶ 13]. The Amended Complaint alleges that H&P and Omron (now Schlumberger) are competitors only in the limited market for specialized engineers and, even then, based solely on Schlumberger's alleged unilateral interpretation of the Non-Solicitation Provision. However, pursuant to the terms of the License Agreement, the Non-Solicitation Provision applies only to those employees solicited for the purpose of developing hardware or software that competes with the software that was the subject of the License Agreement, not all specialized engineers. Accordingly, based on the License Agreement before it, the court concludes that the Non-Solicitation Provision is ancillary to Omron's legitimate grant of a license to use its business asset and, as such, subject to the rule **[*12]** of reason.[6]

2. Application of the Rule of Reason

"Rule of reason analysis first asks whether the offending competitor . . . possesses market power in the relevant market where the alleged anticompetitive activity occurs." *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994)*. *See also* *Beville, 39 P.3d at 760* ("Market power is the preliminary threshold inquiry and is often dispositive of antitrust cases."). "The market power query begins with the determination of the relevant market." *SCFC ILC, Inc., 36 F.3d at 966*. For purposes of the antitrust analysis, the relevant product market "'is composed of products that have reasonable interchangeability for the purposes for which they are produced.'" *Auraria Student Hous. at the Regency, LLC v. Campus Vills. Apartments, LLC, 843 F.3d 1225, 1244-45 (10th Cir. 2016)* (quoting *SCFC ILC, Inc., 36 F.3d at 966*). "'[T]he geographic market is the narrowest market which is wide enough so that products from adjacent areas cannot compete on substantial parity with those included in the market.'" *Id. at 1245* (quoting *Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1222 (10th Cir. 1986))*. A similar analysis applies to employment markets. *See* *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club, 419 F.3d 462, 472 (6th Cir. 2005)*; *Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001)*. "Failure to allege a legally sufficient market is cause for dismissal of the claim." *Campfield., 532 F.3d at 1118*. *See also id*. ("'Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand . . . even when all factual inferences are granted in plaintiff's favor, the relevant **[*13]** market is legally insufficient and a motion to dismiss may be granted.'") (quoting *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436-37 (3d Cir. 1997))*.

H&P argues that it has sufficiently alleged the relevant market—the labor market for specialized engineers. [Doc. #68, p. 12]. The court is not persuaded. Plaintiff makes no reference, either directly or by implication, to the interchangeability of specialized engineering positions with H&P and specialized engineering positions with Omron (now Schlumberger). Nor does the Amended Complaint include any allegations as to cross-elasticity. Further, the Amended Complaint is silent as to the geographic market, and includes no facts upon which an inference of the

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the cited proposition relates to reserve clauses in professional sports contracts, a scenario clearly not implicated in the present matter. Thus, the court is not persuaded by H&P's citation to Areeda.

[6] Because the court concludes that the Non-Solicitation Provision is ancillary to the broader License Agreement, the court is not persuaded by H&P's reference to the United States Justice Department's Antitrust Guidance for Human Resources Professionals. *See* [Doc. #68, p. 9].

relevant geographic market may be based. Even taking the well-pleaded factual allegations of the Amended Complaint as true, H&P does not identify the relevant market with sufficient specificity to state a plausible claim pursuant to *79 O.S. § 203(A)*. Accordingly, dismissal of Count 3 of the Amended Complaint—declaratory judgment that Schlumberger's interpretation of section 3 of the License Agreement violates *79 O.S. § 203(A)*—is warranted.[7]

B. Count 4 — Declaratory Judgment that the Non-Solicitation Provision violates *15 O.S. § 217*

Title 15, section 217 provides: "Every contract by **[*14]** which any one is restrained from exercising a lawful profession, trade or business of any kind, otherwise than as provided by *Sections 218* and *219* of this title, or otherwise than as provided by *section 2* of this act, is to that extent void." *15 O.S. § 217* (internal footnote omitted). *Section 217* was "adopted for the protection of individuals engaged in lawful professions, trades, and business, and for the benefit of the public." *Neil v. Pa. Life Ins. Co., 1970 OK 172, 474 P.2d 961, 963 (Okla. 1970)*. Although *§ 217* does not prohibit reasonable restraints on trade, unreasonable restraints will not be enforced. *See* Bayly, Martin & Fay, Inc. v. Pickard, 1989 OK 122, 780 P.2d 1168, 1170-71 (Okla. 1989). Pursuant to the statute, contracts in unreasonable restraint of trade are void unless the contract falls within a statutory exception. *Id. at 1171*. Whether a non-solicitation provision violates Oklahoma public policy as articulated by *section 217* is a question of law for the court to decide. *Scanline Med., L.L.C. v. Brooks, 2011 OK CIV APP 88, 259 P.3d 911, 913 (Okla. Civ. App. 2011)*.

1. Plausible Claim Pursuant to *15 O.S. § 217*

Schlumberger argues that the Amended Complaint fails to sufficiently plead that any person or entity, including H&P, is restrained from engaging in any lawful trade, profession, or business in violation of *15 O.S. § 217*. [Doc. #66, pp. 14-15]. The court agrees.

The Amended Complaint does not allege that the Non-Solicitation provision restrains H&P from engaging in its trade, profession, **[*15]** or business—drilling. Nor does the Amended Complaint allege that the Non-Solicitation Provision prohibits the employment of an individual as a specialized engineer with any other company in the oil and gas labor market in the field of engineering as a whole. Further, the Amended Complaint does not allege that Schlumberger's interpretation of the License Agreement would result in reduced compensation, business or working conditions in the overall "trade, business or profession," or at any other employer for that matter. Rather, the Amended Complaint's averments relate only to competition to attract employees amongst two companies—H&P and Schlumberger. *See* [Doc. #68, p. 18 (citing Doc. #64, ¶ 53)]. The court is not persuaded that the Amended Complaint's lone averment, without any factual support, that the non-solicitation provisions limits employees' abilities to secure better compensation, benefits, and working conditions states a plausible claim for restraint in the exercise of a "trade, business, or profession."

Nor does the License Agreement bear out H&P's argument. The Non-Solicitation Provision relates only to solicitation by H&P of former or current employees of Omron (now Schlumberger) **[*16]** for purposes of assisting H&P "in any manner in connection with" the development of competing software, and specifically excepts from the prohibition employees who independently approach H&P. Oklahoma statutes include an exception from *section 217*'s prohibition for non-solicitation agreements pursuant to which an employee is prohibited from soliciting employees of one business to becomes employees of another. *15 O.S. § 219B*. *See also Pre-Paid Legal Servs. v. Cahill, 924 F. Supp. 2d 1281, 1289 (E.D. Okla. 2013)* (agreement that did not prevent person from exercising lawful profession was not a restraint of trade). *Compare* *Cardiovascular Surgical Specialists, Corp. v. Mammana, 2002 OK 27, 61 P.3d 210, 213 (Okla. 2002)* ("[P]rovisions by which an employer sought to go beyond a prohibition on active solicitation and thus prevent fair competition have been declared void."). In light of the clear Oklahoma public policy

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[7] In opposition to the motion to dismiss, H&P alleges that the motion is premature and urges the court to decline to dismiss counts 3 and 4 because Schlumberger's motion to dismiss is premised on disputed facts which will require determination only if Schlumberger prevails on counts 1 and 2. *See* [Doc. #68, pp. 6-7 (citing *Topps Chewing Gum, Inc. v. Fleer Corp., 799 F.2d 851 (2d Cir. 1985)]*. However, the court concludes that the Amended Complaint does not allege a plausible claim for declaratory relief as to violation of *79 O.S. § 203(A)*, *as pled*, regardless of Schlumberger's interpretation of the Non-Solicitation Provision.

expressed in the statutory exception, the court is not persuaded that the Amended Complaint's allegations state a plausible claim for violation of *§ 217*.

2. Application of the Rule of Reason

Even if H&P alleged a plausible restraint of trade in violation of *§ 217*, count 4 would fail by reason of application of the rule of reason. As previously mentioned, *§ 217* prohibits only unreasonable restraints of trade. The Oklahoma Supreme Court has held that the rule of reason applies to **[*17]** test the reasonableness of restraints under *§ 217*. *Bayly, Martin & Fay, Inc., 780 P.2d at 1171*. *See also* *Inergy Propane, LLC v. Lundy, 2009 OK CIV APP 8, 219 P.3d 547, 557 (Okla. Civ. App. 2008)* (concluding that enactment of *§ 219A* statutory exception to *§ 217* "does not . . . require abandonment of the rule of reason analysis required by previously established case law").[8]

As previously discussed, the rule of reason begins with identification of the relevant market, and "[f]ailure to allege a legally sufficient market is cause for dismissal of the claim." *Campfield, 532 F.3d at 1118*. As discussed above with regard to count 3, H&P does not identify the relevant market with sufficient specificity to state a plausible claim pursuant to *79 O.S. § 203(A)*. Thus, count 4 is dismissed.[9]

IV. Conclusion

WHEREFORE, the Motion to Dismiss Counts 3 and 4 of the First Amended Complaint is granted.

DATED this 26th day of December, 2017.

/s/ Gregory K. Frizzell

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[8] H&P argues that a full rule of reason analysis is not required by Oklahoma law. *See* [Doc. #68, pp. 14-16]. The court is not persuaded. As recognized in *Bayley*, the Oklahoma Supreme Court expressly adopted the rule of reason with regard to *§ 217*. H&P does not cite to, nor has the court identified, any subsequent decision by that court renouncing the rule of reason. Rather, H&P cites to the Oklahoma Supreme Court's decision in *Howard v. Nitro-Lift Techs., L.L.C.*, in which the court voided a contract provision as a matter of law without performing a complete rule of reason analysis. *See* [Doc. #68, p. 14 (citing *Howard v. Nitro-Lift Techs., L.L.C., 2011 OK 98, 273 P.3d 20 (Okla. 2012)*, *vacated on other grounds,* *Nitro-Lift Techs., L.L.C. v. Howard, 568 U.S. 17, 133 S. Ct. 500, 184 L. Ed. 2d 328 (2012))]*. In *Howard*, the court did conclude that a contractual provision was void as a matter of law based on application of *§ 219A*. However, *Howard* does not compel this court to conclude that the Oklahoma Supreme Court has renounced the rule of reason. Although not binding on this court, the court is persuaded by the analysis of the Oklahoma Court of Civil Appeals in *Inergy Propane*, which reasoned:

> Clearly, *section 219A* is intended to create a third statutory exception to the general prohibition against contracts in restraint of trade set forth in *section 217*. That does not, however, require abandonment of the rule of reason analysis required by previously established case law. *Section 219A* was not enacted in a vacuum. Nor does the language of the statute evidence any legislative intent to supplant the existing and extensive case law interpreting *section 217*. Those cases and the analytical approach developed therein provide the context within which to resolve the issues not specifically addressed by the language of *section 219A*. What the statute does eliminate is the need for part of the rule of reason analysis. In *section 219A* the Legislature has determined that the pro-competitive benefits of an agreement between an employer and an employee preventing the employee from "directly solicit[ing] the sale of goods, services or a **[*18]** combination of goods and services from the established customers of the former employer" after termination of the employment outweigh the anti-competitive effects of that agreement. Beyond that, the Legislature left the parties free to negotiate the terms of post-employment restraints within the constraints of established legal principles.

Inergy Propane, LLC, 219 P.3d at 557 (alterations in original). Thus, *Howard* is properly construed as a determination that the pro-competitive benefits of the provision in that case did not outweigh the anti-competitive effects by operation of statute, rendering the remainder of the rule of reason analysis moot.

[9] Because the court concludes that neither count 3 nor count 4 states a viable claim for relief for the reasons discussed herein, the court does not reach Schlumberger's argument regarding whether H&P sufficiently alleged "antitrust injury."

GREGORY K. FRIZZELL, CHIEF JUDGE

UNITED STATES DISTRICT COURT

In re Korean Ramen Antitrust Litig.

United States District Court for the Northern District of California

December 28, 2017, Decided; December 28, 2017, Filed

Case No. 13-cv-04115-WHO

Reporter

281 F. Supp. 3d 892 *; 2017 U.S. Dist. LEXIS 212843 **; 2017-2 Trade Cas. (CCH) P80,240; 2017 WL 6623036

IN RE KOREAN RAMEN ANTITRUST LITIGATION

Prior History: *Fenerjian v. Nong Shim Co., 2013 U.S. Dist. LEXIS 190435 (N.D. Cal., Dec. 16, 2013)*

Core Terms

prices, increased price, conspiracy, products, plaintiffs', documents, employees, email, Declaration, competitors, defendants', export, sales, discovery rule, Deposition, Ramen, confirmed, hearsay, summary judgment, price support, raw material, disputes, argues, authenticity, antitrust, exchanged, imported, subsidiaries, domestic, comity

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For Ottogi Company, Ltd., Ottogi America, Inc., Defendants: Julian Wolfe Kleinbrodt, Gibson Dunn and Crutcher, LLP, San Francisco, CA; Minae Yu, Gibson Dunn and Crutcher, Los Angeles, CA; Rachel S. Brass, Gibson Dunn & Crutcher LLP, San Francisco, CA.

For SamYang Foods Company, Ltd., Defendant: Elizabeth Dianne Mann, LEAD ATTORNEY, Mayer Brown LLP, Los Angeles, CA.

For Sam Yang (U.S.A.), Inc., Defendant: Edward W. Suh, LEAD ATTORNEY, Michael Kwonchun Suh, Law Offices of Michael K. Suh and Associates, Los Angeles, CA.

For Korea Yakult, doing business as Paldo America, Defendant: Matthew David Taggart, LEAD ATTORNEY, Attorney at Law, Steptoe & Johnson LLP, Los Angeles, CA.

For Paldo Company, Ltd., Defendant: Seong H. Kim, LEAD ATTORNEY, Sheppard Mullin Richter & Hampton LLP, Los Angeles, CA; Edward B. Schwartz, PRO HAC VICE, DLA Piper US LLP, Washington, DC; Matthew David Taggart, Attorney at Law, Steptoe & Johnson LLP, Los Angeles, CA.

Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick **[**6]**

Opinion

[*898] ORDER ON PENDING MOTIONS

Dkt. Nos. 541, 548, 564, 581, 602

There is ample (although hotly disputed) evidence of a conspiracy by the defendants[1] to fix the price of Korean ramen in Korea that was fraudulently concealed from consumers. Defenses of the statute of limitations and international comity are not well taken. The much closer question is whether there is sufficient evidence that the conspiracy impacted ramen prices in the United States, in particular for ramen manufactured in the United States. On defendants' motions for summary judgment, I conclude that plaintiffs have established that material disputes of fact exist that a jury must resolve, and DENY defendants' motions.

The general background and history of this litigation is well known and laid out in my prior orders. Dkt. Nos. 501, 502. The facts material to the determination of these motions, both undisputed and disputed, will be addressed below.

LEGAL STANDARD

Summary judgment on a claim or defense is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. In order to prevail, a party moving for summary judgment must show the absence **[**7]** of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at **[*899]** trial. *See* *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to identify "specific facts showing there is a genuine issue for trial." *Id.* The party opposing summary judgment must then present affirmative evidence from which a jury could return a verdict in that party's favor. *Anderson v. Liberty Lobby, 477 U.S. 242, 257, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant. *Id. at 255*. In deciding a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* Conclusory and speculative testimony does not raise genuine issues of fact and is insufficient to defeat summary judgment. *See* *Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979)*.

The permissible inferences to be drawn from evidence in an antitrust case at summary judgment are further qualified. As the Supreme Court explained in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, "***antitrust law*** limits the range of permissible inferences from ambiguous evidence. . . ." *Id. at 588*. As a result, **[**8]** "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* "To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of *§ 1* must present evidence 'that tends to exclude the possibility" that the alleged conspirators acted independently. . . . Respondents [ ], in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." *Id.*; *see also* *In re Citric Acid Litig., 191 F.3d 1090, 1094 (9th Cir. 1999)* ("permitting the inference of conspiratorial behavior from evidence consistent with both lawful and unlawful conduct would deter pro-competitive conduct—an especially pernicious danger in light of the fact that the very purpose of the antitrust laws is to promote competition.").

In this context, "the defendant can 'rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice' . . . The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not **[**9]** engaging in permissible competitive behavior." *In re Citric Acid Litig., 191 F.3d at 1094* (quoting *Richards v. Neilson Freight Lines, 810 F.2d 898, 902 (9th Cir.1987))*.

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[1] Defendants are Nongshim Co., Ltd., Nongshim America, Inc. (collectively Nongshim), Ottogi Co, Ltd., and Ottogi America, Inc. (collectively Ottogi). The Nongshim and Ottogi entities separately move for summary judgment. Dkt. Nos. 540-4, 544-5.

DISCUSSION

I. STATUTE OF LIMITATIONS

Both defendants move for summary judgment because plaintiffs' antitrust claims are barred by the Sherman Act's four year statute of limitations. In ruling on the motions to dismiss earlier in this case, I determined that the "discovery rule" could toll the otherwise applicable four year statute of limitations. *Fenerjian v. Nongshim Co., Ltd, 72 F. Supp. 3d 1058, 1078 (N.D. Cal. 2014)*. I also concluded that plaintiffs pleaded sufficient facts showing that defendants took affirmative steps to fraudulently conceal the alleged conspiracy to raise prices. *Id. at 1078-79*.

The issue is significant because only a small fraction of the sales at issue **[*900]** fell within the four year statute running from the 2013 filing of the first related action in this litigation. As to those sales — *i.e.*, sales between July 22, 2009 and the end of the class period January 31, 2010 — those claims cannot be knocked out because under Ninth Circuit authority, "each time a defendant sells its price-fixed product, the sale constitutes a new overt act causing injury to the purchaser and the statute of limitations runs from the date of the act." *Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014)*. Therefore, conspiracy-inflated sales from July 22, 2009 **[**10]** through January 31, 2010 are within the express four year limitations period and not barred. The significant question is whether sales occurring prior to the four year period are timely under other applicable theories.

A. Discovery Rule

Plaintiffs argue that my conclusion that the discovery rule can toll *Sherman Act* claims is "law of the case," and as defendants failed to move for reconsideration or otherwise show that reconsideration of that determination is appropriate, I should not revisit the issue. Defendants, on the other hand, rely on language from the Order on the motions to dismiss that the discovery rule "tolled the otherwise applicable statutes of limitations, at least at this pleading stage." Nongshim MSJ 10 n.14. The question of *whether* plaintiffs pleaded sufficient facts to show that the discovery rule applied to their claims (*e.g.*, whether plaintiffs were on notice of their injuries) is fact dependent. The determination that the discovery rule applies under the Sherman Act was a legal determination that was not fact dependent. What defendants seek to challenge here is the legal question, not the factually dependent one.

Defendants point out that following my November 2014 **[**11]** Order, the Hon. Lucy Koh expressly disagreed and followed what she deemed to be "clear U.S. Supreme Court authority and the overwhelming majority of Circuits [that] have explicitly held that antitrust claims are subject to a pure injury rule, not a discovery rule." *In re Animation Workers Antitrust Litig., 87 F. Supp. 3d 1195, 1210 (N.D. Cal. 2015)* (*Animation I*). While the Ninth Circuit has not directly addressed the question, plaintiffs do not dispute that only one circuit has applied the discovery rule to Sherman Act claims. *See* *In re Copper Antitrust Litigation, 436 F.3d 782, 789 (7th Cir. 2006)*.

In their Opposition, plaintiffs spend much time dissecting the authorities Judge Koh relied on in support of her conclusion in *Animation I*. They argue that those authorities do not clearly reject application of the discovery rule under the Sherman Act, but simply apply the "pure injury rule" to situations where the plaintiff's injury is immediately known or question the application of the discovery rule to antitrust claims in *dicta*. Oppo. 7, n.2. Plaintiffs also rely on civil RICO cases, whose statute of limitations are likewise governed by *15 U.S.C. § 15b*, that apply the discovery rule. *See, e.g., Pincay v. Andrews, 238 F.3d 1106, 1109 (9th Cir. 2001)* ("[w]e have continuously followed the 'injury discovery' statute of limitations rule for civil RICO claims"). Judge Koh rejected that line of argument by noting **[**12]** that the Supreme Court in *Klehr v. A.O. Smith Corp., 521 U.S. 179, 188, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* distinguished the "pure injury accrual rule . . . [as] it applies in traditional antitrust cases[,]" from the discovery accrual rule in the civil RICO context where many claims sound in fraud. *See* *Animation I, 87 F. Supp. 3d at 1209*. Finally, plaintiffs contend that no circuit has rejected the discovery rule as applied to antitrust injuries where plaintiffs were unaware of their injuries at the time they occurred, **[*901]** and note the only circuit to have directly addressed those facts applied the discovery rule. *See In re Copper Antitrust Litigation*.

I need not choose a side on this split in authority. As discussed below, I conclude the fraudulent concealment exception to the four year statute of limitations applies.

B. Fraudulent Concealment and Affirmative Acts

In their motions, defendants do not directly contest my prior conclusion that fraudulent concealment would toll the statute based on the allegations in plaintiffs' complaints. Nor do they attempt to undermine those allegations, based on the evidence that was adduced after that initial ruling. Instead, in their reply briefs, they attack plaintiffs' showing of affirmative acts in support of fraudulent concealment.

As I noted in my November 2014 **[**13]** Order, "[fraudulent concealment tolls otherwise applicable statutes of limitation where (i) affirmative acts by defendants conceal their wrongful conduct from plaintiffs, (ii) plaintiffs are actually ignorant of the wrongful conduct, and (iii) there was reasonable diligence by the plaintiff to discover the misconduct in response to any information it may have about that conduct." *Fenerjian v. Nongshim Co., Ltd, 72 F. Supp. 3d at 1078*.

Plaintiffs' evidence of affirmative acts that defendants took to keep their conspiracy secret requires close analysis. On the next several pages, I indent the asserted facts one by one and discuss what the evidence actually shows:

> • Defendants staggered their price increases to minimize the chance that their anticompetitive agreement would be detected. *See* Decl. of Russell W. Mangum III, Ph.D. in Support of DPPs' Mot. for Class Certification ¶ 40 ("Mangum Decl.") (Dkt. 363-6);

While Mangum analyzed in depth the price changes, and felt the pattern of price changes supported a conclusion of collusion - based in part on the fact that all defendants raised their prices following Nongshim's actions - the portion of the Mangum Declaration cited by plaintiffs says nothing about staggered prices or the intent behind **[**14]** that staggering. *See* Mangum Decl., ¶ 40.

> • Defendants communicated by phone, rather than by email or fax, to conceal the frequency and content of their communications. Yu Decl., Ex. 37 at 34 (Kyung Ju Kim Tr., noting that price increase period information was exchanged over the phone or in person, but not by fax or email because "[t]here is a chance that someone may see it."); Decl. of Stephanie Cho ("Cho Decl."), Ex. 1, Dong Hee Kang Tr. at 54:21-55:25.

Kyung Ju Kim is a former Samyang Market Survey Team department head. Cho Decl. Ex. 15 (Kyung Ju Kim Confirmation Statement). He initially testified that he communicated about sales and promotions with Ottogi and Nongshim employees by fax, phone, and in person. Yu Decl., Ex. 37 at 31, 34 (Dkt. No. 547-41) (Kyung Ju Kim Examination Report). He later indicated that information about "price increase period" was "done over the phone" and "in person" if there was time, but "not at all" by fax or email because "[t]here is a chance that someone may see it, so we didn't do it like that." *Id.* at 34. Defendants point out that Kim also appeared to testify that he did *not* exchange non-public "price information" with competitors, and that he only asked his contacts for **[**15]** more details after he heard generally about competitor price increase "in the market." *Id.* at 5, 6.

[*902] Kim's testimony as a whole is somewhat confusing and the parties have different glosses on it. It suggests that while Kim may not have disclosed to competitors exactly when price increases were going to be imposed or what the specific price increases would be, he disclosed non-public information about the "price support period" through methods that would not leave a trail and sought more general information (if not the exact specifics) about otherwise non-public timing and price increase information from competitors.[2]

Dong Hee Kang, another Samyang employee, confirmed in his deposition that he had the cell phone numbers of at least one similarly situated employee from Nongshim (Yoon) and another from Ottogi (Seok Ho Hong) so he could

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[2] Another Samyang employee testified that he didn't ask for "specific" information as to exact dates and levels of price increases, but more generally asked and "about general period or degree of increase." Yu Decl., Ex. 36, Jong-Moon Yui Examination Report at 9-11.(Dkt. No. 547-40)

call them "because it was easier," and that in 2005 Kang had phone calls with both Nongshim and Ottogi about ramen price increases. Cho Decl., Ex. 1, Dong Hee Kang, Depo. Tr. at 21:6-22:15; 26:9-17, 36:3-25, 54:21-55:25. At most, Kang's testimony establishes that phone calls were made to discuss pricing in 2005, not that employees were instructed to or otherwise avoided **[**16]** using email or faxes.

• Ottogi destroyed various pricing memos referring to competitor contacts after the Korea Fair Trade Commission ("KFTC") commenced its investigation and Ottogi altered other price memos to delete any reference to competitor information after the KFTC commenced its investigation. Mot. to Sanction Ottogi For Spoliation 4-12 (Dkt. 420); Decl. of Stephanie Cho In Support of Motion to Sanction Ottogi for Spoliation ¶¶ 11-62 ("Ottogi Sanctions Cho Decl."), and corresponding Exs. (Dkt. 420-1);

Although I concluded that there was an insufficient connection between the alleged conduct in Korea and this litigation to support imposing sanctions in this action, the reasonable inferences drawn in plaintiffs' favor from the evidence presented on the sanctions motion support that Ottogi altered documents (specifically, a January 2004 memorandum and a 2005 memorandum) for production to the KFTC. Having reviewed in-depth the evidence presented by both sides on the sanctions motions and construing the evidence in plaintiffs' favor, there is a significant inference of intentional document alteration to remove evidence of conspiracy and attempt to convince KTFC of other justifications **[**17]** (raw material price increases) to hide the conspiracy.

For example, plaintiffs presented significant evidence regarding the "altered" 2004 and 2005 memoranda that Ottogi: (i) removed information evidencing the relationship between Nongshim and Ottogi's prices (*e.g.*, Ottogi following Nongshim's lead); (ii) removed a chart comparing Nongshim's to Ottogi's prices; (iii) deleted references to Samyang and Yakult; and (iv) "falsely" represented that the purpose of the price increases were to capture escalation in raw material prices. While Ottogi has explanations for the discrepancies between the older versions and the "recreated" versions of these documents (*e.g.*, they recreated at the request of the KFTC or the initial versions were merely drafts), it is a jury question to decide what the more credible explanations are.

• Nongshim and Ottogi destroyed competitor communications concerning price and other sensitive information. **[*903]** *See* Mot. to Sanction Ottogi For Spoliation8-14 (Dkt. 420); Ottogi Sanctions Cho Decl. ¶¶ 11-62, and corresponding Exs. (Dkt. 420-1); Mot. to Sanction Nongshim for Spoliation 8-13 (Dkt. 416); Decl. of Stephanie Cho In Support of Mot. to Sanction Nongshim for Spoliation **[**18]** ¶¶ 92-106 ("Nongshim Sanctions Cho Decl.") (Dkt. 416-1), and corresponding Exs. As a result of this destruction, few or no documents from key witnesses were produced. Ottogi Sanctions Cho Decl. ¶¶ 47, 54; Nongshim Sanctions Cho Decl.¶¶ 80-105; and

• Ottogi implemented a rigorous "auto-delete" protocol on its email servers after the KFTC commenced its investigation that destroyed substantial quantities of relevant documents. Cho Decl., Ex. 5 (Se-Chang Lee Tr. (4-5-2016) at 13:5-16:2, 19:17-21:5; 28:10-19; 40:11-41-18); Ottogi Sanctions Cho Decl. ¶¶ 47, 54;

The evidence from the sanctions motions showed that both Nongshim and Ottogi had limited document preservation policies (more aptly described as "destruction" policies) in place both before and during the KFTC investigation. Again, I did not find a sufficient connection between the defendants' failures to preserve documents and duties that might have run to the KFTC and this jurisdiction that would support sanctions. However, construing the evidence in plaintiffs' favor, there is an inference that defendants intended or otherwise benefitted from the destruction of adverse evidence under their existing or newly implemented document destruction **[**19]** policies.

• Nine days after the KFTC's onsite investigation, Nongshim employee Sung Soo Park began communicating with competitors via his personal email address, "pss0998@naver.com ", to avoid detection. *See* Cho Decl., Ex. 2 (Nongshim's Supplemental Response to IPPs' Interrogatory No. 15); Cho Decl., Ex. 3 (Sung Soo Park Depo. Tr. at 41: 11-18); Cho Decl., Ex. 4 (SHD00003117-59T at 57-58); Vaughn Decl. ¶ 18;

The testimony and documents, according to plaintiffs' expert James Vaughn, shows Park communicating from a personal email account with employees at Ottogi, Yakult, Samyang, and other Nongshim employees (to their Nongshim email accounts) of pricing and sales information. Cho Decl., Ex. 4; Declaration of James Vaughn [Dkt. No. 567-2], ¶ 18. Defendants' forensic expert, Samuel Rubin, disputes whether the documents at issue are emails from Park, given the formatting issues. Declaration of Samuel S. Rubin [Dkt. No. 585-3] ¶¶ 21-23. Assuming that

Vaughn is correct, the persuasiveness of this evidence as an affirmative act is still very limited, given that some of the emails were also apparently sent to other Nongshim employees at their work email accounts, presumably defeating any inference **[**20]** that the private email was used to hide the trail at Nongshim. Vaughn Decl. ¶ 18.

- The conspirators met each other away from their places of business to exchange information and used legitimate meetings of the Ramen Assembly as a cover for anticompetitive conduct. *See* Cho Decl., Ex. 6 (Soo Chang Ahn Depo. Tr. at 42:2-43:17; 67:10-18);

Soo Chang Ahn, a Samyang executive, testified that he attended the yearly Ramen Transaction Order Association (RTOA) meetings, and that at the March 2001 meeting pricing information was discussed between employees of Nongshim, Ottogi, and the other alleged conspirators. Cho Decl., Ex. 6, Soo Chang Ahn Deposition Tr. at 70:5-23, 73:4-74:2, 77:16 — 79:25 **[*904]** (Dkt. No. 567-4 at ECF 90). The cites relied on by plaintiffs, however, do not show Ahn admitting that these meeting took place "away" from places of business *other* than at the RTOA meetings. Ahn also testified that his reports at Samyang would report to him information regarding price increases and timing from competitors, as well as the duration of old price support. Ex. 6 Ahn Dep. Tr. 90, 93, 94.

- Nongshim justified its price increases by giving false and pretextual reasons that were materially misleading. **[**21]** *See:* (1) Cho. Decl., Ex. 7 (ROK000011-14, 16-18, 21, 23) (letters to customers stating that increase costs of goods were the reasons for prices); (2) Cho Decl., Ex. 8 (Krith Roth Depo. Tr. at 29:8-30:12) (when conveying price increases to certain customers, NSA employee did not provide the customers with Nongshim's actual COGS, but merely provided them with articles suggesting the ingredient costs went up); (3) Cho Decl. Ex. 9 (Sunny Kim Depo. Tr. at 45:23-46:3 and 46:20-21) ("when we get a price increase, we would generally say raw material costs went up in general. So then that's kind of the explanation to the customer, just try to- you know, say it in a nice way . . . We will try to say that to our customer. That's just kind of how it's been."); (4) Ottogi noted in an internal memo "Nongshim stated to the media regarding background of price increase that the main factors for prices increases were increases in the production costs. . . . However, the main reason for Nongshim's ramen price increases is that . . . sales growth can be achieved only by increasing prices, by launching new high priced products, and so on." Cho Decl., Ex. 10 (OTGKR-0018659T); (5) Cho Decl., Ex. 11 (RNA0001409T-1414T, **[**22]** 1416T-1422T and RNA0001402T-1404T) (newspaper articles in the U.S. stating that prices are going up due to increased costs); (6) Cho Decl., Ex. 96 at OTGAM-0040904T (Ottogi price lists to customers claiming it must raise prices due to increased material costs); and (7) prices of Korean Ramen increased substantially during the class period and that the delta between the cost of manufacture and the sales price doubled when compared to the pre-conspiracy benchmark period. *See* Decl. of Alan Cox ("Errata Cox Decl."), Ex. 12.2 (Dkt. 441-6, 441-8); Mangum Reply Decl. In Support of Class Certification ("Mangum Reply") (Dkt. 466-8), Ex. 29.1-R.

There is evidence that Nongshim America, Inc. ("NSA") publicly (at least to the Direct Purchasers) attributed its increased prices in imported products to increased raw materials (including oil, petroleum, and other costs), as well as currency exchange rates. *See, e.g.*, Cho Decl., Ex. 7 (May 8, 2005 customer letter; May 19, 2006 customer letter; April 2007 customer letter). Ottogi, in a price list provided to Direct Purchasers, ascribed the 2008 price increases to a rise in global grain prices and exchange rates. Cho Decl., Ex. 96.

If asked about price **[**23]** increases, NSA employees Krith Roth and Sunny Kim would respond by blaming increased raw material and fuel costs. Cho Decl., Ex. 8, Krith Roth Depo. Tr. at 29:8-30:12; Cho Decl., Ex. 9, Sunny Kim Depo. Tr. at 45:23-46:21. The explanations given by Nongshim for price rises (and the decrease in 2010) to the media from 2003 through 2010 (contained in an Ottogi memo and in news reports from Korean-American media outlets) **[*905]** are raw material costs and demand fluctuations.[3]

Generally, the sorts of affirmative acts described in the preceding pages— public pretextual statements, alteration or destruction of documents, and evidence that employees used methods to communication sensitive information

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[3] Nongshim objects to consideration of the media reports as conveyed in the Ottogi memo and the separate news articles as inadmissible hearsay. Those objections will be addressed below.

that would not leave a "trail" — are sufficient to support fraudulent concealment tolling statutes of limitations. *See, e.g., In re Animation Workers Antitrust Litig., 123 F. Supp. 3d 1175, 1200-01 (N.D. Cal. 2015)* (*Animation II*) ("the Court finds that Plaintiffs have sufficiently alleged that both defendants made misleading, pretextual statements and took affirmative steps to keep the alleged conspiracy a secret" with affirmative clandestine steps including those made to "eliminate paper trail" of conspiracy)(internal quotations omitted); *In re TFT—LCD (Flat Panel) Antitrust Litig., 586 F.Supp.2d 1109, 1119-20 (N.D. Cal. 2008)* (finding sufficient allegations of pretextual **[**24]** explanations for price increase and affirmative efforts to ensure secrecy of conspiracy). Plaintiffs do not need to show at trial that raw materials prices were totally irrelevant to the price increases to demonstrate pretext,[4] but rather that the level of price increases were in excess of what was necessary because of the collusive conduct. *See In re Lithium Ion Batteries Antitrust Litig., No. 13-MD-2420 YGR, 2014 U.S. Dist. LEXIS 7516, 2014 WL 309192, at *4, *16 (N.D. Cal. Jan. 21, 2014)* (where price increases were blamed on increases in raw materials, which was in part true, pretext was still alleged where increase in raw materials was used a pretext for "unwarranted" price increases by defendants).

In addition to contending that this evidence does not show what plaintiffs assert it does, Ottogi makes a number of additional arguments. First, Ottogi argues there is little to no evidence of *its* affirmative acts. Acts by Ottogi include, at the very least, document alteration in response to KFTC investigation as well as the 2008 price list conveying to DPPs allegedly false or substantially incomplete reasons for those price increases. More fundamentally, necessary "affirmative acts" may be established through the acts of Ottogi's alleged co-conspirators. *See Animation II, 123 F. Supp. 3d at 1206* (citing cases). **[**25]**

Ottogi also argues that the affirmative acts to conceal the conspiracy must have been directed at these plaintiffs or intended to deflect litigation. Ottogi Mot. 25. I disagree. To the first argument, as Judge Koh explained: "[d]efendants cite no Ninth Circuit authority, or any authority for that matter, that requires Plaintiffs to show that Defendants' affirmative acts were for the purpose of misleading Plaintiffs. To the contrary, one court in this circuit has specifically held that '[t]he proper focus . . . is not whether the intent was to conceal the information from plaintiffs, but whether the 'concealment ... prevented [plaintiff] from being alerted.'" *Animation II, 123 F. Supp. 3d at 1202* (quoting *In re Coordinated Pretrial Proceedings **[*906]** in Petroleum Prods. Antitrust Litig., 782 F.Supp. 487, 490 (C.D. Cal. 1991))*.

With respect to the second argument, Ottogi notes that in denying plaintiffs' motion for sanctions, I concluded that there was no evidence that Ottogi destroyed or altered documents to "impede this litigation." Ottogi Reply 15. Ottogi's argument is unpersuasive for two reasons. First, my point in the Order denying sanctions was that there was not sufficient evidence that Ottogi sought to frustrate litigation in this country in order for me to have jurisdiction or otherwise impose discovery-type sanctions based on conduct that at the time **[**26]** was possibly intended to impact the KFTC investigation and keep evidence regarding coordinated price setting hidden. Second, the Ninth Circuit has not adopted the "deflecting litigation" qualification to affirmative acts sufficient to show fraudulent concealment. Ottogi's source is merely a passing reference to a parenthetical cite in *Grimmett v. Brown, 75 F.3d 506, 515 (9th Cir. 1996)*. In that parenthetically referenced case, *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, the Fourth Circuit found that defendant's failure to disclose its price fixing in response to a customer's question about pricing was insufficient to show fraudulent concealment. It explained that "'[f]raudulent concealment' implies conduct more affirmatively directed at deflecting litigation than that alleged here." *828 F.2d 211, 219 (4th Cir. 1987)*.

The evidence of affirmative acts identified above, when considered in its totality, is sufficient to toll the Sherman Act claims under a fraudulent concealment theory.[5]

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[4] The evidence submitted by Ottogi that flour prices increased from 2006 through 2008 is, therefore, relevant but not by itself determinative. *See* Supplemental Decl. from Kyung Ho Yoo ¶¶ 3-5 (Dkt. No. 585-4). As noted in ruling on the motions for class certification, plaintiffs' experts show that in the same time frame the delta between costs and profits almost tripled. Ottogi points to no evidence that would demonstrate that all of the allegedly collusive price increases were in fact due solely to the increases in the price of flour during the relevant time frame.

C. State Law Claims

Defendants argue that the state law claims — based on California, Massachusetts, Michigan, Florida, and New York law — should likewise be dismissed because they too are governed by four year (or three year) statutes. Nongshim Mot. 11; Ottogi Mot. 23-24. **[**27]** In their opening motions, defendants do not address whether the discovery rule or fraudulent concealment would apply to toll those statutes. Instead, they argue in their Replies that the actual injury rule (instead of the discovery rule) applies at least to plaintiffs' claims under the Cartwright Act. Ottogi Reply 13-14.

With respect to the Cartwright Act claims, plaintiffs place heavy weight on *Aryeh v. Canon Bus. Sols., Inc., 55 Cal. 4th 1185, 151 Cal. Rptr. 3d 827, 292 P.3d 871 (2013)*, where the California Supreme Court held in a case involving California's Unfair Competition Law ("UCL") that when a statute fails to define accrual, the presumption of common law equitable tolling rules (like the discovery rule) will normally apply. Although *Aryeh* was not a Cartwright Act claim, the court based its holding in part on the lower court's erroneous application of *federal antitrust laws* to the tolling question, noting that while the Cartwright Act is often interpreted consistently with the Sherman and Clayton Acts, that is not conclusive with respect to the reach of the *Cartwright Act*. *Id. at **[*907]** 1195*. In addition, as plaintiffs point out, both the UCL and Cartwright Act are silent on accrual and use virtually identical wording as to the statute of limitations.

Defendants respond that following **[**28]** *Aryeh*, Judge Koh has applied the actual injury rule and rejected the discovery rule for Cartwright Act claims. That is not quite accurate. Defendants are correct that in *Ryan v. Microsoft Corp., No. 14-CV-04634-LHK, 2015 U.S. Dist. LEXIS 47753, 2015 WL 1738352, at *16 (N.D. Cal. Apr. 10, 2015)*, Judge Koh did not apply the discovery rule to the Cartwright claims in an antitrust case dealing with agreements to restrict employee solicitations. She concluded that *Aryeh* did not definitively answer the question of whether the discovery rule or fraudulent concealment would apply to either Cartwright or UCL claims, but rejected the application of any equitable tolling in the case before her because plaintiffs failed "to adequately allege an equitable exception or tolling doctrine that would render Plaintiffs' state law claims timely." Her decision was based on a failure of facts that would support equitable tolling, not a bright line rejection of it under California law.[6] For the reasons discussed above, fraudulent concealment applies to the Cartwright Act claims.

Defendants do not separately address in their briefs whether the discovery rule or fraudulent concealment apply under the other state laws at issue.[7] I have no basis to grant summary judgment on any of the state law **[**29]** claims as time-barred.

II. KOREAN SUPREME COURT DECISION AND INTERNATIONAL COMITY

Nongshim argues that principles of comity require that I defer to the Korean Supreme Court's decision in overturning the KFTC's conspiracy findings and fines. Nongshim also argues that the same principles counsel

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[5] Plaintiffs also point out that their injunctive relief claim under the Sherman Act is not subject to a statute of limitations defense, because "there is no statute of limitations for injunctive relief claims under *section 16*." *Oliver v. SD-3C LLC, 751 F.3d 1081, 1085 (9th Cir. 2014)*. Oppo. 13-14. However, the only stated basis for plaintiffs' injunctive relief claim is that because Nongshim and Ottogi are still oligarchs, they still have the power to fix prices. That may be. But, given that plaintiffs admit the conspiracy ended in 2010 and there is no evidence that these oligarchs conspired after 2010 or are *likely* to conspire together in the future, plaintiffs' injunctive relief claim is questionable.

[6] In *Animation I, 87 F. Supp. 3d at 1217*, the parties did not dispute "that resolution of Plaintiffs' Sherman Act claim would also resolve Plaintiffs' Cartwright Act claim." Therefore, Judge Koh applied the accrual rule and rejected the discovery rule on both sets of claims; she did not separately analyze the Cartwright Act claims.

[7] Plaintiffs argue that the discovery rule applies to claims under Massachusetts and New York law, while fraudulent concealment applies under Florida, Massachusetts, Michigan, and New York law. Oppo. 16.

against finding a conspiracy in light of the Korean government's role in setting prices, a role explained and relied upon by the Korean Supreme Court in overturning the KFTC findings and fines.

International comity "is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *In re Simon, 153 F.3d 991, 998 (9th Cir.1998)* (internal quotation omitted). "International comity is a doctrine of prudential abstention, one that 'counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law.'" *Mujica v. AirScan Inc., 771 F.3d 580, 598 (9th Cir. 2014)* (quoting *United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir.1997))*.

There are two doctrines recognized under "international comity." The first **[**30]** is "legislative or prescriptive comity," which "guides domestic courts as they decide **[*908]** the extraterritorial reach of federal statutes." *Mujica, 771 F.3d at 598*. The second "is referred to as 'comity among courts' or adjudicatory comity, which 'may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state.'" *Id. at 599* (*quoting* *In re Maxwell Commc'n Corp. plc by Homan, 93 F.3d 1036, 1047 (2d Cir.1996))*. Considerations in determining whether to abstain for comity to an international tribunal include the strength of the various governments' interests, the adequacy of the foreign forum, any conflicts between the laws of the jurisdictions, and the extraterritorial reach of the laws at issue. *Id. at 600-604*. In looking to the various governmental interests, the critical factor is where the conduct in question took place, "conduct" including not only the actions of the defendants but the injury suffered by plaintiffs. *Id. at 605* (citing *Torres v. S. Peru Copper Corp., 965 F.Supp. 899, 909 (S.D.Tex.1996)*, dismissing action under comity where the "activity *and the alleged harm* occurred entirely in Peru [and] Plaintiffs are all residents of Peru.") (emphasis added).

Nongshim argues that I should abstain under the adjudicatory comity doctrine and defer to the Korean **[**31]** Supreme Court decision that overturned the findings of the KFTC. The Korean Supreme Court concluded that the evidence of an express agreement being reached at the Representative's Meeting[8] was hearsay (the second-hand Samyang statements and inconsistent and not fully credible Ahn statements about whether he attended), and therefore the court could not "rule out a possibility that it was merely ambience of resonance for a desire for [Nongshim] to take an initiative and lead the price increase" given that the companies had been prevented by economic circumstances from increasing their prices in the past years. Korean Supreme Court decision (January 2016), Ex. 24 to Yu Decl. [Dkt. No. 547-27] at 7. The court noted that the degrees of difference in price increases made it "hardly possible" to specify any specific substance of agreement "beyond the point" that ramen prices should be increased in 2001. *Id.* The court concluded that it was "unclear" if "a definitive agreement that can impact competition in the long run" was agreed to at the Representative's Meeting, and as a result declined to find that subsequent exchanges of information were in furtherance of an agreement reached at the Representative's **[**32]** Meeting. *Id.*

As to whether there was a "tacit agreement" regarding the price increases following the initial 2001 increases, the court noted that some of the evidence was not consistent with an agreement and did not support an "inference" of "mutual connectivity of intention." *Id.* at 8. That evidence included the use of different percentage increases in price, a history in the industry of "follow the leader" pricing, the role of the Korean government in establishing *de facto* pricing for the leader, the product variations offered by the defendants, and use of the "old price" support system (which could be used either to support a collusive agreement or an "instrument to engage in aggressive mutual competition"). *Id.* at 8-9.[9]

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[8] As discussed below, according to plaintiffs' theory, in late 2000 or early 2001 the initial agreement was formed at this Representatives' Meeting. That agreement was confirmed at the March 2001 RTOA meeting.

[9] The "old price support system" was how long the Ramen companies would continue to sell either products labelled with the "old" price, after the new prices increases were announced, or in some instances sold new, newly labelled products at the old prices so as to minimize disruption to the market. Declaration of Bangwan Ku [Dkt. No. 545] ¶ 9.

[*909] The Korean Supreme Court weighed evidence (presumably consistent with principles of Korean law regarding admissibility and sufficiency), made credibility determinations, and determined what the inferences supported on a matter that was within its jurisdiction — whether the KFTC's order concluding there was a conspiracy and as a result imposing fines on defendants was adequately supported under Korean law. There is a different question before this Court: did defendants' conduct as it **[**33]** impacted sales of products *in the United States* violate federal and state antitrust and unfair competition laws? This is not a situation where, for example, Korean plaintiffs are trying to recover for injuries suffered in Korea at the hands of United States or Korean corporations. *See* *Mujica, 771 F.3d at 609*. The allegations (the evidence of which will be weighed below) are that a conspiracy hatched in Korea was exported and impacted the prices of goods defendants sold in the United States. The injuries for which recovery is sought here occurred in the United States.

None of the cases cited by Nongshim in support of its comity argument address similar facts or connections to American plaintiffs injured by sales that occurred in the United States. Instead, the more apposite case is *F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*, where the Supreme Court recognized that:

> No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect **[**34]** a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.

While what the Korean Supreme Court did is similar to what a jury will be called upon to do here — weigh the evidence, make credibility determinations, determine which inferences are supported by the evidence — the jury may weigh the evidence and inferences differently, applying the law of the United States as instructed. The evidence may well exceed the amount and type of evidence that was before the Korean Supreme Court, such as the document alteration and destruction as well as expert economic analyses.

Also underlying this issue are the parties' different views of the role the Korean government played during the relevant time period in approving prices for some subset of the ramen market. Nongshim, generally, contends that the Korean government exercised tight control and made Nongshim seek approval prior to increasing prices on its leading products. Plaintiffs dispute whether Nongshim's prices were "controlled" by the Korean government, and point to evidence that at most Nongshim voluntarily included the Korean government on its contemplated price increases for some of the **[**35]** price increases at issue. Oppo. 54-55. According to plaintiffs, this voluntary and non-binding process cannot absolve Nongshim from its responsibility for price-fixing. Moreover, even if not technically or practically mandatory for Nongshim, at most the Korean government's role limited the top price Nongshim could charge and does not absolve Nongshim from the consequences of agreeing with the conspirators that they should follow suit and raise prices within a reasonable **[*910]** time to protect everyone's market share. *See, e.g.*, Ahn Depo. Tr. [567-4 at ECF 90] at 165:6-166:4 (describing his understanding of the process as a "discussion or negotiation" with the government and that Ramen companies are free to compete below the government approved price); Cho Decl., Ex. 12, Deposition Transcript of Jung Soo Kim [Dkt. No. 567-4] at 31:5-10.

Again, the jury will be tasked with determining disputes of fact, considering the admissible evidence and expert opinions. The principles of international comity do not require that I defer to the findings of the Korean Supreme Court on the question of whether defendants' sales in the United States harmed consumers in the United States as the result of an agreement **[**36]** to fix prices.

III. EVIDENCE OF CONSPIRACY IN KOREA

A. Direct Evidence: Witness Testimony

Plaintiffs rely on the testimony of three individuals who were Samyang executives or employees as direct evidence of the conspiracy: Jung Soo Kim, Soo Chang Ahn, and Jong Min Kim. I discuss the materiality of that testimony below.

1. Jung Soo Kim

Jung Soo Kim, Samyang's "Consultant Advisor" and President, testified that she was aware of a meeting of Ramen company executives that occurred in late 2000 or early 2001. Deposition Transcript of Jung Soo Kim [Dkt. No. 567-4] at 27:17-20. Kim recalls that Samyang executive Choi Don Joong attended. *Id.* at 37: 6-14. Joong reported back to Kim that at the meeting (hereafter "Representatives' Meeting"),[10] there was a conversation that because ramen prices could not be raised for two to three prior years, "if Nongshim raised the price, then we would follow Nongshim's act." *Id.* at 38:6-15. It was Kim's understanding that representatives from Nongshim, Ottogi, and Paldo were at that meeting, but she was "not certain." *Id.* at 39:18-25, 40:3-20. Kim testified, "I don't know if I can characterize it as they reached some kind of consensus," but Joong expressly confirmed that the **[**37]** discussion included that if Nongshim raised prices, then the others would follow. *Id.* at 42:22-25.

Later in Kim's testimony, after her recollection was refreshed with a prior written statement, she agreed that her understanding of what happened at the meeting was that the representatives "agreed to increase Ramen price by collaborating with one another." *Id.* at 56:2-57:4. She also testified that "information concerning sales or marketing or marketing research among Ramen companies were exchanged either in person or via email, and I would receive a report from my subordinates as to such information." *Id.* at 65:5-10. She stated that she saw "advance price information" collected by her employees for Nongshim prices, but not for Ottogi prices. *Id.* at 67:19-24. Kim also understood that her employees exchanged "advance price information" with both. *Id.* at 69:10 — 70:9. Even more specifically, it was her understanding that Samyang shared non-public price information with Nongshim, Ottogi, and Paldo before Samyang had publicly announced what its prices would be. *Id.* at 76:12-17. When Samyang initiated a price decrease in January 2010, it did so to eliminate the perception of price-fixing. Kim **[**38]** said, "[T]his indicates our determination or reflects our determination that we **[*911]** will not participate in any type of price-fixing activities, and we do not want to be investigated by Fair Trade Commission." *Id.* at 93:7021. Finally, she confirmed that she would receive information from Soo Chang Ahn (who was the head of sales at the time) and Kim Bong Hoon (who was in charge of marketing) about Nongshim's planned price increases and then Samyang would prepare for its price increases. *Id.* at 176:16-177:24.

Defendants attack Kim's testimony as hearsay, speculative, and lacking in personal knowledge. They point out that the Korean Supreme Court disregarded her testimony regarding the initial Representatives' Meeting in March 2001 because it was hearsay — she did not attend the meeting. Ottogi also notes that she offers essentially no testimony that Samyang received non-public price information *from* Ottogi, a point with which I agree. But her testimony does support a conclusion that Nongshim, Samyang, and Yakult were actively part of the conspiracy as she understood it; to effectuate that conspiracy, Samyang provided non-public price information *to* Ottogi.[11]

2. Soo Chang Ahn

Soo Chang Ahn was the Deputy **[**39]** Division Head of Sales at Samyang during the relevant time. Ahn attended the March 2001 RTOA meeting on behalf of Samyang, and testified that representatives from Ottogi, Nongshim, and Paldo were there to the best of his recollection. Cho Decl., Ex. 6, Soo Chang Ahn Deposition Transcript [Dkt. No. 567-4 at 90] at 64:20-24, 67:2-9. The issue of price increases was discussed at that meeting, although there were no specifics at to exact prices given the vast number of products at issue. Ahn admitted that it "was possible

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[10] According the plaintiffs' theory, this "Representatives' Meeting" meeting took place in late 2000 or early 2001, and the representatives' agreement was solidified at the March 2001 RTOA meeting.

[11] Objections to the Kim testimony based on speculation and lacking in personal knowledge are OVERULED. Objections based on hearsay, as discussed in more detail below, are OVERRULED.

that question concerning the increase of — percentage of price increase — something like that might have been asked." 69:5-70:7. While Ahn proposed a double-digit percentage increase and Ottogi concurred, Nongshim recommended exercising caution given "negotiations" underway, presumably with the Korean government. *Id.* at 70:20-72:13. According to Ahn, Nongshim's representative — Dong Gyun Yoon — suggested the end price increase to be initiated by Nongshim would be sufficient "so that we can have a profit." *Id.* at 73:20-74:2; 78:24-79:6.

Ahn confirmed that the employees of Samyang, Ottogi, and Yakult exchanged "advance information about price increase" and that the information **[**40]** came into Samyang's "market research department." *Id.* 80:11-81:19. Those exchanges included timing of price increases and periods of "old price support." *Id.* at 90:11-15; 91-93. Using that information from its competitors, Samyang would determine what its plan would be. *Id.* at 94:9-14.

Defendants attack Ahn's testimony as hearsay, lacking in personal knowledge, and contradictory. They note that the Korean Supreme Court disregarded Ahn's testimony because records of the March 2001 RTOA meetings did not show Ahn in attendance, and argue that plaintiffs have failed to adequately rebut that point. Yu Decl., Ex. 33 (March 2001 RTOA Minutes, not showing Ahn in attendance). But plaintiffs rely on Ahn's deposition testimony, where he testified that he personally attended that meeting.[12] Deposition of Soo **[*912]** Chang Ahn [Dkt. No. 567-4 at ECF 90] at 43-44. Ottogi argues that Ahn's testimony is also undercut by the Witness Examination of Guen Ho Choi,a representative of Ottogi who attended the March 2001 conference and testified that price was not discussed by the attendees. Yu Decl., Ex. 35 [Dkt. No. 547-39] at 2. However, Choi's testimony,[13] even if admissible, does not definitively undercut Ahn's but **[**41]** instead raises a question of fact.

3. Jong Min Kim

Plaintiffs also rely on the testimony of Jong Min Kim, a Samyang employee who testified about meetings that occurred in March 2008. At the first meeting, an "administrator's meeting" on March 19, 2008, participants discussed that Nongshim and Samyang had already raised their prices and what the status of Ottogi's and Yakult's expected price increases was. Cho Decl., Ex. 13, Deposition Transcript of Jong Min Kim [Dkt. No. 567-4 at ECF 179] at 30:8-31:16. A week later, at the 2008 RTOA meeting, prices were again discussed, including that once prices had been increased (which had occurred for all but Yakult), they were unable to lower them. *Id.* at 71:16-72:14. All of the alleged conspirators — Nongshim, Ottogi, Samyang, and Yakult — were at this meeting. *Id.* at 43:4-44:5.

B. Corroborating Evidence

Plaintiffs characterize the "follow the leader" pattern — where market leader Nongshim would raise its prices first and the other companies would follow — as being established following the March 2001 RTOA meeting. Oppo. at 18. Defendants counter, relying in part on the Korean Supreme Court decision, that the follow the leader pattern

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[12] Defendants point to a portion of Ahn's deposition testimony where Ahn supposedly admitted to never having heard of the "Representatives Meeting" until preparing for the KFTC leniency petition. The testimony is: "Q: Is it true that you had never known about the alleged representative meeting that supposedly occurred at the end of 2000 or early 2001 until you heard about it from someone else while preparing one of your statements to the KFTC? A: Yes. That is correct. And that's how I testified earlier." Yu Decl., Ex. 18, Ahn Depo. Tr. at 45:21-46:6. But Ahn goes onto explain that "representative meeting" was also referred to as the "presidents meeting." Ahn thereafter testified he attended the March 28, 2001 RTOA meeting. It appears Ahn thought some *other* meeting was meant by the "representatives meeting." The testimony plaintiffs rely on from Ahn is with respect to the March 28, 2001 RTOA meeting. That Ahn allegedly signed over his voting rights for the March 28, 2001 RTOA meeting to a subordinate, Changwoon Kim, was significant to the KFTC in discrediting Ahn's testimony. That issue is not directly addressed by plaintiffs, but again merely presents a dispute of fact.

[13] Plaintiffs object to Ottogi's reliance on this testimony as hearsay, and move to exclude the Choi Examination Statement because Choi was not disclosed by Ottogi as a witness. *See infra*.

existed **[**42]** well before then (since the 1980s and including the time when Samyang was the market leader), and was a function of the *de facto* price controls imposed by the Korean government. Nongshim MSJ at 5-6; Ottogi MSJ at 5. Given the role the Korean government and the long-standing *de facto* follow the leader pricing, defendants contend that collusion *cannot* be inferred. Nongshim MSJ at 28; Ottogi MSJ at 7. Plaintiffs bolster their "express or tacit" agreement argument by relying on the information exchanges discussed below. But in the end, whether or not there was an express or implicit agreement, or whether defendants were simply following old, established pricing patterns raises a dispute of fact.

1. Monitoring and Exchange of Information by Alleged Conspirators

As noted above, Jung Soo Kim and Ahn from Samyang testified regarding how their employees, particularly those in **[*913]** "market research," would exchange advance price information (including prices, timing, and length of old price support) with their competitors. Plaintiffs rely also on testimony from other Samyang employees on the Market Research Team who explained how the "lower level" sales and marketing employees were generally friendly and would gather for drinks or meals. These employees were trained **[**43]** by Samyang to exchange information with their competitors. Yu Decl., Ex. 36, Jong Moon Yui Witness Examination [Dkt. No. 547-40] at 5-6, 15 (Samyang head of Market Research was expected to and trained to "keep[] in communication with the competitor companies and mutually request[] needed materials, and so on," and confirmed that Kyung Joo Kim at Samyang was in charge of "external" duties including exchanging price increase information with competitors).[14] Jong Moon Yui confirmed that the Samyang email address marektone@hanmail.net email was used to exchange emails with competitor companies, including information about price increases but he was not personally aware of whether the competitors' price increase information was otherwise publicly known to others or had been disclosed at that time he received it and passed it along to his superiors. *Id.* at 13, 15-16.[15]

Plaintiffs also rely on Jong Moon Yui's 2010 affidavit to the KFTC. Yui stated that his boss, Kyung Ju Kim, would mostly handle the price information exchange "around the time" of price increases, but that he "exchanged the information at the time of the 2005 price increase," under Kim's direction. Cho Decl., Ex. 14, Jong Moon Yui KFTC Statement **[**44]** [Dkt. No. 567-4 at ECF 189] at ¶ 7. While defendants were successful in getting Yui to testify in his witness examination that as of 2016, he did not have an independent recollection of the facts in his KFTC statement (and he refused to confirm the "opinions" in that statement drafted by "lawyers" that collusion occurred), at most the testimony from the witness examination raises issues of fact about Yui's role and his understanding of Kim's role in securing, collecting, and passing up the chain of authority information regarding competitors' price changes and old price support.

Plaintiffs also rely on the Confirmation Statement of Kyung Ju Kim, a former Samyang Market Survey Team department head. Cho Decl. Ex. 15, Kyung Ju Kim KFTC Confirmation Statement [Dkt. No. 567-4 at ECF 213]. In his Confirmation Statement, Kyung Ju Kim testified that the most urgent information that needed to be exchanged with the competitors was about the price, the timing of the price increase and the duration of old price support system. *Id.* at 4, 6. As with Jong Moon Yui, the parties have differing views about the import and meaning of Kyung Ju Kim's *subsequent* testimony in his Witness Examination. Plaintiffs contend **[**45]** his subsequent testimony confirmed that *non-public* **[*914]** "price period" information was exchanged over the phone or in person (and not by fax or email because of the trail). Defendants contend that his testimony confirmed that only *public* "price

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[14] In his Witness Examination, Jong Moon Yui confirmed that he asked his competitors about price information, such as about when prices might be increased and about "the general period or degree of increase," but not about specific prices. *Id.* at 10-11.

[15] Jong Moon Yui could not clearly recall about the use of an external hard drive to save information received from competitors. *Id.* at 17. He also recalled that there was a plan to buy an external hard drive to back up data in case of computer malfunctions and "I remember that the work materials for the entire department were backed up along with the data for the person in charge of market research. We didn't just back up the data only specially for market research. I remember that materials for advertisement, BM, and more were all backed up." *Id.* at 17. But, he also admitted that he does not know who controlled or managed the external hard drive. *Id.* at 50-51.

increase" information was exchanged among the competitors. Drawing appropriate inferences in plaintiffs' favor, Kim seems to admit to exchanging non-public information regarding the "price period" or old price support system in his witness examination although he does seem to deny circulating non-public "price information."

Stepping back to put this testimony (and the dueling interpretations offered by plaintiffs and defendants) in context, plaintiffs' theory is that Nongshim started the price-fixing process by spreading verbal rumors about price increases. Then its competitors' market research employees would reach out to Nongshim and figure out more about when the price increase might occur, the general parameters of the increase, and how long price support would last.[16] Kyung Joo Kim Witness Examination (Yu Decl. Ex. 37) [Dkt. No. 547-41] at 5, 6, 32; Cho Decl., Ex. 10 at OTGKR-0018660T (Ottogi price reaction memo from 2005) [Dkt. No. 567-4 at ECF **[**46]** 133]; *see also* Cho Decl., Ex. 19, Deposition Transcript of Bong Hoon Kim (Samyang's Marketing Team Leader) [Dkt. No. 567-4 at ECF 252] at 128:5-7 (noting that Samyang had information about Nongshim's December 2004 price increase "beforehand.").[17]

Defendants argue that the testimony of these low-level Samyang employees about conversations and information exchanges with their own low-level employees cannot prove an agreement to raise prices, especially when price setting is indisputably out of the control of these employees. But defendants misstate the point. These employees, according to some of the direct testimony, were tasked with gathering up price and price support system information (much of which had not yet been publicly disclosed) and passing it up the chain to those — at least at Samyang — who did have the power to set the prices.[18] **[*915]** While defendants — through witness examinations — were successful in "walking back" and calling into question some of the testimony by some of these witnesses, those efforts do not fully undermine the testimony given to the KFTC. There are issues of fact regarding whether the information exchanged between lower-level **[**47]** employees was non-public and collected and passed up to managers who did have the power to set prices.

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[16] Nongshim argues that all that plaintiffs have established is what they admit; that the companies' representatives would readily find out competitors' planned price increases before the public became aware of them but *after* they were announced to distributors (who often sold more than one company's products) by contacting those distributors. *See, e.g.*, Nongshim MSJ at 24 n.28, 25 n.30; Nongshim Reply at 10-11. But plaintiffs have at least *some* evidence that price and price support information that was not public even to distributors was exchanged amongst the conspirators.

[17] Ottogi says that Samyang's witnesses confirmed that Ottogi was not involved in this exchange of information. Ottogi Reply 11. However, Samyang's Jong Moon Yui testified that he spoke with a specific Ottogi employee "occasionally" and that they exchanged a "few emails." Yu Decl., Ex. 36 at 12, 63 (admitted exchange information with Ottogi, just not as frequently as with Nongshim and Yakult). Yui also confirmed that he exchanged price information with Ottogi, although he could not say whether it was otherwise "undisclosed" at the relevant time, and that emails from Ottogi were sent to the marketone@hanmail.com account managed by Yui. *Id.* at 16, 20-21, 70. *See also* Yu Ex. 37, Kyung Joo Kim Witness Examination at 4 ("I was responsible for mutual and close exchange of information with competitors such as Nongshim, Paldo, and Ottogi, even including most sensitive pieces of information such as competitors' price increases, new product launching, sales strategies, organizational and personnel changes, and various market trends, and so on."); *see also id.* at 5-6 (rejecting the idea that specific price increase information was exchanged, but rather more general information was exchanged).

[18] Similarly, Ottogi relies on testimony from Ottogi's own witnesses who were high enough up in the structure that they were responsible for setting prices and point out that these employees all denied exchanging confidential or otherwise sensitive information with competitors. Ottogi Reply 11. For example, Bangwan Ku testified that from what he was able to learn, he did not know about meetings or emails between Ottogi and Nongshim or Samyang employees because "[b]ased upon what I was able to find out, I haven't seen anything like that with my own eyes." Yu Decl., Ex. 3 at 138:17 — 140:8. The people he asked at Ottogi confirmed that there was "there was no contact made with any of the competition." *Id.* at 144; Ex. 4 at 19:17-20. Similarly, Young Hyun Doh testified that he was "not aware of Ottogi Korea ever having possession, during the timeframe of 2000 to 2010, of nonpublic information regarding pricing plans of your competitors." Yu Decl., Ex. 5 at 84:21 — 85:3. Dae Gyo Suh testified that he did not believe that anyone on Ottogi's marketing team would have communicated with competitors about pricing and production, in part because he instructed them not to do so. Yu Decl., Ex. 6 at 85:7 — 86:9, 90:10-14, 128:6-14. These assertions, however, appear to be undermined by documents produced by Ottogi that were prepared for the higher-up decision makers and produced by the departments of these lower-level employees that allegedly contain non-public information about Ottogi's competitors. Although some of the Ottogi witnesses who were questioned about these documents denied having seen them, there are material disputes of fact.

2. 2001-2004 Price Increases

Plaintiffs rely on the KFTC Supplement Confirmation Statement of Kyung Ju Kim, whose role was to be the point of contact with competitors for the Marketing Department, the department involved in sharing "information regarding the price increase" of Samyang and its competitors, including the "most sensitive information." Kim testified that he held that role from 2001 (upon the creation of the market survey team in 2001) until he resigned in 2006. Cho Decl., Ex. 15, Kyung Ju Kim May 2011 Supplement Confirmation Statement at 3. Kim's boss, Bong Hoon Kim testified that in May 2001, he received Nongshim price information from Kim. Cho Decl., Ex. 17, Deposition Transcript of Bong Hoon Kim at 88:17-92:15. He also testified that in late 2003, Kim passed along information about Nongshim's price increases ("he told me that prices will go up"). Bong Hoon Kim Depo. Tr. at 73:17-74:11. Also, a "draft" of Nongshim's 2003 price increases was located in the SHD as well as in the custodial files of a Nongshim employee. *Compare* Cho Decl., Ex. 20 *with* Ex. 21. Another Samyang **[**48]** employee met with a Yakult employee in 2003 and learned when the price of Yakult products would be raised and how long old price support would last. Cho Decl., Ex. 22, Deposition Transcript of Eui Ryul Kim at 17:25-18:7.

Regarding Ottogi, plaintiffs rely on a January 2004 memo, where Ottogi's Kang Hoon Lee indicated that Ottogi would raise prices in response to Nongshim's increase and mentioned information from Samyang and Yakult about when those companies might increase price — showing that the companies were communicating on the subject in advance of their price increases — and commented on Nongshim's concern about critical reaction but determination to go ahead with its price increase anyway. Cho Decl., Ex. 23.[19] Ottogi contends that the only significant line in **[*916]** this January 2004 memo shows that Ottogi was determined to raise its prices because Nongshim did but in ways that would be efficient and facilitate sales. Ottogi Reply at 5-6. Ottogi, however, does not address the alleged non-pubic information in that memo from Samyang and Yakult.

3. 2004/2005 Price Increases

Plaintiffs allege that Nongshim circulated non-public price increase information to its competitors on December 10, 2004. **[**49]** *See* Bong Hoon Kim Depo. Tr. at 128:5-7 (Samyang had Nongshim December 2004 price increases "beforehand"). Nongshim received internal approval on December 20, 2004. Cho Decl., Ex. 25. It emailed its approved prices to Samyang on December 22, 2014 and implemented the price increase in December 24, 2014. Cho Decl., Ex. 14 (Jong Moon Yui April 1, 2010 KFTC Affidavit) at ¶ 28; Cho Decl., Ex. 25.

Plaintiffs note that when Samyang did not raise its prices within a month after Nongshim did in December 2004, *i.e.*, during the typical month-long Nongshim old price support period, Nongshim contacted Samyang to complain and demanded to know the date Samyang would increase its prices. Cho Decl., Ex. 19, Deposition Transcript of Bong Hoon Kim (Samyang's Marketing Team Leader) at 121:3 — 124:12; 128:5-23; Cho Decl., Ex. 1, Dong Hee Kang Depo. Tr. at 20:20-22:16. Nongshim was forced to extend its normal one month old price support system through February and then through March (Cho Decl., Ex. 10; Cho Decl., Ex. 27 at OTGRM-0209-T), until Samyang and Ottogi "backed down" and announced price raises at the end of February.

According to Samyang employee Jong Moon Yui's April 1, 2010 KFTC Affidavit, Yakult emailed its price increase plan to Samyang on January 11, 2005 (and raised prices **[**50]** on January 15), and Ottogi emailed the date of its price increase plan to Samyang on February 25, 2005. Jong Moon Yui April 1, 2010 KFTC Affidavit at ¶ 28; Cho Decl., Ex. 30 (document from SHD authored by "Ottogi" with last modified date of February 25, 2005 "February 25 document"). Samyang delayed (until it succumbed to Nongshim's pressure) in order to expand sales in conjunction with its then lower-price and an ad campaign. *Id.*

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[19] This January 2004 memo is one of the memos that plaintiffs contend Ottogi intentionally edited and removed the information about its competitors before the memo was produced to the KFTC.

Ottogi disputes the authenticity of the February 25 document found in the SHD, arguing that Samyang could have created it based on "guesswork." Ottogi Reply 13. However, not only does the February 25 document have document-level metadata indicating that it was created by Ottogi,[20] it also shows Ottogi's proposed before and after increased factory and retail prices for a leading product. Those price increases were actually implemented thereafter. Samyang would have had to have remarkable prescient abilities to get both of those data points correct.

Ottogi also attempts to reduce the impact of the February 25 document by relying on a declaration from Bangwan Ku that sometimes Ottogi sent to customers its "near final" price lists before they were finalized. Declaration **[**51]** of Bangwan Ku [Dkt. No. 545], ¶ 8. Plaintiffs argue that this testimony contradicts Ku's deposition testimony where he answered "no" when asked whether price lists were circulated prior to final approval. Cho Decl., Ex. 32, Deposition Transcript of Bangwan Ku at 23:6-24:4. The disputes over the interpretation and significance of Ku's deposition and declaration testimony, as well as the significance and genesis of the February 25 document, show that material disputes **[*917]** of fact have been raised by plaintiffs whether the documents regarding the 2004/2005 price increase support their theory of conspiracy.

4. 2007 Price Increases

Plaintiffs argue that in 2007, Samyang used the private marketone@hanmail.net email address to circulate competitor information, and that by this time Nongshim employee Yeo Won Yoon was likewise using a private email address to email Samyang employees price information at their own private email accounts. Cho Decl., Exs. 34 (emails from NSK) & 38 (SHD screenshots).[21] Samyang's marketing team leader (Jin Woo Seo) testified that he was confident that from July 2006 through September 2008, Samyang was receiving advance information about Nongshim's price intentions before **[**52]** it was public through Yui. Cho Decl., Ex. 18, Deposition Transcript of Jin-Woo Seo at 66:2-25.

As for documentary support, plaintiffs contend that Nongshim notified its distributors of the prospect of price increases on February 23, 2007. On March 1, Nongshim set its increases in prices and emailed its competitors a document detailing shipping dates and old price support periods. Cho Decl., Ex. 38 (from SHD).[22] According to a February 28, 2007 Ottogi memo, Ottogi had already been in touch with Samyang and Yakult to inquire about their plans for raising prices. Cho Decl., Ex. 39. According to the Ottogi memo, Samyang and Yakult informed Ottogi of the dates and scope of *their* contemplated price increases. Samyang disclosed its price increase plan to Nongshim and Ottogi on April 11, 2007, and raised its prices on April 16, 2007. Cho Decl., Ex. 40 (SHD email).

Plaintiffs allege that this time Ottogi was the company that attempted to delay its price increases. Around July 18, 2007, Samyang's Jong Moon Yui had a conversation with Ottogi to discuss the market's reaction to the price increases, according to an Ottogi memo of the same date. Cho Decl., Ex. 42. Ottogi sent a draft of its price increases to its competitors in second **[**53]** half of July (Cho Decl., Ex. 43 (SHD document)) and finalized its proposed price increases on July 23, 2007. Cho Decl., Ex. 44 (an Ottogi document that lists products in the same order as the SHD document in Ex. 43). The effective date of Ottogi's increases was September 1, 2007. Cho Decl., Ex. 45.

During this timeframe, plaintiffs allege that the competitors continued to share market and sales information, including information about promotions, so that they could monitor the impact of Nongshim and then Samyang's

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[20] As discussed below, the significance of the different types of metadata associated with documents found in the SHD is a point of dispute between the experts.

[21] Defendants' computer forensic expert argues that none of the SHD emails are "authentic" emails because none of them were natively produced. *See infra*. As discussed below, given the other information provided about the creation and storage of "emails" on the SHD (through screen shots, compilations, etc.), this goes to their weight but not their admissibility.

[22] This SHD document's metadata shows that it was created by Nongshim with a "last author" who was a Yakult employee.

price increases on the market. Cho Decl., Exs. 14, 34.[23] Ottogi also shared its quarterly sales performance. Cho Decl., Exs. 47, 48 (SHD documents, with Ottogi document-level metadata).

Defendants respond with the same objections to the evidence — primarily that the documents on the SHD are not authenticated or otherwise admissible — and that at most plaintiffs show that the information exchanged could have already been **[*918]** known by distributors. *See, e.g.*, Ottogi Reply at 8. However, as above, the testimony and documents create disputes of material fact.

5. 2008 Price Increase and Competitor Meetings

According to plaintiffs, the pattern of information sharing continued into 2008. **[**54]** Nongshim sent Ottogi its before and after factory and retail price increases on February 17, 2008, and informed them of the date when those increases would be implemented. Cho Decl., Ex. 50. Nongshim raised its prices on February 20, 2008, and sent its old price support information to Samyang and Ottogi. Cho Decl., Exs. 54 (Ottogi), 55 (SHD). Samyang used this information to draft its own report for the period covering February 22 — 28th. Cho Decl., Ex. 56. It then circulated its price increase details to its competitors on February 27 and 28th (Cho Decl., Exs. 33), raised its prices on March 1, 2008, and shared its price support information on March 3, 2008. Cho Decl., Ex. 33 (SHD). Ottogi sent its information to Samyang on February 29, 2008. Cho Decl., Exs. 14 (Ottogi), 57 (SHD).[24]

In sum, considering the testimony from Samyang witnesses and their KFTC statements (which, as acknowledged above, were somewhat "walked back" in subsequent examinations) and the documents, plaintiffs have some evidence — although on close inspection, not as overwhelming as plaintiffs contend — to corroborate their "direct evidence" of conspiracy.

C. Confirmatory Economic Analysis

Finally, plaintiffs rely on **[**55]** their experts' analyses that price collusion was in play. Oppo. 36. The conclusions of those experts were discussed extensively in my Order granting the motions for class certification. The defendants, at this juncture, do not make a concerted attempt to persuade me that my conclusions on the prior Orders missed key points, facts, or contrary expert positions that should turn the summary judgment motions in their favor.

In Opposition, plaintiffs rely on their experts' conclusions that the delta between costs of goods sold and profit nearly tripled during the Conspiracy Period (when they moved in tandem in the Benchmark period).[25] Plaintiffs also point out that during the Conspiracy Period, the market shares of the conspirators remained consistent, and only changed (with Ottogi surpassing Samyang) after the conspiracy ended in 2010.[26] Their expert support strengthens (but is not the sole support of) the conclusion that plaintiffs have presented enough evidence of a conspiracy in Korea to survive summary judgment on this issue.[27]

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[23] Plaintiffs note that many of the Nongshim Korea ("NSK") documents produced from this time frame mirror ones found on the SHD. Oppo. 29.

[24] Ottogi in Reply does not discuss the February 29, 2008 date that plaintiffs contend Ottogi sent its non-public price information to Samyang, but instead argues over the date (and method) of the delivery of information from Nongshim to Ottogi. Ottogi Reply. at 8-9.

[25] As acknowledged before, defendants contend that plaintiffs' experts unreasonably removed certain overhead costs that, in their view and as discussed extensively on the class certification motion, should be included and if included result in slim to negative profit margins for defendants during the conspiracy.

[26] Ottogi attributes this increased market share and overtaking Samyang to Ottogi's improvement of taste in its Jin Ramen product and the development of a new higher priced premium product. Declaration of Bangwan Ku [Dkt. No. 545] ¶ 15.

[27] The evidence in this case is markedly unlike that in *In re Chocolate Confectionary Antitrust Litigation, 801 F.3d 383, 397 (3rd Cir. 2015)*, where the plaintiffs relied primarily on economic analysis and failed to offer testimony or documentary evidence to

[*919] D. Summary

Reviewing all of the evidence — and considering defendants' objections to much of it and their contrary characterizations of some of it — I find that **[**56]** plaintiffs have shown "sufficiently unambiguous" evidence of a conspiracy; in other words that the inference of conspiratorial behavior reasonably drawn from the evidence is *more consistent* with unlawful conduct than lawful conduct.

Nongshim attempts to dismiss the evidence as hearsay (for Samyang testimony generally), as subsequently contradicted (as a few of the Samyang witnesses in 2016 could not recall the bases for some of the statements made in their KFTC statements in 2010 and 2011), and as unreliable (for the SHD documents). It blames "lazy low-level" employees for exchanging information. These lines of defense may be persuasive to a jury, but do not get them to summary judgment on the issue of a conspiracy in the Korean market.

Ottogi's attacks on the evidence of a conspiracy are similar. But Ottogi also ignores the import of their memos, which support a reasonable inference that it had advance access to its competitors' price and old price support information and used that information in shaping its own plans. Moreover, plaintiffs have evidence that Ottogi omitted information from some of the "recreated" memos it submitted to the KFTC — which Ottogi contends it was asked to **[**57]** do by the KFTC — that supports plaintiffs' conspiracy and collusion theory. Ottogi also points to its separate testimony and documents showing that the prices it ultimately selected "differed" from its competitors. Ottogi Reply 16. That, however, was plausibly explained in plaintiffs' favor by the experts on class certification (*i.e.*, the exact prices did not and do not have to match, but the percentage moves and timing does line up with a conspiracy). Ottogi also points to evidence that it engaged in extensive analysis and strategizing before any price changes. Ku Decl. ¶ 16 & Exs. A-Q (attaching pricing memos considering market dynamics and options for price increases and old product support). That may be so, but plaintiffs have likewise shown evidence that there was analysis in *that process* of at least some allegedly non-public competitor price and price support information.

IV. IMPACT OF CONSPIRACY IN THE UNITED STATES

That plaintiffs have come forward with sufficient evidence to raise a dispute of material fact regarding the existence of a conspiracy to raise prices in a coordinated fashion in Korea does not mean plaintiffs have cleared the hurdle of defendants' motions for summary **[**58]** judgment. Defendants argue that there is insufficient evidence that the Korean conspiracy (if it existed) impacted purchasers in the United States.

Defendants are correct that the existence of a conspiracy overseas does not, by itself, evidence a conspiracy impacting the United States. There must be "some linkage" between the conduct overseas and sales (or other injury) in the United States. *See, e.g.,* *In re Elevator Antitrust Litig., 502 F.3d 47, 52 (2d Cir. 2007)* ("Allegations of anticompetitive wrongdoing in Europe-absent any evidence of linkage between such foreign conduct **[*920]** and conduct here-is merely to suggest (in defendants' words) that 'if it happened there, it could have happened here.'"); *Williamson Oil Co. v. Philip Morris USA, 346 F.3d 1287, 1317 (11th Cir. 2003)* (requiring evidence of "some palpable tie between [] overseas activities and [] pricing actions in the United States.").

As an initial matter, there is no direct evidence that the conspirators *expressly aimed* the alleged collusive conduct towards products destined for export to the United States or products manufactured in the United States.[28] Plaintiffs

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undermine the notion that in an oligopolistic market, prices will tend to move in tandem resulting in supra-competitive prices that *are not* the product of an anticompetitive agreement. Here, plaintiffs do not rely alone on evidence of "conscious parallelism" to create a reasonable inference of a conspiracy; there is some direct evidence and additional corroborating evidence (but subject to dueling interpretations of significance and reliability) sufficient for plaintiffs to survive summary judgment on an issue of a conspiracy in Korea. *Id. at 398*.

[28] Defendants rely on "public statements" from the KFTC that the alleged conspiracy did not involve products for the United States. Ottogi MSJ at 20, citing Dkt. No. 85-1 (a KFTC request for clarification to a news article); Dkt. No. 95-2 (communication

argue they have supplied the necessary linkage through indirect evidence: namely, the connections between and the control exercised by the Korean parent companies over their wholly-owned subsidiaries, Ottogi **[**59]** American and NSA. The linkage depends in part on the nature of NSK and Ottogi Korea. Plaintiffs' expert, Dr. Stephen Haggard, describes them as "chaebols," diversified family business entities that (even if publicly traded and separately organized under corporate law) are dominated by one family or extended family. *See* Declaration of Professor Stephan Haggard [Dkt. No. 567-1] ¶¶ 12-13.[29] According to Haggard, the family domination and control extends to subsidiaries and affiliated companies. *Id.* ¶ 17. Subsidiaries of Korean chaebols generally are run as "integrated business units" to service the interests of the founding families and the flagship organization. *Id.* ¶¶ 36, 47.

Standing alone, however, opinions regarding the integrated operations of chaebols generally, including overlap between and "sharing" of executives between parent and subsidiary corporations, would be insufficient to demonstrate linkage in *this* case. Haggard goes slightly further and relies on information about the specific operations of NSK and Ottogi Korea and their American subsidiaries NSA and Ottogi America — including organizational charts, lists of employees and executives, and other documents produced in this **[**60]** case — as bases for his opinions about integrated control over subsidiaries exercised by NSK and Ottogi Korea. Haggard Decl. ¶¶ 38-39, 49-62 (Nongshim), ¶¶ 63-68 (Ottogi).[30]

In addition to this overarching, somewhat generalized theory of chaebols operation from Haggard, plaintiffs rely on evidence showing that directors and upper-level management were shared between the Korean parents and American subsidiaries. Plaintiffs also offer evidence showing that Ottogi America and NSA sold products produced in Korea by the parent corporations engaged in the conspiracy and that the pricing of those export products were based on Korean domestic prices. Even for NSA products produced in the U.S., plaintiffs claim that documents show that their pricing was also controlled by NSK and impacted by the conspiracy. Defendants counter that plaintiffs' generalizations and a few mischaracterized documents cannot carry plaintiffs' weight to **[*921]** show a dispute of material fact that the Korean conspiracy had any impact on the pricing decisions made by NSA and Ottogi America.[31]

A. Ottogi

It is undisputed that Ottogi's products were manufactured by Ottogi Ramen and exported to the United States by Ottogi Korea, initially **[**61]** through sales to DPPs and Korea-based exporters and then after Ottogi America was formed in 2005, through sales to Ottogi America.

Ottogi argues that plaintiffs' alleged evidence of impact in the United States is insufficient - at least for its products - because:

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from KFTC to law firm clarifying that "the export item (ramen) was not the target of price-fixing"). However, these statements by the KFTC do not bind my determination or resolution of that issue.

[29] As discussed below, defendants object to and move to exclude the Declaration and testimony of Haggard.

[30] As one specific example, Haggard points out that Jun (or Joon) Park simultaneously acted as Chairman of the Board and President of NSA and as NSK's overseas sales team. Haggard Decl. ¶ 52.

[31] Following the hearing on these motions, Nongshim submitted a request to file an "appendix" of supplemental citations regarding lack of causation and impact in the United States. Dkt. No. 599. That appendix did not simply include supplemental citations, but also excerpts of expert testimony and Nongshim's characterization of the competing testimony. *Id.* Not surprisingly, plaintiffs then filed their response to Nongshim and their own supplemental memorandum re causation, supported by a supplemental declaration. Dkt. Nos. 602, 603. Ottogi and Nongshim then filed briefs opposing plaintiffs' filings, but also addressing (really readdressing) the evidence and arguments made by plaintiffs. Dkt. Nos. 605, 606. The parties' attempts to submit further evidence and briefing on these issues - after having been provided excess pages to make their arguments initially - contravenes this District's Local Rules. Nonetheless, because all parties have now had the opportunity to respond to each other, the motions to supplement are GRANTED and I will consider the evidence and arguments raised therein. Dkt. Nos. 599, 602.

• Ottogi manufactured different products for the U. S. market. Prior to creation of Ottogi American in 2005, the U.S. products were sold to U.S.-based DPPs or exporters in Korea (and both those entities were responsible for importing the product to the U.S.) at the "export price." The export price was not increased, and was below the Korean-domestic price, through 2003.

As to the differences in the domestic and export products, plaintiffs argue that there is no evidence that minor differences in packing or ingredients - which are the only differences - had any impact on pricing. Plaintiffs note that Ottogi conceded there were no differences in the manufacturing process, although there could be differences in ingredients. Cho Decl., Ex. 59, Deposition Transcript of Kyu Tae Kim [Dkt. No. 567-4 at ECF 472] at 28:23-29:24. As to the pre-2003 period, plaintiffs do not dispute from that 1999 - 2003, Ottogi's Overseas Business division **[**62]** did not raise its export price, and the export price remained much lower than its domestic price. Declaration of Heung Duck Seo [Dkt. No. 548-3] ¶ 4. However, as the class period does not start until 2003, this fact is of limited relevance (other than a piece of evidence Ottogi can use to argue that the Korean prices didn't impact the U.S. prices).[32]

The significant issue here is the determination of the "export price" (the price Ottogi Korea set for products destined for the United States); how it was determined and who determined it. If the export price was inflated due to the conspiracy, then products with an inflated price were sent into the U.S. market and sold by Ottogi America. Ottogi contends that extensive evidence shows that different entities were **[*922]** involved in setting their own prices, including:

• Ottogi Ramen (which manufactured the products and sold them to the separate-but-related Ottogi Korea entity at the "procurement price"); Ottogi Korea Overseas Business Division (which set the export price);[33] the Ottogi Korea Product Planning Team, Marketing Team 3, and Sales Planning Teams (which set domestic prices, *see* Bangwan Ku Decl. [Dkt. No. 545] ¶ 6); and then Ottogi America **[**63]** (formed in 2005). Yu Decl., Appx A [Dkt. No. 547 at ECF pg. 8].

As an initial matter, that Ottogi America (from 2005 on) or the exporters (who prior to the formation of Ottogi America imported the products into the U.S.) may have "discounted" their prices to attempt to gain a stronger foothold in the States or in discrete regions and therefore charged different end-prices to each DPP depending on base price, shipping distance, and discounts, at most provides an argument as to the amount of damage suffered by plaintiffs. It does not mean that the conspiracy did not reach or impact consumers in the United States.

Ottogi relies heavily on the testimony of Bangwan Ku[34] that the Overseas Business Division set the export prices and argues there was no overlap between the narrow-category of individuals who were "responsible" for setting the different divisions' prices. Yu Decl., Appx A. Plaintiffs, in response, point out that Ottogi America's board of directors and upper-level management were "filled" with Ottogi Korea board members and high-level executives. Haggard Decl., ¶¶ 67, 68 (identifying family members of Ottogi Korea's founder who held positions at Ottogi America and other individuals **[**64]** who held concurrent Board or employment positions at Ottogi Korea and Ottogi America from February 2008 through March 2011). They also emphasize that many Ottogi Korea employees were "dispatched" to oversee the day-to-day operations for Ottogi America. Oppo. at 38 n.54. According to plaintiffs and

[32] Plaintiffs will, presumably, argue that Ottogi intentionally kept the U.S. price low during this period to help it "break into" the U.S. market. Plaintiffs also rely on their expert, Mangum, who ascribed the lag in part to the initial focus of at least Nongshim on the Korean conspiracy which, following that success, was then exported to the U.S. and other markets. Mangum Decl. [Dkt. No. 363-6] ¶ 98.

[33] Ottogi's witnesses testified that the export price was determined based on procurement price only plus export factors (margin, exchange rate) and was not set with respect to the domestic price. Yu Decl., Ex. 10, Deposition Tr. Min Hwan Choi [Dkt. No. 547-12] 10:9 - 11:17:17.

[34] Bangwan Ku is currently Ottogi's Deputy Senior Sales Manager for Ottogi Korea. From 2000 through 2015, he was an associate in the Sales Planning Office, which set prices for products produced for the Korean domestic market. Bangwan Ku Decl. ¶¶ 1, 2.

their expert (Haggard), this allowed Ottogi Korea to oversee and participate in Ottogi America's operations with the ultimate goal of protecting the profits and carrying out the aims of the parent corporation.

As additional support, plaintiffs point to documents evidencing that export prices and Ottogi America's sales prices were influenced by Korean domestic prices. That evidence to show that Ottogi Korea was exercising control over the export prices includes a 2002 price approval document, circulated to both the Korean domestic division and the "Overseas Sales — Export Office" along with deposition testimony from Bangwan Ku that these sorts of price adjustment notifications were sent to departments who needed to know. Cho Decl. Ex. 81 (price approval form), 82 (Bangwan Ku Depo. Tr. [Dkt. No. 566-24] at 117:15-23). Plaintiffs also rely on evidence from 2008 that after Ottogi Korea increased factory and retail prices, the **[**65]** head of the Overseas Sales Team emailed that document to the Overseas business department to notify them that price increases for exports "would be" 10%. Cho **[*923]** Decl., Exs. 85-86; *see also* Supp. Cho Decl. [Dkt. No. 603-5], Ex. 8 ("Ottogi American Export Price Computation" from November 2007).[35]

Weighed together, plaintiffs have some (albeit slim) evidence that the Ottogi America prices were impacted by the prices set by Ottogi Korea that were inflated because of the conspiracy. The domestic-Korean and U.S. products were *produced* in Korea by a related-company, Ottogi Ramen, purchased by Ottogi Korea, and then sold by Ottogi Korea to Ottogi America (after Ottogi America's creation). Construing the evidence in plaintiffs' favor, the linkage between the Korean market and the products produced in Korea and sold in the U.S. market has been established.

B. NSA Arguments

Nongshim argues that partial summary judgment must be entered for NSA because there is no evidence that NSA was part of the conspiracy.[36] Relatedly, Nongshim also moves for partial summary judgment seeking a "bar" order under *Rule 56(g)* carving out the U.S.-produced products from the scope of the case.

Nongshim argues that it declarants uniformly **[**66]** testified that NSA's pricing decisions for products sold in the U.S. — both those produced in the U.S. and those imported from Korea — were "wholly independent" of NSK. Declaration of Young Lee [Dkt. No. 540-6], ¶ 6; Declaration of Won Joon Lee [Dkt. No. 541-30] ¶ 9. It is undisputed that prior to the opening of NSA's Rancho Cucamonga factory in 2005, NSA's products sold in the U.S. were manufactured by and purchased from NSK in Korea. After the NSA factory started domestic U.S. production in 2005, the majority of product sold by NSA was domestically produced by NSA. Over the class period, 65% of the relevant product was manufactured in the U.S. Y. Lee Decl., ¶ 5.

1. NSK-Produced Products

As to the NSK-produced products sold by NSA, Nongshim admits that the products were priced in part by reference to what NSK charged NSA for them (plus freight, duty, customs and other import-related costs as well as profit margin, and depended in part on the exchange rate). Young Lee Decl. ¶ 8; Declaration of Won Joon Lee [Dkt. No. 541-30] ¶ 7. However, Nongshim contends, because the prices were ultimately the result of negotiations between NSA and NSK (Y. Lee Decl. ¶ 8), there is no evidence the alleged-conspiracy **[**67]** led to higher prices for the

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[35] Plaintiffs also rely on documents showing that after Ottogi Korea decreased its prices in 2010 based on directions from the KFTC, the Overseas Sales Team informed Ottogi America of that, and Ottogi America reduced its prices accordingly just nine days later. Cho Decl., Exs. 84, 87, 88.

[36] Plaintiffs identify one instance of an NSK employee emailing a "dispatched" NSK employee on assignment at NSA an NSK "weekly report," detailing information about Samyang, Ottogi, and Yakult's market share. Cho Decl., Ex. 49 (NSK emails). Plaintiffs also argue that because NSA destroyed their copy of the Factbook (that had been available from NSA's website but was taken down after the inception of the litigation), there is an inference that other documents showing NSA's role in the conspiracy were likewise destroyed. Oppo. 51. This "evidence" is mere speculation and not sufficient to show that NSA played a direct role in the conspiracy emanating from Korea.

products NSA sold. NSK's Won Joon Lee likewise states the NSK employees involved in the negotiations with NSA operated "entirely separately" from the NSK employees in the "different unit" of NSK who set the Korean-domestic price. Won Joon Lee Decl. **[*924]** ¶ 7. And NSK had no role in determining the ultimate price NSA charged DPPs. *Id.*

As with Ottogi, that NSA had some flexibility to negotiate its purchase price from related-NSK and then could discount and set its *own* prices for DPPs does not mean that the price NSA paid for *imported* NSK products were not inflated by the conspiracy or that the conspiracy did not impact the prices ultimately charged by NSA. Plaintiffs have significant evidence that the export price of NSK-produced products was directly set in conjunction with Korean "factory price" levels. Cho Decl. [Dkt. No. 566, 567], Ex. 60 (Sales System Setup for US subsidiary); Ex. 65 (as maintained by Jae Chan Lee, a manager of American exports, Ex. 66); Ex. 72 (import price set off of factory price and selling price set off of domestic-Korea price); Ex. 67 (describing formula in April 2007); Ex. 68 (2003 export price increase); Ex. 73 (2008 price increase); **[**68]** *see also* Supp. Cho Decl. [Dkt. No. 603-5], Exs. 5-6.[37] There are also emails between NSK and NSA indicating that prices NSA charged in the United States for at least Korean-export products should be increased *in light of* the increased prices in Korea. *Id.*, Exs. 72, 75.[38]

There is sufficient, albeit disputed, evidence that for the NSK-produced products, the alleged-conspiracy-inflated prices in Korea *impacted* the export-priced products sold by NSA. This direct evidence, combined with the evidence of shared directors and employees and Haggard's opinions about control by NSK over NSA, raises at least a question of fact as to NSA's participation in and liability for the alleged conspiracy. In other words, NSA may have not only paid conspiracy-inflated prices for the NSK-produced products, but also allowed input if not control by NSK for the prices it charged on those products, knowingly furthering the goals of the conspiracy.[39]

2. U.S.-Produced Products and *Rule 56(g)* Order

In the alternative, NSK and NSA seek a *Rule 56(g)* partial judgment excluding **[*925]** from plaintiffs' case any products produced and sold by NSA in the United States. Nongshim MSJ at 18.[40] As to the U.S.-produced products, NSA's Young Lee declares that the prices were set **[**69]** by considering NSA's costs plus sales/administrative expenses plus a gross profit, and without any role from NSK. Y. Lee Decl. ¶¶ 6, 11.

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[37] Nongshim argues that these documents discuss export pricing to areas *other* than the United States, because products for the United States had to be "localized" to comply, for example, with FDA requirements. *See, e.g.*, Nongshim Reply [Dkt. No. 607-1]. But that is not clear from the face of the documents or the limited testimony regarding the documents and simply demonstrates there are disputes of material fact.

[38] Plaintiffs rely on two "Approval Request" forms and attached documents from 2003 and 2008 which they contend contradict Young Lee's position that NSA independently set prices without any input from NSK. Plaintiffs point out that those requests, proposing changes to "transfer" pricing between NSK and NSA, include attachments regarding NSK export and factory prices, as well as NSA's market supply prices. Cho Decl. Exs. 69, 73. The forms required sign offs by both NSA and NSK executives. One of the signatories, Joon Park, was the director and President of NSA at the same time he was a director and President of the International Business Division of NSK. Cho Decl., Ex. 95; Pls. Oppo. 50. The signoffs, according to plaintiffs, further contradict Lee's statements, and add support to Haggard's conclusions that NSA did not operate independently of NSK given the shared control. Haggard Decl. ¶¶ 16-21, 72.

[39] Plaintiffs contend that even if I grant defendants' motions as to NSA and Ottogi America based on insufficient evidence of NSA and Ottogi America's participation in the conspiracy, the DPPs would still have standing to assert their Sherman Act damages claims — presumably against NSK and Ottogi Korea — because of the "control exception." *See, e.g., Costco Wholesale Corp. v. AU Optronics Corp., 2015 U.S. Dist. LEXIS 180580, 2015 WL 11529919, at *1 (W.D. Wash., June 4, 2015)* (standing to seek damages for purchases whose prices were inflated by conspiracy, even if not purchased from a conspirator as long as the seller was "controlled" by a conspirator). Given that I have found a question of fact as to the subsidiaries' participation in the conspiracy, I need not address it now.

[40] Nongshim argues the exact amount of damages at issue does not need to be resolved; those sales can simply be excluded from the case. Nongshim MSJ at 18 n.25.

As to overlap between NSA and NSK — to rebut plaintiffs' argument that NSK exercised some degree of control over its wholly-owned subsidiary NSA — Young Lee declares that at all times during the class period and since, NSA "was a wholly independently operated and managed entity: there is little overlap between the employees, managers, and offices of NSA and NSK," and there was no overlapping personnel between NSK and NSA "in charge of pricing decisions." Young Lee Decl. ¶¶ 12-13. Won Joon Lee declares that there was no overlap between personnel in NSK's domestic pricing and export pricing decision-makers. Won Joon Lee Decl. ¶ 8.

In response, plaintiffs rely heavily again on evidence that while the discrete individuals in charge "of pricing" at NSK and NSA did not overlap, there was concurrent overlap between directors and high-level managers of both organizations during the relevant timeframe and high—level employees worked for one company and then the other (in other words, were "seconded" to NSA from NSK) during the relevant timeframe. Haggard Decl. **[**70]** ¶¶ 56-60. The overlap of these directors and employees, according to plaintiffs, is evidence of the "control" NSK asserted over the prices that NSA charged, even for its U.S.-produced products. Haggard Decl. ¶¶ 53-55.

To show that NSK's domestic prices — allegedly inflated as a result of the conspiracy — played a role in the price of NSA U.S.-produced products, plaintiffs rely on an email exchange between Young Lee ("USA Resident Nongshim Co. Officer") and Krith Roth (at NSA), to the effect that because prices had been increased in Korea in March 2007, the prices at NSA would have to be increased "as soon as possible," Cho Decl., Ex. 74,. That document does not address whether the price increase would be for imported (Korean-produced) or U.S.-produced products. Plaintiffs also identify an October 2010 "Overseas Business Strategy Meeting," where NSA planned to "increase the prices of all imported products and the prices of all the products that are produced in America." *Id.*, Ex. 76. But that document does not indicate on what basis any of the prices are being increased (*e.g.*, because of direction from NSK or increase in Korean-domestic prices) and in 2010, as all parties agree, the conspiracy **[**71]** ended with a *decrease* in prices.

Plaintiffs then rely on one undated NSA price list allegedly showing that the prices NSA charged for U.S.-produced products were identical to the prices NSK charged for equivalent products in Korea. Cho Decl., Ex. 97. They also cite to deposition testimony from the director of NSA sales that products sold by NSA that were the same type, even if not the same flavor, and were priced similarly because they were the "same product" despite one being produced in the U.S. and the other being produced in Korea. Cho Decl., Ex. 9, Deposition Tr. Kim at 66:23-67:25. The Kim testimony is not clear or persuasive on the point of matched pricing between products imported from Korea and the U.S., but plaintiffs expert Mangum bolsters that point by testifying that it "made sense" for NSA to price U.S. and Korean imported product similarly, to keep the same "value **[*926]** proposition" between the products. Mangum Decl. [Dkt. No. 363-6] ¶ 131.[41] Finally, plaintiffs rely on evidence that the 2007 and 2008 price increases implemented by NSK for Korean domestic products were, mere months later, followed by price increases by NSA for *both* imported and U.S.-produced products. Mangum **[**72]** Decl. ¶ 47.[42]

Unlike the documentary evidence regarding NSK-produced product, the documentary evidence regarding the impact of the Korean-based conspiracy on U.S.-produced product is extremely thin.[43] Plaintiffs attempt to shore it

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[41] *See* Mangum Decl. ¶ 131 ("That is, if NSK increases the price of cup Shin Ramyun, but NSA does not similarly begin selling bag Shin Ramyun at higher prices, the relative value proposition between these two products is muddled, which weakens the company's ability to price discriminate and attract different types of purchasers.").

[42] Plaintiffs also rely on an email from NSK to NSA that in light of "domestic" price increases there will increases in export products. Pls. Oppo. at 53; Cho Decl., Ex. 75. Yet Ex. 75 is characterized first by plaintiffs as a document explaining that Korean-export prices will be set off of "'domestic' (*i.e.*, Korean)" increased prices. Then plaintiffs attempt to redefine "domestic" as used in that document to mean U.S. manufactured product. *Compare* Pls. Oppo. at 40 *with id.* at 53. Plaintiffs cannot rely on the same document for two different propositions.

[43] Perhaps intentionally, plaintiffs do not separately identify the documentary evidence supporting their argument that NSA set the prices for U.S.-produced products with reference to NSK prices or under NSK control, and instead cite evidence generally for that proposition *and* the separate proposition that NSK influenced the price of the products NSA sold that were exported from Korea.

up with testimony from Mangum and, almost as an aside, argue that NSA employees gave "false" information to the U.S. market about the cause of the NSA price increases (blaming it on raw material costs) when plaintiffs' experts have shown (according to plaintiffs and based on disputes of fact) that rising costs do not adequately account for the price increases. Cho Decl., Ex. 8 Deposition Tr. of Krith Roth [Dkt. No. 566-2] 29:8-30:12 (stating that he provides customers with articles from the internet discussing cost increase for raw material); Ex. 9, Deposition Tr. of Sunny Kim [Dkt. No. 566-3], 45:23-46:21 (Kim would explain to customers generally that price increases were due to raw material cost increases). But, as with the documents, it is unclear how far this testimony extends and whether it was given to justify cost increases in imported (from Korea) products *as well as* U.S.-produced products.

In sum, other than the very weak documentary **[**73]** showing, the evidence regarding whether prices for the U.S.-produced products were impacted by the Korean-based conspiracy is the somewhat generalized chaebol argument as supported by the opinions of Haggard that NSK exercised control over the pricing decisions of NSA generally. There is also the testimony from Mangum that keeping prices of similar products the same (despite the fact one was imported from Korea and one was manufactured in the United States) makes sense and identifying price increases that were implemented by NSA for both the imported and U.S.-produced product.

Plaintiffs also seek to avoid the fact that the U.S.-produced product evidence is not fulsome by arguing that because NSK's conduct artificially raised prices across all markets for its products (including the United States), damages can still be recovered for those sales.[44] Plaintiffs rely on *In **[*927]** re Cathode Ray Tube (CRT) Antitrust Litig., 2016 U.S. Dist. LEXIS 189474, 2016 WL 6246736, at *1 (N.D. Cal., Oct. 26, 2016)*. There, the plaintiffs alleged a conspiracy to fix prices on "smaller-sized" cathode ray tubes but sought damages for products containing "larger-sized" CRTs, arguing that the conspiracy to fix the smaller CRTs distorted the price of the larger CRTs as well. This "price ladder" theory of recovery was allowed to proceed. Plaintiffs **[**74]** argue here that even if there is not sufficient evidence that NSA itself participated in the conspiracy, the U.S.-produced products should remain because their prices were matched off of and impacted by the Korean-price conspiracy, as shown by their experts' hedonic regression analyses.

C. Economic Analyses

Defendants argue that plaintiffs' experts' analyses showing that prices in the United States correlated with the increase prices imposed in Korea (allegedly inflated due to the conspiracy) is not sufficient in and of itself to show that the alleged conspiracy had an impact in the United States. Nongshim MSJ 34; Ottogi MSJ 22-23. Defendants point out that in the Ninth Circuit (in considering the *opposite* situation; whether a U.S.-based conspiracy could provide standing for claims arising overseas), the court cut out foreign injuries from the scope of a case under the FTAIA, because of insufficient evidence that "higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad. Other actors or forces may have affected the foreign prices." *In re Dynamic Random Access Memory Antitrust Litig. v. Micron Technology, Inc., 546 F.3d 981, 988 (9th Cir. 2008)*.

Defendants contend that prices in the United States, even if correlated, could have been caused by the increased costs **[**75]** of raw materials. I rejected the same argument in granting the motions for class certification, finding that the plaintiffs' experts had controlled for raw material price fluctuations in conducting their regression and correlation analyses. Dkt. No. 501 at 5. Defendants again argue that the correlation analyses by plaintiffs' experts were deficient. Nongshim MSJ at 34; Ottogi MSJ at 23. I found the admittedly limited correlation analyses performed by plaintiffs' experts generally sufficient at class certification. Dkt. No. 501 at 22-24.

Defendants also argue that plaintiffs' experts correlation analyses are faulty concerning the issue of impact in the United States because: (1) they fail to examine whether NSA and Ottogi America's prices were raised "in unison" to

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[44] Plaintiffs, somewhat relatedly, oppose any grant of judgment as to NSA because NSA did not own the U.S. factory until 2009. They assert the factory was initially owned by a separate NSK subsidiary (Nongshim Foods, Inc.) and NSA didn't own any portion of the factory until Nongshim Foods and NSA merged in 2009. Cho Decl., Ex. 100, Deposition Transcript of Young Hoon Lee at 47:20-48:13. It is unclear how this cuts in favor or against plaintiffs. However, NSA remains in this case given the evidence, discussed above, that NSA played some role in passing on NSK-influenced conspiracy-inflated prices.

show an active conspiracy in the U.S.; and (2) in order to avoid data that would contradict their theories, plaintiffs' experts failed to include all of the necessary transactional data in their analyses by excluding Samyang's data that (when considered by defendants' expert Cox) confirmed there was no correlation between the price movements in the U.S. Defendants' Supplemental Citations [Dkt. No. 599].

Plaintiffs' experts say that they did not use the Samyang **[**76]** sales data in their regression models or in their confirmatory correlation analyses (despite the fact that Samyang was an alleged coconspirator) because of: (1) incomplete Samyang sales data from the benchmark period; (2) the "family relationship" between Samyang **[*928]** Korea and Samyang USA and the "potential implications for pricing"; (3) the existence of a "most-favored nation" clause in the exclusive agreement between Samyang Korea and Samyang USA; and (4) highly irregular and unexplained price series found in the Samyang sales data. Reply Declaration of Mangum [Dkt. No. 466-8] ¶ 150; *see also* Rebuttal Declaration of Daniel A. Ackerberg [Dkt. No. 473-2] at 25.[45] As plaintiffs point out, while Cox indicates that inclusion of the Samyang data shows no "correlation" as to price changes in the U.S., there is no evidence that Cox separately analyzed the Samyang data as part of his attempts to undermine plaintiffs' experts' regression analyses, which is what the plaintiffs' rely on to show impact of the conspiracy on prices in the United States.

Plaintiffs do not dispute that they did not conduct any correlation between NSA and Ottogi America's prices.[46] Instead, they argue that their experts' hedonic **[**77]** regression analyses (discussed extensively on class certification) are more robust and reliable than a correlation analysis of defendants' U.S. prices. *See* Declaration of Daniel A. Ackerberg [Dkt. No. 362-4] at 27[47]; Declaration of Russell W. Mangum [Dkt. No. 363-6] ¶ 18.[48]

Perhaps if plaintiffs had no affirmative evidence of a conspiracy (which as discussed above, there is), if they had no affirmative evidence that the prices of the products exported to the U.S. were influenced or based off of the Korean prices (which as discussed above, there is), if there was no evidence of control or input from Korea in the activities of the American subsidiaries (which as discussed above, there is), and if there was no evidence from plaintiffs' experts' regression models showing artificially high prices in the U.S. (which there is, even though the assumptions in those models provide ripe grounds for dispute), then the failure of plaintiffs' experts to conduct a correlation analysis between prices charged by NSA and Ottogi America might be more problematic. On this record, and for purposes of summary judgment, it is not.

D. Standing/Proximate Causation

Related to the argument that plaintiffs have failed **[**78]** to show impact of the alleged conspiracy in the U.S., Nongshim relies on the established proposition that an antitrust plaintiff must show her or his alleged injuries were proximately caused by defendants' conduct. Nongshim MSJ at 31-34. Nongshim cites the Ninth Circuit's decision in *In re DRAM* where (as noted above) the court concluded that it could **[*929]** not stretch liability for a price fixing conspiracy in the United States to injuries occurring outside the United States under the FTAIA. *In re DRAM, 546 F.3d at 988*. In reaching that conclusion, the court applied well-settled requirements for standing under antitrust

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[45] In their Response to Plaintiffs' Sur-Reply, the Nongshim defendants argue that there was sufficient benchmark Samyang data for plaintiffs' experts to consider and cite a particular spreadsheet that was reviewed by Cox. Dkt. No. 607-1 at 10. However, there is no explanation in Cox's declaration or in Appendix C itself to substantiate that argument.

[46] Plaintiffs point out only that their experts found correlations between the Korean defendants' domestic prices and their subsidiaries' U.S. prices.

[47] "[T]here is statistical evidence of the collusive agreement resulting in higher prices in each of the six subperiods, controlling for demand and cost factors that might be changing over time. In summary, econometric tests of price fixing conduct using Defendants' sales data indicate that the collusive agreement caused higher prices across all (or most) product groups." *Id.*

[48] At class certification I recognized that the sufficiency of the experts' measures to control for raw material cost increases and the plaintiffs' experts' assumptions about the delays (and time periods used to show correlation) were contested by defendants' experts. Those disputes, however, should be presented to the jury and resolved at trial.

precedent and concluded that foreign plaintiffs had not shown that higher U.S. prices had proximately caused their injuries abroad. *Id.* The DRAM court concluded that evidence of the U.S.-based conspiracy plus evidence of price correlation between the markets at issue was insufficient to establish proximate cause. *Id. at 989*.

As further support for their argument that causation has not been shown here, Nongshim notes that in *Pierson v. Walmart.com USA LLC (In re: Online DVD Rental Antitrust Litig.), No. M 09-2029 PJH), 2011 U.S. Dist. LEXIS 49090, 2011 WL 1629663, at *1 (N.D. Cal., Apr. 29, 2011)*, the Hon. Phyllis Hamilton concluded that plaintiffs could not establish separate antitrust standing against non-conspirator Blockbuster even though Blockbuster **[**79]** and Netflix's movie rentals were in a closely connected market and Blockbuster matched Netflix's pricing following Netflix's alleged antitrust agreement with Walmart. Nongshim seeks to export that conclusion to the different posture here: arguing that even though NSK and NSA's markets are "linked," plaintiffs cannot rely on the fact that NSA matched its prices with any conspiracy-driven NSK prices to have standing against NSA. Under Nongshim's argument, simply because NSA linked its prices to NSK to some degree, without separate proof that NSA's prices were actually constrained by NSK (as opposed to simply voluntarily followed), NSA cannot be liable. Nongshim Mot. 33. However, as noted above with respect to products exported from Korea, plaintiffs have significant evidence showing direct impact and linkage between the pricing of domestic Korean product and Korean-produced exported product.[49] That there may have been minor differences (according to plaintiffs) between the products destined for the U.S. market and destined elsewhere does not, on this record, make the products so fundamentally different that the differences undermine plaintiffs' ability to sue over alleged impacts suffered **[**80]** in the U.S. market.

Nongshim's final argument is that the weaknesses in plaintiffs' theory of why NSA sales should be included are shown by plaintiffs' limitation of the class to sales from 2003 onward. Plaintiffs allege the Korean conspiracy, which NSK allegedly directed and intended to be carried out worldwide, started in 2001. Plaintiffs admit (as they must) that NSA did not raise its prices from 2001 through part of 2003, showing (according to defendants) the logical weakness in plaintiffs "all price increases in Korea were mandated and followed by price increases in the United States" theory. But plaintiffs' explanations for this — obviously disputed by defendants — are that NSA and Ottogi America were trying gain bigger footholds in the U.S. (and therefore kept U.S. prices lower for a period of time) and that there was lag in implementation of the conspiracy from Korea to the U.S. *See, e.g.*, Oppo. at 43.

The resolution of these issues rests on disputes of material fact. For example, a jury may well find it significant that U.S. prices did not increase prior to 2003 to **[*930]** discount plaintiffs' theories that a conspiracy existed and that the conspiracy impacted the U.S. market. Or it might not. **[**81]** These disputes preclude summary judgment.

V. STATE LAW CLAIMS

Defendants argue that because the Sherman Act claims fail, so too do the state law antitrust and unfair competition claims. However, as noted above, the Sherman Act claims survive summary judgment.

VI. DEFENDANTS' MOTION TO EXCLUDE HAGGARD DECLARATION

Separately, defendants move to exclude the declaration of Professor Stephan Haggard. Dkt. No. 581; Dkt. No. 584-2. Professor Haggard has been retained by plaintiffs to offer "testimony on the corporate structure and organizational features of Korean business groups known as *chaebol*, the corporate governance setting in which they operate, and to provide expert analysis and opinions with respect to whether and to what extent these factors

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[49] As plaintiffs note, this case is closer to (albeit still significantly different from) the one presented in *In re Cathode Ray Tube (CRT) Antitrust Litig., 2016 U.S. Dist. LEXIS 189474, 2016 WL 6246736, at *1 (N.D. Cal., Oct. 26, 2016)*. There, the market linkage was based on allegations and corroborating evidence that a conspiracy to fix prices on "smaller-sized" cathode ray tubes impacted the prices charged by conspirators on "larger-sized" CRTs. This "price ladder" theory of recovery was allowed to proceed.

are germane to understanding the organization and operations of the Ottogi and Nongshim groups in particular." Declaration of Stephan Haggard [Dkt. No. 567-1] ¶ 8 (emphasis in original).

Defendants argue that Haggard's testimony: (1) lacks critical foundation to extrapolate academic literature about Korean chaebols to U.S. pricing decisions by Nongshim America and Ottogi America; (2) relies on irrelevant allegations that have nothing to do with how **[**82]** prices were set by these companies in the U.S.; and (3) crosses the line into impermissible legal opinion on Korean law and the strength of the parties' arguments. Plaintiffs oppose. Dkt. No. 593.

A. Legal Standard

Federal Rule of Evidence 702 allows a qualified expert to testify "in the form of an opinion or otherwise" where:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.
>
> *Fed. R. Evid. 702*.

Expert testimony is admissible under *Rule 702* if it is both relevant and reliable. *See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. "[R]elevance means that the evidence will assist the trier of fact to understand or determine a fact in issue." *Cooper v. Brown, 510 F.3d 870, 942 (9th Cir. 2007)*; *see also Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010)* ("The requirement that the opinion testimony assist the trier of fact goes primarily to relevance.") (internal quotation marks omitted).

Under the reliability requirement, the expert testimony must "ha[ve] a reliable basis in the knowledge and experience of the relevant discipline." *Primiano, 598 F.3d at 565*. To ensure reliability, the court must "assess the [expert's] **[**83]** reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance." *Id. at 564*. These factors are "helpful, not definitive," and a court has discretion to decide how to test reliability "based on the particular circumstances of the particular case." *Id.* (internal quotation marks **[*931]** and footnotes omitted). "When evaluating specialized or technical expert opinion testimony, the relevant reliability concerns may focus upon personal knowledge or experience." *United States v. Sandoval-Mendoza, 472 F.3d 645, 655 (9th Cir. 2006)*.

The inquiry into the admissibility of expert testimony is "a flexible one" where "[s]haky but admissible evidence is to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not exclusion." *Primiano, 598 F.3d at 564*. "When the methodology is sound, and the evidence relied upon sufficiently related to the case at hand, disputes about the degree of relevance or accuracy (above this minimum threshold) may go to the testimony's weight, but not its admissibility." *i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 852 (Fed. Cir. 2010)*. The burden is on the proponent of the expert testimony to show, by a preponderance of the evidence, that the admissibility requirements are satisfied. *Lust by & Through Lust v. Merrell Dow Pharms., 89 F.3d 594, 598 (9th Cir. 1996)*; *see also Fed. R. Evid. 702* Advisory Cttee. Notes.

B. Reliability and [**84] Methodology

Defendants' first challenge to Haggard's testimony — regarding how pricing decisions were made by Nongshim American and Ottogi America and how those decisions were controlled and/or influenced by the parent Korean corporations — is that Haggard's methodology is unreliable. That is because (according to defendants) Haggard: (1) reviewed only documents on subjects selected by him (to support his theory) and found by his Korean-speaking assistant; (2) ignored deposition testimony that was contradictory to his opinions; (3) relied on several incorrect assumptions and guesses (about the setting and impact of "export prices" and the timeframes when the Korean parent and domestic subsidiaries had relatives employed); and (4) relied on counter-factual and *ipse dixit* assumptions (*e.g.*, assumed subsidiaries are "controlled" by the parent corporations).

However, as disclosed in his declaration, Haggard based his opinions on his extensive personal study of Korean chaebols and academic and business publications regarding the same as well as numerous documents produced in this case. Dkt. No. 567-1 ECF Pg. 49-51. That Haggard did not address (or review) deposition testimony where defendants' **[**85]** employees testified to matters that purportedly undermine some of his opinions or assumptions does not make his testimony excludable. Those are grounds for cross-examination.

As a separate reason to exclude Haggard's testimony, defendants contend that it is based on nothing more than impermissible national-origin based stereotypes; *i.e.*, that Korean employees and executives follow "deeply rooted" notions of hierarchy and have a culture of "obeisance to elders," implying that lower-level employees would lie under oath to protect the company. Defendants rely on *Jinro America Inc. v. Secure Investments, Inc., 266 F.3d 993 (9th Cir. 2001)*, where the Ninth Circuit concluded that the district court abused its discretion by admitting expert testimony "about Korean law and the business practices of Korean companies—particularly their alleged propensity to engage in fraudulent activity, including the avoidance of Korean currency laws." *Id. at 1001*. The Ninth Circuit concluded that the testimony at issue (given by a private investigator based in Korea) was not reliable because it was based on "impressionistic generalizations." *Id. at 1006*. The same cannot be said of Haggard, whose academic qualifications **[*932]** and reliance on extensive literature go unchallenged by defendants.

The Ninth Circuit **[**86]** also held the testimony was unduly prejudicial under *Rule 403* because it was so tinged with ethnic bias and stereotyping and "generalize[d] that most Korean businesses are corrupt, are not to be trusted and will engage in complicated business transactions to evade Korean currency laws" and that testimony was "tantamount to ethnic or cultural stereotyping, inviting the jury to assume the Korean litigant fits the stereotype." *Id. at 1007*. Reviewing the portions of the Haggard Declaration objected-to by defendants on this point — paragraphs 47, 69-72, Haggard Mot. at 9-10 —Haggard does not similarly use racial or ethnic stereotyping to generalize that Korean businesses are corrupt or willing to violate laws. In his own words, Haggard relies on the "cultural dimension" of Korean culture and corporate culture to support his conclusions that the "twin cultural dimensions of hierarchy and familism thus play an important role in supporting chaebol cohesion, hierarchy and centralized control across all of the chaebol subsidiaries." *Id.* ¶ 71.

Haggard does not, contrary to defendants' characterization, accuse lower-level employees of being so obedient that they would lie. While Haggard does state that "it would not be surprising **[**87]** that lower level managers would deny participating in price-fixing, or any other managerial decision-making," he explains that is because "[i]t is likely that they would conceive of their task as simply gathering information and passing it up the chain of command for the top management — usually family leadership — to make." Haggard Decl. ¶ 69. His testimony here is similar to that which he gave in *Electrograph Sys. v. Hitachi, Ltd. (In re Cathode Ray Tube (CRT) Antitrust Litig.), 2017 U.S. Dist. LEXIS 65917, 2017 WL 2616916 (N.D. Cal., Apr. 5, 2017)*, where his testimony was admitted to provide background on chaebols and "some of the mechanisms that chaebol use to control intra-group corporate entities" because intragroup corporate control was directly at issue. *2017 U.S. Dist. LEXIS 65917, [WL] at *1*.

However, plaintiffs should be careful when eliciting testimony on Korean business "culture" from Haggard at trial. Attempts to suggest that Korean corporate culture tolerates or encourages illegal activity (on behalf of its executives or lower-level employees) will not be permitted.

C. Materiality

Relatedly, defendants argue that paragraphs 61-62 of the Haggard Declaration discussing procurement of raw materials, must be excluded because Haggard makes clear that he was taking no position on the effect of raw material prices on pricing decisions. Those paragraphs comment on evidence **[**88]** of the interconnectedness of the Nongshim-related firms and the connection in decision-making between NSK and NSA. These paragraphs are material.

Defendants also object to paragraphs 55-56 and 66-68 because those paragraphs suggest only that chaebols use a top-down, market-free approach to pricing but are not connected to any specific evidence regarding the defendants here, and his opinions about overlapping appointments (between Korean parent and subsidiary companies) and secondments of employees uninvolved in pricing are irrelevant when this case is about pricing. However, these paragraphs too are material to his testimony.

Finally defendants criticize Haggard's opinions about the form, organization, and characteristics of NSA and Ottogi America as "besides the point" when under U.S. law parent corporations and subsidiaries are presumed to operate independently. However, the "piercing the corporate veil" cases cited by defendants go to a different issue and one that does not make immaterial Haggard's points. While Haggard does opine on generalizations regarding chaebols, **[*933]** he then reviews specifics regarding the defendants to support the relevance of those generalizations to this case. **[**89]**

D. Inadmissible Legal Conclusions

Finally, defendants object that Haggard crosses the line into impermissible legal conclusions in paragraphs 25 and 34 when discussing the strength of Korean corporate-governance laws and the scope of a 2015 law. The discrete references to Korean law, however, are not material legal conclusions or outside the scope of Haggard's expertise.

Objections are also made to paragraphs 50 and 63-64 as impermissible legal conclusions about U.S. law. Haggard's characterizations of the claims made in defendants' summary judgment motions are not impermissible legal conclusions (nor are they particularly helpful). He is simply articulating his opinion on why some of the arguments made by defendants are not persuasive. He is not impermissibly opining on ultimate legal questions and will not be able to do so at trial if he attempts it.

The motion to exclude Haggard's testimony is DENIED.

VII. EVIDENTIARY OBJECTIONS

A. Defendants' Objections

Defendants object to numerous pieces of evidence that plaintiffs rely on in support of their Opposition. *See generally* Nongshim Evid. Objs. [Dkt. No. 584]; Ottogi Evid. Objs. [Dkt. No. 585-5]. I will not rule on every objection made in **[**90]** the over 200 pages of objections submitted by defendants, but will address objections to the evidence I have relied on above and explain my rulings on certain categorical objections below.[50]

1. Co-Conspirators and Hearsay

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[50] Defendants reiterate (to preserve) and make additional objections to the declarations of plaintiffs' experts Dr. Russell Mangum III and Danial A. Ackerberg, that were submitted by plaintiffs in support of their motions for class certification. Ottogi Evid. Obj. [Dkt. No. 585-5] 3-6. In my prior Order, I addressed defendants' apposite and timely raised objections to these experts' declarations. *See generally* Class Certification Order [Dkt. No. 501]. I will not reconsider the same objections, or new objections that should have been raised before, in conjunction with the motions for summary judgment. Defendants' objections to plaintiffs' experts are OVERRULED. Similarly, defendants object to plaintiffs' reliance on evidence they submitted in conjunction with plaintiffs' motions for sanctions. Ottogi Evid. Obj. 6-7. The fact that these materials were not resubmitted in connection with the motions for summary judgment is not a problem and defendants' objections to those materials on this basis is OVERRULED.

Defendants also make repeated objections to documentary and declaration evidence as lacking in personal knowledge, incomplete, and unreliable. Those objections are OVERRULED. Holes in the documentary or declaration evidence can be exposed and challenged at trial.

Defendants assert that numerous documents relied on by plaintiffs, including all of the Samyang Hard Drive (SHD) documents (discussed below) and the statements by Samyang's Kim and Ahn, contain inadmissible hearsay. *See* Nongshim Evid. Objs. 3-10; Ottogi Evid. Objs. 11-13. Plaintiffs respond, generally, that statements from Samyang are admissible under *Fed. R. Evid. 801(d)(2)(E)*, as co-conspirator statements when offered against Nongshim and Ottogi.

Defendants' main argument against the applicability of the co-conspirator hearsay exception is that plaintiffs cannot rely it because they have failed to show other proof (*i.e.*, proof besides the alleged co-conspirator statements) that substantiates the existence of a conspiracy. *See* Nongshim Evid. Objs. 4-10; Ottogi Evid. Objs. 11-12; *see also In re Coordinated **[*934]** Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, 459 (9th Cir. 1990)* (recognizing that the offering party must present "some evidence" aside from the "proffered co-conspirator's statements" to show the non-offering party knowingly participated in the alleged conspiracy). **[**91]** However, as recognized above, the evidence of the conspiracy is not derived solely from the objected-to Samyang documents and statements, but also defendants' own conduct and the economic analyses provided by the experts.[51] The documents allegedly exchanged between the conspirators and the statements regarding the same are admissible at this juncture because a basic showing has been made that "the declarants were all employees acting within the scope of their employment, the evidence that their employer participated in the conspiracy is strong independent evidence of their own participation." *United States v. AU Optronics Corp., 2012 U.S. Dist. LEXIS 3967, 2012 WL 12036080, at *2 (N.D. Cal., Jan. 11, 2012)*.

2. Samyang Hard Drive and Vaughn Declaration

Defendants challenge the admissibility of any of the Samyang Hard drive (SHD) documents. Ottogi Evid. Obj. 7-9; Nongshim Evid. Obj. Nos.94-96, 98, 100, 103, 106, 108, 111, 112, 113, 116, 117, 120-123. The hard drive was, during the KFTC leniency petition phase, kept by an auditor at Samyang (who admitted deleting pornographic and foreign movie files to keep the storage device from failing) and then by Samyang's attorneys. Yu Decl., Ex. 7, Deposition Transcript of Sung Chul Yoon [Dkt. No. 547-7] at 17, 23-27.

Defendants' primary argument (aside from **[**92]** hearsay, addressed above) is that plaintiffs cannot authenticate any of the documents contained on the SHD, or show that any of the documents originated with Nongshim and Ottogi. Generally, the proponent of evidence need "only make a prima facie showing of authenticity 'so that a reasonable juror could find in favor of authenticity or identification.' [] Once the prima facie case for authenticity is met, the probative value of the evidence is a matter for the jury." *United States v. Workinger, 90 F.3d 1409, 1415 (9th Cir. 1996)* (quoting *United States v. Chu Kong Yin, 935 F.2d 990, 996 (9th Cir.1991))*; *see also Norse v. City of Santa Cruz, 629 F.3d 966, 973 (9th Cir. 2010)* ("[w]hile the evidence presented at the summary judgment stage does not yet need to be in a form that would be admissible at trial, the proponent must set out facts that it will be able to prove through admissible evidence.").

Plaintiffs rely primarily on their expert — James Vaughn [Dkt. No. 567-2] — who points out that for a number of the documents at issue, the document metadata indicates that they were authored or last edited by Nongshim or Ottogi employees (as well as the dates the documents were allegedly created or edited by those employees.). Vaughn Decl. ¶¶ 4-16.[52] Nongshim's expert, Rubin, argues that nothing can be assumed from this "document **[*935]** level" metadata because the "author" and "last author" **[**93]** metadata can be manipulated by the person creating the

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[51] Of course, defendants have different reads on the import or significance of the non-Samyang evidence of conspiracy plaintiffs rely on. *See* Nongshim Evid. Objs. at 7-10

[52] Vaughn's declaration and explanations as to document creation information undermine Nongshim's argument that because the documents at issue may have been "saved" to the Samyang HD in 2009, they were not "created" at or near the time of the conspiratorial events and, therefore, cannot fall within the business records hearsay exception. Plaintiffs' testimony from Jeong Eun Park and Jong Moon Yui explain how (and why) the records were kept in the form in which they were kept as part of a regularly conducted business practice by Samyang.

document. Rubin Decl. ¶¶ 18-19. Rubin does not address that the "author" and "last author" document-level metadata is created at the same time the document is created and, therefore, whoever purported to create these documents would have had to know the individuals in 2005, 2006, 2007, and 2008 to attribute them to Nongshim and Ottogi employees; *i.e.*, prior to Samyang becoming a leniency petitioner with the KFTC and prior to the KFTC investigation.

Relatedly, Rubin argues that none of the SHD documents that plaintiffs purport to be emails are "authentic emails," because while "native emails" typically contain embedded metadata (IP addresses and dates) that can help establish their authenticity, none of the "emails" on the SHD have that sort of metadata. Rubin Decl. ¶¶ 22, 24. Similarly, Ottogi's contractor at Deloitte Korea testified that the SHD contains no emails because none of the file extensions on the SHD documents purporting to be emails contain any typical email extensions. Declaration of Tae Hoon Yeo [Dkt. No. 548-6] ¶ 5.

Plaintiffs characterize defendants' objections as objections to the way emails were captured and stored **[**94]** on the SHD, issues that go to the weight of the evidence, not their admissibility. Oppo. 33 n. 49. They also point to Samyang employee Jong Moon Yui's testimony that he recognized some "screen captures" in the SHD production as ones he made of emails on orders from superiors, although he had trouble recollecting which screen shots he might have taken himself. Yu Decl., Ex. 36 [Dkt. No. 547-40], Witness Examination of Jong Moon Yui at 17, 49 — 52. And they show how various documents found on the SHD and allegedly authored by Nongshim or Ottogi match documents produced by Nongshim and Ottogi in this litigation, supporting the testimony from Samyang's witnesses that the SHD contained documents and information received from its competitors. Oppo. 29 (comparing Cho Decl., Ex. 34 [NSK0001383] with Cho Decl., Ex. 47 [SHD00002538]).

Defendants' motion is DENIED with respect to the SHD documents plaintiffs rely on in these motions. Plaintiffs have brought forth sufficient testimony about the creation and maintenance of the SHD and explanations about why some of the "emails" were captured in the way they were (without native metadata).[53]

Relatedly but separately, Ottogi objects to the Vaughn Declaration on the grounds of relevance (generally **[**95]** and to Ottogi specifically), reliability, and speculation. Ottogi Evid. Obj. [Dkt. No. 585-5] 1-3. Nongshim also objects to portions of the Vaughn Declaration on the basis of relevance, improper expert testimony, and improper opinion testimony. Nongshim Evid. Obj., Appendix A [Dkt. No. 584-1], Nos. 165-168. Defendants' objections are OVERRULED. The strength of Vaughn's opinions that documents on the SHD were either authored by employees of Nongshim or Ottogi or represent "emails" can be tested on cross-examination.

As a separate challenge to the SHD documents (in addition to hearsay and lack of authentication), Nongshim argues that documents from the SHD violate the "rule of completeness" encompassed by *Federal Rule of Evidence 106* and the Best Evidence Rule of *Rule 1002*, *1003*. Nongshim **[*936]** Evid. Obj. 22-26. Nongshim admits its *Rule 106* argument is not the typical rule of completeness argument (seeking introduction of *additional* testimony to cure any incomplete statements), but argues that allowing plaintiffs to present "cut and pasted" emails from the SHD which on their face are incomplete violates the purpose of the rule, to prevent taking statements out of context or making misrepresentations to the jury. Absent apposite case law, **[**96]** these SHD documents (purported emails or others) will not be excluded under *Rule 106*. Defendants may, of course, attack plaintiffs' (and their experts') characterization of the documents as emails. The Best Evidence Rule hinges on well-founded challenges to the authenticity of documents, which I address below.

3. Authentication

In addition to the challenged to the SHD documents, Nongshim challenges the authentication of a number of documents that were produced from their or from Ottogi's own files. *See, e.g.*, Nongshim Evid. Objs. 33, 35. To the

[53] Authenticity objections regarding *specific* SHD documents that plaintiff intend to rely on at trial that have unique characteristics that raise questions about their authenticity may be challenged pretrial after the parties have identified their proposed exhibits.

extent the documents were produced by Nongshim or Ottogi in discovery in this action, and are offered by plaintiffs, their authenticity is established for purposes of these motions. *See, e.g., Orr v. Bank of America, NT &SA, 285 F.3d 764, 777 n.20 (9th Cir. 2002)* (recognizing case law holding that documents produced by a party in discovery were deemed authentic when offered by a party opponent).

4. Hearsay

In addition to the hearsay objections address above, defendants also object separately to plaintiffs' submission of newspaper articles, particularly those attached as Exhibits 11, 29, 90 and 94 to the Cho Declaration. Nongshim Evid. Objs. 26-30; Ottogi Evid. Objs. 12. Defendants object to plaintiffs' attempt to rely on **[**97]** any of the articles for the truth of the matters asserted (as any statements in the articles by defendants would constitute double hearsay), only one of the many reporters for the many different articles has been made available to testify, three of the four articles have not been authenticated as business records, and for the one article authenticated by a reporter (Jae Hee Lee), the reporter did not provide sufficient foundation for how she recorded the defendants' statements.

As to at least one level of hearsay (the statements by the defendants, as opposed to the publication of them in a newspaper and the accuracy of how they were reported), plaintiffs point out that the statements by defendants fall within the co-conspirator hearsay exception, as offered against defendants and made to further the conspiracy. Plaintiffs' Responses to Evidentiary Objections [Dkt. No. 591-1], *see, e,g.*, Response to Nongshim No. 37. As to the second level of hearsay, plaintiffs point out that defendants have not disputed the accuracy of the reporters' characterization of the statements. Plaintiffs also do not rely on the defendants' alleged admissions in the articles for the truth of the matters asserted **[**98]** (for example that costs were in fact raised due to raw material cost increases). Instead, they rely on those statements to show that defendants were making public statements that other evidence will demonstrate were pre-textual, to hide or cover up their conspiracy. *See, e.g.*, Plaintiffs' Responses to Evidentiary Objections [Dkt. No. 591-1], Nongshim Nos. 37, 154. And finally, at least with respect to the articles authored by Jae Hae Lee, the defendants who were questioned about the statements included by Ms. Lee in her articles did not deny their accuracy. At this juncture, plaintiffs can rely on the newspaper articles for the limited purpose of showing defendants' steps to conceal the alleged conspiracy.

[*937] B. Plaintiffs' Objections

Plaintiffs' objections to the evidence relied on by defendants are much more limited. Plaintiffs object and move to exclude Ottogi's declarations from Young Joon Ham and Shin Gook Kang, as well as the witness examination protocol from Guen Ho Choi, because (1) these individuals were not disclosed as potential witnesses on defendants' initial disclosures or in any supplement thereto and (2) plaintiffs' requests to include these individuals as custodians were **[**99]** rejected. Dkt. No. 564 at 1. Plaintiffs separately move to strike the Choi examination as hearsay when offered by defendants. Ottogi responds that they did not need to disclose these individuals because their testimony is solely for impeachment and any failure to disclose was harmless. Ottogi Opp. To Strike [Dkt. No. 582].

1. Legal Standard

Rule 26(a) requires a party to provide "the name . . . of each individual likely to have discoverable information . . . that the party may use to support its claims or defenses . . . ." *Rule 37(c)(1)* provides that "[if] a party fails to provide information or identify a witness as required by *Rule 26(a)* or *(e)*, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Courts have applied this sanction even when a litigant's entire cause of action or defense has been precluded and courts have wide latitude to exclude even in absence of bad faith or willfulness. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th Cir. 2001)*.

Under *Rule 37(c)(1)*, the party whose evidence may be excluded has the burden of proving that its failure to disclose was substantially justified or is harmless. *R & R Sails, Inc. v. Ins. Co. of Pennsylvania, 673 F.3d 1240, 1246 (9th Cir. 2012)*. "The determination of whether a failure to disclose **[**100]** is justified or harmless is entrusted to the broad discretion of the district court." *San Francisco Bay Area Rapid Transit Dist. v. Spencer, No. 04-04632-SI, 2007 U.S. Dist. LEXIS 11693, 2007 WL 421336, at *4 (N.D. Cal. Feb. 5, 2007)*. Nondisclosure is harmless if it does not prejudice the other party. *Yeti, 259 F.3d at 1106*. In assessing harmlessness, I may consider a number of factors, including "(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence." *Unionamerica Ins. Co. v. Fort Miller Group, Inc., No. 05-01912-BZ, 2009 U.S. Dist. LEXIS 12332, 2009 WL 275104, at *1 (N.D. Cal. Feb. 4, 2009)*.

2. Ham and Kang

Young Joon Ham is a current member of Ottogi Korea's board of directors and from March 2000 through March 2010 was one of two Ottogi Korea CEOs. Declaration of Young Joon Ham [Dkt. No. 548-5], ¶ 1. Shin Gook Kang was the other CEO, who served alongside Young Joon Ham from March 2000 through March 2008. Declaration of Shin Good Kang [Dkt. No. 548-7] ¶ 1. The declarations of the two former executives are submitted to dispute plaintiffs' position that a "Representative's Meeting" occurred in **[**101]** 2000 or 2001, as well as to dispute the existence of any price fixing agreement. Ham and Kang each testify that neither of them attended a meeting with other ramen company executives in 2000 or 2001, neither of them met Don Jong Choi from Samyang, and neither of **[*938]** them entered into a price fixing agreement or authorized any employee to do so.

Plaintiffs move to exclude the declarations from Ham and Kang because they were not disclosed as witnesses by Ottogi and were not included as custodians based on Ottogi's misrepresentations or destruction of evidence. Declaration of Stephanie Cho in Support of Motion To Exclude [Dkt. No. 564-1] ¶ 2, Ex. 1. Plaintiffs knew of these individuals' existence and roles at Ottogi and sought to include them as "custodians" whose files would be searched. Ham's files, however, were not included because Ottogi represented that Ham had no relevant information or documents (the truth of which is now belied by Ham's declaration). Cho Decl. to Exclude, ¶ 4, Ex. 2. With respect to Kang, Ottogi responded that he had left Ottogi and "no documents" existed. *Id.* ¶¶ 4-5. In light of these representations and Ottogi's failure to identify these two in their disclosures, **[**102]** plaintiffs did not pursue discovery (documents or depositions) from them. Plaintiffs' Mot. to Exclude 5. Plaintiffs argue that given Ottogi's now-central reliance on this testimony — in an attempt to undermine the Samyang executives' statements — inclusion of this untested testimony prejudices them and should be excluded.

Ottogi responds, first, that they did not need to disclose Ham and Kang under *Rule 26(a)* because their testimony is merely impeachment evidence, introduced to show that the Samyang executives' testimony was wrong. Ottogi Opp. to Strike at 1-2. This argument is not well taken. The testimony at issue goes to the heart of Ottogi's defense (no conspiracy) and includes factual assertions that go far *beyond* the Samyang executives' testimony. *See, e.g.*, Ham Decl. ¶ 3 & Kang Decl. ¶ 3 (discussing when they first heard of the alleged 2000 or 2001 meeting, what they did with respect to the KFTC questionnaire, what they did in response to the KFTC investigation, and whether they personally authorized any collusive agreement).

Ottogi also argues that the non-disclosure of these two individuals was substantially justified and harmless because these individuals, and their roles at Ottogi, were made known to plaintiffs **[**103]** during discovery by (1) interrogatory responses identifying them as Ottogi executives, (2) in the KFTC Report (released in 2015), and (3) disclosed in Ottogi's response to the KFTC (that was produced in discovery).[54] These disclosures, however, did not

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[54] Ottogi argues that Ham and Kang were identified in deposition testimony by other witnesses, but the three instances Ottogi relies on simply identified Ham as a relative of a deponent (ECF 437-7 at 54:9-17), mention Kang and Ham in passing as executives involved in approving price increases (Yu Decl., Ex. B), and identified that another deponent confirmed that Kang had no knowledge of a meeting in 2000 - 2001. Yu Decl., Ex. C.

indicate that Ham and Kang had access to the specific information now disclosed in their declarations filed in support of Ottogi's motion for summary judgment.

Ottogi's failure to disclose Kang and Ham as witnesses and its rejection of plaintiffs' request to include them as custodians precludes it from calling them as witnesses on such a central part of this case. Their testimony is STRUCK.

3. Choi

Plaintiffs also move to exclude the Witness Examination Protocol of Geun Ho Choi [Dkt. No. 549-35], another former Ottogi executive who claims he attended the 2001 RTOA meeting but did not discuss pricing there. Ottogi relies on this testimony to contradict the Samyang executives' testimony that pricing was discussed at that conference. Plaintiffs object **[*939]** to this testimony as inadmissible hearsay. They also note that Choi was not disclosed as a witness in Ottogi's initial disclosures and when plaintiffs attempted to identify him as a custodian, **[**104]** plaintiffs were told by Ottogi that he had likewise left the company and had no documents. *See* Cho Decl. to Exclude ¶¶ 4, 5.[55]

As with respect to Ham and Kang, Ottogi argues that Choi's testimony was submitted to rebut plaintiffs' claim that prices were discussed at the 2001 Ramen Conference. The Choi testimony was filed with but not cited in Ottogi's opening brief, which disputed plaintiffs' evidence regarding the "confirmation" of the price fixing agreement at the 2001 RTOA meeting. Choi's testimony was only cited in Ottogi's Reply. Dkt. No. 585 at 3 n.3. As to substantial justification and harmlessness, Ottogi argues that Choi's existence and knowledge were adequately disclosed in the KFTC Report (disclosing that Choi was Ottogi's representative at the 2001 RTOA meeting), and his position and leave date were disclosed in interrogatory responses. Ottogi Opp. to Strike 2-3.

Ottogi knew that plaintiffs' theory was that the price fixing agreement was confirmed at the 2001 RTOA meeting, yet failed to disclose as a witness their representative at that conference on whom they now rely. This testimony is not simply rebuttal, but central to a point in dispute between the parties. **[**105]** Ottogi's failure to disclose Choi as a person with information that would be used to support Ottogi's defense of this action was neither substantially justified nor harmless. Choi's testimony (as contained in the Witness Examination Protocol) is STRUCK.[56]

CONCLUSION

Defendants' motions for summary judgment are DENIED. Defendants' motion to exclude the Haggard testimony is DENIED. Plaintiffs' motions to strike the testimony of Ham, Kang and Choi are GRANTED.

IT IS SO ORDERED.

Dated: December 28, 2017

/s/ William H. Orrick

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[55] The hearsay objection is not well-taken to the extent of Choi's recollection that prices were not discussed at the 2001 RTOA meeting because the Witness Examination Protocol of Choi is sworn and given under penalty of perjury. *See, e.g., Gulf USA Corp. v. Federal Ins. Co., 259 F.3d 1049, 1056 (9th Cir. 2001)* (finding that "sworn deposition testimony" from another matter may be used on summary judgment as an affidavit pursuant to *Federal Rule of Civil Procedure 56(c)*).

[56] In Reply, plaintiffs note another new Ottogi witness that was not disclosed but is relied upon by Ottogi in its Reply; Kyung Ho Yoo [Dkt. No. 585-4]. Plaintiffs' Mot. Exclude Reply at 4 n.2. Because plaintiffs do not present the same evidentiary showing as to Yoo that they did with respect to Ham, Kang and Choi, I will not strike evidence from Yoo at this time, but plaintiffs may raise this issue again in a motion *in limine* prior to trial.

William H. Orrick

United States District Judge

Malden Transp., Inc. v. Uber Techs., Inc.

United States District Court for the District of Massachusetts

December 29, 2017, Decided; December 29, 2017, Filed

Civil Action No. 16-12538-NMG; Civil Action No. 17-10142-NMG; Civil Action No. 17-10180-NMG; Civil Action No. 17-10316-NMG; Civil Action No. 16-12651-NMG; Civil Action No. 17-10586-NMG; Civil Action No. 17-10598-NMG

Reporter

286 F. Supp. 3d 264 *; 2017 U.S. Dist. LEXIS 213023 **; 2018-1 Trade Cas. (CCH) P80,247

Malden Transportation, Inc. et al., Plaintiffs, v. Uber Technologies, Inc., Defendant.Anoush Cab, Inc. et al., Plaintiffs, v. Uber Technologies, Inc., Defendant.Dot Ave Cab, Inc. et al., Plaintiffs, v. Uber Technologies, Inc., Defendant.Max Luc Taxi, Inc. et al., Plaintiffs, v. Uber Technologies, Inc., Defendant.Gill & Gill, Inc. et al., Plaintiffs, v. Uber Technologies, Inc. et al, Defendant.Sycoone Taxi, Inc. et al., Plaintiffs, v. Uber Technologies, Inc., Defendant.Taxi Maintenance, Inc. et al., Plaintiffs, v. Uber Technologies, Inc., Travis Kalanick, and Garrett Camp, Defendants.

Prior History: *Maiden Transp., Inc. v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 182983 (D. Mass., Oct. 5, 2017)*

Core Terms

Taxi, drivers, unfair competition, regulations, motion to dismiss, licensed, pricing, business relationship, Transportation, passengers, unfair, personal jurisdiction, plaintiffs', hire, individual defendant, common law, ordinance, courts, civil conspiracy, antitrust, cases, aiding and abetting, municipalities, allegations, defendants', hackney, taxicab, TNC Act, monopolize, cause of action

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For Lavb Cab, Inc., Legal Taxi, Inc., Leonids Cab, Inc., Lisa M.B. Cab, Inc., Logo Cab, Inc., Lotem Cab, Inc., Lyman Cab, Inc., Max Jacob Taxi, Inc., Metro Boston Taxi, Incorporated, Midnight Cab, Inc., Mileage Taxi, Inc., Mir Taxi, Inc., Mit Taxi, Inc., Mla Taxi, Inc., Monit Cab, Inc., Morad, Inc., Munroe Tax, Inc., Mvl Taxi, Inc., My Susan Cab, Inc., Natalia Cab, Inc., Neponset Cab, Inc., Nevets Cab, Inc., Ngozi Trans., Inc., Ninth Street Cab Inc., Northwind Taxi, Inc., Oak Cab, Inc., Oskar Cab, Inc., Partridge Cab, Inc., Photo Cab, Inc., P.J.C. Taxi, Inc., **[**5]** R.A.S. Cab Inc., R.L. Kids Cab, Inc., Radio Taxi, Inc., Reem Trans., Inc., Rescu, Inc., Rollan Cab, Inc., Rosebud Express, Inc., S.D.I. Taxi, Inc., S.T.N.A. Corp., Salgan Transportation, Inc., Scammel Cab, Inc., Seventh St. Taxi, Inc., Shadow Taxi, Inc., Sharoneys Taxi, Inc., Signal Cab, Inc., Sixth St. Taxi, Inc., Sky Cab, Inc., Slem Cab Inc., Sofia Taxi, Inc., South Boston Taxi, Inc., Space Cab, Inc., Star Taxi, Inc., Stevens Cab, Inc., Tappan Taxi, Inc., Tatyana Cab, Inc., Taurus Taxi, Inc., Taxi Auto Club Boston, Inc., Taxipark Odessa, Inc., Teperman Cab, Inc., Tesfay Cab, Inc., The Court Jessa Taxi, Inc., Third St. Cab, Inc., Tim Taxi, Inc., Tivi Cab, Inc., Tone Taxi, Inc., Vlp Trans., Inc., Vri Taxi, Inc., Walid Cab, Inc., Waterfront Taxi, Inc, Westfield Cab, Inc., Y & K Cab Inc., Zena Cab, Inc., K And T Taxi, Inc., Handy Taxi, Inc., L. Rose Cab, Inc., Alvan & Maries Cab, Inc., Tema Cab, Inc., Jamel Taxi, Inc, Jo-Nessa, Inc, My Krystyna Corporation, Super Moon, Inc., Rk Taxi, Inc., Burtinle Cab, Inc., St. Michel A, Inc., Lbt Cab, Inc., Bzr Cab, Inc., Vostok Cab, Inc., Mpf Cab, Inc., Irianna Trans., Inc., Eldali Transporation, Inc., Adana, Inc., Tatas Cab, Inc., Breatnach, Inc., **[**6]** Ld Taxi, Inc., Nikitas Taxi, Inc., Stefan Turolski, Kiev Cab, Inc., Ial Cab, Inc., D.P. Taxi, Inc., Piff & Hector Cab, Inc., Kirry Cab, Inc., Victor Taxi, Inc., D.V. Taxi, Inc., Zgas Taxi, Inc., Lbi Trans, Inc., Lorraine Cab Co., Inc., Amaradia, Inc., Bucuresti Inc., Novaci, Inc., S & D Taxi, Inc., Kashan Taxi, Inc., Nile Express, Inc., Rhh, Inc., Nora Transport, Inc., Rad Transport, Inc., Gold Transport, Inc., Ben Transport, Inc., M & M Taxi, Inc., Plaintiffs (1:17cv10180): Daniel J. McGonagle, Paul J. Hayes, Thomas C. O'Konski, Prince Lobel Tye LLP, Boston, MA USA.

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For Max Luc Taxi, Inc., Tiger Taxi, Inc., Loomans Cab, Inc., Joyce Cab, Inc., Valley Taxi, Inc., Rachel Cab, Inc., Michael Jojo **[**7]** Cab, Inc., Emma Jane Cab, Inc., Teddy G., Inc., Warrior Taxi, Inc., Ralphy Taxi, Inc., G Money Cab, Inc., Jo G Cab, Inc., M.L.J. Taxi, Inc., Plaintiffs (1:17cv10316): Daniel J. McGonagle, Paul J. Hayes, Thomas C. O'Konski, Prince Lobel Tye LLP, Boston, MA USA.

For Crusader Taxi, Inc., Linda Garofalo, doing business as LAG Medallion Financing, Nancy Gargano, doing business as NAG Mortgage, Erminio Gargano, doing business as EG Mortgage, Plaintiffs (1:17cv10316): Thomas C. O'Konski, LEAD ATTORNEY, Daniel J. McGonagle, Paul J. Hayes, Prince Lobel Tye LLP, Boston, MA USA.

For Uber Technologies, Inc., Defendant (1:17cv10316): Beatriz Mejia, LEAD ATTORNEY, PRO HAC VICE, Cooley LLP, San Francisco, CA USA; Michael Sheetz, LEAD ATTORNEY, Adam S. Gershenson, Michael E. Welsh, Timothy W. Cook, Cooley LLP, Boston, MA USA.

For Anoush Cab, Inc., Interested Party (1:17cv10316): Daniel J. McGonagle, Paul J. Hayes, Thomas C. O'Konski, Prince Lobel Tye LLP, Boston, MA USA.

For Judge Jennifer C. Boal, Mediator (1:17cv10316): Thomas C. O'Konski, Prince Lobel Tye LLP, Boston, MA USA.

For Gill & Gill., Inc., Nanak Naam, Inc., Amritsar Express, Inc., Sonny And Bobby Trans., Inc., Gill Trans., Inc., Finos Taxi, **[**8]** Inc., Charlene Taxi, Inc., Mytasha Taxi, Inc., Wyoming Cab, Inc., Edward's Taxi, Inc., Curtis Cab, Inc., My Father Taxi, Inc., Mic-Paul Taxi, Inc., A. Stacy Taxi, Inc., Patti Pie Taxi, Inc., Mcgaff Taxi, Inc., Rawan Taxi, Inc., Spring Taxi, Inc., Summers Taxi, Inc., Autumn Taxi, Inc., Winters Taxi, Inc., Bow St. Auto Repair & Sales, Inc., Blue Knight Taxi, Inc., Chele Taxi, Inc., Christmas Taxi, Inc., Ges Taxi, Inc., Grand Sport Taxi, Inc., Breenie Taxi, Inc., Lil's Taxi, Inc., Claire Taxi, Inc., Don-Lil Taxi, Inc., Andy's Cab, Inc., Boardman Cab, Inc., Grove Cab, Inc., Secret Squirrel Taxi, Inc., Navjit Cab, Inc., Preed, Inc., Najjar Enterprises, Inc., Bilga, Inc., Jimmy 1, Inc., Anju Trans Incorporated, Deep Cab, Inc., Ematesse Cab, Inc., Christopher Cab, Inc., Dadoo Cab, Inc., Guru Gobind Cab, Inc., Aubanel Trans., Inc., Ramc Cab, Inc., Ted D. J. Taxi, Inc., Makonnen Cab, Inc., Yellow Cab of Belmont, Inc., Plaintiffs (1:16cv12651): Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

For Majid, Inc., Hiram's Taxi, Inc., Joune, Inc., Hare Hare Trans., Inc., Anpaul Cab, Inc., Tabiking Express, Inc., Marcia And Everton Cab, Inc., Ricardo & Joanne Cab, Inc., **[**9]** Patience Taxi, Inc., Turk Trans., Inc., Nativity Cab, Inc., Rose Cab, Inc., Haama Trans, Inc., Tom's Taxi, Inc., Mera Soami, Inc., Mugal Trans., Inc., Khaveeri, Inc., F. Edel, Inc., Angereb, Inc., Tremont Street Taxi, Inc., Ganga, Inc., New Invision, Inc., K. Heyden, Inc., Brent Taxi, Inc., Iraj, Inc., Swami Ji, Inc., Geolange, Inc., Esperanta Taxi, Inc., Singh Cab, Inc., Shiva, JI & Parvati Cab, Inc., Larrouse Cab, Inc., Jave Cab, Inc., Talin Cab, Inc., Lunica, Inc., Nile Express, Inc., Smooth Rider, Inc., E. And Anne Taxi, Inc., Alen's Cab, Inc., Megan Cab, Inc., Samuel Transportation, Inc., Petit Goave Cab, Inc., Michael Cab, Inc., Absolute Taxi of Cambridge, Inc., Alta Taxi, Inc., Tarjan Cab, Inc., Alexandria Trans., Inc., Koshar, Inc., Rival Cab, Inc., Yhwh Sabaoth, Inc., Praise The Lord, Inc., Harvard Square Cab, Inc., Flying Carpet Cab, Inc., Mehrose, Inc., Plaintiffs (1:16cv12651): Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

For Amar Trans., Inc., Rb Cab, Inc., Croyance Cab, Inc., Promesse Cab, Inc., P.I. Cab, Inc., Homano & Carl Taxi, Inc., Fledo, Inc., J.W. Cab Inc., Pidi Cab, Inc., Godavari, Inc., St. Richard Taxi, Inc., Ruth Cab, Inc., **[**10]** Satkartar, Inc., Eliot Cab, Inc., Wadh Bagh Singh Cab, Inc., My Yasmina Cab, Inc., Two Girls Taxi, Inc.,Papeso Cab, Inc., Zahida Trans., Inc., Yves Taxi, Inc., Yung Cab, Inc., Paloma Transportation, Inc., Martha's Trans., Inc., La Boule DE Feu, Inc.,Splendide Cab, Inc., Shoopite Cab, Inc., Green Land, Inc., Tr Cab,Inc., Fedsen & Tedsen, Inc., Dieu Est Bon, Inc., Viceroy Cab, Inc., Neges Jr., Cab, Inc., Radha Swami Bias, Inc., Promise Cab, Inc., G.G.M. Cab, Inc., Pable Taxi, Inc., Brothers Cab, Inc., Kassie Cab, Inc., Jazz Taxi, Inc., B Good Cab, Inc., Ohm, Shiva & Ganesh Cab, Inc., L'Oiseau Taxi, Inc., Lysette & Jardus, Inc., Fatima Cab, Inc., Selon Dieu Cab, Inc., M. & D. Brothers, Inc., La Trinite, Inc., Lovely One, Inc., Wilvens Cab, Inc., Good Time Cab, Inc., Dou Dou Cab, Inc., Tara Transportation, Inc., Mgp Taxi, Inc., Plaintiffs (1:16cv12651): Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

For G. Jose Cab, Inc., Jeahanna Taxi, Inc., Natou Cab, Inc., Clerna Corp., Antonio & Franco, Inc., Guru Tegh Bhadur Cab, Inc., Stefan Turolski, Mona Cab, Inc., Eric & Maria Cab, Inc., Chris And Junior, Inc., Surprise Cab, Inc., Chenal Cab, Inc., Anh Cab, Inc., **[**11]** August Cab, Inc., Kartar Cab, Inc., Nimrah Trans., Inc., Jelus Cab, Inc., Elzira & Luc Cab, Inc., Bkmb, Inc., Only Believe Taxi, Inc., Nada, Inc., Manor Cab, Inc., Galehad Taxi, Inc., A. Tammy Cab, Inc., Garven's Cab, Inc., Arnold Court Taxi, Inc., Bbj Cab, Inc., Silva Cab, Inc., Gumat Cab, Inc., Briol Cab, Inc., Best is Best Cab, Inc., Mj Taxi Cab, Inc., Sami's Taxi, Inc., C.T.P. I, Inc., Era et Labora, Inc., Munny Trans., Inc., Harsh Cab, Inc., Soeg Cab, Inc., Aldine Cab, Inc., Tivy, Inc., God's Blessing Cab, Inc., Isaih Mathew, Inc., Advantage Taxi of Cambridge, Inc., Banwait Trans., Inc., Cayes II Cab, Inc., Jacquet Cab, Inc., Eben-Ezer Taxi Cab, Inc., Yoly-Carvens, Inc., Sheikh Trans., Inc., My Nathalie Cab, Inc., Red Fish Cab, Inc., Azin Taxi, Inc., Lideta Cab, Inc., Meklit Cab, Inc., P & S Taxi Corp., Robenson Taxi, Inc., Rp Excelsior, Inc., Millennium Taxi, Inc., Bb Taxi Express, Inc., Teja Trans., Inc., Rol & G., Inc., Love Cab, Inc., Les Gens DU Nord, Inc., Bhargo Inc., H & L Cab, Inc., Delivrance Cab, Inc., Town Taxi of Cape Cod, Inc., Kurala Trans., Inc., Tina & Nina Trans., Inc., Mava Taxi, Inc., Cambridge Cab Connection, Inc., Hernandez Transportation, Inc., Ril-Tul Cab, **[**12]** Inc., Khalsa Cab, Inc., Alpha Omega Cab, Inc., La Diligence, Inc., T & J Cab, Inc., Mt. Everest, Inc., U & I Corp., Jfl Cab, Inc., Dady-Phone, Inc., R. Candy Taxi, Inc., Victoria Cab, Inc., Selam Transportation, Inc., Pro-Cab, Inc., Yotille Cab, Inc., Abcd Taxi, Inc., Nkb Cab, Inc., Marcus Cab, Inc., Elpoorag, Inc., Kendra Corporation, Britney Cab, Inc., Elan Cab, Inc., Raymy, Inc., Jai Gurudev, Corporation, Dophy Taxi, Inc., Dreamers Cab,Inc., Walger, Inc., Desdunes United, Inc., Patrick Taxi, Inc., Douceur Cab, Inc., Je Crois EN Dieu, Inc., Mt. Carmelle Taxi, Inc., Randah Cab, Inc., M. Angelo Cab, Inc., Virginia Cab, Inc., Desdunes Cab, Inc., Gl Cab, Inc., Ph & Kn, Inc., Nek Fab, Inc., Ariel & Japheth, Inc., Radha Trans., Inc., Addis Cab, Inc., Jacqueline Cab, Inc., Louine Cab, Inc., Bethel Cab, Inc., Dalesha Taxi, Inc., Gagan Taxi, Inc., Abbed Cab, Inc., Goh Cab, Inc., Jeremie Taxi, Inc., Charlie Cab, Inc., G And E. Cab, Inc., Zando Cab, Inc., Cyrilo Cab, Inc., Windsor Cab, Inc., S & J Inc., 116 Cab, Inc., Nahar Singh Cab, Inc., Coretta, Inc., First Street Cab, Inc., O.D.J. Taxi, Inc., Jean Baptiste, Inc., Elysse Corporation, Onkar Cab, Inc., Two Boys Cab, Inc., Krishna Krishna **[**13]** Trans., Inc., Mirka, Inc., El Chalday, Inc., Keshia Cab, Inc., Rock Solid & Momone, Inc., Roly Cab, Inc., Sasun Cab, Inc., Jv Taxi, Inc., Taxi Technology, Inc., An Yin PA Ta, Inc., Cleo Taxi, Inc., Farb, Inc., Enchante Taxi, Inc., Shree Ganesh Cab, Inc., Green Stripe Cab, Inc., Golden Temple Trans., Inc., Pafou Cab, Inc., Mas Taxi, Inc., Mogadishu Cab, Inc., Ahram Cab, Inc., Shani Taxi, Inc., Hosana Taxi, Inc., Jmf Cab, Inc., Yo YO Cab, Inc., Papu, Inc., Cayes Cab, Inc., You Too Cab, Inc., Renee Taxi, Inc., C.E.F. Cab, Inc., Ita Cab, Inc., Kevin Taxi, Inc., G & J Cab Inc., Anna Cab, Inc., Satnum Cab, Inc., P & P Dumerant Corp., Bay City Taxi, Inc., Eagle Taxi, Inc., Ulysse's Cab, Inc., Hawelti Cab, Inc., Krishana Trans., Inc., Tt, Inc., Cambridge Classic Cab, Inc., Aristocrats Ambiance Taxi, Inc., Jezil Cab, Inc., Lexington Taxi, Inc., Defer Cab, Inc., Elizabeth Cab, Inc., Demosterne, Inc., Rai Transportation, Inc., Sunset Cab, Inc., Nelcheri Cab, Inc., Taylor Taxi, Inc., Guru Trans., Inc., Paul Cab, Inc., Bainet Cab, Inc., Lele Cab, Inc., No no Cab, Inc., Anderson & Joshua Cab, Inc., Ulysse Trans. Holding, Corp., Sea Wall Taxi, Inc., Larrieux Cab, Inc., Melchisedek Cab, Inc., Raavi **[**14]** Trans., Inc., Zicky Cab, Inc., Mit Cab, Inc., Rios Gon Cab, Inc., Joyse Cab, Inc., Symphony Taxi, Inc., Queen Jessica Cab, Inc., Telfort Cab, Inc., Eureka Cab, Inc., P & G Cab, Inc., Naju, Inc., Red Cab of Worcester, Inc., Bibi's Cab, Inc., Central Square, Cab, Inc., Karim Cab, Inc., Giorgio's Cab, Inc., Impeccable Trans, Inc., Mark & S, Inc., Renette & Franlyn, Inc., Jane Mary Cab, Inc., Jehovah Jureh, Inc., Hanef Trans., Inc., Hare Krishna Trans., Inc., Jojo E.M. Cab, Inc., Kalkat Cab, Inc., Tristan & Vanessa Cab, Inc., Cadoux Taxi, Inc., Jeffrey & Tanisha, Inc., Abbas Cab, Inc., You And I Cab, Inc., Meshualekia, Inc., Cathul, Inc., Phatricksey Cab, Inc., Marzeneb, Inc., Binyamin Cab, Inc., Dillons Trans., Inc., Christopher's Cab, Inc., Leyna Cab, Inc., Thomas Family, Inc., Sjp Taxi, Inc., Mobarak Cab, Incorporated, Benito & Roseline Cab, Inc., De Lerebours, Inc., Rosamelia Inc., Reham Cab, Inc., Laracine, Inc., Pal Taxi, Inc., Msw Taxi, Inc., Kbs Cab, Inc., Roody's Cab, Inc., Gadl Cab, Inc., Mahnoor Trans., Inc., Taj Trans., Inc., Paul Paras, M And J Cab, Inc., N M R Cab, Inc., Punjab Trans., Inc., Noor Cab, Inc., Fafou Cab, Inc., Take it EZ Cab, Inc., Youssef, Inc., Deruka Taxi, **[**15]** Inc., C & G Leasing, Inc., Sweet Rose Trans., Inc., Sj Cab, Inc., Iqra Enterprise, Inc., Parvati Cab, Inc., E.D.R. Cab, Inc., Next Cab, Inc., Jason Cab, Inc., Crossroad Trans. Inc., Ti Lou Lou Cab, Inc., Mcg Cab, Inc., Seven Hills Taxi, Inc., Manhar, Inc., Rodney Cab, Inc., Hattie Cab, Inc., Ange & Michelle, Inc., Betru Ami Corp., Himalaya, Inc., Satlouj, Inc., Micasta Cab, Inc., Dalul, Inc., Franklin Taxi, Inc., Les-Mar Taxi, Inc., Debra Cab, Inc., Edward Noel, Inc., Bern. & Y. Cab, Inc., God is Good, Inc., Jude Cab, Inc., Yahweh Cab, Inc., Noma Cab, Inc., C.T.P. Ii, Inc., Orow, Inc., D Q Donne Cab, Inc., Benben Cab, Inc., Kripalu Trans., Inc., Beno Cab, Inc., Rebecca Cab, Inc., Radha Soami, Inc., Le Bon Berger, Inc., Nicky Trans, Inc., Baran Trans., Inc., W.L.E.J., Inc., Willky-Medgene, Inc., J & J Transportation, Inc., Cambridge Taxi, Inc., Sosthene, Inc., Samyr Cab, Inc., P.B. Cab, Inc., Yamuna, Inc., South Sudan Corp, Nel & Son, Inc., Inman Cab, Inc., St. Michel A, Inc., Ripert Cab, Inc., Et Cab, Inc., Hare Ram Trans., Inc., Alganes Cab, Inc., Fern, Inc., Aaa Cab, Inc., Mitachal Cab, Inc., Four J'S Cab, Inc., Grand Canyon, Inc., Zubir, Inc., The 32 Summer St. Corp., Daphne Taxi, **[**16]** Inc., Cecilard Transportation, Inc., Yilma Trans., Inc., Vette Taxi, Inc., Emily & Kelly Cab, Inc., Ketterle Cab, Inc., Addis Ababa, Inc., Twins Brothers Transportation, Inc., Gabrielle Cab, Inc., Loren Cab, Inc., Matelots, Inc., Mew Cab, Inc., On Y VA Taxi, Inc., Nancy Cab, Inc., Baba Nanak Cab, Inc., Carlon Trans., Inc., Plaintiff (1:16cv12651): Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

For Uber Technologies, Inc., Defendant (1:16cv12651): Michael Sheetz, LEAD ATTORNEY, Adam S. Gershenson, Michael E. Welsh, Timothy W. Cook, Cooley LLP, Boston, MA USA; Beatriz Mejia, PRO HAC VICE, Cooley LLP, San Francisco, CA USA.

For Anoush Cab, Inc., Interested Party (1:16cv12651): Edward F. Haber, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA USA; Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

For Sycoone Taxi, Inc., Taxi Management, Inc., Andrew J. Cab, Inc., Jeff & Nayama, Inc., Myra, Inc., Cambridge Transportation Services, Inc., Step by Step Cab, Inc., Fillette Cab, Inc., Saint, Inc., Plaintiffs (1:17cv10586): Christopher G. Timson, Law Offices of Christopher G. Timson, PC, Norwood, MA USA.

For Uber Technologies, **[**17]** Inc., Defendant (1:17cv10586): Michael Sheetz, LEAD ATTORNEY, Adam S. Gershenson, Michael E. Welsh, Timothy W. Cook, Cooley LLP, Boston, MA USA; Beatriz Mejia, PRO HAC VICE, Cooley LLP, San Francisco, CA USA.

For Anoush Cab, Inc., Interested Party (1:17cv10586): Edward F. Haber, Shapiro Haber & Urmy LLP, Boston, MA USA.

For Taxi Maintenance, Inc., Alice's Cab, Inc., George's Cab, Inc., G&V&R Cab, Inc., Tung's Cab, Inc., Tutun Cab, Inc., Metaxia Motor, Inc., Plaintiffs (1:17cv10598): Darin M. Colucci, LEAD ATTORNEY, Colucci, Colucci & Marcus, P.C., Milton, MA USA; Brendan R. Pitts, Paul K. Flavin, Colucci, Colucci, Marcus & Flavin, P.C., Milton, MA USA.

For Uber Technologies, Inc., Defendant (1:17cv10598): Michael Sheetz, LEAD ATTORNEY, Cooley LLP, Boston, MA USA; Adam S. Gershenson, Michael E. Welsh, Timothy W. Cook, Cooley LLP, Boston, MA USA; Beatriz Mejia, PRO HAC VICE, Cooley LLP, San Francisco, CA USA.

For Anoush Cab, Inc., Interested Party (1:17cv10598): Edward F. Haber, LEAD ATTORNEY, Shapiro Haber & Urmy LLP, Boston, MA USA; Brendan R. Pitts, Colucci, Colucci, Marcus & Flavin, P.C., Milton, MA USA.

Judges: Nathaniel M. Gorton, United States District Judge.

Opinion by: Nathaniel M. Gorton

Opinion

[*268] MEMORANDUM & [18] ORDER**

GORTON, J.

This case involves seven consolidated actions by various taxi medallion holders in the Greater Boston area ("plaintiffs") who allege that Uber Technologies, Inc. ("Uber" or "defendant") and two of its founders, Travis Kalanick and Garrett Camp (the "individual defendants") competed unlawfully in the on-demand, ride-hail ground transportation market in and around Boston, Massachusetts. Plaintiffs in all seven actions allege that Uber competed unfairly in violation of the common law and the *Massachusetts Consumer Protection Act*. Certain plaintiffs also allege that Uber violated state and federal ***antitrust law***, interfered with advantageous business relationships, engaged in a civil conspiracy and aided and abetted unfair competition.

Before the Court are 1) a motion to dismiss of individual defendants Travis Kalanick and Garrett Camp (Docket No. 70) and 2) defendants' consolidated motion to dismiss plaintiffs' complaints (Docket No. 72).

I. Background

The City of Boston has traditionally regulated taxis under a set of municipal rules, ordinances and regulations collectively **[*269]** known as "Taxi Rules". The Police Commissioner for the City of Boston ("the Commissioner") is authorized **[**19]** by statute to regulate all vehicles that fall under those rules. Boston Police Department Rule 403 ("Rule 403") requires that

> [i]n the City of Boston, no person, firm, or corporation driving or having charge of a taxicab or other private vehicle shall offer the vehicle for hire for the purpose of transporting, soliciting and/or picking up a passenger or passengers unless said person is licensed as a hackney driver and said vehicle is licensed as a hackney carriage by the Police Commissioner.

City of Boston Code 16-15.05: Vehicle for Hire Ordinance (Appendix I to Rule 403).

Rule 403 applies to all vehicles "used or designed to be used for the conveyance of persons for hire from place to place" within the city of Boston.[1] The Taxi Rules impose certain regulations on taxi cabs, such as requiring possession of a taxi medallion, maintaining a properly equipped taxicab and belonging to an approved dispatch service or radio association.

Uber entered the Boston market for private transportation services in 2011 and launched its UberX service in 2013. The company provides a digital tool for requesting private vehicles-for-hire by users who download Uber's free "smart phone application" ("the Uber app"). Users who open the Uber **[**20]** app on their mobile phones are shown a map of their location or designated pick-up point and the available Uber-affiliated vehicles in that vicinity.

In August, 2016, Massachusetts enacted the *Transportation Network Companies Act* ("the TNC Act"). See M.G.L. c. 159A 1/2. The statute defines a TNC as an "entity that uses a digital network to connect riders to drivers to pre-arrange and provide transportation." *M.G.L. c. 159A 1/2 § 1*. The law preempts municipalities from regulating TNCs through local Taxi Rules. *M.G.L. c. 159A 1/2 § 10* ("[N]o municipality or other local or state entity, . . . may subject a [TNC]" to requirements besides the Massachusetts Department of Public Utilities and the Massachusetts Port Authority.).

In the "Taxi Maintenance" action plaintiffs assert claims against Travis Kalanick, Uber's co-founder and former CEO, and Garrett Camp, an Uber co-founder and a current director. The complaint names both individuals as defendants.

The present litigation involves seven different groups of plaintiffs that represent over 700 holders of taxi medallions in the Greater Boston area. The various complaints were filed in this district between December, 2016, and April, 2017. The Court consolidated the cases pursuant to *Fed. R. Civ. P. 42(a)(2)* on October 5, 2017. **[**21]** On November 13, 2017, this Court entered an order explaining in detail how the cases were to proceed consistent with judicial economy and due process for all parties.

Before the Court are two omnibus motions to dismiss filed by defendants: one with respect to Uber and the other with respect to the individual defendants.

II. Analysis

A. The Motion to Dismiss of Defendants Travis Kalanick and Garrett Camp

[1] Plaintiffs note that Taxi Rules vary among municipalities but do not identify any specific differences.

Only the Taxi Maintenance plaintiffs pursue a claim against the individual defendants. Accordingly, defendants' motion to dismiss is directed only at the Taxi **[*270]** Maintenance Corrected Amended Complaint.

Personal Jurisdiction

On a motion to dismiss for want of personal jurisdiction, plaintiff bears the burden of showing that the Court has authority to exercise jurisdiction over defendants. See *Mass. Sch. of Law at Andover, Inc. v. ABA, 142 F.3d 26, 33-34 (1st Cir. 1998)*. The Court must take facts alleged by plaintiff as true and construe disputed facts favorably toward plaintiff. See *Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 203 (1st Cir. 1994)*.

In a diversity suit, this Court acts as "the functional equivalent of a state court sitting in the forum state." See *Astro-Med, Inc. v. Nihon Kohden America, Inc., 591 F.3d 1, 8 (1st Cir. 2009)*. As such, this Court must determine whether (1) jurisdiction is permitted by the Massachusetts long-arm statute and (2) the exercise of jurisdiction coheres with the *Due Process Clause of the United States Constitution*. Id. **[**22]**

The Massachusetts long-arm statute, *M.G.L. c. 223A, § 3*, extends jurisdiction to the limits of the United States Constitution. See *Tatro v. Manor Care, Inc., 416 Mass. 763, 771, 625 N.E.2d 549 (1994)*. Accordingly, this Court need not further consider the statute's applicability and may proceed to the due process question. See *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A., 290 F.3d 42, 52 (1st Cir. 2002)*.

Due process demands a showing of general or specific personal jurisdiction by plaintiff. See *Negron-Torres v. Verizon Commc'n, Inc., 478 F.3d 19, 24 (1st Cir. 2007)*. Plaintiffs must demonstrate that defendants have made sufficient contacts with the forum state to justify the exercise of that jurisdiction. Id.

1. General Jurisdiction

This Court may assert general jurisdiction over a defendant who maintains continuous and systematic activity in the forum state. See *United Elec., Radio and Mach. Workers of Am. v. 163 Pleasant St., 960 F.2d 1080, 1088 (1st Cir. 1992)*. General jurisdiction is only appropriate where the defendant's activity renders him "essentially at home in the forum state". *Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)*.

The Taxi Maintenance complaint states, in conclusory fashion, that the individual defendants are subject to general personal jurisdiction within the Commonwealth of Massachusetts by "regularly engaging in persistent courses of conduct in the Commonwealth of Massachusetts" through the Uber ride-hailing service. Plaintiffs fail, however, to allege specific facts demonstrating that the individual defendants, as opposed to the corporate **[**23]** defendant with which they are associated, should be considered "at home" in Massachusetts. See id. The plaintiffs' threadbare statement is insufficient to establish this Court's general jurisdiction.

2. Specific Jurisdiction

The *Due Process Clause of the Fourteenth Amendment* requires that a defendant have "minimum contacts" with the forum state such that the "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*. The plaintiff must allege that (1) the claim underlying the litigation arises directly out of, or relates to the defendant's forum-state activities, (2) the defendant's in-state contacts represent a purposeful availment of the privilege of **[*271]** conducting activities in the forum state and (3) the exercise of jurisdiction is reasonable. *Sawtelle v. Farrell, 70 F.3d 1381, 1389 (1st Cir. 1995)* (citing *United Electrical Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992))*.

"The relatedness requirement focuses on the nexus between the defendant's contacts and the plaintiff's cause of action." *Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 714 (1st Cir. 1996)* (citing *Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 206 (1st Cir. 1994))* (internal quotation omitted). Personal jurisdiction over an employee does not follow from the fact jurisdiction over the employer exists. *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n. 13, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)*. Instead, there must be "an independent basis for jurisdiction based on an individual's actions." *Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics Inc., 901 F. Supp. 2d 255, 263 (D. Mass. 2012)* (citations omitted).

Plaintiffs fail to allege facts that demonstrate a nexus **[**24]** between the individual defendants' contacts and the plaintiff's cause of action.

No specific facts with regard to Camp are alleged beyond the claim that he founded (and is a director of) Uber and that he resides in California. Plaintiffs attempt to attribute the acts of Uber to Camp through principles of agency law. They fail to allege, however, a single fact indicating that Camp made decisions about Uber's operations in Massachusetts or even traveled to the Commonwealth. Accordingly, plaintiffs have failed to allege that this Court has specific personal jurisdiction over Garrett Camp. Cf. *Galletly v. Coventry Healthcare, Inc., 956 F. Supp. 2d 310, 314 (D. Mass. 2013)* (finding that court lacked jurisdiction over individual defendant because plaintiff's allegations "[did] not suggest that [defendant] played any specific role" in the underlying cause of action).

The handful of statements that plaintiffs attribute to Kalanick do not create a nexus to their cause of action. Plaintiffs provide a smattering of irrelevant comments made by Kalanick, such as that he is a fan of Ayn Rand's novel "Fountainhead" (sic). They do not, however, point to a single decision Kalanick made about Uber's operations in Massachusetts. They do not allege that Kalanick traveled to the Commonwealth **[**25]** regularly, or even at all. Plaintiffs have failed to allege that this Court has specific personal jurisdiction over Travis Kalanick. Cf. *Interface Grp.-Massachusetts, LLC v. Rosen, 256 F. Supp. 2d 103, 107 (D. Mass. 2003)* (determining that Court lacked specific personal jurisdiction because there was "too tenuous a nexus" between the defendant's specific Massachusetts contacts and the injuries suffered by the plaintiff).

Because plaintiffs have failed to establish the relatedness requirement of specific personal jurisdiction, the Court declines to address the foreseeability and reasonableness requirements.

3. Piercing the corporate veil

As an alternative, plaintiffs contend that they have established specific personal jurisdiction over the individual defendants on the basis of an alter ego theory. That theory is inapposite. Under Massachusetts law, courts consider a multitude of factors when deciding whether to pierce a corporate veil:

> (1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; **[*272]** (9) siphoning away of corporation's funds by dominant shareholder; **[**26]** (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud.

Attorney Gen. v. M.C.K., Inc., 432 Mass. 546, 555 n. 19, 736 N.E.2d 373 (2000) (citing *Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 14-16 (1st Cir. 1985))*.

The complaint does not allege facts in support of a single factor relevant to piercing the corporate veil. Accordingly, plaintiffs have not justified the application of such a theory. See *Newman v. European Aeronautic Defence & Space Co. Eads N.V., 700 F. Supp. 2d 156, 168 (D. Mass. 2010)*.

Plaintiffs have failed to establish that this Court has personal jurisdiction over either of the individual defendants. Therefore, the motions to dismiss of defendants Travis Kalanick and Garrett Camp will be allowed.

B. The Consolidated Motion to Dismiss of Defendants Uber, Travis Kalanick and Garrett Camp

Defendants contend that plaintiffs fail to state a claim upon which relief can be granted. In summary, Uber avers that it has not been shown: 1) to compete "unfairly" because it was never subject to the Taxi Rules, 2) to present a dangerous probability of monopolizing a market, 3) to interfere with advantageous business relationships or with the market-at-large, or 4) to have been part of a conspiracy or to have aided and abetted the violation of any legal canon. The Court will address these contentions seriatim.

To survive **[**27]** a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In considering the merits of a motion to dismiss, the Court may look only to the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken. *Nollet v. Justices of Trial Court of Mass., 83 F.Supp.2d 204, 208 (D. Mass. 2000)*, aff'd, *248 F.3d 1127 (1st Cir. 2000)*. Furthermore, the Court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Langadinos v. Am. Airlines, Inc., 199 F.3d 68, 69 (1st Cir. 2000)*. If the facts in the complaint are sufficient to state a cause of action, a motion to dismiss the complaint must be denied. See *Nollet, 83 F.Supp.2d at 208*.

Although a court must accept as true all of the factual allegations contained in a complaint, that doctrine is not applicable to legal conclusions. *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Threadbare recitals of the legal elements which are supported by mere conclusory statements do not suffice to state a cause of action. Id. Accordingly, a complaint does not state a claim for relief where the well-pled facts fail to warrant an inference of any more than the mere possibility of misconduct. *Id. at 1950*.

1. Unfair competition under the common law and the Massachusetts [28] Consumer Protection Act, *M.G.L. c. 93A § 11***

All seven groups of plaintiffs bring claims of unfair competition under the common law and Massachusetts statutory **[*273]** law.[2]

Plaintiffs theory, in its simplest form, is that the taxi industry in Greater Boston area is a heavily regulated business. Taxi cabs must, for instance, obtain a license, known as a "taxi medallion", to operate lawfully. Uber, the plaintiffs insist, did not comply with the Taxi Rules, did not incur the concomitant costs, and thereby gained an unfair advantage and caused economic injury to taxi medallion holders and duly licensed fleet owners.

Uber responds that it is not and has never been subject to the Taxi Rules. Uber submits that the rules have never been enforced against it and furthermore that the Commonwealth of Massachusetts has recently enacted a statute that preempts municipalities from regulating Uber (referring to *M.G.L. c. 159A 1/2, § 10*). According to defendants, the TNC Act thus reaffirms that the Taxi Rules do not apply (and never have applied) to Uber.

Chapter 93A makes it unlawful for a party to engage in an "unfair method of competition" or an "unfair or deceptive act or practice." *M.G.L. c. 93A, § 11*. Proponents of such claims must prove they have suffered a tangible **[**29]** loss as a result of the unfair or deceptive conduct. *Arthur D. Little, Inc. v. Dooyang Corp., 147 F.3d 47, 56 (1st Cir. 1998)*.

To determine whether a particular practice is unfair, courts examine

> Whether the practice . . . is within at least the penumbra of some common-law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers . . . .

[2] The plaintiffs do not distinguish between the legal standard for their common law and statutory claims.

Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc., 552 F.3d 47, 69 (1st Cir. 2009).

The lodestar of Chapter 93A claims is whether the defendant's actions "would raise an eyebrow of someone inured to the rough and tumble of the world of commerce." *Levings v. Forbes & Wallace, Inc., 8 Mass. App. Ct. 498, 504, 396 N.E.2d 149 (1979)* (Kass, J.).

Although claims under Chapter 93A are uniformly included with allegations of statutory and common law violations, "[v]iolation of a statutory regime is not a necessary basis" for them to proceed. *Morris v. BAC Home Loans Servicing, L.P., 775 F.Supp.2d 255, 259 (D. Mass. 2011)*; see also *Mass. Eye & Ear Infirmary, 552 F.3d at 66* ("To prove [a Chapter 93A] claim, it is neither necessary nor sufficient that a particular act or practice violate common or statutory law."); cf. *Madan v. Royal Indem. Co., 26 Mass. App. Ct. 756, 763, 532 N.E.2d 1214 (1989)* (explaining that a plaintiff must show unfair or deceptive acts over and above a breach of contract to demonstrate a violation of Chapter 93A).

As noted above, the TNC Act authorizes the operations of Uber and preempts municipalities from regulating TNCs. Indeed, plaintiffs concede **[**30]** that, after enactment of the statute in August, 2016, Uber can not, as a matter of law, violate the Taxi Rules. Accordingly, the activity in dispute in this action is limited to that which took place prior to August 5, 2016.

i. Competing as an unlicensed participant in a licensed market can constitute an unfair trade practice

Determining the boundaries of actionable conduct under Chapter 93A is a **[*274]** question of law. *Incase Inc. v. Timex Corp., 488 F.3d 46, 56 (1st Cir. 2007)* (citation omitted). Whether a particular set of acts is unfair or deceptive is a question of fact. Id.

Taking the plaintiffs' plausibly alleged facts as true and construing disputed acts in their favor, plaintiffs have stated a claim that Uber engaged in an unfair method of competition by operating its services outside of the purview of Massachusetts and local law. Massachusetts courts have consistently allowed "a licensed carrier of passengers [to] restrain competition by an unlicensed carrier." *A. B. & C. Motor Transp. Co. v. Dep't of Pub. Utilities, 327 Mass. 550, 551, 100 N.E.2d 560 (1951)* (collecting cases). This Court has already allowed claims similar to plaintiffs' to survive a motion to dismiss against this same defendant. See *Boston Cab Dispatch, Inc. v. Uber Techs., Inc., 2014 U.S. Dist. LEXIS 42063, 2014 WL 1338148, at *6-7 (D. Mass. Mar. 27, 2014)* (holding that plaintiffs stated a claim for unfair competition pursuant to Chapter 93A and the common law where defendant allegedly operated **[**31]** service without incurring expense of local and state regulation).

Whether Uber's conduct in this particular instance was sufficiently egregious will require "an individualized, fact-specific inquiry". *Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 358 (1st Cir. 2013)* (citing *Arthur D. Little, 147 F.3d at 55*) (internal quotation omitted). At this stage, however, plaintiffs have plausibly stated a claim that Uber's conduct amounted to more than a statutory violation or tort. See *Juárez v. Select Portfolio Servicing, Inc., 708 F.3d 269, 281 (1st Cir. 2013)*.

ii. The Regulatory Framework

Uber vigorously rejoins that it "is not, and was not, subject to Taxi Rules." Accordingly, it submits, it cannot be said to compete unfairly for failure to follow inapplicable rules. The Court disagrees.

The Massachusetts legislature authorized the Commissioner to regulate the taxi business in Boston. *Town Taxi Inc. v. Police Com'r of Boston, 377 Mass. 576, 578, 387 N.E.2d 129 (1979)*. The Commonwealth has issued regulations regarding vehicle registration requirements. Those regulations define a "Taxicab" as

> any vehicle which carries passengers for hire, and which is licensed by a municipality pursuant to *M.G.L. c. 40, § 22* as a taxicab.

540 Code Mass. Regs. 2.05(3) (Dec. 7, 2012).

A "Livery Vehicle" is defined as

> any limousine or other vehicle which is designed to carry fifteen or fewer passengers, including the driver, and carries passengers for hire, business courtesy, employee shuttle, customer shuttle, charter **[**32]** or other pre-arranged transportation, and which vehicle is not required to obtain a taxicab license pursuant to M.G.L. c. 40, §22.

Id.[3]

In turn, the City of Boston defines a "Taxi" as

> [a] vehicle used, or designed to be used, for the conveyance of persons for hire, from place to place, and licensed by the Hackney Carriage Division of the Boston Police Department.

Traffic Rules and Regulations, City of Boston (November 1, 2012).

It defines a "Livery Vehicle" as

> **[*275]** A vehicle used, or designated to be used, for the conveyance of less than sixteen (16) persons for hire, from place to place, except a bus, streetcar, taxi or commercial vehicle.

Id.

Finally, in January, 2016, the Massachusetts Department of Transportation revised 540 Code Mass. Regs. § 2.05 to include a "Personal Transportation Network Vehicle" which is defined as

> a private passenger motor vehicle that is used by a Transportation Network Company Driver to provide Transportation Services for a Transportation Network Company.

540 Code Mass. Regs. 2.05(3) (Jan. 16, 2015).

The regulations impose state-level requirements and standards for entities and their drivers.

The Commissioner has imposed additional requirements on taxis operating in Boston, over and above the state regulations. The primary ordinance at issue **[**33]** is the City of Boston's Vehicle for Hire Ordinance ("Rule 403"), which requires that

> [i]n the City of Boston, no person, firm, or corporation driving or having charge of a taxicab or other private vehicle shall offer the vehicle for hire for the purpose of transporting, soliciting and/or picking up a passenger or passengers unless said person is licensed as a hackney driver and said vehicle is licensed as a hackney carriage by the Police Commissioner.

City of Boston Code 16-15.05: Vehicle for Hire Ordinance (Appendix I to Rule 403).

Uber relies heavily on the fact that Rule 403 was not enforced against it between 2013 and 2016. Nor was the Rule enforced against livery vehicles, Uber contends, even though it seems to apply to livery vehicles as well. The statutory and regulatory framework does, however, distinguish between Uber and livery vehicles. State regulations explicitly state that livery vehicles are "not required to obtain a taxicab license" pursuant to state regulation. 540 Code Mass. Regs. 2.05(3) (Dec. 7, 2012). Uber can point to no such regulation or ordinance with respect to TNCs during the complained of period.

iii. Analogous caselaw does not preclude plaintiffs' claim

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[3] The definitions of "taxicab" and "livery vehicle" were not changed by the January, 2015, revision.

Neither Massachusetts courts nor the United States Circuit **[**34]** Court of Appeals for the First Circuit ("First Circuit") has determined whether Uber's conduct was permissible under the Taxi Rules during the relevant period. Accordingly, Uber maintains, this Court should not interpret Rule 403 pursuant to the doctrine propounded in *Dial A Car, Inc. v. Transportation, Inc., 82 F.3d 484, 489, 317 U.S. App. D.C. 240 (D.C. Cir. 1996)*, which it contends is "the leading case" on the issue at hand and dispositive.

The Dial a Car doctrine is a prudential principle that a federal court should not interpret an ambiguous local regulation until the local regulator has addressed the issue. See id. In Dial a Car, a licensed, on-call taxi service alleged that two defendant taxi companies were illegally providing unlicensed taxi services within the District of Columbia. *Id. at 484*. The plaintiff brought a Lanham Act claim alleging that defendants misled customers by holding themselves out as an authorized business. *Id. at 488*. The Circuit Court of Appeals for the District of Columbia affirmed dismissal of plaintiff's claim, explaining that it saw "no reason to reach out and apply federal law to this quintessentially local dispute." *Id. at 488-89*. Accordingly, the court held that

> there must be a clear and unambiguous statement from the Taxicab Commission **[*276]** regarding [defendants'] status before a Lanham **[**35]** Act claim can be entertained.

Id. at 489.

The reasoning in the *Dial a Car* decision is not controlling with respect to the issue before this Court if for no other reason than that the First Circuit has neither adopted nor cited the case.

Furthermore, the Dial a Car court's justification for abstention, grounded in principles of federalism, does not apply to the unfair competition claims of these plaintiffs. The D.C. Circuit Court took particular issue with the fact that the claim in that case was brought under the Lanham Act in an effort to transform a federal statute "into a handy device to reach and decide all sorts of local law questions." *Id. at 491*. In the present case, by contrast, plaintiffs rely on state regulations, statutes and common law that is designed to hold a business to a "standard of lawfulness." See *J.E. Pierce Apothecary, Inc. v. Harvard Pilgrim Health Care, Inc., 365 F. Supp. 2d 119, 145 (D. Mass. 2005)* (emphasis in original). Under the regulations of the Attorney General of Massachusetts, an act or practice violates Chapter 93A, § 2 if it "fails to comply with existing statutes, rules, regulations or laws" meant for the protection of the public's health, safety or welfare. *940 Code Mass. Regs. 3.16(3)*. Uber does not dispute that the Taxi Rules are designed for the public's health, safety or welfare and there is

> no reason **[**36]** to assume that [section 3.16(3)] ought not apply to claims brought pursuant to *section 11 [of Chapter 93A*].

J.E. Pierce Apothecary, 365 F. Supp. 2d at 145.

Even if the Dial a Car doctrine applied to this case, Uber's application of it is inapposite. The D.C. Circuit Court acknowledged that a regulation might "be so clear on its face that no good faith doubt concerning its interpretation would be possible." *Dial A Car, 82 F.3d at 489 n. 3*. In such a case, the Court explained, no explicit statement from the municipal regulator would be necessary. Because the Court found that the regulatory scheme in the Dial a Car case was, "at the very least, ambiguous with regard to the legality" of the defendants' conduct, the regulation was found insufficiently clear for *Lanham Act* purposes. Id.

In sharp distinction, the regulatory scheme in this case is "so clear on its face that no good faith doubt concerning its interpretation" is possible. Under the rubric of Rule 403, Uber is a

> corporation . . . having charge of a . . . private vehicle [that] offer[s] the vehicle for hire for the purpose of transporting . . . a passenger or passengers.

Those vehicles were not, at the operative time, licensed as hackney carriages by the Police Commissioner. A response from Uber that it did not "hav[e] charge" of the vehicles **[**37]** is underwhelming. If this Court were to find that Uber did not have control over its drivers, then its business model would consist of aiding and abetting the "private vehicle[s]" of those drivers, none of which was licensed as a hackney carriage by the Police Commissioner.

Under either reading, there is "no good faith doubt" that Uber was (during the subject interlude and if the facts alleged are proved) engaged in unlawful behavior. See *id. at 489 n. 3*.

For all of these reasons, the Dial a Car doctrine does not compel this Court to dismiss plaintiffs' unfair competition claims.

iv. Uber is not exempt from Chapter 93A liability

Chapter 93A exempts from liability

> **[*277]** transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the Commonwealth.

M.G.L. c. 93A, § 3.

Uber contends that it was exempt from Chapter 93A because the Commonwealth authorized its conduct. It has failed, however, to satisfy the rigorous requirements for application of that statutory safe haven.

"Defendants have the burden of proving the exemption" and that burden is a "heavy one". See *Fleming v. National Union Fire Ins. Co., 445 Mass. 381, 389, 837 N.E.2d 1113 (2005)*. A defendant must show that the Commonwealth's regulatory scheme "affirmatively permits the **[**38]** practice which is alleged to be unfair or deceptive." *Id. at 390* (quotation omitted).

Uber relies on three arguments. First, it repeats its contention that Rule 403 never applied to it or to its drivers. That argument fails for the reasons articulated above.

Second, it emphasizes that Rule 403 was not enforced against it. Drawing all inferences in favor of the plaintiffs, as the Court must do at this stage, they have plausibly alleged that Rule 403 or its equivalent in other municipalities was, at least occasionally, enforced against Uber drivers. Even if that were not the case, regulatory forbearance is insufficient to prompt exemption under *§ 3*. A defendant must show that the regulatory scheme "affirmatively permits the practice which is alleged to be unfair or deceptive." Id. (emphasis added). Failure to enforce a regulation is insufficient.

Finally, Uber submits that the TNC Act codified the fact that the Taxi Rules did not apply to it. The Court disagrees. Massachusetts courts interpret statutes with a presumption against retroactivity. See generally *Fed. Nat. Mortg. Ass'n v. Nunez, 460 Mass. 511, 952 N.E.2d 923 (2011)*. Accordingly, a statute only applies retroactively if it is "unequivocally clear . . . from the words, context or objects" of the statute that the legislature intended **[**39]** it to be retroactive in operation. *Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370, 377, 968 N.E.2d 884 (2012)*. No such "unequivocally clear" intention is evident from the TNC Act.

Uber's conduct is not exempted from liability under *Chapter 93A, section 3*.

v. Other litigation involving Uber does not compel dismissal

Uber cites a number of cases in which taxi companies have brought actions involving unfair competition and regulation of TNCs. The Court agrees with defendant that, since the TNC Act was enacted, Uber has not been required to comply with local taxi ordinances. Accord *Boston Taxi Owners Ass'n, Inc. v. City of Boston, 223 F. Supp. 3d 119, 122 (D. Mass. 2016)*. On the other hand, no case that Uber cites justifies dismissal of plaintiffs' unfair competition claims given the relevant law, alleged facts and regulatory framework.

Some of the cases Uber cites are simply beside the point. For instance, plaintiffs do not challenge the legality of the Taxi Rules or the TNC Act. Contra, e.g., *Boston Taxi Owners Ass'n, Inc. v. Baker, 2017 U.S. Dist. LEXIS 9628, 2017 WL 354010 (D. Mass. Jan. 24, 2017)*, appeal dismissed, *2017 U.S. App. LEXIS 17032, 2017 WL 3758297*

(1st Cir. Mar. 27, 2017); *Illinois Transportation Trade Ass'n v. City of Chicago, 839 F.3d 594, 599 (7th Cir. 2016)*, cert. denied sub nom. Illinois Transp. Trade Ass'n v. City of Chicago, *Ill., 137 S. Ct. 1829, 197 L. Ed. 2d 761 (2017)* (dismissing equal protection and takings challenges to the City of Chicago's TNC ordinance).

[*278] Other cases upon which Uber relies depend on different operative law. The California Public Utilities Code, for example, forbids courts, except the California Supreme Court and Court of Appeal, from hindering or interfering with the **[**40]** California Public Utilities Commission's exercise of regulatory authority. See *A White & Yellow Cab, Inc. v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 171795, 2017 WL 4642346, at *3-4 (N.D. Cal. Oct. 17, 2017)* (dismissing plaintiff's unfair competition and unfair practices claims because a ruling in plaintiff's favor would "hinder or interfere with a broad and continuing CPUC program") (citing *California Public Utilities Code § 1759(a)*) (additional citation omitted).

Massachusetts state law has a more expansive understanding of unfair competition than do other states. Cf. *Checker Cab Philadelphia, Inc. v. Uber Techs., Inc., 689 F. App'x 707, 709 (3d Cir. 2017)* (explaining that, under Pennsylvania law, unfair competition is limited to an entity passing off its product as another, dishonest statements, tortious interference with contract or intellectual property theft) (citations omitted); *Greenwich Taxi, Inc. v. Uber Techs., Inc., 123 F. Supp. 3d 327, 340 (D. Conn. 2015)* (stating that, under Connecticut law, unfair competition is guided by the Federal Trade Commission's "cigarette rule"). Chapter 93A, by contrast, renders violations of public safety regulations actionable. See *940 Code Mass. Regs. 3.16(3)*.

Finally, Uber cites a handful of cases where courts have relied on Dial a Car to find that plaintiffs could not state a claim for unfair competition based on regulatory violations. Those cases, too, are of no consequence. For instance, in *Manzo v. Uber Techs., Inc., 2014 U.S. Dist. LEXIS 95106, 2014 WL 3495401, at *4 (N.D. Ill. July 14, 2014)*, the court maintained that the ordinance at issue was ambiguous. Id. (explaining that whether a smartphone equipped **[**41]** with Uber constituted a "taximeter" as that term was defined by the city ordinance was ambiguous). This Court has explained why the regulatory framework at issue here is unambiguous.

Uber fails to distinguish cases where courts have allowed unfair competition claims based on Uber's non-compliance with local regulation. See, e.g., *The Yellow Cab Co. v. Uber Techs., Inc., 2015 U.S. Dist. LEXIS 109417, 2015 WL 4987653, at *5-6 (D. Md. Aug. 19, 2015)* (finding that plaintiffs demonstrated a possibility of success on their common law unfair competition claim because the "expansive scope" of Maryland's unfair competition law does not impose a fraud or deceit requirement). Most importantly, Uber fails to distinguish the similar claims with which it has already been confronted in this Court.

Although the facts and legal arguments vary somewhat, this Court held that plaintiffs had sufficiently stated a claim that

> Uber unfairly competes with plaintiffs, in violation of Chapter 93A, [] by operating its service without incurring the expense of compliance with Massachusetts law and Boston ordinances.

*Boston Cab Dispatch, Inc. v. Uber Techs., Inc., 2014 U.S. Dist. LEXIS 42063, 2014 WL 1338148, at *6-7 (D. Mass. Mar. 27, 2014)*.

The Court also found that plaintiffs had stated a common law unfair competition claim based upon the same conduct. *Id. at *7*. Defendant does not distinguish Boston Cab from the present action. Indeed, it does not cite that case **[**42]** anywhere nor explain why this Court should rule differently than it did before.[4] The Court finds no **[*279]** reason to do so. Plaintiffs have state a claim for unfair competition.

Accordingly, defendant's motion to dismiss will, with respect to the statutory and common law unfair competition claims, be denied.

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[4] In its proposed reply memorandum Uber proffers an unconvincing distinction. It contrasts the magistrate judge's analysis of the plaintiffs' Lanham Act claim with the unfair competition claim before this Court but it fails to distinguish the unfair competition claim in the earlier case with the unfair competition claim here.

2. Attempt to monopolize under the Sherman Antitrust Act, *15 U.S.C. § 2* and the Massachusetts Antitrust Act, *M.G.L. c. 93 § 5*

The Malden, Dot Ave, Max Luc and Taxi Maintenance plaintiffs all bring actions for attempt to monopolize in violation of the *Sherman Antitrust Act* and the *Massachusetts Antitrust Act*, *M.G.L. c. 93 § 5*.[5]

Plaintiffs argue that Uber has attempted to drive taxi companies out of business through the use of its allegedly predatorily priced UberX service. Defendants respond that plaintiffs have not met the high burden of alleging a predatory pricing claim.

Section 2 of the Sherman Act makes it illegal to

> monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

15 U.S.C. § 2.

To state a monopolization claim under *§ 2*, a plaintiff must adequately allege that defendant (1) has monopoly power in the relevant market **[**43]** and (2) has engaged in illicit "exclusionary practices" with "the design or effect of protecting or enhancing its monopoly position." *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 125 (1st Cir. 2011)* (quoting *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996)* (internal citation omitted)).

One kind of exclusionary practice is the practice of "predatory pricing". In this scheme, a company reduces the price of its product to below cost, hoping to drive competitors out of business and then raise prices once it has achieved a monopoly position. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 584-585, n. 8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. To succeed on a predatory pricing claim a plaintiff must demonstrate that

> the prices complained of are below an appropriate measure of its rival's costs . . . [and that the competitor had] a dangerous probability of recouping its investment in below-cost prices.

Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (U.S. 1993).

Because an economically unsound approach by a competitor could actually benefit consumers, plaintiffs must explain with particularity "just what the arrangements were and why they plausibly constituted antitrust violations." See *Am. Steel Erectors v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 71 (1st Cir. 2016)* (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 65 (1st Cir. 2004))*.

Plaintiffs fail to allege facts supporting a predatory pricing claim.

Plaintiffs do not allege that Uber's services were priced below Uber's costs. Accordingly, they have failed to "explain in detail" why Uber's conduct constituted an antitrust violation. See id. **[**44]** No complaint alleges any facts with respect to Uber's costs. Instead, the Malden complaint repeatedly states that Uber employs a "below-cost pricing scheme". **[*280]** Such "threadbare recitals of a cause of action's elements, supported by mere conclusory statements, do not suffice" survive the motion to dismiss stage. *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 555*).

Plaintiffs repeatedly allege that UberX was priced below the cost of a taxi. But to state a claim for antitrust injury from a rival's low prices, a plaintiff must allege that "the prices complained of are below an appropriate measure of its rival's costs." See *Brooke Group, 509 U.S. at 222* (emphasis added).

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[5] Neither party contends that the legal standard varies for the state law claim.

Plaintiffs attempt to bolster their predatory pricing claims by noting that Uber has lost "billions of dollars". That allegation lacks the particularity required from an antitrust plaintiff. If Uber's "unconventional approach is economically unsound," then it may just be "a boon to consumers." *Am. Steel Erectors, 815 F.3d at 71* (quoting *Brooke Group, 509 U.S. at 224*). Without specific factual allegations as to Uber's costs, plaintiffs' invocation of Uber's annual deficits is unavailing.

Because plaintiffs have failed adequately to allege a claim for predatory pricing, the defendants' motion to dismiss will, with respect to plaintiffs' antitrust claims, be **[**45]** allowed.

3. Aiding and abetting and civil conspiracy to engage in unfair competition in violation of the common law and the Massachusetts Consumer Protection Act, M.G.L. c. 93A

The Anoush and Taxi Maintenance plaintiffs each allege a different theory of civil conspiracy to engage in unfair competition in violation of the common law and Massachusetts statutory law. The Anoush plaintiffs allege that Uber conspired with its independent contractor, third-party drivers. The Taxi maintenance plaintiffs allege that the individual defendants, Uber and Uber's employees entered into a common conspiracy. Both conspiracy claims include allegations that Uber had a common plan, design and agreement to operate in violation of the Taxi Rules.

Under Massachusetts law, a defendant may be liable for aiding and abetting a tort where

> (1) a third-party committed the relevant tort; (2) the defendant knew the third-party was committing the tort; and (3) the defendant actively participated in or substantially assisted in the commission of the tort.

Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 616 (D. Mass. 2016) (citing *Go-Best Assets Ltd. v. Citizens Bank of Mass., 463 Mass. 50, 64, 972 N.E.2d 426 (2012)*; *Restatement (Second) of Torts § 876(b)* (1977)).

Massachusetts courts recognize a tort of civil conspiracy that is a form of vicarious liability for the tortious conduct of others. *Snyder v. Collura, 812 F.3d 46, 52 (1st Cir.)*, cert. denied, **[**46]** *136 S. Ct. 2517, 195 L. Ed. 2d 843 (2016)* (citing *Taylor v. Am. Chemistry Council, 576 F.3d 16, 34 (1st Cir. 2009))*. To state a claim for civil conspiracy, a plaintiff must allege that the conspiring parties agreed to or assisted in committing the underlying tort. *Taylor, 576 F.3d at 35* (citations omitted).

First, the Court notes that (as it has already found) it lacks personal jurisdiction over the individual defendants. With respect to the Taxi Maintenance plaintiffs' contention that Uber conspired with its employees, the claim is legally untenable. No civil conspiracy can exist under plaintiffs' theory because "an entity cannot conspire with itself." *Platten v. HG Bermuda Exempted Ltd., 437 F.3d 118, 131 (1st Cir. 2006)*.

[*281] The Anoush plaintiffs' theory represents a more belt-and-suspenders approach to pleading. In Count I of their complaint they allege that Uber controls and manages its drivers, such that Uber is directly liable for violating Chapter 93A. Their claims of civil conspiracy and aiding and abetting, (Counts III and IV), however, resort to Plan B. They allege that if Uber did not violate the Taxi Rules, they facilitated the violation of those rules by assisting Uber drivers in an unlawful business.

Plaintiffs have pled facts sufficient to establish that Uber gave substantial assistance to its drivers to violate the Taxi Rules. Both Uber and the plaintiffs agree that **[**47]** Uber classifies its drivers as "independent third-party drivers". Both parties agree that Uber connects the drivers to passengers through its smart phone application and that Uber collects the fares for its drivers. The parties disagree on the issue of whether Uber's drivers were subject to the Taxi Rules.

This Court finds that the text of Rule 403 clearly applies to Uber drivers. If Uber denies that it "controls" the drivers (such that it is not subject to direct liability), it cannot dispute that its drivers drove

> other private vehicle[s] [that were] offer[ed] for hire for the purpose of transporting . . . passengers [and that those vehicles were not] licensed as a hackney carriage by the Police Commissioner.

Finally, plaintiffs have pled facts sufficient to indicate, if proved, that Uber had knowledge that its drivers were committing torts. See also *Boston Cab Dispatch, Inc. v. Uber Techs., Inc., 2015 U.S. Dist. LEXIS 8508, 2015 WL 314131, at *6-7 (D. Mass. Mar. 27, 2014)* (denying defendant's motion to dismiss where plaintiffs alleged that Uber competed unfairly in violation of the common law and *M.G.L. c. 93A, § 11*).

Uber claims that it does not control its drivers but rather that the drivers are independent contractors. The courts in which it has proffered such claims have not necessarily seen it that way. See, e.g., *O'Connor v. Uber Techs., Inc., 82 F. Supp. 3d 1133, 1135 (N.D. Cal. 2015)* (denying Uber's **[**48]** motion for summary judgment that Uber drivers are independent contractors as a matter of law); *Mumin v. Uber Techs., Inc., 239 F. Supp. 3d 507, 532 (E.D.N.Y. 2017)* (holding that plaintiff stated a plausible overtime claim under New York labor law under theory that Uber misclassified its drivers as independent contractors); *Razak v. Uber Techs., Inc., 2016 U.S. Dist. LEXIS 139668, 2016 WL 5874822, at *5 (E.D. Pa. Oct. 7, 2016)* (holding that Uber driver stated a plausible claim under state and federal labor law that they were employees of Uber). Based on the litigated position of Uber, then, plaintiffs have stated a plausible claim.

Defendants' motion to dismiss the conspiracy and aiding and abetting claims will, with respect to the claim of the Taxi Maintenance plaintiffs, be allowed but, with respect to the claim of the Anoush plaintiffs, be denied.

4. Interference with advantageous business relationships

The Taxi Maintenance plaintiffs bring a count of interference with advantageous business relationships. They allege that Uber interfered with identifiable business relationships through improper means with improper motives. Uber responds that the complaint alleges that it interfered with the "market-at-large", which is insufficiently precise to state a claim.

According to Massachusetts law, a claim for tortious interference with advantageous business relationships **[**49]** requires four elements: (1) the plaintiff was **[*282]** involved in a business relationship or anticipated involvement in one, (2) the defendant knew about the relationship, (3) the defendant intentionally interfered with the relationship for an improper purpose or by an improper means and (4) the plaintiff suffered damages as a result. *Pembroke Country Club, Inc. v. Regency Sav. Bank, F.S.B., 62 Mass. App. Ct. 34, 815 N.E.2d 241 (2004)* (citing *United Truck Leasing Corp. v. Geltman, 406 Mass. 811, 812, 815-17, 551 N.E.2d 20 (1990))*. To demonstrate an anticipated business relationship, a plaintiff must show that it "had a probable future business relationship anticipating a reasonable expectancy of financial benefit." *Brown v. Armstrong, 957 F. Supp. 1293, 1305 (D. Mass. 1997)*, aff'd, *129 F.3d 1252 (1st Cir. 1997)* (citation omitted). A plaintiff cannot rely on speculative future relationships but must allege that a specific business relationship existed between itself and the potential customer. See *Sherman v. Clear Channel Outdoor, Inc., 889 F. Supp. 2d 168, 177 (D. Mass. 2012)*.

Plaintiffs claim that they had a prospective business relationship with every person seeking ride-hailing services in the City of Boston. They explain that, before Uber began operating in Boston, "every individual seeking for-hire services in Boston was a de facto customer" of the regulated taxi companies. That evanescent, hypothetical relationship lacks the specificity required to survive a motion to dismiss.

A plaintiff "may not speculate about future business relationships **[**50]** when alleging this tort." *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc., 308 F.3d 25, 48 (1st Cir. 2002)*. Instead, they must allege "a specific business relationship that was interfered with by [defendant]." See id. The "mere possibility that [their] proposal would be accepted by [the customers] is not sufficient." *Sherman, 889 F. Supp. 2d at 177*.

Because plaintiffs have failed to allege that they were involved in a specific anticipated business relationship, defendants' motion to dismiss for failure to state a claim upon which relief can be granted will be allowed. Cf. *Moving & Storage, Inc. v. Panayotov, 2014 U.S. Dist. LEXIS 31546, 2014 WL 949830, at *3 (D. Mass. Mar. 12, 2014)* (allowing motion to dismiss because the class of alleged customers included "any individual who may need moving services in the future").

ORDER

For the foregoing reasons, the motion to dismiss of defendants Travis Kalanick and Garrett Camp (Docket No. 70), is **ALLOWED** and the consolidated motion to dismiss of defendants Uber, Travis Kalanick and Garrett Camp (Docket No. 72) is, with respect to the claims of antitrust violation and interference with advantageous business relationships and the Taxi Maintenance claim of civil conspiracy, **ALLOWED**, but is otherwise **DENIED**.

The following claims of the named plaintiffs remain pending:

1) the claims of all plaintiffs for unfair competition under the common law and *M.G.L. c. 93A § 11*.

2) the claims of the **[**51]** Anoush plaintiffs for:
  a) aiding and abetting unfair competition in violation of the common law and M.G.L. c. 93A, and
  b) civil conspiracy to commit unfair competition in violation of the common law and M.G.L. c. 93A.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated December 29, 2017

Garlington v. Kima

United States District Court for the Northern District of Florida, Gainesville Division

January 3, 2018, Decided; January 3, 2018, Filed

Case No. 1:17cv131-MW/GRJ

Reporter

2018 U.S. Dist. LEXIS 13396 *; 2018-1 Trade Cas. (CCH) P80,243

WENDY M. GARLINGTON, Plaintiff, v. MARIE KIMA, et al., Defendants.

Prior History: Garlington v. Kima, 2017 U.S. Dist. LEXIS 223534 (N.D. Fla., Oct. 5, 2017)

Core Terms

infectious disease, privileges, patients, alternate, provider, Defendants', antitrust, allegations, private practice, antitrust claim, enforcer, interstate commerce, anti trust law, subject matter jurisdiction, motion to dismiss, competitors, practiced, Sherman Act, practitioner, conspiracy, on-call, prices

Counsel: **[*1]** For Wendy M Garlington, Plaintiff: PAUL ANDREW DONNELLY, DONNELLY & GROSS PA - GAINESVILLE FL, Gainesville, FL USA.

For Marie Kima, Defendant: JENNIFER CATES LESTER, SALTER FEIBER MURPHY ETC - GAINESVILLE FL, Gainesville, FL USA.

For Sanil Thomas, Defendant: JAMIE LYNN WHITE, JOHN D JOPLING, DELL GRAHAM PA - GAINESVILLE FL, Gainesville, FL USA.

For Robert Yancey, Defendant: BENJAMIN J STEINBERG, AVERA & SMITH LLP - GAINESVILLE FL, Gainesville, FL USA.

Judges: Mark E. Walker, United States District Judge.

Opinion by: Mark E. Walker

Opinion

AMENDED[1] ORDER GRANTING MOTION TO DISMISS

This is an antitrust case. Plaintiff is a physician who wanted to start her own private practice specializing in infectious disease in Gainesville, Florida. For this plan to work, Plaintiff needed patients. The primary way Plaintiff could get patients referred to her practice was to obtain privileges at Gainesville's only private hospital, North

[1] This Amended Order is identical to this Court's prior Order, ECF No. 43, except that it has been amended to correct a scrivener's error to reflect that Count I is dismissed without prejudice. *See* Fed. R. Civ. P. 60(a) ("The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice.").

Florida Regional Medical Center ("NFRMC").[2] But Defendants' refusals to sign off as Plaintiff's alternate provider during the application process effectively blocked Plaintiff from obtaining privileges. Plaintiff claims Defendants violated federal ***antitrust law*** because they conspired to keep Plaintiff **[*2]** from competing against them in Gainesville's market for private infectious disease services. Defendants assert there was no conspiracy—they simply made individual decisions not to be Plaintiff's alternate provider primarily due to quality of care concerns. Defendants have moved to dismiss for lack of subject matter jurisdiction, and alternatively, for failure to state a claim. This Court has considered, without hearing, Defendants' Motion to Dismiss, ECF No. 32. For the reasons set out below, the motion to dismiss is **GRANTED**.

I

Plaintiff has some history with Defendants. In 2012, she started working for Defendant Kima's private practice in Gainesville. ECF No. 41-10 at 157. Dr. Kima and the other Defendants coordinated their on-call schedules at NFRMC to have cross-coverage at all times for patients needing infectious disease care. *Id.* at 166; *see also* ECF No. 41-7 at 28.While working for Defendant Kima, Plaintiff obtained privileges at NFRMC and split Defendant Kima's on-call days. ECF No. 41-10 at 67, 166-67.

In 2013, Plaintiff left Defendant Kima's practice after working there for about a year. *Id.* at 75. Plaintiff's employment agreement included a one-year noncompete provision, so in compliance **[*3]** with that provision, Plaintiff practiced outside of Gainesville for the duration of the year after she left Defendant Kima's practice. *Id.* And Plaintiff eventually resigned her privileges at NFRMC. *Id.* at 68.

Infectious disease physicians with privileges at NFRMC periodically serve on call at the hospital to provide NFRMC with 24/7 coverage in infectious disease services every day of the year. ECF No. 41-5 at 4. These physicians get a majority of their patients by first contacting them through their work at NFRMC. *Id.* at 3. Thus, Plaintiff claims, a private infectious disease practice in Gainesville is economically viable only if she can obtain privileges (and, therefore, patients) at NFRMC. ECF No. 41-10 at 231.

Without privileges at NFRMC, Plaintiff lacks the same access to patients as other private infectious disease physicians in Gainesville. This is true, even though Gainesville is home to two other hospitals (Shands and the Veterans Affairs Medical Center ("VA")), because those *public* hospitals generally don't refer infectious disease patients to private practices in Gainesville. *See* ECF No. 41-11 at 62 ("Shands will not allow any of their employees to work outside of the confines of Shands Hospital **[*4]** . . . ."); *see also* ECF No. 41-4 at 43-44.

Part of the application process for infectious disease privileges at NFRMC required Plaintiff to name another physician to be her "alternate provider" to "attend [her] patients in an emergency when the staff member is not available or until the staff member can be present." ECF No. 41-1 at 26 (D.18 Alternate Physician Coverage). And NFRMC's bylaws require a physician seeking privileges to "delegate in his/her absence . . . the responsibility for diagnosis and/or care of his/her patients only to a Practitioner who is a member in good standing of the Medical Staff and who is qualified and approved by the Hospital to undertake this responsibility by the granting of appropriate clinical privileges." ECF No. 41-8 at 21 (NFRMC Bylaw 3.5.2). The alternate provider must have privileges in the same specialty as Plaintiff's chosen specialty. At NFRMC, "[i]nfectious disease has a different set of privileges . . . and . . . is deemed to be separate from internal medicine." ECF No. 41-3 at 28.

As a solo practitioner, Plaintiff's application for privileges must include a signed letter from her alternate provider that sets out the physician's pledge to act **[*5]** as such. ECF No. 41-2 at 41. The only other physicians in

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[2] The parties apparently agree that NFRMC is the only private hospital in Gainesville, Florida. But Plaintiff's deposition testimony includes some discussion of another hospital in Gainesville that also provides infectious disease services but isn't affiliated with Shands or the VA. *See* ECF No. 41-10 at 241. The existence of a second private hospital at which Plaintiff could have obtained privileges to kick start her private practice would probably be fatal to her federal antitrust claim. *See* *Pierson v. Orlando Reg'l Healthcare Sys., Inc., 619 F. Supp. 2d 1260, 1277 (M.D. Fla. 2009)* (no antitrust injury when Plaintiff was not prevented from practicing medicine at other private hospitals in the vicinity). This Court is left wondering why Defendants fail to make the argument.

Gainesville with infectious disease privileges at NFRMC are Defendants and a fourth individual, Dr. Mauceri, who was originally a Defendant but was dropped before this case reached this Court. None of these physicians agreed to be Plaintiff's alternate provider, which Plaintiff asserts blocked her from obtaining privileges at NFRMC.

Plaintiff alleges a conspiracy to block her from obtaining privileges arose in February 2014 when Defendants met and discussed the issue of Plaintiff's requests for an "alternate provider." Defendant Kima testified that Defendants discussed the "call schedule" at this time, because "[Plaintiff] wanted to be included, and there was an unwillingness to give up any additional calls." ECF No. 41-7 at 224. By affidavit, Dr. Mauceri also asserts that the February 2014 discussion occurred and that all the Defendants agreed that they didn't want to give up on-call days or be Plaintiff's "alternate physician." ECF No. 41-5 at 7-8. Though Defendant Yancey did not recall any discussion in February 2014, he did send Plaintiff an email stating that he alone couldn't make the decision about providing backup coverage **[*6]** to Plaintiff. ECF No. 41-6 at 100-02.

Plaintiff pursued several other avenues to secure an "alternate provider," but none succeeded. For example, she contacted individuals at the University of Florida and Wake Forest residency programs to inquire if any infectious disease residents would like to join her practice and concurrently apply for privileges at NFRMC. ECF No. 41-10 at 132-33. She contacted other infectious disease physicians across the map to see if any would relocate to Gainesville to join her practice and apply for privileges. *Id.* at 15, 172. And she pursued an exception to the bylaws requirement that staff members reside within 30 miles of the hospital by naming an infectious disease practitioner in Vero Beach, Florida as her alternate provider. *Id.* at 216-17. Ultimately, Plaintiff's application for privileges was denied for nonconformance with the bylaws. *Id.*

According to NFRMC's CEO Bryan Cook, he wasn't "aware of any shortages of infectious disease [services or care] at [NFRMC]." ECF No. 41-3 at 41-42. Nor, according to Mr. Cook, has a "community needs assessment" ever identified any "community need" for additional infectious disease physicians while he's been with NFRMC. *Id.* at 46. But Plaintiff testified **[*7]** that members of the Gainesville community have approached her about their desire for more doctors to choose from for private infectious disease services. *See* ECF No. 41-10 at 220-21 ("I have also had a couple of neighbors that have asked if I was practicing in Gainesville, because either themselves or family members had an [infectious disease] issue, and they had seen the two practitioners that had outpatient offices, and were not satisfied with the care that they received and they were seeking alternate providers.").

Plaintiff continues to reside in Gainesville, but now works as an infectious disease physician in Ocala with privileges at three area hospitals. *Id.* at 133-34. She currently makes about $30,000 a year more than when she previously worked for Defendant Kima. *Id.* at 136-37.

II

Plaintiff claims Defendants violated the Sherman Act, *15 U.S.C. § 1*, and Florida law because they conspired to deny Plaintiff's request to be her alternate provider to keep her from obtaining privileges at NFRMC. She claims Defendants' conduct essentially caused her exclusion from Gainesville's market of private infectious disease physicians because they wanted to prevent her from competing in the market for private infectious **[*8]** disease services. Defendants have moved to dismiss based on lack of subject matter jurisdiction, and, in the alternative, for failure to state a claim for a violation of *§ 1* of the Sherman Act. They assert that Plaintiff lacks antitrust standing to proceed with the federal antitrust claim serving as the basis for federal jurisdiction in this case.

Defendants present a factual attack on subject matter jurisdiction, asserting (1) that each Defendant made a *unilateral* decision to refuse Plaintiff's request to act as her alternate provider, based in large part on their concerns about her quality of care; (2) that Defendants did not prevent Plaintiff from practicing infectious disease in Gainesville because she could have gotten privileges from Shands or the VA; (3) that Plaintiff suffered no injury at all because she's earning more money now in Ocala than she ever did when she practiced infectious disease in Gainesville prior to her attempt to reapply for privileges and she can only speculate as to how successful her private practice would be in Gainesville had she obtained privileges at NFRMC; and (4) Defendants' actions had no "anticompetitive effect," as Plaintiff is the only individual **[*9]** affected by Defendants' actions (i.e., no evidence suggests that patient costs have increased at NFRMC or that patients have lost services at NFRMC based on Plaintiff's inability to obtain privileges and open her own private practice).

The parties agree that a factual attack on subject matter jurisdiction allows this Court to consider matters outside the pleadings without converting the motion into a summary-judgment motion. And Plaintiff correctly notes that in cases where the dispute concerning subject matter jurisdiction implicates the merits of the underlying claim, this Court should apply the summary-judgment standard when evaluating Defendants' factual attacks. In this case, Defendants' attack on subject matter jurisdiction implicates the merits of Plaintiff's federal antitrust claim, because it goes to the heart of whether Plaintiff suffered an antitrust injury at all.

Section 1 of the Sherman Act is actionable by private individuals only through *section 4* of the Clayton Act. *See* *15 U.S.C. § 15*. *Section 4* of the Clayton Act authorizes suits for treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *Id.* at *§ 15(a)*. But "private individuals who do **[*10]** not qualify for Clayton Act standing may not bring a damage action for antitrust violations." *Feldman v. Palmetto Gen. Hosp., Inc., 980 F. Supp. 467, 468-69 (S.D. Fla. 1997)*.

"Standing to sue under the Sherman and Clayton Acts is a question of law." *Id.* (citing *Austin v. Blue Cross and Blue Shield of Alabama, 903 F.2d 1385, 1387 (11th Cir. 1990))*. A plaintiff has antitrust standing when she alleges facts showing that she (1) has suffered an "antitrust injury," and (2) that she is "an efficient enforcer of the antitrust laws." *See* *Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1449 (11th Cir. 1991)*.

An "antitrust injury" is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. "[A]n antitrust plaintiff must allege and show that his own injury coincides with the public detriment from the alleged violation thereby increasing the likelihood that public and private enforcement will further the same goal of increased competition." *Feldman, 980 F. Supp. at 469* (citing *Todorov, 921 F.2d at 1450*). But "[a]ntitrust law does not require that the defendant be the exclusive cause of plaintiff's injury but only a 'material' one." *Gulf States Reorg. Grp., Inc. v. Nucor Corp., 466 F.3d 961, 965 (11th Cir. 2006)* (quoting *Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559, 1561-62 (11th Cir. 1987))*. At its core, "the standing inquiry . . . ensures that the plaintiff's demand for relief ultimately serves the purpose of ***antitrust law*** to increase consumer choice, lower prices and assist competition, not competitors." *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc., 123 F.3d 301, 306 (5th Cir. 1997)*.

Plaintiff asserts her injury was exclusion **[*11]** from "the market of private practitioners of [infectious disease] medicine in Gainesville," due to Defendants' collective decision not to be her alternate provider when she reapplied for privileges at NFRMC. ECF No. 41 at 9. In other cases, the Eleventh Circuit has held that an antitrust plaintiff's alleged exclusion from the relevant market "is inseparable from the alleged harm to competition." *Nucor, 466 F.3d at 967*. Indeed, the Eleventh Circuit "has recognized . . . that an attempt to enter a market coupled with a showing of preparedness is sufficient to establish an injury in fact." *Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1572 (11th Cir. 1991)*.

Plaintiff testified that members in the community wanted more choices for outpatient care for infectious disease services in Gainesville. And this record presents a factual dispute as to whether Defendants' refusals to be Plaintiff's alternative provider were coordinated instead of unilateral. Both Defendant Kima and Dr. Mauceri admit that some discussion occurred between the four private infectious disease physicians in Gainesville about their shared desire not to give up on-call days or serve as Plaintiff's alternate provider. Finally, based on this record, there's a clear dispute as to whether Plaintiff would have been **[*12]** able to open her own private practice in infectious disease had she obtained privileges at Shands or the VA (or simply attempted to open up shop without first obtaining privileges at NFRMC). *See* ECF No. 41-11 at 62 ("Shands will not allow any of their employees to work outside of the confines of Shands Hospital . . . ."); ECF No. 41-4 at 43-44. In short, these disputed issues of fact prevent this Court from determining as a matter of law that Plaintiff hasn't established an antitrust injury.

Assuming Plaintiff has suffered some antitrust injury, she must also be an "efficient enforcer" of the antitrust laws to have antitrust standing in this case. To determine whether an antitrust plaintiff is an "efficient enforcer," courts generally consider several factors including: (1) the directness or indirectness of the asserted injury; (2) the remoteness of the injury; (3) whether other potential plaintiffs were better suited to vindicate the harm; (4) whether the damages were highly speculative; (5) the extent to which the apportionment of damages was highly complex and would risk duplicative recoveries; and (6) whether the plaintiff would be able to efficiently and effectively enforce the **[*13]** judgment. *Sunbeam Television Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1271 (11th Cir. 2013)*.

Other courts addressing similar claims within the medical services and credentialing context have found that patients, third-party payors, and the government are often better suited to pursue antitrust claims based on competitors' anticompetitive conduct. For example, in *Ginzburg v. Mem'l Healthcare Sys., Inc., 993 F. Supp. 998 (S.D. Texas 1997)*, a neonatologist sued other neonatologists at the hospital where she practiced for antitrust violations due to, among other things, her competitors' alleged refusals to provide coverage for her patients and to refer patients to her. The neonatologist claimed her competitors refused to deal with her to drive her from the market for neonatal services, which allegedly decreased both patient choice options and the quality of care.

Assuming such an antitrust injury occurred, the district court held that it would be the hospital's "patients and third party payors, not Ginzburg, who are actually injured by Defendants' allegedly unlawful conduct." *Id. at 1020*. "[The hospital's] patients and third party payors have a strong, nonconflicted interest in assuring that neither quality of care nor patient choice options at [the hospital] are diminished by anticompetitive conduct." *Id.* The neonatologist, on the other hand, "has an **[*14]** indisputable business interest at stake—that of retaining her privileges to see patients at [the hospital] and in gaining a greater percentage of referrals currently directed towards her competitors." *Id.*

Similarly, in *Robles v. Humana Hosp. Cartersville, 785 F. Supp. 989 (N.D. Ga. 1992)*, the district court held that an obstetrician was not an "efficient enforcer" to pursue antitrust claims against the hospital and doctors involved in the revocation of his hospital privileges. The court identified two other groups with "a stronger interest [than the obstetrician's] in ensuring that prices and services remain at competitive levels"—obstetric patients and the government. *Id. at 999*. On the other hand, the court noted, the obstetrician's "only interest is that *he* be allowed to compete in Bartow County, not that patients receive quality services at competitive prices." *Id.* (emphasis in original); *see also* *Pierson, 619 F. Supp. 2d at 1277* (physician not an efficient enforcer because his interests didn't coincide with patients' interests); *Feldman, 980 F. Supp. at 470* (same).

Defendants' alleged conduct—conspiracy to exclude Plaintiff from the market of private infectious disease physicians in Gainesville—harms competition by decreasing consumer choice. Defendants and Dr. Maurceri operated the only private practices specializing **[*15]** in infectious disease in Gainesville at the time Plaintiff applied for privileges at NFRMC. Dr. Maurceri has since retired. Gainesville's market for private infectious disease services has therefore shrunk since Plaintiff was allegedly blocked from entering the market. And Plaintiff's testimony identifies consumers who are looking for more choices than what the market currently has to offer. The question, then, is whether Plaintiff is the appropriate party to pursue the interests of ***antitrust law***; namely, "to increase consumer choice, lower prices and assist competition, not competitors." *Doctor's Hosp., 123 F.3d at 306*. Defendants argue that Plaintiff is not an "efficient enforcer."

This Court agrees. Those potential patients seeking more choices in Gainesville for quality infectious disease care at competitive prices are better suited than Plaintiff to pursue an antitrust claim against Defendants.

Moreover, Plaintiff's damages are speculative. She admits that she's not entitled to or guaranteed any patient referrals, even if she obtains privileges at NFRMC. *See* ECF No. 41-10 at 240. And she testified that she has "no idea whether [she'd] make more or less" than she currently makes practicing infectious disease in **[*16]** Ocala. *Id.* at 137. All things considered, Plaintiff is not an "efficient enforcer" to bring this sort of antitrust claim.

III

Alternatively, Defendants move to dismiss for failure to state a claim upon which relief can be granted because (1) Plaintiff hasn't alleged sufficient facts to show Defendants' alleged conduct affected interstate commerce, and (2) Plaintiff's allegations only show that Defendants acted unilaterally. Neither argument carries much weight.

"[T]he essence of any violation of § 1 [of the Sherman Act] is the illegal agreement itself[,] rather than the overt acts performed in furtherance of it." *Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)* (citation omitted). "[P]roper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful." *Id.* Plaintiff "need not allege, or prove, an *actual effect* on interstate commerce to support federal jurisdiction." *Id.* (emphasis added). Rather, factual allegations that "demonstrate a substantial effect on interstate commerce generated" by Defendants' provision of medical services are sufficient. *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)* ("Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy **[*17]** to fix commission rates, or by those other aspects of respondents' activity [that are] alleged to be unlawful."); *see also* *Shahawy v. Harrison, 778 F.2d 636, 641 (11th Cir. 1985)* ("We hold, therefore, that pleading Sherman Act jurisdiction requires allegations that defendant's business activities have a substantial impact on interstate commerce.").

Plaintiff's allegations in this case satisfy *McLain*'s pleading standard. The complaint alleges that Defendants each provide medical care to out-of-state patients, that they accept Medicare and Medicaid payments for their services in addition to out-of-state private insurance payments, and that they accept credit card payments involving out-of-state financial institutions. ECF No. 1 at 2-3. Plaintiff further alleges that Defendants Kima and Thomas purchase out-of-state supplies for their private practices. *Id.* at 2. And all three Defendants provide their services at a hospital that is undoubtedly involved in interstate commerce. Considered together, these allegations "demonstrate a substantial effect on interstate commerce" generated by Defendants' business activities.

"An antitrust complaint must include allegations plausibly suggesting (not merely consistent with) an illegal agreement among the defendants." **[*18]** *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 870 F.3d 1262, 1270 (11th Cir. 2017)* (citation and quotation marks omitted). This Court has already noted that the record presents a factual dispute as to whether an agreement or conspiracy existed between the Defendants. But even limiting this Court's review to the four corners of the complaint, Plaintiff's factual allegations plausibly suggest an illegal, anticompetitive agreement among Defendants to exclude her from entering Gainesville's market for private infectious disease physicians.

The complaint sets out allegations describing the unique circumstances governing the market for private infectious disease services in Gainesville. A small group of doctors operate the only private practices specializing in infectious disease in town, and all of them have privileges at NFRMC. These same doctors refused to act as Plaintiff's "alternate provider" when she attempted to reapply for privileges at NFRMC. Defendants allegedly came to this decision together after meeting in February 2014 and discussing Plaintiff's plan to open a new private infectious disease practice in Gainesville and agreeing that none of them would give up any on-call days or agree to be Plaintiff's alternate provider. Defendants allegedly "entered into **[*19]** [this agreement] in order to exclude [Plaintiff] from the market of NFRMC [infectious disease] referrals and thereby reserve the associated profits for themselves." ECF No. 1 at 16.

IV

Despite pleading sufficient facts to state a plausible claim for relief, Plaintiff still lacks standing to pursue her antitrust claim. Plaintiff is not an "efficient enforcer." Accordingly, Defendants' motion to dismiss, ECF No. 32, is **GRANTED**. Plaintiff's federal antitrust claim, Count I, is dismissed. This Court declines to exercise jurisdiction over the remaining state-law claims. *See* *28 U.S.C. § 1367(c)(3)*. The parties are not diverse, nor has Plaintiff made any argument as to why her remaining state-law claims should not also be dismissed. The remaining claims are dismissed without prejudice, and the Clerk shall close the file.

SO ORDERED on January 3, 2018.

/s/ **Mark E. Walker**

United States District Judge

[Wyo. Bevs., Inc. v. Core-Mark Int'l, Inc.](#)

United States District Court for the District of Wyoming

January 4, 2018, Decided; January 4, 2018, Filed

Case No: 17-CV-116-F

Reporter
2018 U.S. Dist. LEXIS 230106 *; 2018 WL 8221068

WYOMING BEVERAGES, INC.; BIRRELL BOTTLING COMPANY, INC.; TORRINGTON BEVERAGE, INC., Plaintiffs, vs. CORE-MARK INTERNATIONAL, INC., Defendant.

Core Terms

Beverages, products, tortious interference, Bottling, customers, expectancy, territorial, exclusive territory, soft drink, bottler, alleges, distribute, interfered, manufacture, trademark, licensing, provisions, contracts, asserts, sales, third party, transshipping, tortiously, private right of action, false advertising, Brands, anti trust law, Lanham Act, consumers, licensee

Counsel: **[*1]** For Wyoming Beverages Inc, Birrell Bottling Company Inc, Plaintiffs: Brett M Mull, Hugh Q Gottschalk, Webster C Cash, III, LEAD ATTORNEYS, PRO HAC VICE, WHEELER TRIGG ODONNELL LLP, Denver, CO; John Matthew Walker, Paul J Hickey, LEAD ATTORNEYS, HICKEY & EVANS, Cheyenne, WY.

For Torrington Beverage Inc, Plaintiff: Brett M Mull, LEAD ATTORNEY, PRO HAC VICE, WHEELER TRIGG ODONNELL LLP, Denver, CO.

For Core-Mark International Inc, Defendant: Bambo Obaro, David R Singh, LEAD ATTORNEYS, PRO HAC VICE, WEIL GOTSHAL AND MANGES LLP, Redwood Shores, CA; Khale J Lenhart, LEAD ATTORNEY, HIRST APPLEGATE LLP, Cheyenne, WY; Travis W Koch, OVERSTREET HOMAR & KUKER, Cheyenne, WY.

Judges: NANCY D. FREUDENTHAL, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion by: NANCY D. FREUDENTHAL

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on Defendant's Motion to Dismiss Plaintiffs' Amended Complaint (Doc. 24). The Court has considered the motion, response, and reply, and is fully informed in the premises. For the following reasons, Defendant's Motion to Dismiss is GRANTED IN PART AND DENIED IN PART.

BACKGROUND

Plaintiffs Wyoming Beverages, Inc. ("Wyoming Beverages") and Birrell Bottling **[*2]** Company, Inc. ("Birrell Bottling") are bottlers and distributors of PepsiCo, Inc. ("PepsiCo") branded soft drinks.[1] Admiral Beverage Corporation is a corporation owned by seven independent bottling companies, including Wyoming Beverage. Birrell Bottling is a subsidiary of Admiral Beverage. Plaintiffs claim Admiral Beverage and its subsidiaries are the exclusive licensed manufacturers, sellers, and distributors of PepsiCo brands for a large portion of the Rocky Mountain region. Plaintiff Torrington Beverage, Inc. ("Torrington Beverage") is Wyoming Beverages' authorized sub-distributor of PepsiCo products in a portion of Wyoming Beverages' exclusive market. Wyoming Beverage is a licensed PepsiCo bottler that operates in several counties in eastern Wyoming. Birrell Bottling is a licensed PepsiCo bottler operating in the Provo, Utah and Springville, Utah markets.

Plaintiffs allege Wyoming Beverages and Birrell Bottling are parties to hundreds of trademark licensing agreements, known as Exclusive Bottling Agreements ("EBAs") with PepsiCo. Plaintiffs assert through the EBAs, PepsiCo granted them a license authorizing them to serve as the exclusive manufacturer, distributor, and seller of PepsiCo **[*3]** soft drink products in their defined geographic territories in Wyoming and Utah.

Core-Mark International, Inc. ("Coremark") has a nationwide broad-line distribution business in the food and beverage industry. On March 26, 2015, PepsiCo sent a letter to Core-Mark demanding Core-Mark stop engaging in unauthorized sales of PepsiCo bottle and can products in the exclusive territory of another bottler. Plaintiffs allege Core-Mark is "transshipping", which is the manufacture, distribution, or sale of PepsiCo products in a bottler's territory by anyone other than the licensed bottler. Plaintiffs allege that Core-Mark began transshipping PepsiCo products to customers in Plaintiffs' exclusive territories in early 2017. Specifically, Plaintiffs allege Core-Mark transshipped PepsiCo products in the Casper and Cheyenne markets, which are Wyoming Beverages' exclusive markets and are serviced by Torrington Beverage, and the Provo and Springville, Utah markets, which are Birrell Bottling's exclusive territory.

Core-Mark seeks to dismiss Plaintiffs' Amended Complaint.

LEGAL STANDARD

It is well-settled that "a judge ruling on a defendant's motion to dismiss a complaint, 'must accept as true all factual **[*4]** allegations contained in the complaint.'" *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 572, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). The Court must also view the allegations in the light most favorable to the nonmoving party. *See* *Sutton v. Utah State Sch. for Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999)*.

When ruling on a motion to dismiss for failure to state a claim, it is not the Court's function "to weigh [the] potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991)*. To survive a motion to dismiss, the plaintiffs "complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). Plausibility requires the plaintiff to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. This standard "is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citation omitted). Thus, although the plaintiff does not need to provide detailed factual allegations, the complaint must contain more than mere "labels," "conclusions," and "formulaic recitations of the elements of a cause of action." **[*5]** *Twombly, 550 U.S. at 555*.

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[1] In Plaintiffs' Amended Complaint and in their Response to Defendant's Motion to Dismiss, Plaintiffs Wyoming Beverages and Birrell Bottling bring claims under the name "Admiral Beverages." Admiral Beverages is not a party to this lawsuit. Plaintiffs clarify that they collectively refer to Wyoming Beverages and Birrell Bottling as "Admiral Beverage," while the term "Plaintiffs" refers to Wyoming Beverages, Birrell Bottling, and Torrington Beverage. (Doc. 21 at 2; Doc. 33 at 2).

DISCUSSION

In their Amended Complaint, Plaintiffs assert several claims. Plaintiffs assert claims under the *Soft Drink Interbrand Competition Act* ("the Soft Drink Act"), tortious interference with contract, tortious interference with a business expectancy, the *Declaratory Judgment Act*, and a false advertising claim under the *Lanham Act*. Core-Mark argues Plaintiffs' claims should be dismissed for failure to state a claim upon which relief can be granted.

Soft Drink Interbrand Competition Act

Plaintiffs assert a claim for relief under the Soft Drink Act. Core-Mark argues that the Soft Drink Act does not create a private right of action and Congress did not intend to create a private right of action under the Act. Thus, the question for the Court is whether the Soft Drink Act creates a private right of action.

"The question of the existence of a statutory cause of action is, of course, one of statutory construction." *Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979)*. "[The fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Id.* (quoting *Cannon v. University of Chicago, 441 U.S. 677, 688, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979)*). The Court's task is "limited solely to determining whether Congress intended to create the private **[*6]** right of action asserted." *Id.* "The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction, such that what must ultimately be determined is whether Congress intended to create the private remedy asserted." *Southwest Air Ambulance, Inc. v. City of Las Cruces, 268 F.3d 1162, 1169 (10th Cir. 2001)* (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)* (quotation marks omitted)). The analysis begins with the text and structure of the statute to discern Congress's intent. *Alexander v. Sandoval, 532 U.S. 275, 288, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001)*.

Section 3501 of the Soft Drink Act states:

> Nothing contained in any ***antitrust law*** shall render unlawful the inclusion and enforcement in any trademark licensing contract or agreement, pursuant to which the licensee engages in manufacture (including manufacture by a sublicensee, agent, or subcontractor), distribution, and sale of a trademarked soft drink product, of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area or limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area: *Provided*, That such product is in substantial and effective competition with other products of the same **[*7]** general class in the relevant market or markets.

15 U.S.C. § 3501.

First, *§ 3501* states, "Nothing contained in any ***antitrust law*** shall render unlawful the inclusion and enforcement[,] in any trademark licensing contract or agreement[,] . . . of provisions granting the licensee the sole and exclusive right to manufacture, distribute, and sell such product in a defined geographic area . . . ." *Section 3501* also states, "Nothing contained in any ***antitrust law*** shall render unlawful the inclusion and enforcement[,] in any trademark licensing contract or agreement, . . . of provisions . . . limiting the licensee, directly or indirectly, to the manufacture, distribution, and sale of such product only for ultimate resale to consumers within a defined geographic area . . . ." On its face, *§ 3501* permits enforcement of provisions in EBAs that grant or limit a licensee's right to manufacture, distribute, and sell the products in a defined geographic area.

Finally, *§ 3501* provides a limitation on the inclusion and enforcement of provisions granting and/or limiting a licensee's right to manufacture, distribute, and sell products in a defined geographic area. It states these provisions are lawful and enforceable "[p]rovided, [t]hat such product **[*8]** is in substantial and effective competition with other products of the same general class in the relevant market or markets."

Plaintiffs assert the language of § 3501 creates a private right of action because it "authorizes the 'enforcement' of 'provisions' in 'trademark licensing' agreements 'granting the licensee the sole and exclusive right to manufacture, distribute, and sell such products in a defined geographic area." (Doc. 33 at 2 [Resp. Mot. Dismiss]). Plaintiffs claim the language of § 3501 clearly creates a private right of action. The Third Circuit found, "[t]he Act explicitly provides for the 'enforcement' of agreements limiting extraterritorial sales both 'directly and indirectly,' and is aimed at combatting both bottler and third parties who transship." Com. of Pa. ex rel. Zimmerman v. PepsiCo, Inc., 836 F.2d 173, 177 (3rd Cir. 1988). Plaintiffs argue the *Zimmerman* Court found a private right of action under § 3501. However, in *Zimmerman*, the State of Pennsylvania brought an action against PepsiCo for violations of antitrust laws after PepsiCo took actions against a bottler to prevent transshipping. The *Zimmerman* Court found § 3501 permits PepsiCo to enforce its EBAs with bottlers by taking actions against bottlers who are involved in transshipping in violation of the EBAs. Thus, in *Zimmerman*, PepsiCo's enforcement **[*9]** of a bottler's exclusive territory did not violate antitrust laws.

Here, Plaintiffs argue the Act provides a cause of action to enforce EBAs against third parties. While the language of § 3501 appears to permit enforcement of provisions granting a bottler the exclusive right to manufacture and distribute PepsiCo products, the language of the Act does not clearly indicate against whom the agreements may be enforced.

Turning to the structure of the Act, § 3502 clarifies that § 3501 does not legalize provisions in trademark licensing agreements that would otherwise be unlawful under antitrust laws. Section 3502 states, "[n]othing in this chapter shall be construed to legalize the enforcement of provisions described in section 3501 . . . in trademark licensing contracts or agreements . . . by means of price fixing agreements, horizontal restraints of trade, or group boycotts, if such agreements, restraints, or boycotts would otherwise be unlawful." 15 U.S.C. § 3502. Thus, § 3502 acknowledges that certain licensing agreement provisions are enforceable under § 3501, by clarifying that certain provisions are not enforceable if they are otherwise unlawful. Thus, while the structure of the Act reiterates the enforceability of exclusive territorial provisions, it **[*10]** does not clearly state the context of their enforcement or against whom they may be enforced. As such, the structure of the Act does not clearly create a private right of action.

Plaintiffs argue the legislative history of the Soft Drink Act clearly indicates Congress's intent to create a private right of action. Congress enacted the Act in the wake of several Supreme Court decisions and a Federal Trade Commission investigation into the soft drink industry.

> In 1967, the Supreme Court, in the now overruled *Schwinn* decision, held that, under certain circumstances, manufacturer-imposed territorial restraints are *per se* illegal under section 1 of the Sherman Act. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382, 87 S.Ct. 1856, 1867, 18 L.Ed.2d 1249 (1967). The *Schwinn* decision helped launch a Federal Trade Commission investigation into soft drink industry distribution practices. In 1971, that investigation culminated in the filing of complaints against seven soft drink syrup companies.
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> During the pendency of those actions, the Supreme Court overruled the *Schwinn* decision in Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). In *Sylvania*, the Court held that the law should "return to the rule of reason that governed vertical restrictions prior to *Schwinn*." Id. at 59, 97 S.Ct. at 2562. In 1978, relying in part on *Sylvania*, the FTC ruled that certain territorial restrictions **[*11]** existing in the soft drink industry were unlawful. Coca Cola Co., 91 F.T.C. 517 (1978), 642 F.2d 1387, 207 U.S. App. D.C. 1 (D.C.Cir.1981) (remanding for dismissal); PepsiCo, Inc., 91 F.T.C. 680 (1978), 642 F.2d 1387, 207 U.S. App. D.C. 1 (D.C.Cir.1981) (same). Those decisions were the primary stimuli to the enactment of the Soft Drink Act in 1980.
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> The Soft Drink Act was adopted after Congress conducted an intensive investigation into the soft drink industry. In passing the Act, Congress determined that the exclusive territorial distribution agreements common to the soft drink industry warranted protection because that industry was a prototype of industries in which territorial restraints foster interbrand competition. *See* H.REP. NO. 1118, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2377. Such restraints encourage each bottler to invest and promote in his own territory, and prevent "free riding" by sellers from outside the territory on the bottler's investment and effort.

Zimmerman, 836 F.2d at 175-76.

The legislative history also discusses the enforcement of territorial provisions. The House Report states, "[i]t is the intent and purpose of the Committee that the territorial agreements used in the soft drink industry shall be lawful and may be judicially enforced . . . ." H.R. REP. NO. 96-1118, at 5 (1980). The Senate Report explained **[*12]** the two purposes of the Act: 1. Permit exclusive territorial agreements in the soft drink industry, which would otherwise be illegal under antitrust laws; 2. "if the requirements of the bill are met, the relevant territorial provisions are not only lawful, but also enforceable through judicial proceedings." S. REP. NO. 96-645 at 10 (1980). The Senate Report further states, "[T]he exclusive territorial rights of one licensee are protected from the direct or indirect sales by the licensor or any of its other licensees into his defined geographic area . . . ." *Id.* The House Report recognizes the soft drink industry should be permitted to continue to use the exclusive territorial agreements and "to enforce them in accordance with their contractual rights." H.R. REP. NO. 96-1118 at 20 (1980).

In support of the Act, Representative Robert McClory stated the bill provided that the antitrust laws should not upset EBAs between bottlers and syrup manufacturers and those EBAs could be enforced. *Id.* at 23. "But it is well-established law that a contract—no matter what it claims to accomplish—can be enforced only against those who are parties to, and bound by, the contract. But since this bill does not itself **[*13]** establish territories, there can be no general enforcement." *Id.* "In sum, a contract between A and B is not enforceable against C and is enforceable against A or B only if certain competitive requirements of [the bill] have been met." *Id.* Thus, the legislative history indicates that Congress enacted the Act to permit soft drink syrup companies and bottlers to enter into exclusive territorial agreements without violating antitrust laws. The statements about enforcement do not provide general enforcement of territorial rights beyond the contracts between the syrup companies and bottling companies.

Here, the language and structure of the statute, as well as the legislative history, indicate Congress intended to permit the enforcement of exclusive territorial agreements in EBAs. However, the legislative history indicates Congress did not intend the Act to create a private right of action to enforce EBAs. Instead, the legislative history, the language of the statute and the structure of the Act indicate Congress intended to permit syrup companies and bottlers to enter into exclusive territorial agreements, without violating antitrust laws.

For all these reasons, the Court finds the Soft Drink **[*14]** Act does not provide for a private right of action. As such, Plaintiffs' claim under the Soft Drink Act in Count I is DISMISSED WITH PREJUDICE.

Tortious Interference Claims (Counts III, IV, V, VI)

Plaintiffs allege several tortious interference claims against Core-Mark. In Count III, Plaintiffs allege Core-Mark tortiously interfered with contracts between PepsiCo and Wyoming Beverages and interfered with Birrell Bottling's contracts. In Count IV, Plaintiffs claim Core-Mark tortuously interfered with Wyoming Beverages' and Birrell Bottling's business expectancies. In Count V, Plaintiffs allege Core-Mark tortiously interfered with Torrington Beverage's contract with Wyoming Beverages. In Count VI, Plaintiffs also assert Core-Mark interfered with Torrington Beverage's business expectancy.

Wyoming Beverages' and Torrington Beverage's claims for tortious interference occurred in Wyoming, while Birrell Bottling's claim arose in Utah. The Court has diversity jurisdiction over these claims pursuant to *28 U.S.C. § 1332*. As such, the substantive law of the forum state applies, including the forum state's choice of law rules. *Pepsi-Cola Bottling Co. of Pittsburg v. PepsiCo, Inc., 431 F.3d 1241, 1255 (10th Cir. 2015)* (citing *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 495-97, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*; *New York Life Ins. Co. v. K.N. Energy, Inc., 80 F.3d 405, 409 (10th Cir. 1996))*. In this case, Wyoming is the forum state. The Wyoming Supreme Court has held, **[*15]** "as a general rule . . . the law of the place where the tort or wrong has been committed[] is the law that governs and is to be applied with respect to the substantive phases of torts . . . ." *Boutelle v. Boutelle, 2014 WY 147, ¶ 12, 337 P.3d 1148, 1153 (Wyo. 2014)*.

Plaintiffs Wyoming Beverages and Torrington Beverage allege Core-Mark tortiously interfered with their contracts and business expectancies in Wyoming. Plaintiff Birrell Bottling alleges Core-Mark tortiously interfered with its contracts and business expectancies in Utah. As such, Wyoming law applies to Wyoming Beverages' and Torrington Beverage's claims, and Utah law applies to Birrell Bottling's tortious interference claims.[2]

A. Wyoming Beverages

Wyoming Beverages claims Core-Mark tortiously interfered with its contracts and tortiously interfered with its business expectancy.

1. Tortious *Interference* with Contract (Count III)

In Wyoming, to sustain a cause of action for tortious interference with contract the following elements must be shown:

> (1) The existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) intentional and improper interference inducing or causing a breach or termination of the relationship **[*16]** or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disputed.

Gore v. Sherard, 2002 WY 114, ¶ 13, 50 P.3d 705 (2002).

The Wyoming Supreme Court adopted the definition of the tort of intentional interference with a contract as found in *Restatement (Second) of Torts § 766*. *First Wyoming Bank, Casper v. Mudge, 748 P.2d 713, 715 (1988)*; *Davenport v. Epperly, Wyo. 744 P.2d 1110, 1111 (1987)*. *Section 766* provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Mudge, 748 P.2d at 715 (citing *Restatement (Second) of Torts, § 766* (1979)). Thus, *§ 766* permits claims for tortious interference of contract when the plaintiff alleges the defendant's interference is causing a third party to breach its contract with the plaintiff.

Wyoming Beverages claim Core-Mark is causing Wyoming Beverages to breach provisions of its own EBAs with PepsiCo. However, Wyoming Beverages fails to claim Core-Mark is causing a third party to breach its contracts with Wyoming Beverages, as is actionable under *§ 766*. Instead, Core-Mark argues Wyoming Beverages' claim must be dismissed because Wyoming Beverages' claim is in-line with *Restatement (Second) of Torts § 766A*, which **[*17]** Wyoming has declined to adopt. Therefore, Core-Mark argues, Wyoming Beverages' claim for tortious interference with a contract should be dismissed because a tortious interference claim based on Wyoming Beverages' own failure to perform its contracts is not actionable under Wyoming law.

The Wyoming Supreme Court has rejected *Restatement (Second) of Torts § 766A* which recognizes tortious interference claims based on Defendant's interference with Plaintiffs' contracts with a third party causing Plaintiff to breach its own contracts. *Birt v. Wells Fargo Home Mortg., Inc, 2003 WY 102, ¶¶ 71-73, 75 P.3d 640*; *Price v. Sorrell, 784 P.2d 614, 615 (Wyo. 1989)*. "*[Section] 766A* deals with the situation where A may be liable to B for preventing B from performing a contract between B and C." *Birt*, 2003 WY at ¶ 72. Instead, the Wyoming Supreme Court has only adopted *Restatement (Second) of Torts § 766* which recognizes tortious interference with contract

[2] Core-Mark moves to dismiss Birrell Bottling's claims under Wyoming law. Core-Mark stated it "will assume that Wyoming law applies to Plaintiffs' tortious interference claims solely for the purposes of this motion, but reserves the right to challenge Plaintiffs' choice of Wyoming law at a later time." (Doc. 25 at 9 n. 5 [Memo. in supp. mot. to dismiss]). While the Court has applied Utah law to Birrell's claims, it appears the same result would occur under either application of the law.

claims when Defendant interferes with a contract between Plaintiff and third party and Defendant's interference causes third party to breach its contract with Plaintiff. *Birt*, 2003 WY at ¶ 72.

Here, Wyoming Beverages allege Core-Mark's interference with their contracts caused Wyoming Beverages to breach its own contracts with third parties, including its own EBAs with PepsiCo. Wyoming Beverages' tortious interference with contract claim is premised **[*18]** on the same factual scenario as *§ 766A*, which the Wyoming Supreme Court declined to adopt. Therefore, Wyoming Beverages' claim is not sufficient to establish a claim for tortious interference with contract.

While Wyoming Beverages has failed to allege that Core-Mark caused a third party to breach its contracts with Wyoming Beverages, the Court will dismiss this claim without prejudice, in the event Wyoming Beverages can plead facts to support its claim for tortious interference with contract. As such, Plaintiff Wyoming Beverages' tortious interference with contract claim in Count III is DISMISSED WITHOUT PREJUDICE.

2. Tortious Interference with Business Expectancy (Count IV)

In Wyoming, to state a claim for tortious interference with a business expectancy, Plaintiff must allege the following elements: "(1) the existence of a valid contractual relationship or business expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional and improper interference inducing or otherwise causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose expectancy has been disrupted." *Gore, 2002 WY 114, 50 P.3d 705, 710 (Wyo. 2002)*.

Core-Mark argues Wyoming Beverages **[*19]** fails to allege the existence of a valid business expectancy because Wyoming Beverages failed to identify specific customers with whom it had a business expectancy. However, both parties acknowledge that in order to allege a claim for tortious interference with a business expectancy, no Wyoming court has required the plaintiff to identify specific third parties with whom they claim to have a business expectancy. (Doc. 25 at 16 [Memo. in supp. mot. Dismiss]; Doc. 33 at 28 [Resp. to mot. dismiss]).

Wyoming Beverages alleges through the EBAs, PepsiCo granted Admiral Beverage the exclusive right to distribute PepsiCo products in its exclusive territory. Pursuant to an EBA with PepsiCo, Wyoming Beverages alleges it is a licensed bottler operating within its exclusive territory in several counties in southeastern Wyoming. (Doc. 21 at 9 [Am. Compl.]). Wyoming Beverages asserts Core-Mark sells PepsiCo products to Wyoming Beverages' customers located in Wyoming Beverages' exclusive territory without authorization, thereby transshipping PepsiCo products in Wyoming Beverages' exclusive territory. According to the EBAs, only PepsiCo or Admiral Beverage can permit an entity to manufacture or distribute PepsiCo products within Admiral's exclusive territory and **[*20]** Wyoming Beverages' alleges Core-Mark has not been authorized to distribute PepsiCo products in its exclusive territory. (Doc. 21 at 84 [Ex. 4]). Wyoming Beverages asserts it expects to be the sole source of PepsiCo products in its exclusive territory, pursuant to the EBAs with PepsiCo; therefore, Wyoming Beverages' expected to be its customers' sole source of its PepsiCo products. (Doc. 33 at 27-28 [Resp. mot. dismiss]).

Wyoming Beverages asserts Core-Mark had knowledge of the EBAs and its exclusive territory. Wyoming Beverages claims PepsiCo has sent Core-Mark multiple letters demanding that Core-Mark stop reselling PepsiCo products in the exclusive territory of any licensed bottler. On March 26, 2015, PepsiCo sent a letter to Core-Mark which stated:

> Our management has notified Core-Mark on numerous prior occasions, both at you headquarters and at the division level, that Core-Mark's sales of our Pepsi-Cola, Mountain Dew, and other bottle and can soft drinks are interfering with our relationship with our independent Pepsi-Cola bottlers and PepsiCo has asked Core-Mark to stop these sales. Our independent Pepsi-Cola bottlers have exclusive bottling appointments for their respective geographic territories and have spent decades developing relationships **[*21]** with their customers and growing sales of PepsiCo beverages.

(Doc. 21 at 84). PepsiCo also said this was the second time in six months that PepsiCo addressed an unauthorized sales issue with Core-Mark. (*Id.*). PepsiCo stated, "in my prior letter dated November 7, 2014, we have not authorized Core-Mark to act as our distributor of any bottler and can products, including Pepsi-Cola and Mountain Dew, anywhere in the US .... In addition, any reselling of products to another distributor is also not permitted." (*Id.*), PepsiCo's letter informed Core-Mark that unless the exclusive bottler in the territory grants Core-Mark the explicit authority to distribute PepsiCo products in the territory, then Core-Mark's "unauthorized sales will be viewed as tortious interference with the bottler's relationship with accounts in its bottling territory." (*Id.*), Additionally, Wyoming Beverages asserts Core-Mark was in the food and beverage distribution industry for many years and its distribution often overlapped with Admiral Beverage's. (Doc. 21 at 42 [Am. Compl.]). Thus, Wyoming Beverages asserts Core-Mark had knowledge of the EBAs and how its actions interfered with the EBAs and nonetheless, Core-Mark continued to distribute in Wyoming **[*22]** Beverages' exclusive territory.

In order to state a claim of tortious interference with a business expectancy, Wyoming Beverages must allege Core-Mark's conduct was improper. To determine if a defendant's intentional conduct was improper, the Wyoming Supreme Court has adopted the following factors:

(a) The nature of the actor's conduct,
(b) The actor's motive,
(c) The interests of the other with which the actor's conduct interferes,
(d) The interests sought to be advanced by the actor,
(e) The social interests in protecting the freedom of action of the actor and the contractual interests of the others,
(f) The proximity or remoteness of the actor's conduct to the interference, and
(g) The relations between the parties.

Toltec Watershed Impr. Dist. v. Johnston, 717 P.2d 808, 814 (Wyo. 1986) (quoting *Restatement (Second) of Torts § 766* (1979)).

In support of their argument that Core-Mark's conduct was improper, Wyoming Beverages claims the nature of Core-Mark's conduct is "indefensible under the Soft Drink Interbrand Competition Act" with which Core-Mark must comply. (Doc. 21 at 48 [Am. Compl.]). Wyoming Beverages also alleges Core-Mark continued to transship in Wyoming Beverages' territory after receiving multiple communications from PepsiCo demanding that Core-Mark stop transshipping because it violated PepsiCo's EBAs with **[*23]** bottlers. Wyoming Beverages asserts Core-Mark is "reselling expired and outdated product to customers and consumers," which is "diminishing interbrand competition," and is "harming the integrity of PepsiCo Brands." (*Id.* at 49). Wyoming Beverages claims Core-Mark's motives are improper because Core-Mark is "free-riding" off of Wyoming Beverages' "70-plus years of capital investments and brand development" to make short-term profits and steal Wyoming Beverages' exclusive customers. (*Id.*).

Wyoming Beverages claims their interests in its exclusive territories are both statutory, under the Soft Drink Act, and contractual under the EBAs. Wyoming Beverages also asserts it has an interest in "reaping the benefits of its massive capital investments, maintaining its customer relationships, engaging in effective marketing and promotional activities, and maximizing the sale of PepsiCo products in its territories." (*Id.*). Wyoming Beverages asserts Core-Mark does not have a legitimate interest in selling PepsiCo products in Wyoming Beverages' exclusive territory because Core-Mark does not have a right to sell PepsiCo products in Wyoming Beverages' exclusive territory.

Wyoming Beverages asserts when enacting **[*24]** the Soft Drink Act, Congress determined that "preserving exclusive territories benefits consumers and that transshipping hinders interbrand competition." (*Id.*). Additionally, bottlers' EBAs with PepsiCo are important because the EBAs "stimulate interbrand competition, encourage further bottler investment, promote customer service, and limit the volume of outdated product that reaches consumers." (*Id.* at 50).

Wyoming Beverages alleges Core-Mark's conduct is the direct cause of the interference preventing bottlers from performing their obligations under the EBAs which require bottlers to prevent transshipping. Finally, Wyoming

Beverages claims it does not have a professional relationship with Core-Mark, and PepsiCo has not granted Core-Mark a license to sell PepsiCo products in Plaintiffs' exclusive territories. For all these reasons, Wyoming Beverages has alleged Core-Mark's conduct was improper.

Wyoming Beverages must allege Core-Mark's intentional and improper interference caused a breach or termination of a business expectancy. Wyoming Beverages claims Core-Mark stole its customers by selling PepsiCo products in Wyoming Beverages' exclusive territories. Wyoming Beverages alleges Core-Mark "caused **[*25]** a termination of Admiral Beverage's relationships and business expectancies with any and all customer accounts and consumers located in its exclusive territories." (*Id.* at 51). Wyoming Beverages alleges Core-Mark's sales have caused them to suffer damage including lost profits, damage to the PepsiCo brand, damaged customer relationships, lost fountain soda contracts, injury to Admiral Beverage's businesses and goodwill. (*Id.* at 51).

For all of these reasons, Wyoming Beverages has stated a claim for tortious interference with a business expectancy. As such, Core-Mark's motion to dismiss Wyoming Beverages' tortious interference with a business expectancy claim in Count IV is DENIED.

B. Torrington Bottling

Torrington Bottling alleges Core-Mark tortiously interfered with its contract with Wyoming Beverages. Additionally, Torrington Beverage asserts Core-Mark tortiously interfered with its business expectancy. Torrington Beverage's tortious interference claims are identical to Wyoming Beverages' claims.

1. Tortious Interference with Contract (Count V)

Torrington Beverage alleges Core-Mark tortiously interfered with Torrington Beverage's contractual relationship with Wyoming Beverages. Specifically, Torrington **[*26]** Beverage alleges Core-Mark has caused it to breach its contract with Wyoming Beverages. This claim contains the same fatal argument as Wyoming Beverages' tortious interference with contract claim. Here, Torrington Beverage claims Core-Mark caused it to breach its own contracts with Wyoming Beverages. The Wyoming Supreme Court has declined to adopt *§ 766A* which permits these claims. Thus, Torrington Beverage has failed to allege Core-Mark caused a third party to breach its contracts with Torrington Beverage. While Torrington Beverage fails to allege a claim for tortious interference with contract, the Court will dismiss this claim without prejudice in the event Torrington Beverage can plead facts to support its claim for tortious interference with contract. As such, Plaintiff Torrington Beverage's claim for tortious interference with contract in Count V is DISMISSED WITHOUT PREJUDICE.

2. Tortious Interference with Business Expectancy (Count VI)

Torrington Beverage also asserts Core-Mark tortiously interfered with its business expectancy. Torrington Beverage has a contract with Wyoming Beverages, which grants Torrington Beverage the right to "resell and distribute PepsiCo products to any and **[*27]** all customers and accounts located in [Torrington Beverage's] designated segment of Wyoming Beverages' territory." (Doc. 21 at 55 [Am. Compl.]). Torrington Beverage's tortious interference with business expectancy is identical to Wyoming Beverages' claim. The Court found Wyoming Beverages asserted a claim for tortious interference with a business expectancy. For the same reasons, Torrington Beverage has also asserted a claim for tortious interference with business expectancy. As such, Core-Mark's motion to dismiss Torrington Beverage's tortious interference with a business expectancy claim in Count VI is DENIED.

C. Birrell Bottling

Plaintiff Birrell Bottling claims Core-Mark tortiously interfered with its contract and tortiously interfered with its business expectancy. Birrell Bottling's exclusive territories in Provo and Springville, Utah, and Birrell Bottling's tortious interference claims arise out of Core-Mark's actions in Utah. As such, the Court applies Utah law to Birrell Bottling's tortious interference claims.

To assert a claim for tortious interference in Utah, Birrell Bottling must allege: "(1) the defendant intentionally interfered with the plaintiff's existing or potential economic relations, (2) . **[*28]** . . by improper means, (3) causing injury to the plaintiff. *Eldridge v. Johndrow, 2015 UT 21, 345 P.3d 553, 565 (Utah 2015)*.

1. Tortious Interference with Contract (Count III)

Birrell Bottling alleges that Core-Mark caused it to breach its own contract with Wyoming Beverages. "A party is subject to liability for an intentional interference with *present* contractual relations if he intentionally and improperly causes one of the parties not to perform the contract." *St. Benedict's Development Co. v. St. Benedict's Hosp., 811 P.2d 194, 201 (Utah 1991)*.

Similar to Wyoming, the Utah Supreme Court has adopted *Restatement (Second) of Torts § 766*, stating, intentional interference with present contractual relations requires the plaintiff to allege the defendant, "intentionally and improperly interfered] with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract." *Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 301 (Utah 1982)* (quoting citing *Restatement (Second) of Torts § 766* (1979)), *overruled on other grounds by Eldridge, 2015 UT 21, 345 P.3d 553*; *St. Benedict's Development Co. 811 P.2d at 201*.

While the Utah Supreme Court recognizes tortious interference claims pursuant to *§ 766*, the Utah Supreme Court has not expressly adopted or declined to adopt *Restatement (Second) of Torts § 766A*. *Section 766A* was first published in 1979. Since the Utah Supreme Court has only adopted *§ 766*, not *§ 766A*, this Court will not presume the Utah Supreme Court intended to adopt tortious interference of contract claims pursuant to *§ 766A*. Again, **[*29]** *§ 766* only recognizes tortious interference claims wherein the plaintiff alleges the defendant caused a third party to breach its contract with the plaintiff, Here, Birrell Bottling fails to allege that Core-Mark's tortious interference caused a third party to breach its contract with Birrell Bottling. Rather, Birrell Bottling claims Core-Mark caused it to breach its own contract with Wyoming Beverages. While Birrell Bottling fails to allege a claim for tortious interference in accordance with *Restatement (Second) of Torts § 766*, the Court will dismiss this claim without prejudice in the event Birrell Bottling can plead facts to support its claim for tortious interference with contract.

For these reasons, Plaintiff Birrell Bottling's claim for tortious interference with contract in Count III is DISMISSED WITHOUT PREJUDICE.

2. Tortious Interference with Business Expectancy (Count IV)

Birrell Bottling also alleges Core-Mark interfered with its business expectancy by delivering and selling PepsiCo products to customers within Birrell Bottling's exclusive territory. Birrell alleges Core-Mark had express knowledge that selling PepsiCo products to Plaintiffs' customers interfered with Plaintiffs' business relationships with its customers. **[*30]**

First, Birrell points to a cease and desist letter PepsiCo sent Core-Mark stating PepsiCo has "not authorized Core-Mark to act as [PepsiCo's] distributor of any bottle and can products, including Pepsi-Cola and Mountain Dew, anywhere in the US . . . . In addition, any reselling of products to another distributor is also not permitted." (Doc. 21 at 84 [Ex. 4]). PepsiCo also informed Core-Mark that PepsiCo's "independent Pepsi-Cola bottlers have exclusive bottling appointments for their respective territories . . . ." (*Id.*) Finally, PepsiCo stated:

> We must demand that you cease and desist any further sales of Pepsi-Cola, Mountain Dew or any other PepsiCo soft drinks in bottle or can packages. Unless Core-Mark obtains explicit authority to distribute these

> products from the Pepsi-Cola bottler in the Territory, any further unauthorized sales will be viewed as tortious interference with the bottler's relationship with the accounts in its bottling territory.

(*Id.*). Additionally, Birrell Bottling alleges Core-Mark's operations in the beverage industry have overlapped with Wyoming Beverages' and Birrell Bottling's direct store delivery system for years, so "Core-Mark knows the geographic boundaries and customers" **[*31]** within Plaintiffs' exclusive territories. (Doc. 21 at 42 [Am. Compl.]). Despite the cease and desist letter sent in 2015, Birrell alleges Core-Mark continued to distribute PepsiCo products in its exclusive territory. Thus, Birrell alleges Core-Mark intentionally interfered with its business expectancy.

Under Utah law, "Improper means are present where the means used to interfere with a party's economic relations are contrary to law . . . . Improper means include . . . deceit or misrepresentations . . . . Means may also be improper or wrongful because they violate an established standard of a trade or profession." *Overstock.com v. Smartbargains, Inc., 2008 UT 55, 192 P.3d 858, 864 (Utah 2008)* (quoting *St.Benedict's Dev. Ca., 811 P.2d at 201*).

Birrell Bottling alleges Core-Mark misrepresented to Birrell Bottling's customers that it was authorized to distribute PepsiCo products. Birrell Bottling alleges Core-Mark distributed promotional material to Birrell Bottling's customers which advertised PepsiCo products at low prices. Bin-ell Bottling alleges Core-Mark mispresented that it was authorized to distribute PepsiCo products through Core-Mark's promotional materials and verbal statements. Birrell Bottling alleges Core-Mark led its customers to believe that Core-Mark was associated with PepsiCo and/or Admiral Beverage. Additionally, **[*32]** Birrell asserts Congress enacted the Soft Drink Act to prevent transshipping. As a result of Core-Mark's interference, Bin-ell Bottling claims its injuries include lost profits, damage to the PepsiCo brands, undermined territorial rights, damaged and confused customer relations, lost fountain soda contracts, and "injury to Admiral Beverage's businesses and goodwill in its own territories." (Doc. 21 at 51 [Am. Compl.]).

For these reasons, Bin-ell Bottling has stated a claim for tortious interference with a business expectancy. As such, Defendant's Motion to Dismiss Birrell Bottling's claim for tortious interference with a business expectancy in Count IV is DENIED.

False Advertising under the Lanham Act (Count VII)

Plaintiffs also assert Core-Mark made false and misleading statements in violation of *§ 1125(a)(1)* of the Lanham Act. *Section 1125(a)(1)* of the Lanham Act states:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—
>
>> (A) Is likely to cause confusion, or to cause mistake, or to deceive **[*33]** as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>> (B) In commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a). To state a claim under *§ 1125(a)*, "a plaintiff must allege: (1) that defendant made material false or misleading representations of fact in connection with the commercial advertising or promotion of its product . . .; (2) in commerce; (3) that are either likely to cause confusion or mistake as to (a) the origin, association or approval of the product with or by another, or (b) the characteristics of the goods or services; and (4) injure the plaintiff." *Cottrell, Ltd. V. Biotrol Intern., Inc., 191 F.3d 1248, 1252 (10th Cir. 1999)* (citations omitted). *Section 1125(a)* "creates two distinct bases of liability: false association, *§ 1125(a)(1)(A)*, and false advertising, *§ 1125(a)(1)(B)*." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S.Ct. 1377, 1384, 188 L. Ed. 2d 392 (2014)*.

A. False Association Claim under 1125(a)(1)(A)

Plaintiffs allege two types of false or misleading representations by **[*34]** Core-Mark. First, Plaintiffs allege a false association claim under *§ 1125(a)(1)(A)*, asserting Core-Mark misrepresented to Plaintiffs' customers that Core-Mark "was authorized to sell PepsiCo Brands." (Doc. 21 at 58 [Am. Compl.]). Plaintiffs allege Core-Mark made these misrepresentations both verbally and in writing. Core-Mark distributed promotional brochures to Plaintiffs' customers which "listed PepsiCo Brands as New Offerings' and pitched "month-long 'Introductory Pricing' programs to [Plaintiffs'] customers" that "offered to sell PepsiCo products at artificially low prices." (*Id.* at 59). Plaintiffs claim "Core-Mark's misrepresentations caused confusion and mistake among [Plaintiffs'] customers, leading them to believe that Core-Mark's sale of [PepsiCo brands] were conducted in association with, or with the approval of, PepsiCo and/or Admiral Beverage." (*Id.*). Thus, Plaintiffs have alleged a cause of action under *§ 1125(a)(1)(A)* of the Lanham Act.

Core-Mark argues Plaintiffs failed to sufficiently plead that Core-Mark's actions confused Plaintiffs' customers. Plaintiffs allege that Core-Mark's promotional materials caused its customers confusion about Core-Mark's affiliation or association with PepsiCo and Admiral Beverages, as Core-Mark is not **[*35]** authorized to distribute PepsiCo products in Plaintiffs' exclusive territories. (Doc. 21 at 59 [Am. Compl.]). In addition, Plaintiffs claim Core-Mark's promotional brochures and verbal statements offering to sell PepsiCo products in Plaintiffs' exclusive territory confused and deceived Plaintiffs' customers about the services provided in connection to the sale of PepsiCo products. (*Id.* at 60). Plaintiffs assert Core-Mark's misrepresentations deceived and confused Plaintiffs' customers because Core-Mark sold outdated PepsiCo products, rather than the fresh products provided by Plaintiffs. (Doc. 21 at 59-60 [Am. Compl.]). Plaintiffs allege as a result of Core-Mark's promotional materials and misleading representations, Plaintiffs lost sales with customers in their exclusive territories and lost goodwill and enterprise value. (*Id.* at 61). As such, Plaintiffs have alleged enough facts to state a false association claim under *§ 1125(a)(1)(A)*.

B. False Advertising Claim under *§ 1125(a)(1)(B)*

Plaintiffs also allege a claim for false advertising under *§ 1125(a)(1)(B)*. *Section 1125(a)(1)(B)* requires the plaintiff to allege the false or misleading statements were made in commercial advertising or promotion. The Tenth Circuit has held:

> In order for representations to constitute "commercial advertising or promotion" under **[*36]** [*§ 1125(a)(1)(B)*, they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. While the representations need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Proctor & Gamble Co. v. Haugen, 222 F.3d 1262, 1273-74 (10th Cir. 2000) (citations omitted).

Plaintiffs assert that Core-Mark made false misrepresentations "by distributing promotional brochures to Admiral Beverage's customers that listed PepsiCo Brands as 'New Offerings' and by pitching month-long 'Introductory Pricing' programs to Admiral Beverage's customers which offered to sell PepsiCo Brands at artificially low prices." (Doc. 21 at 59 [Am. Compl.]). Plaintiffs claim Core-Mark's brochures lead Plaintiffs' convenience store customers to believe that PepsiCo authorized Core-Mark to sell their products and Core-Mark's representations about pricing influenced Plaintiffs' customers' purchasing decisions. Specifically, Core-Mark's artificially low prices influenced Plaintiffs' customers **[*37]** to purchase PepsiCo products from Core-Mark, rather than from Plaintiffs who had exclusive rights to distribute PepsiCo products to the customers in the respective territories. Plaintiffs allege Core-Mark's promotional brochures caused confusion for Plaintiffs customers and consumers who, Plaintiffs allege, "believed they were purchasing the same high-quality product associated with Admiral Beverage" but, those customers actually purchased "outdated product manufactured hundreds of miles away from Admiral Beverage's manufacturing centers." (*Id.*). Additionally, Plaintiffs allege Core-Mark's promotional brochures and sales of PepsiCo products lead Plaintiffs' customers to believe Core-Mark was associated with PepsiCo or Admiral Beverage, or that Core-Mark sold PepsiCo products with the approval of PepsiCo or Admiral Beverage, causing Plaintiffs' customers confusion and deception about the characteristics, quality control, and freshness of the products Core-Mark sold. (*Id.* at 59-60). As a result, Plaintiffs' allege Core-Mark's false representations have caused Plaintiffs' lost sales and lost goodwill and enterprise value. (*Id.* at 61).

Core-Mark asserts the Court should dismiss Plaintiffs' false advertising **[*38]** claim under the Lanham Act because the heightened pleading requirement of *Fed. R. Civ. P. 9(b)* applies to the claim. Specifically, Core-Mark argues Plaintiffs failed to plead that Core-Mark made a false representation of fact in "commercial advertising" with the specificity required by *Rule 9(b)*. (Doc. 25 at 20 [Mot. To Dismiss]). "*Rule 9(b)* states that 'in all averments of fraud or mistake, the circumstances constituting the fraud or mistake shall be stated with particularity." *U.S. ex rel Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 726-27 (10th Cir. 2006)* (quoting *Fed. R. Civ. P. 9(b)*). "At a minimum, *Rule 9(b)* requires that a plaintiff set forth the who, what, when, where and how of the alleged fraud . . . and must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *U.S. ex rel Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 726-27 (10th Cir. 2006)* (citations and quotation marks omitted). The Tenth Circuit has not ruled on whether *Rule 9(b)* applies to false advertising claims under the Lanham Act. However, even if *Rule 9(b)* applies, Plaintiffs have alleged a claim for false advertising with enough particularity to meet the heightened pleading requirements of *Rule 9(b)*.

Core-Mark also argues Plaintiffs' claim under *§ 1125(a)(1)* is barred by the First Sale Doctrine. Generally, "the right of a producer to control distribution of its trademarked product does not extend beyond the **[*39]** first sale of the product " *Australian Gold, Inc. v. Hatfield, 436 F.3d 1228, 1240-41 (10th Cir. 2006)* (citation and internal markings omitted). "It is the essence of the 'first sale' doctrine that a purchaser who does no more than stock, display, and resell a producer's product under the producer's trademark violates no right conferred upon the producer by the Lanham Act." *Id. at 1241* (citation omitted). "However, the first sale doctrine does not protect resellers who use other entities' trademarks to give the impression that they are favored or authorized dealers for a product when they are not." *Id.* (citation omitted).

Plaintiffs claim that Core-Mark used PepsiCo's trademark in their promotional brochures. Core-Mark distributed the brochures to Plaintiffs' customers in Plaintiffs' exclusive territories. Through the EBAs between PepsiCo and Admiral Beverage, PepsiCo granted Admiral Beverage the exclusive right to manufacture and distribute PepsiCo products within its defined territory. Admiral Beverage also had the right to grant other entities the exclusive right to sell PepsiCo products within its exclusive territory. Plaintiffs allege Core-Mark resold PepsiCo products within Plaintiffs' exclusive territory which gave Plaintiffs' customers the impression that it **[*40]** was authorized to sell PepsiCo products when neither PepsiCo nor Admiral Beverage authorized Core-Mark to sell PepsiCo within Admiral Beverage's territory. As such, the First Sale Doctrine does not bar Plaintiffs' claim under the Lanham Act.

Additionally, "the first sale doctrine is not applicable 'when an alleged infringer sells trademarked goods that are materially different than those sold by the trademark owner.'" *Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC, 562 F.3d 1067, 1072 (10th Cir. 2009)* (quoting *Davidoff, 263 F.3d at 1302*). "A materially different product is not genuine and may generate customer confusion about the source and quality of the trademarked product." *Id.* (citations omitted). However, not all differences are material and the determining question in "evaluating whether a difference between two products bearing the same trademark is material is whether the difference 'confuses consumers and impinges on the . . . trademark holder's goodwill." *Id. at 1073* (quoting *Nestle, 982 F.2d at 638*). "[A] difference is material if 'consumers [would] consider [it] relevant to a decision about whether to purchase a product." *Id.* (quoting *Davidoff, 263 F.3d at 1302*). "Because many factors influence such considerations, the threshold must be kept low to include even subtle differences between products." *Id.* (citation and quotation omitted). Material **[*41]** differences are not limited to physical differences, but may also include differences in service commitments. *Id.*

Plaintiffs allege Core-Mark transships PepsiCo products that are materially different than Plaintiffs' products. Plaintiff alleges Core-Mark sells outdated PepsiCo products. Additionally, Plaintiffs allege Core-Mark causes its customers confusion by selling PepsiCo products in Plaintiffs' exclusive territories, therefore, Plaintiffs' customers believe Core-Mark is authorized by Plaintiffs' or PepsiCo to sell PepsiCo products. As a result, Plaintiffs' allege its customers believe they are receiving the same high-quality, fresh product and service commitment as Plaintiffs provide, however, Core-Mark does not provide the same service commitment, including replacing expired products with fresh products.

As such, Plaintiffs' have alleged a claim for false advertising under the Lanham Act and Plaintiffs' claim is not barred by the First Sale Doctrine. Defendant's motion to dismiss Plaintiffs' false advertising claim in Count VII is DENIED.

Declaratory Judgment Act (Count II)

Plaintiffs seek declaratory relief under the Declaratory Judgment Act. (Doc. 21 at 40 [Am. Compl.]). Core-Mark argues Plaintiffs' Declaratory **[*42]** Judgment Act claim should be dismissed because Plaintiffs' request for declaratory judgment relates to issues that will be resolved through litigating or their claim does not relate to the instant dispute. "[T]he Declaratory Judgment Act 'gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so.'" *State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 982 (10th Cir. 1994)* (quoting *Public Affairs Associates, Inc. v. Rickover, 369 U.S. 111, 112, 82 S. Ct. 580, 7 L. Ed. 2d 604 (1962)*). At this early stage, the Court does not see a reason to dismiss this claim. As such, Core-Mark's Motion to Dismiss Plaintiffs' claim under the Declaratory Judgment Act in Count II of Plaintiffs' Amended Complaint is DENIED.

CONCLUSION

For the reasons stated above, the Court finds Plaintiffs provide sufficient facts to state claims for Declaratory Judgment Act (Count II), False Advertising under the Lanham Act (Count VII), and tortious interference with a business expectancy (Counts IV and VI). Plaintiffs fail to state a claim for tortious interference with contract (Counts III and V) and do not have a right of action under the Soft Drink Interbrand Competition Act (Count I). As such, Defendant's Motion to Dismiss is GRANTED IN PART and DENIED IN PART.

IT IS ORDERED Plaintiffs' **[*43]** claim under the Soft Drink Interbrand Competition Act in Count I (Doc. 21) is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED Plaintiff Wyoming Beverages' tortious interference with contract claim in Count III (Doc. 21) is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED Plaintiff Birrell Bottling's tortious interference with contract claim in Count III (Doc. 21) is DISMISSED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED Plaintiff Torrington Beverage's tortious interference with contract claim in Count V (Doc. 21) is DISMISSED WITHOUT PREJUDICE.

IT IS FINALLY ORDERED Plaintiffs shall have until January 24, 2018 to amend their complaint to allege facts to support a claim for tortious interference with contract. Failure to file an Amended Complaint within this time will result in the Court dismissing these claims with prejudice.

Dated this 4th day of January, 2018.

/s/ Nancy D. Freudenthal

NANCY D. FREUDENTHAL

CHIEF UNITED STATES DISTRICT JUDGE

[Meyer v. Aabaco Small Bus., LLC]

United States District Court for the Northern District of California, San Jose Division

January 5, 2018, Decided; January 5, 2018, Filed

Case No. 5:17-cv-02102-EJD

Reporter
2018 U.S. Dist. LEXIS 3177 *; 2018 WL 306688

RONALD MEYER, et al., Plaintiffs, v. AABACO SMALL BUSINESS, LLC, et al., Defendants.

Core Terms

Hosting, Web, customer, notice, terminate, unfair, alleges, business practice, disruptions, website, cancel, unjust enrichment, consumers, breach of contract, fraudulent, omission, email, prong, motion to dismiss, particularity, verification, disclose, fails

Counsel: **[*1]** For Ronald Meyer, Luz Betzabeth Bedoya-Apolo, Plaintiffs: Rosemary M. Rivas, Levi & Korsinsky LLP, San Francisco, CA.

For Aabaco Small Business, LLC, Yahoo! Inc., Defendants: Matthew Stewart Kahn, LEAD ATTORNEY, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Timothy William Loose, Gibson, Dunn & Crutcher LLP, Los Angeles, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

Re: Dkt. No. 26

I. INTRODUCTION

Plaintiffs Ronald Meyer ("Meyer") and Luz Betzabeth Bedoya-Apolo ("Apolo") initiated this nationwide putative class action suit against Defendants Aabaco Small Business, LLC ("Aabaco") and Yahoo! Inc. ("Yahoo!") seeking redress for Defendants' alleged failure to provide web hosting services to customers, failure to provide notice of termination, cancellation or suspension, and failure to cancel services in accordance with Defendants' Terms of Service. Federal subject matter jurisdiction is predicated on the *Class Action Fairness Act of 2005*. Presently before the Court is Defendants' motion to dismiss the First Amended Complaint pursuant to *Fed.R.Civ.P.12(b)(6)*. Defendants contend that the alleged internet service disruptions **[*2]** with the website hosting services ("Web Hosting") they were providing to Plaintiffs do not amount to a violation of California's Unfair Competition Law ("UCL") or the False Advertising Law ("FAL"), nor constitute a breach of the Terms of Service contract governing the Web Hosting. Defendants further contend that the unjust enrichment claim fails because the parties' relationship is governed by the Terms of Service. For the reasons set forth below, Defendants' motion is granted in part and denied in part.

II. BACKGROUND[1]

Defendant Yahoo! is a technology company that offers online services to millions of people. First Amended Complaint ("FAC") at ¶2. Yahoo!'s wholly-owned subsidiary, Aabaco, offers a range of small business services, including Web Hosting. Id. Customers pay monthly or annual fees to Defendants to receive Web Hosting services. Id. at ¶3. Defendants' Web Hosting includes website building tools and storage space, business emails attached to the website and the ability to market or advertise through websites. Id. at ¶22. Defendants promised 24-hour phone and email support. Id. Plaintiffs acknowledge that Defendants' Terms of Service govern the relationships between Defendants **[*3]** and customers who pay for Web Hosting. Id. at ¶4.

Plaintiff Meyer, a resident and citizen of Michigan, signed up for Defendants' Web Hosting sometime between 1998 and 2000 to have and maintain a photography related website. Id. at ¶¶8, 26. Within his website, Meyer also paid for and maintained two separate URLs for two children's books he wrote and illustrated. Id. at ¶26. Meyer paid $9.95 a month for Defendants to host his website and to provide him with email accounts tied to his website. Id.

Meyer received and used Web Hosting until October of 2016 when Defendants "abruptly and without reason or notice stopped providing the Web Hosting, although Defendants continued to charge him monthly through March of 2017. Id. at ¶8. Meyer alleges that as a result of the Web Hosting disruption, potential buyers of his books and photography could no longer visit his URLs or email him. Id. at ¶27. Meyer alleges on information and belief that Defendants only stopped charging him because he filed the instant action on April 14, 2017. Id.

After Meyer became aware that his services were "cancelled," he called and emailed Defendants multiple times, asking them to reactivate his Web Hosting or in the alternative, **[*4]** to return all data that made up the site, including the domain name, and to cancel Web Hosting. Id. at ¶9. According to Meyer, "[n]ot a single live customer service representative could help him in either reactivating his website and email accounts, or cancelling his services according to the Terms of Service." Id. at ¶32. Meyer asked for a refund and was told he would have to talk to the accounting department; however, he was not given the accounting department phone number. Id. at ¶9.

Meyer was never informed that Defendants may suspend or terminate the Web Hosting services with no notice or reason while continuing to bill and collect payment. Id. at ¶28. Meyer also asserts that Defendants never asked him to verify his domain name information as part of compliance with the Internet Corporation for Assigned Names and Numbers ("ICANN") or Internet Names Worldwide ("INWW"). Id. at ¶29.

Plaintiff Apolo, a resident and citizen of California, started paying for Defendants' Web Hosting services in approximately 2011 when she became the owner and operator of the Apolo Driving & Traffic School in Van Nuys, California. Id. at ¶¶11, 35. Apolo used Defendants' services to maintain a website to facilitate **[*5]** and advertise her business. Id. The annual fee for Defendants' services was approximately $140.00. Id. at ¶35. In approximately March of 2017, Defendants "abruptly and without reason or notice stopped providing Plaintiff Apolo with the Web Hosting that was paid in full through August of 2017." Id. at ¶11. Apolo was never informed that Defendants may terminate the Web Hosting services without notice or reason. Id. at ¶40. Apolo alleges on information and belief that Defendants suspended her Web Hosting for approximately one week, possibly longer. Id. at ¶11.

When Apolo's employee contacted Defendants regarding the disruption in service, Defendants' customer representative allegedly said "it was done with all accounts to make sure the billing address was correct." Id. at ¶12. Apolo contends that the stated reason for the disruption in service was suspicious because nothing had changed with her business or billing information, and moreover she had paid for a full year of service in advance. Id. Apolo alleges that the disruption in service damaged her business and jeopardized her license to operate a driving school with the Department of Motor Vehicles. Id.

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[1] The Background is a summary of the allegations in the First Amended Complaint. All well-pleaded facts are accepted as true for purposes of the instant motion.

Plaintiffs seek to represent a **[*6]** class consisting of: "Any person or entity in the United States with a Web Hosting Account with Defendant and who (1) was charged for, but [ ] was not provided, with Web Hosting services; or (2) asked for cancellation of Web Hosting services pursuant to the Terms of Service but [was] continued to be billed by Defendants." Id. at ¶51. Plaintiffs assert claims for (1) unfair business practices in violation of the UCL; (2) fraudulent business practices in violation of the UCL; (3) unlawful business practices in violation of the UCL; (4) violation of the FAL; (5) breach of contract; and (6) unjust enrichment.

III. STANDARDS

A motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* tests the legal sufficiency of claims alleged in the complaint. *Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. When deciding whether to grant a motion to dismiss, the court must generally accept as true all "well-pleaded factual allegations." *Ashcroft v. Iqbal, 556 U.S. 662, 664, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The court must also construe the alleged facts in the light most favorable to the plaintiff. See *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)* (providing the court must "draw all reasonable inferences in favor of the nonmoving party" for a *Rule 12(b)(6)* motion). Dismissal "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." **[*7]** *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

Consumer-protection claims that sound in fraud, as Plaintiffs' claims do, are subject to the heightened pleading requirements of *Fed.R.Civ.P. 9(b)*. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003)*; see also *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*; *In re Apple and AT&T iPad Unlimited Data Plan Litigation, 802 F. Supp. 2d 1070, 1075 (N.D. Cal. 2011)* (*Rule 9(b)* applies to claims under the UCL and FAL). *Rule 9(b)* requires that "a party must state with particularity the circumstances constituting fraud. . . ." *Fed.R.Civ.P. 9(b)*. The circumstances constituting the fraud must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Therefore, a party alleging fraud must set forth "the who, what, when, where, and how" of the misconduct. *Vess, 317 F.3d at 1106* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))*.

IV. DISCUSSION

A. UCL and FAL Claims

Defendants seek dismissal of the UCL and FAL claims, asserting that Plaintiffs have failed to plead fraud with the requisite particularity.

California Business & Professions Code §17200 defines unfair competition as any "unlawful, unfair or fraudulent business act or practice." "Unlawful" practices are forbidden by law. *Saunders v. Super. Ct., 27 Cal.App.4th 832, 838, 33 Cal. Rptr. 2d 438 (1994)*. "Unfair" practices constitute "conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable **[*8]** to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal.4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. The "fraudulent" prong requires a showing of actual or potential deception to some members of the public, or harm to the public interest. See *Id. at 180*. A plaintiff may base a UCL claim on an alleged omission, "[but] to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact that the defendant was obliged to disclose." *Sud v. Costco Wholesale Corp., 229 F.Supp.3d 1075, 1085 (N.D. Cal. 2017)* (quoting *Daugherty v. Am. Honda Motor Co., 144 Cal.App.4th 824, 835, 51 Cal. Rptr. 3d 118 (2006))*.

The FAL proscribes the making or disseminating of any statement which is untrue or misleading. *Cal. Bus. & Prof. Code §17500*. By its terms, the FAL does not encompass omissions without an alleged misstatement. See *Dana v. Hershey Company, 180 F.Supp.3d 652, 668 (N.D. Cal. 2016)*; *Norcia v. Samsung Telecommunications America, LLC, No. 14-582 JD, 2015 U.S. Dist. LEXIS 110454, 2015 WL 4967247, at *8 (N.D. Cal. Aug. 20, 2015)*. Therefore, to state a FAL claim premised on an omission, the plaintiff must plead that the alleged omission was contrary to a statement made by the defendant. See *Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016, 1023 (N.D. Cal. 2016)* ("a plaintiff may state a claim under the FAL if the defendant actually made a statement, but omitted information that undercuts the veracity of the statement"). For both a UCL and FAL fraud claim, the plaintiff must plead particularized facts **[*9]** demonstrating a causal connection or reliance on the alleged misrepresentation. *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 326, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*.

1. UCL and FAL Fraud Theory

Meyer alleges that he was never informed that Defendants may suspend or terminate the Web Hosting services with no notice or reason while continuing to bill and collect payment. Apolo similarly alleges that she was never informed that Defendants may terminate the Web Hosting services without notice or reason. Plaintiffs' claims are deficient insofar as Plaintiffs fail to identify any statement by Defendants that would have caused them or other consumers to reasonably believe that charges would not be assessed during periods of service interruption. Instead, the Terms of Service state clearly and unambiguously in pertinent part: "The Company reserves the right at any time and from time to time to modify or discontinue, temporarily or permanently, the Services (or any part thereof) with or without notice." FAC, Ex. A at p. 25, §1(e). The Terms of Service also state: "You agree that the Company shall not be liable to You or to any third party for any modification, suspension, or discontinuance of any Service." Id. Further, the Terms of Service provide that: "The Company does not warrant **[*10]** that (i) the services will meet your requirements or be uninterrupted, timely, secure or error-free, (ii) the quality of the services will meet your expectations, and [iii] any error in the services will be corrected[.]" Id. at p.36, §12(d). The Terms of Service thus expressly disclose the possibility that services may be interrupted without notice, that services would not be error-free, and that Defendants will not be liable for service interruptions. Accordingly, Plaintiffs' alleged fraud claim is not actionable as a matter of law. See *In re Sony Gaming Networks & Customer Data Sec. Breach Litig., 996 F.Supp.2d 942, 989-990 (S.D. Cal. 2014)* ("[n]o reasonable consumer would believe that Sony's representations regarding the network were meant to promise continued and uninterrupted access to Sony Only Services and/or that Sony was providing uninterrupted access to the" Play Station Network); see also *Porras v. StubHub, Inc., No. 12-1225 MMC, 2012 U.S. Dist. LEXIS 126111, 2012 WL 3835073, at *5-6 (N.D. Cal. Sept. 4, 2012)* (StubHub's use of "guarantee," "100% confidence," "authentic," and "valid" did not support UCL and FAL claims where StubHub discloses possibility of invalid tickets). In light of the disclosures made in the Terms of Service, Plaintiffs cannot establish the requisite causal connection between Defendants' alleged fraudulent **[*11]** conduct and Plaintiffs' injuries. Plaintiffs' UCL fraud claim and FAL claim are dismissed with prejudice.

2. "Unlawful" Conduct

Plaintiffs' UCL claim under the "unlawful" prong is based upon an alleged violation of the FAL and breach of contract. For the reasons discussed above, Plaintiffs' FAL claim fails as a matter of law. It follows that Plaintiffs' "unlawful" prong claim fails to the extent it is based upon a violation of the FAL. Further, Plaintiffs' breach of contract claim cannot support a UCL claim. See *Shroyer v. New Cingular Wireless Services, Inc., 622 F.3d 1035, 1043-44 (9th Cir. 2010)* ("a common law violation such as breach of contract is insufficient" unless conduct is independently unlawful, unfair or fraudulent). Plaintiffs' UCL claim under the "unlawful" prong fails as a matter of law and is accordingly dismissed with prejudice.

3. "Unfair" Conduct

Plaintiffs allege that Defendant's business practices with respect to cancellation are unfair in three respects. FAC, ¶66.[2] First, Plaintiffs allege that Defendants do not disclose, or inadequately disclose, a customer service phone number on their website that can be used to cancel an existing customer's Web Hosting. Id. Second, Plaintiffs allege that Defendants have an outdated verification process requiring **[*12]** old information that makes it difficult for customers to verify their identity. Id. Third, Plaintiffs allege that Defendants "do not timely process cancellation requests for a whole host of reasons, including by failing to provide an adequate number of properly trained customer service representatives." Id.

The UCL does not define the term "unfair" and the California Supreme Court has not established a definitive test to determine whether a business practices is unfair. *Wahl v. Yahoo! Inc., No. 17-2745 BLF, 2017 U.S. Dist. LEXIS 150403, 2017 WL 4098884, at *2 (N.D. Cal. Sept. 15, 2017)*. Nevertheless, three separate tests have emerged from the California Courts of Appeal that provide guidance on the issue. The first test requires that the public policy underlying the claim "must be tethered to specific constitutional, statutory or regulatory provisions." Drum, supra, at 257. Under the second test, courts analyze whether the alleged business practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" and "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Wahl, supra, at *2* (quoting *Drum, supra, at 257*). The third test requires that "(1) the consumer injury must be substantial; (2) **[*13]** the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided." *Drum, supra, at 257*.

Plaintiffs' UCL claim under the "unfair" prong is inadequately pled. Plaintiffs have not pled the who, what, when, where, and how of the alleged misconduct. For example, Meyer alleges that he was unable to cancel his Web Hosting, but does not plead with particularity facts describing his interaction(s) with Defendants' customer service representative(s). As another example, Plaintiffs allege that Defendants have an outdated verification process, but do not include particularized facts regarding the outdated verification process. In response to the motion to dismiss, Plaintiffs argue that existing customers are unable to confirm their identity with Defendants even if they offer to provide current banking information to establish their identity and the payments being made for the Web Hosting services. This allegation, however, is not included in the operative complaint.

Nor are Plaintiffs' allegations sufficient to satisfy any of the three tests for an "unfair" business practice. Plaintiffs do not tether **[*14]** their claim to any specific constitutional, statutory or regulatory provision. Instead, Plaintiffs allege in conclusory language that Defendants' practices "violate the legislative policies of the underlying statutes alleged herein: namely, protecting customers from unfair business practices and preventing persons from being injured by misleading advertising." FAC at ¶ 67. With respect to the second test, Plaintiffs' allegations suggest that their interactions with Defendants' customer service agents and Defendants' verification process may have been inconvenient, frustrating and time consuming. There are insufficient facts, however, to establish that Defendants' business practices rise to the level of immoral, unethical, oppressive, unscrupulous, or substantially injurious practices. Plaintiffs' allegations are also insufficient to satisfy the third test. Among other things, Plaintiffs' allegations fail to establish that Defendants' customer service representatives and the outdated verification process caused Plaintiffs "substantial" injuries. The UCL claim under the "unfair" prong is dismissed with leave to amend.

B. Breach of Contract

Plaintiffs allege that pursuant to the Terms of **[*15]** Service, Defendants had a contractual duty to provide Web Hosting in exchange for payment (§4(c)), and that Defendants breached that duty by terminating Plaintiffs' Web Hosting without notice (§5(c)). FAC at ¶97. Plaintiffs allege that they have been injured and harmed by Defendants' failure to provide Web Hosting to paying customers without notice while continuing to charge for services. Id. at ¶99.

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[2] The "unfair" business practice claim is also based upon the alleged failure to disclose that Defendants could terminate, suspend, cancel or otherwise not provide Web services without notice and continue to charge for services. FAC at ¶65. The allegation is insufficient to state a claim for the reasons discussed in the context of Plaintiffs' UCL fraud claim and FAL claim.

Defendants seek dismissal of the breach of contract claim, arguing that the Terms of Service do not require reimbursement during temporary interruptions of service or notification prior to a disruption in service. With respect to reimbursement, Defendants argue that section 4(c) states only that "You will be charged the applicable fees for the Service(s) You select," and makes no representations regarding reimbursement. With respect to notice prior to termination, Defendants argue that section 5(c) of the Terms of Service applies only when there is a "Termination by the Company," and Plaintiffs have not alleged that their accounts were permanently terminated by Defendants.

Defendants' arguments are persuasive. Section 4(c) of the Terms of Service does not impose a contractual duty to reimburse fees incurred during temporary disruptions **[*16]** in service. The notice provision in Section 5(c) is also clear. Section 5(c), entitled "Termination by the Company," provides that Defendants "may terminate this Agreement or any of the Services at any time, for any reason, upon notice to You." See FAC, Exhibit A, p. 27. Plaintiffs do not allege that Defendants permanently terminated the Agreement or services. Rather, Plaintiffs allege that they experienced disruptions in service, which they repeatedly contend should be characterized as terminations. Although the disruptions in service may have been prolonged, especially for Meyer (six months), the disruptions were nevertheless disruptions, and cannot reasonably be characterized as terminations in service. Plaintiffs' breach of contract claim is accordingly dismissed.

C. Unjust Enrichment

Defendants contend that the unjust enrichment claim fails as a matter of law because an enforceable written contract exists between the parties. The Court agrees. See *Mosier v. Stonefield Josephson, Inc., 815 F.3d 1161, 1172 (9th Cir. 2016)* (quasi-contract action for unjust enrichment does not lie where express binding agreements exist and define the parties' rights); *Paracor Fin., Inc. v. GE Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996)* (unjust enrichment "does not lie when an enforceable, binding agreement exists defining the rights of the parties."); *Durell v. Sharp Healthcare, 183 Cal.App.4th 1350, 1370, 108 Cal. Rptr. 3d 682 (2010)* ("An unjust **[*17]** enrichment theory is inapplicable because Durell alleges the parties entered into express contracts."). Nevertheless, Plaintiffs are entitled to plead claims in the alternative. *Clear Channel Outdoor, Inc. v. Bently Holdings Cal. L.P., No. 11-2573 EMC, 2011 U.S. Dist. LEXIS 140764, 2011 WL 6099394, at *9 (N.D. Cal. Dec. 7, 2011)* ("[E]ven though a plaintiff may not ultimately prevail under both unjust enrichment and breach of contract, it may plead both in the alternative.")

V. CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss is GRANTED as to Count I ("unfair" business practices) with leave to amend, and GRANTED with prejudice as to Counts II ("fraudulent" business practices), III ("unlawful" business practices), IV (FAL), and VI (breach of contract), and DENIED as to Count VII (unjust enrichment).[3] Plaintiff shall file and serve an amended complaint consistent with this Order no later than January 19, 2018.

IT IS SO ORDERED.

Dated: January 5, 2018

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

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[3] The complaint does not include a "Count V."

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Baar v. Jaguar Land Rover N. Am., LLC

United States District Court for the District of New Jersey

January 9, 2018, Decided; January 9, 2018, Filed

Civ. No. 2:17-04142

Reporter

295 F. Supp. 3d 460 *; 2018 U.S. Dist. LEXIS 3867 **; 2018-1 Trade Cas. (CCH) P80,249; 2018 WL 334516

BRIAN BAAR, Plaintiff, v. JAGUAR LAND ROVER NORTH AMERICA, LLC, and JAGUAR LAND ROVER LIMITED, Defendants.

Core Terms

dealers, products, alleges, export, concerted action, relevant market, antitrust, purchasers, unjust enrichment, consulting, consumer, resale, fails, rule of reason, manufacturers, No-Export, markets, motion to dismiss, reasons, restraint of trade, anti trust law, interchangeable, cognizable, Counts, luxury

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For JAGUAR LAND ROVER NORTH AMERICA, LLC, JAGUAR LAND ROVER LIMITED, Defendants: BRIAN D. SULLIVAN, LEAD ATTORNEY, FOX ROTHSCHILD LLP, ROSELAND, NJ.

Judges: WILLIAM J. MARTINI, United States District Judge.

Opinion by: WILLIAM J. MARTINI

Opinion

[*461] **WILLIAM J. MARTINI, U.S.D.J.**:

Plaintiff Brian Baar brings this class action against Jaguar Land Rover North America, LLC ("JLRNA") and Jaguar Land Rover Limited ("JLRL") (collectively "Defendants"), alleging violations of the *Sherman Act, 15 U.S.C. § 1*, various state antitrust and consumer protection laws and unjust enrichment, in connection with the imposition of Defendants' no-export policy at the point of sale of Defendants' products. This matter comes before the Court on Defendants' motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. There was no oral argument. *Fed. R. Civ. P. 78(b)*. For the reasons set forth below, Defendants' motion to dismiss is **GRANTED** and Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

I. BACKGROUND

Plaintiff is a California resident who purchased one of Defendants' **[**2]** products, a 2015 Range Rover, from a dealership in Carlsbad, California on April 1, 2015. First Am. Compl. ("Compl.") ¶ 25, ECF No. 25. JLRNA is a Delaware company with its principal place of business in Mahwah, New Jersey. *Id.* ¶ 26. JLRL is the parent company of JLRNA and is incorporated under the laws of England and Wales, with its principal place of business in the United Kingdom. *Id.* ¶¶ 26-27. JLRL designs, develops and manufactures luxury cars and **[*462]** sport utility vehicles ("SUVs"), which it sells in the United States through JLRNA. JLRL also sells its products all over the world. *Id.* This dispute centers on a significant price differential of Defendants' products in foreign countries such as China. The following facts alleged in the Complaint are not in dispute.

Apparently, demand for luxury vehicles in certain foreign countries commands a sale price of Defendants' products three or four times greater than the price in the United States. *Id.* ¶ 2. "[T]his price differential creates an arbitrage opportunity for Purchasers of JLR Vehicles in the United States who wish to have the ability to export them to foreign markets for resale at higher resale prices than in the United States." *Id.* ¶ **[**3]** 3. To protect their profit margins in these foreign markets, Defendants implemented a "No-Export Policy" (the "Policy") in April 2013. *Id.* The Policy requires that a purchaser agree to the following at the time of sale: "(i) [he or she has] no intention of exporting the JLR Vehicle outside the United States for up to one year from the date of delivery; (ii) if the JLR Vehicle is exported (even by subsequent purchasers), the Purchaser is subject to liquidated damages ranging from $25,000 to $40,000, losses and expenses; and (iii) the warranty will be voided if the JLR Vehicle is exported." *Id.* ¶ 5.

Defendants required Plaintiff to sign "the No-Export Agreement" (the "Agreement") when he purchased his Range Rover. *Id.* ¶ 25. Plaintiff maintains that he "would have freely re-sold [*sic*] the JLR Vehicle for export within one year of delivery absent the No-Export Agreement." *Id.* Plaintiff alleges that the Agreement is non-negotiable and that every purchaser must sign it "at the end of the transaction process, after agreeing upon all financial terms of the transaction." *Id.* ¶ 46. Plaintiff also alleges that Defendants require their United States dealers to undertake certain actions of due diligence **[**4]** to enforce the Policy. Such actions include searching the vehicle purchase history of prospective purchasers, validating their addresses, searching for publicly available information on the internet, and determining the source of funds used to make the purchases. *Id.* ¶ 38.

Plaintiff alleges a conspiracy among Defendants, their dealers, and a third-party consulting company to violate the Sherman Act and unreasonably restrain trade through the enforcement of the Policy. *See id.* ¶¶ 48-58. Plaintiff claims, and Defendants do not deny, that the purpose and effect of the Policy "is to prevent Purchasers from taking advantage of an arbitrage opportunity that exists in foreign countries, such as China, to obtain and maintain higher profits abroad." *Id.* ¶ 59. Plaintiff submits that the relevant market affected by the Policy "is the market for exporting JLR Vehicles for resale." *Id.* ¶ 87. Plaintiff's Amended Complaint asserts five causes of action:

(1) Count 1: declaratory relief under *15 U.S.C. § 1*, *id.* ¶¶ 118-25;

(2) Count 2: injunctive relief under *15 U.S.C. § 1*, *id.* ¶¶ 126-32;

(3) Count 3: violation of 24 state antitrust laws, *id.* ¶¶ 133-37;

(4) Count 4: violation of 26 state consumer protection laws, *id.* ¶¶ 138-47; and **[**5]**

(5) Count 5: unjust enrichment under 48 States' common law, *id.* ¶¶ 148-50.

Defendants now move for dismissal of all claims. Defendants first argue that Plaintiff has failed to allege any concerted action to restrain trade between Defendants and other independent entities. *See* Defs.' Mem. in Supp. of Mot. to Dismiss ("Defs.' Mem.") 9-14, ECF No. 30. Defendants next argue Plaintiff's claims fail under a rule of reason analysis because Plaintiff **[*463]** fails to identify a cognizable relevant market and does not allege an antitrust injury incurred in the United States. *See id.* at 15-29. Defendants also argue that Plaintiff lacks standing to pursue all state law claims other than his California claims and that his California antitrust claims fail for the same reasons as his federal antitrust claims. *See id.* at 29-31. Defendants further argue that Plaintiff's claim under the California Unfair Competition Law ("UCL") fails because he failed to allege fraudulent, unlawful or unfair conduct. *See id.* at 31-35. Finally, Defendants argue that Plaintiff's unjust enrichment claim fails because this Court previously determined that California does not recognize such claims. *See id.* 35-36.

Plaintiff counters, arguing first that the Court should reject **[**6]** Defendants' arguments on the merits because such arguments require the development of a factual record and are inappropriate at the dismissal phase of litigation.

See Pl.'s Mem. of Law in Opp'n to Defs.' Mot. ("Pl.'s Opp'n) 8-10, ECF No. 31. Plaintiff next submits that he properly pleaded the existence of concerted action between Defendants, their dealers and the consulting company, as required by the Sherman Act. *See id.* at 11-16. Plaintiff contends that the Policy unreasonably restrains trade under both the *per se* and rule of reason analyses. Plaintiff argues that the Policy "reduces output by restraining U.S. sales of JLR Vehicles" and the relevant market is "the U.S. market for exporting JLR Vehicles for resale," in which Defendants "have market power." *See id.* at 17-26. Plaintiff submits that he properly alleged an antitrust injury through the restriction of Plaintiff's ability to export Defendants' products for resale. *See id.* at 26-28. Plaintiff further submits that a determination as to his standing to bring non-California based state law claims should be deferred until class certification. *See id.* 31-32. Finally, Plaintiff contends that he plausibly alleges his California claims for the same reasons as his federal claims **[**7]** and that unjust enrichment is a viable claim under California law. *See id.* at 32-40. Defendants filed a reply, in which they largely reiterate their prior arguments. *See* Defs.' Reply Mem. in Supp. of Mot. to Dismiss ("Defs.' Reply"), ECF No. 35.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if the plaintiff fails to state a claim upon which relief can be granted. The moving party bears the burden of showing that no claim has been stated. *Hedges v. United States, 404 F.3d 744, 750 (3d Cir. 2005)*. In deciding a motion to dismiss under *Rule 12(b)(6)*, a court must take all allegations in the complaint as true and view them in the light most favorable to the plaintiff. *See* *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*; *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir. 1998)*.

Although a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. Thus, the factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, such that it is "plausible on its face." *See* *id. at 570*; *see also* *Umland v. PLANCO Fin. Servs., 542 F.3d 59, 64 (3d Cir. 2008)*. A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable **[**8]** inference that the defendant is liable for the misconduct alleged." **[*464]** *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Id.*

III. DISCUSSION

As an initial matter, the Court finds that the alleged facts of the instant case are not in dispute. Defendants do not deny that they maintain a no-export policy or that they make prospective purchasers agree to it at the time of sale. The only real dispute before the Court is whether the Policy violates federal and state antitrust laws by unreasonably restraining the resale of Defendants' products in foreign markets. Plaintiff's other state law and unjust enrichment claims are tethered to the alleged illegal antitrust conduct. The Court, therefore, rejects Plaintiff's contention that merits-based determinations as to his pleadings are untimely and inappropriate at the instant stage of litigation. *See* *Twombly, 550 U.S. at 558* ("a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed") (internal quotation omitted). To the contrary, the Court finds that the undisputed facts lead to a straightforward **[**9]** conclusion: Plaintiff's antitrust claims fail because he fails to allege an illegal concerted action and to identify a cognizable relevant market under the rule of reason. Plaintiff's other claims suffer from the same fatal flaw and Defendant's motion, therefore, is granted.

A. Plaintiff's Sherman Act Claims (Counts 1 & 2)

"*Section 1 of the Sherman Act* prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.'" *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 441 (3d Cir. 2016)* (quoting *15 U.S.C. § 1*). "To establish a *[§] 1* violation, a plaintiff must prove: (1) concerted action by the defendants; (2) that produced anticompetitive effects within the relevant product and geographic markets; (3) that the objects of the conduct pursuant to the concerted action were illegal; and (4) that it was injured as a proximate result of the concerted action." *Id.* (internal quotation and citation omitted).

1. The Rule of Reason Governs the Alleged Scheme.

Plaintiff makes a half-hearted argument that Defendants' alleged conduct is *per se* anticompetitive but falls short. *Per se* liability is reserved for conduct that is manifestly anticompetitive, such as a horizontal cartel among competing manufacturers or retailers to reduce output or **[**10]** fix a price. *See Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*. "[T]he legality of a vertical agreement that imposes a restriction on the dealer's ability to sell the manufacturer's product is governed by the rule of reason." *Id.* (citing *Leegin, 551 U.S. at 907*). The agreement at issue here is unquestionably vertical in nature between the manufacturer Defendants and their dealers. The rule of reason, therefore, governs and Plaintiff's Complaint must properly allege the four factors described above. *See id.*

2. Plaintiff Fails to Allege a Concerted Action

Plaintiff alleges an antitrust conspiracy between Defendants, their dealers and a third-party consultant. First, with **[*465]** respect to the dealers, Plaintiff alleges that they "agree to comply with and enforce" the Policy by requiring purchasers of Defendants' vehicles to sign the no-export Agreement at the point of sale.[1] The dealers also perform various due diligence tasks at Defendants' direction. *See* Compl. ¶¶ 6-11. If they fail to comply adequately with the Policy, the dealers face substantial penalties and "even potential termination." *See id.* ¶ 12.

Plaintiff only alleges that the dealers comply with the Policy; he does not allege anywhere that the dealers actually conspired with Defendants to develop **[**11]** and implement the Policy. The Complaint makes clear that Defendants unilaterally implemented the Policy and required their dealers to enforce it. "Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 760, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Furthermore, "Department of Justice guidelines addressing vertical restraints have approved the argument that it is inappropriate to consider intrabrand restraints as 'agreements' to conspire and manufacturers are permitted to *unilaterally* impose appropriate restraints without giving rise to a cognizable antitrust violation[.]" *Int'l Logistics Grp., Ltd. v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989)* (quoting DOJ Vertical Restraint Guidelines § 2.1 at 6265) (emphasis original). Plaintiff, therefore, fails to allege concerted action between Defendants and their dealers.

Second, with respect to the consulting company, Wolf Consulting ("Wolf"), the Court does not agree that the hiring of a consultant to aid in the drafting of the Policy amounts to a concerted action under *§ 1*. Defendants unilaterally decided to implement the Policy to preserve their prices in foreign markets. *After they made that decision*, Defendants then hired Wolf to draft a revised Policy. Wolf also allegedly conferred **[**12]** with one dealer as to the meaning of the Policy on one occasion. *See* Compl. ¶ 49. Wolf is not in the business of selling luxury SUVs; it is in the business of consulting. The fact that Defendants hired Wolf to assist in executing their business decision does not make that decision less one-sided and it certainly does not transform Wolf into a coconspirator to restrain trade. *See White v. R.M. Packer Co., Inc., 635 F.3d 571, 583 (1st Cir. 2011)* (defendant's employment of a consultant "was entirely economically rational behavior" and such conduct "which the Supreme Court sought to protect from

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[1] Plaintiff's argument that further consideration be given to purchasers in exchange for their consent not to export Defendants' vehicles is meritless. The simple fact is that either a purchaser agrees not to export his vehicle within twelve months of purchase or he leaves the dealership without a vehicle. Clearly, a purchaser's consent to the Agreement is a condition of sale regardless of whether the financial terms are agreed to before consent is given.

chilling effects") (citing *Monsanto, 465 U.S. at 763*). Plaintiff, therefore, fails to allege concerted action between Defendants and Wolf.

3. Plaintiff Fails to Identify a Cognizable Relevant Market.

Plaintiff also fails to satisfy the second factor under the rule of reason. "Plaintiffs have the burden of defining the relevant market." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)* (citation omitted). "'The outer boundaries of a product market are determined by the reasonable interchangeability **[*466]** of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *Id.* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*. "The term [i]nterchangeability implies that one product is roughly equivalent to another for the use to which it is put." *Mylan Pharms., 838 F.3d at 436* (internal quotations omitted). **[**13]** "It also means that while there might be some degree of preference for . . . one [product] over the other, either would work effectively." *Id.* (internal quotation omitted). "Moreover, products need not be perfectly fungible to be considered reasonably interchangeable for market-definition purposes." *Id.* "Cross-elasticity of demand is a measure of the substitutability of products from the point of view of buyers. More technically, it measures the responsiveness of the demand for one product [X] to changes in the price of a different product [Y]." *Id. at 437*. "Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, 124 F.3d at 436* (citation omitted).

Plaintiff identifies the relevant market for Defendants' products as a resale market of one: "the U.S. market for exporting JLR Vehicles for resale." *See* Pl.'s Opp'n at 21. Plaintiff argues that the export **[**14]** market is a "unique" market because Defendants' SUVs "have particular, historically recognized characteristics which make them unique to consumers." *See id.* at 22-23. "Consumers recognize JLR Vehicles' long-standing reputation as dependable, rugged, all-terrain, expeditionary vehicles." *Id.* at 23. For their part, Defendants argue that Plaintiff's market definition is insufficient because it fails to account for the fact that they "face stiff competition for sales from other manufacturers of cars and sports utility vehicles." *See* Def.'s Mem. at 19-20. Furthermore, Plaintiff "does not account for other vehicles that he or others might want to export from the United States." *Id.* at 20.

The Court agrees with Defendants. With all due respect to the quality of Defendants' vehicles, they are not so "unique" as to be impervious to the greater luxury SUV primary and export markets in the United States. One need not think long or hard to arrive at other competing luxury SUV brands—*e.g.*, Lexus, BMW, Mercedes, Audi, Bentley, Porsche, Maserati, to name a few. While the Court finds it entirely possible that consumers prefer Defendants' products for a variety of reasons, consumer preference does not transform an otherwise dynamic **[**15]** market with dozens of interchangeable and cross-elastic products into a singular market. *See Mylan Pharms., 838 F.3d at 436*. As the Third Circuit has previously recognized, "[b]y defining the market so narrowly that it only includes defendants, plaintiffs' proffered geographic and product markets are unrealistic." *See Eichorn v. AT&T Corp., 248 F.3d 131, 147 (3d Cir. 2001)*. The same holds true here.

Accordingly, Plaintiff fails to allege a concerted action between Defendants, their dealers and Wolf. Plaintiff further fails to identify a cognizable relevant market. The Court also finds that any further attempt by Plaintiff to amend his pleadings would be futile, absent a dramatic shift in the alleged facts that would substantially alter the content of the Complaint. *See Banks v. Rozum, 639 F. App'x 778, 784 (3d Cir. 2016)* ("Finally, the District Court was within its discretion to **[*467]** dismiss the complaint with prejudice on the ground that granting leave to amend would have been futile."). Counts 1 and 2 of the Complaint, therefore, are **DISMISSED WITH PREJUDICE**.

B. Plaintiff's Remaining State Law and Unjust Enrichment Claims

Count 3 of the Complaint alleges, "Defendants' unlawful anticompetitive conduct . . . constitutes a violation of federal antitrust laws and, therefore, constitutes violation of the state antitrust laws set forth **[**16]** herein." Compl. ¶ 134. Count 4 similarly alleges violations of various state consumer protection laws, citing Defendants' federal

antitrust law violations as the underlying illegal conduct. *Id.* ¶ 139. It follows then that Plaintiff's state antitrust and consumer protection claims fail for the same reasons that his federal antitrust claims fail. Accordingly, Counts 3 and 4 are **DISMISSED WITH PREJUDICE**.

Finally, Count 5 alleges that Defendants were unjustly enriched "from their unlawful acts by the imposition of the JLR No-Export Policy." As set forth above, however, Plaintiff failed to allege that Defendants' actions were in fact unlawful under the Sherman Act. Plaintiff's unjust enrichment claim, therefore, must also fail. Accordingly, Count 5 is **DISMISSED WITH PREJUDICE**.

IV. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is **GRANTED** and all counts are **DISMISSED WITH PREJUDICE**. An appropriate order follows.

/s/ William J. Martini

WILLIAM J. MARTINI, U.S.D.J.

Date: January 9, 2018

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] ORDER

THIS MATTER comes before the Court on Defendants' motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* (ECF No. 29); for the reasons set forth in the accompanying opinion;

IT IS on this 9th day of January 2018, **[**17]** hereby,

ORDERED that Defendants' motion to dismiss is **GRANTED**; and it is further

ORDERED that all counts are **DISMISSED WITH PREJUDICE**.

/s/ William J. Martini

WILLIAM J. MARTINI, U.S.D.J.

United States v. Sanchez

United States District Court for the Northern District of California

January 12, 2018, Decided; January 12, 2018, Filed

Case No. 14-cr-00580-PJH-2, -3

Reporter
2018 U.S. Dist. LEXIS 6128 *; 2018 WL 399305

UNITED STATES OF AMERICA, Plaintiff, v. JAVIER SANCHEZ and GREGORY CASORSO, Defendants.

Subsequent History: Motion denied by *United States v. Casorso, 2018 U.S. App. LEXIS 3451 (9th Cir. Cal., Feb. 14, 2018)*

Motion denied by *United States v. Sanchez, 2019 U.S. App. LEXIS 2485 (9th Cir. Cal., Jan. 24, 2019)*

Decision reached on appeal by *United States v. Sanchez, 760 Fed. Appx. 533, 2019 U.S. App. LEXIS 2567 (9th Cir. Cal., Jan. 25, 2019)*

Prior History: *United States v. Marr, 2016 U.S. Dist. LEXIS 80734 (N.D. Cal., June 21, 2016)*

Core Terms

Sherman Act, motions, pending appeal, per se rule, price fixing, Pretrial, prices, bail, bid

Counsel: **[*1]** For Michael Marr, Defendant: Jonathan Robert Howden, LEAD ATTORNEY, Winston & Strawn LLP, San Francisco, CA; Martha A Boersch, LEAD ATTORNEY, Boersch Shapiro LLP, Oakland, CA.

For Javier Sanchez, Defendant: Colin L. Cooper, LEAD ATTORNEY, Cooper Law Office, Berkeley, CA.

For Gregory Casorso, Defendant: Erik G. Babcock, LEAD ATTORNEY, Law Offices of Erik Babcock, Oakland, CA.

For Victor Marr, Defendant: Teresa Caffese, LEAD ATTORNEY, Law Offices of Teresa Caffese, San Francisco, CA.

For USA, Plaintiff: E. Kate Patchen, LEAD ATTORNEY, Alexis Jane Loeb, Micah Lanielle Rubbo, U.S. Department of Justice, Antitrust Division, San Francisco, CA; Albert Bilog Sambat, U.S. Department of Justice, U.S. Attorney's Office, San Francisco, CA; Susan Ashley Musser, Department of Justice, Antitrust, San Francisco, CA.

Judges: PHYLLIS J. HAMILTON, United States District Judge.

Opinion by: PHYLLIS J. HAMILTON

Opinion

ORDER DENYING MOTIONS FOR RELEASE ON BAIL PENDING APPEAL

Re: Dkt. Nos. 391, 392

Before the court are defendant Javier Sanchez's joinder in codefendant Michael Marr's motion for release on bail pending appeal and Gregory Casorso's motion for bail pending appeal, which incorporates the authorities and arguments made in Marr's motion. **[*2]** Doc. nos. 391, 392. Marr's motion for release pending appeal was filed prematurely, before sentence or judgment of conviction has been entered, and therefore remains pending. Doc. no. 390. Having held a hearing on Sanchez and Casorso's motions for release on bail pending appeal, and having considered the relevant authority, the parties' briefs, the record, and the argument of counsel, the court DENIES the motions for the reasons stated on the record and set forth below.

For purposes of these motions, the government does not raise a dispute, under *18 U.S.C. § 3143(b)(1)*, whether Sanchez or Casorso presents a flight risk or poses a danger to the community, or whether the appeal is for the purpose of delay. The parties only dispute whether defendants have raised a "substantial question of law or fact likely to result in reversal [or] a new trial." *18 U.S.C. § 3143(b)(1)(B)*. Defendants contend that they raise three substantial questions on appeal: (I) Whether "unreasonable restraint" is a necessary element of a criminal violation of the *Sherman Act*; (II) If so, can a defendant, consistent with the *due process clause*, be convicted of a Sherman Act violation without this necessary element being found by the jury; and (III) Whether "controlling precedent" **[*3]** bars the Ninth Circuit from deciding Questions I and II.

On appeal, defendants will necessarily ask the Ninth Circuit to revisit its ruling in *United States v. Manufacturers' Ass'n of Relocatable Bldg. Industry, 462 F.2d 49, 50 (9th Cir. 1972)*. There, the Ninth Circuit rejected the argument, challenging a conviction under the Sherman Act, that "the per se rule as to price-fixing, i.e., that price-fixing is per se a violation of the antitrust laws and that the test of reasonableness has no application, is in substance the creation of a conclusive presumption and denies them due process in a criminal trial." *Id.* The court in *Manufacturers' Ass'n*. applied well-settled authority recognizing that price fixing has long been held to be "a per se violation of the Sherman Act without consideration of the rule of reasonableness." *Id. at 51* (citing *United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 47 S. Ct. 377, 71 L. Ed. 700 (1927)* (sustaining criminal conviction for violation of the Sherman Act by price fixing where the district court "refused various requests to charge that both the agreement to fix prices and the agreement to limit sales to a particular group, if found, did not in themselves constitute violations of law, unless it was also found that they unreasonably restrained interstate commerce"); *United States v. American Tobacco Co., 221 U.S. 106, 31 S. Ct. 632, 55 L. Ed. 663 (1911)*; *Standard Oil Co. v. United States, 221 U.S. 1, 60-68, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*. Defendants revive their argument, initially raised in pretrial motions, that **[*4]** the holding of *Manufacturers' Assn*. has been undermined by intervening cases deciding antitrust and due process issues. Doc. no. 390 at 6-10.

Defendants suggest that there is an open question whether unreasonable restraint is an element of a criminal Sherman Act offense by arguing that the Supreme Court "has never expressly held that 'unreasonable restraint' is not a necessary element of a criminal violation." Doc. no. 403 at 3. But in *Trenton Potteries*, the Supreme Court was presented with the question "whether the trial judge correctly withdrew from the jury the consideration of the reasonableness of the particular restraints charged," and held that "[w]hether the prices actually agreed upon were reasonable or unreasonable was immaterial in the circumstances charged in the indictment and necessarily found by the verdict." *273 U.S. at 396, 401*. The Court recognized that *Standard Oil* and *American Tobacco* did not overrule earlier cases holding that "uniform pricefixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman Law, despite the reasonableness of the particular prices agreed upon." *Trenton Potteries Co., 273 U.S. at 398* (citations omitted). "That only those restraints upon interstate **[*5]** commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this court in the Standard Oil and Tobacco Cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable." *Id. at 396*.

Defendants contend that even in light of this long line of antitrust jurisprudence, they will present a fairly debatable question whether "unreasonable restraint" is a necessary element of a criminal violation of the Sherman Act. Doc. no. 403 at 2-3. This issue was squarely decided by the Ninth Circuit in *Manufacturers' Ass'n*. "The per se rule does not operate to deny a jury decision as to an element of the crime charged, since "unreasonableness" is an element of the crime only when no per se violation has occurred." *462 F.2d at 52*. In light of this binding circuit authority, this court does not find a fairly debatable question whether bid rigging, a form of price fixing, is a per se violation of the Sherman Act, without inquiry as to reasonableness, as a matter of substantive law:

> Thus the Court has interpreted a broad and inclusive statute, and since the earliest **[*6]** days of the Act, has enunciated two distinct rules of substantive law: (1) certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act; (2) restraints upon trade or commerce which do not fit into any of these classes are prohibited only when unreasonable. The first rule, in light of the second, defines certain classes of pernicious conduct as unreasonable. Roughly restated, the per se rule establishes a conclusive presumption that certain types of conduct are unreasonable.

Manufacturers' Ass'n, 462 F.2d at 52 (citing *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. *See* *Harkins Amusement Enterprises, Inc. v. Gen. Cinema Corp., 850 F.2d 477, 487 (9th Cir. 1988)* ("Concerted action to eliminate competitive bidding violates the Sherman Act.") (citing *United States v. Champion Int'l Corp., 557 F.2d 1270, 1272-73 (9th Cir. 1977)*; *United States v. Brighton Bldg. & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979))*.

Defendants challenge the dichotomous approach under ***antitrust law*** requiring per se treatment for bid rigging, but analyzing other forms of anticompetitive conduct under the rule of reason. Doc. no. 403 at 2-3. Defendants complain that the government should not be able to remove the question of reasonableness from the jury merely by charging anticompetitive conduct as bid rigging. However, long-standing authority, followed by the court in *Manufacturers' Ass'n*, recognizes that price fixing is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry **[*7]** as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co., 356 U.S. at 5*. As the government pointed out in response to defendants' motions, the circuit courts that have been presented with this issue have similarly held that the per se rule is a substantive rule of law and does not create an evidentiary presumption or withhold an element from the jury. Doc. no. 402 at 4 (citing *United States v. Giordano, 261 F.3d 1134, 1144 (11th Cir. 2001)*; *United States v. Cargo Serv. Stations, Inc., 657 F.2d 676, 683 (5th Cir. 1981)*; *United States v. Koppers Co., 652 F.2d 290, 293 (2d Cir.1981)*; *United States v. Gillen, 599 F.2d 541, 545 (3d Cir. 1979)*; *Brighton Bldg. & Maint. Co., 598 F.2d at 1106 (7th Cir. 1979))*.

Defendants suggest that *Manufacturers' Ass'n* is stale because it was decided over 45 years ago and is irreconcilable with more recent authority requiring a jury to decide whether each element of the offense had been proven beyond a reasonable doubt. Doc. no. 403 at 6-7. As the court noted in its pretrial rulings, the due process principle that the jury must decide every element of the crime is not a novel issue that has arisen since *Manufacturers' Ass'n* was decided. "The due process principles that defendants contend contravene the per se rule were considered by the court in *Manufacturers' Ass'n*, which cited *Morissette* as authority on the right to have every element of the crime submitted to the jury." Doc. no. 247 (Pretrial Order No. 5) at 7 (citing *Morissette v. United States, 342 U.S. 246, 276, 72 S. Ct. 240, 96 L. Ed. 288 (1952)* ("Whether that intent existed, the jury must **[*8]** determine, not only from the act of taking, but from that together with defendant's testimony and all of the surrounding circumstances.")).

The court considered defendants' challenges to per se treatment of the bid rigging counts, and addressed their arguments in Pretrial Order No. 2 denying their motion to adjudicate the Sherman Act allegations pursuant to the rule of reason (doc. no. 66) and Pretrial Order No. 5 denying their motion in limine to admit evidence of auction sale price analyses. Doc. nos. 135, 247. Having been found guilty by a jury, based on a theory of criminal liability fully supported by Ninth Circuit authority, defendants now ask the court to find a fairly debatable issue as to whether the Ninth Circuit should overrule itself. This court, being bound by existing authority, does not find that defendants raise a substantial question of law. Defendants' challenge to the per se rule, in light of long-standing authority recognizing per se treatment of horizontal price fixing as a substantive rule of law and rejecting pleas to require a jury finding of unreasonableness, does not present "an appeal to precedent or to reason commanding respect that might possibly prevail" **[*9]** or an otherwise fairly debatable issue. *United States v. Handy, 761 F.2d 1279, 1281 (9th Cir. 1985)* (citation omitted).

Accordingly, Sanchez and Casorso's motions for release on bail pending appeal are DENIED.

IT IS SO ORDERED.

Dated: January 12, 2018

/s/ Phyllis J. Hamilton

PHYLLIS J. HAMILTON

United States District Judge

Imhoff v. Goin

Appellate Division, Superior Court of California, Los Angeles County

January 16, 2018, Opinion Filed

CASE NO.: BC593161

Reporter
2018 Cal. Super. LEXIS 4 *

MARGARET IMHOFF, individually and on behalf of all others similarly situated, Plaintiff, vs. SUZANNE GOIN; CAROLYN STEIN; LUCQUES CATERING, INC.; DAVID LENTZ; DIRTY CHICKEN, INC, JON SHOOK; VINNY DOTOLO; O&A HOSPITALITY LCC; 1104 WILSHIRE LLC; JOSIAH CITRIN; RUSTIC CANYON FOOD AND WINE, INC.; JOSH LOEB; ZOE NATHAN; and DOES 1-100, inclusive, Defendants.

Prior History: *Imhoff v. Goin, 2016 Cal. Super. LEXIS 14818 (Cal. Super. Ct., Sept. 19, 2016)*

Core Terms

notice, class member, restaurants, surcharge, Defendants', class action, ascertainable, card, Cartwright Act, damages, customers, records, class certification, certification, member of the class, conspiracy, questions, Adequacy, parties, Reply, staff, self-identify, predominate, employees, benefits, defenses, courts, individual class member, personal notice, common issue

Judges: [*1] MAREN E. NELSON, Judge of the Superior Court.

Opinion by: MAREN E. NELSON

Opinion

ORDER TENTATIVELY CERTIFYING CLASS

I. BACKGROUND

Plaintiff Margaret Imhoff ("Plaintiff") commenced this class action on September 1, 2015, against Defendants Suzanne Goin, Carolyn Stein, Lucques Catering, Inc., David Lentz, Dirty Chicken, Inc., Jon Shook, Vinny Dotolo, O&A Hospitality, LLC, 1104 Wilshire, LLC, Josiah Citrin, Rustic Canyon Food and Wine, Inc., Josh Loeb, and Zoe Nathan (collectively, "Defendants") for violation of: (1) the Cartwright Act (*Bus. & Profs Code, §16720 et seq.*); and (2) the Unfair Competition Law (*Bus. & Profs. Code, §17200 et seq.*).

Defendants are competitors and owners/operators of restaurants in Los Angeles who allegedly met and agreed to levy a 3% to 3.5% employee benefit surcharge on their customers' bill beginning in September 1, 2014 in order to start health care coverage October 1, 2014. (Compl., ¶¶39, 41; Sterrett Decl., Exs. B [Newsletter], C [Press Release].) Plaintiff alleges this was advantageous for Defendants because an individual restaurant implementing the surcharge would be placed at a competitive disadvantage. (Compl., ¶¶40, 42.) Plaintiff argues this conduct constitutes horizontal price fixing, harms consumers, and is illegal per se in California **[*2]** under the Cartwright Act and Unfair Competition Law.

There are 17 restaurants at issue. Lucques, A.O.C., The Hungry Cat, Tavern, and The Larder are owned and operated by Defendants Suzanne Goin, Carolyn Stein, Lucques Catering, Inc., and David Lentz. (Compl., ¶¶17-20.) Animal, Son of a Gun, Trois Mec, Petit Trois, and Jon & Vinny's are owned and operated by Defendants Dirty Chicken, Inc., Jon Shook, and Vinny Dotolo. (*Id.*, ¶¶21-23.) Melisse and Lemon Moon are owned and operated by Defendants O&A Hospitality, LLC, 1104 Wilshire, LLC, and Josiah Citrin. (*Id.*, ¶¶24-26.) Rustic Canyon, Huckleberry Cafe & Bakery, and Milo & Olive are owned and operated by Rustic Canyon Food and Wine, Inc., Josh Loeb, and Zoe Nathan. (*Id.*, ¶¶27-29.) Defendants identify two more restaurants: Lucques Catering, Inc. and the Larder at Burton Way. (Patrick Decl., Ex. A [Chart].)

Defendants demurred to the Complaint. The demurrer was overruled. This motion for class certification followed.

Plaintiff seeks to certify a class of:

“All natural persons who were customers at one or more of Defendants' California restaurants on or after September 1, 2014.

Excluded from the class are: retail employees; corporate officers, **[*3]** members of the board of directors, and senior executives of Defendants; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.“

(Mot. at p.3.)

Extensive pleadings and evidentiary objections thereto were filed.[1] The Court heard oral argument on October 27, 2017. For the reasons that follow, the Court now issues its ruling, tentatively concluding that the class, as proposed, may not be certified but that a more limited class may be certified. However, given that much of what Plaintiff argues regarding class certification was contained only in her Reply, and given that the Court relies on authorities published after oral argument, the parties will be afforded thirty (30) days after entry of this (Tentative) Order to assert any objections thereto.

II. LEGAL STANDARD

A class action is authorized “when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court . . . .” (*Cal. Code Civ. Proc. § 382*.)

“The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, **[*4]** and substantial benefits from certification that render proceeding as a class superior to the alternatives.” (*Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021, 139 Cal. Rptr. 3d 315, 273 P.3d 513* (“*Brinker*”); *Dailey v. Sears, Roebuck and Co. (2013) 214 Cal.App.4th 974, 988, 154 Cal. Rptr. 3d 480*.)

These requirements are commonly articulated in terms of four primary requirements:

---

[1] Defendants submit evidentiary objections to the declarations of Dan Montrenes and Dr. Charles J. Cicchetti, Ph.D.

The evidentiary objections to Montrenes' declaration are sustained (Nos. 1-9). Montrenes states his qualifications as to his ability to opine on the general practices of credit card processing companies and his experience in the field, from which he bases his opinions as to how to ascertain class members. However, he shows no knowledge as to Defendants' payment processing systems or what data they maintain (See Dec. Para. 7). His opinions are thus irrelevant and speculative.

The evidentiary objections to Dr. Cicchetti's declaration are sustained as to Nos. 1, 3 and 8 as they constitute inadmissible legal conclusions. No. 2 is overruled as his statement is based on his economic opinion of whether the 3% surcharge is a harm to Defendants' consumers. Nos. 4-7 regarding his methodology for calculating damages are overruled as the objections are not proper evidentiary objections but are disagreements on the merits of the opinion.

"Numerosity" — The proposed class is numerous in size (see *Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934, 179 Cal. Rptr. 287*);

"Ascertainability" — It is possible to ascertain who is a member of the class by resort to common, objective characteristics (*Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 915, 107 Cal. Rptr. 2d 761*) because "the right of each individual to recover [is] not [] based on a separate set of facts applicable only to him" (*Vasquez v. Superior Court (1971) 4 Cal.3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964*);

"Community of Common Interest" — Common questions of law or fact predominate and class representatives have claims or defenses typical of the class and can adequately represent the class (*Richmond v. Dart Industries, Inc. (1981) 29 Cal.3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*); and

"Superiority" — Proceeding with the case as a class action is superior to other methods of adjudication (*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1089, 56 Cal. Rptr. 3d 861, 155 P.3d 268*).

III. ANALYSIS

A. Ascertainability

The primary purpose of the ascertainability requirement is to provide notice to all potential class members. (*Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal.App.4th 908, 914, 107 Cal. Rptr. 2d 761*.) In this regard it is important to note that judgments in class actions have preclusive res judicata effects that bind absent class members. (*Id.*) If class members are to receive individualized monetary damages, due process requires notice and **[*5]** an opportunity to opt out. (*Carter v. City of Los Angeles (2014) 224 Cal.App.4th 808, 823, 169 Cal. Rptr. 3d 131* [quoting *Wal-Mart Stores, Inc. v. Dukes (2011) 564 U.S. 338, 360], 824* ["[T]he takeaway from *Wal-Mart* is that the *due process clause* requires notice and opt-out rights to class members unless 'the relief sought must perforce affect the entire class at once ....'"].) "A class representative has the burden to define an ascertainable class." (*Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 918, 117 Cal. Rptr. 3d 66*.)

What constitutes an ascertainable class has been the subject of considerable recent case law. Plaintiff relies on *Aguirre v. Amscan Holdings, Inc. (2015) 234 Cal. App. 4th 1290, 184 Cal. Rptr. 3d 415*, arguing that at this stage of the proceedings she need identify neither a method for giving notice to the proposed class nor the names of individual class members but need only put forth a class definition that is precise, objective and presently ascertainable. Based thereon, Plaintiff asserts that individual class members can then "self-identify."

Under the "self-identification" theory a class is ascertainable for purposes of class certification "if it identifies a group of unnamed plaintiffs by describing a set of common characteristics sufficient to allow a member of that group to identify himself or herself as having a right to recover based on the description." (*Sevidal, 189 Cal.App.4th 905, 920, 117 Cal. Rptr. 3d 66*.) Although not entirely free from doubt, it appears that it is also required that the parties and the Court be able to **[*6]** confirm that those who self-identify as members of the class are in fact class members by way of some form of objective evidence. (*Sotelo v Medianews Group Inc. (2012) 207 Cal. App. 4th 639, 650, 143 Cal. Rptr. 3d 293*; *Estrada v FedExGround Package System Inc. (2007) 154 Cal. App. 4th 1, 64 Cal. Rptr. 3d 327*.)

Plaintiff further argues, for the first time in her Reply, that she need not establish a means of giving personal notice to class members and argues that under the notice provisions contained in *California Rules of Court, Rule 3.766(f)* notice in this case may be given by placing notice in newspapers, on defendants' websites, and by placing signage in the restaurants at issue. (Reply at page 5, lines 10-16.) In. this regard Plaintiff relies on *Aguirre*, which held that a "representative plaintiff need not identify, much less locate, individual class members to establish the existence of an ascertainable class." (*Aguirre, supra, 234 Cal.App.4th at p. 1301*.) *Aguirre* further held that the representative plaintiff need not establish a means for providing personal notice of the action to individual class members.

Aguirre's holdings were discussed in *Noel v. Thrifty Payless, Inc. 17 Cal. App. 5th 1315, 226 Cal. Rptr. 3d 465 (2017)*:

We do not endorse the view that individual members of the class must be *identified by name* at the time of a class certification motion, but we do not think it violates class action doctrine or public policy to require some showing of a *means of identifying* them and a description of how notice **[*7]** might be given. The court may require personal notice in a specific case, depending in part on the amount of loss at stake for each individual class member and the size of the class.

Aguirre acknowledged, as have other cases, that the purpose of the ascertainability requirement is the due process concern of facilitating notice to the class. (*Aguirre, supra, 234 Cal.App.4th at pp. 1300-1301*.) That being so, we do not think a trial court should be precluded from inquiring into the means of giving notice at the class certification stage. Yet, the only inquiry into identity of class members allowed under *Aguirre* is to determine whether the class will be ascertainable "at the remedial stage" based on self-identification. (*Id. at p. 1300*.) To ignore the issue of identifying class members for notice purposes gives short shrift to the due process considerations in play at the certification stage, a consequence of the holding of *Aguirre* in which we do not concur."

(*Noel v. Thrifty Payless, Inc. (2017) 17 Cal.App.5th 1315, 1332, 226 Cal. Rptr. 3d 465*.)

The Court concurs with the analysis in *Noel* and, to the extent it rejects *Aguirre*, adopts the reasoning of *Noel* pursuant to *Auto Equity Sales v Superior Court (1962) 57 Cal. 2d 450, 456, 20 Cal. Rptr. 321, 369 P.2d 937* (Where there is more than one appellate court decision, and such appellate decisions are in conflict, the court exercising inferior jurisdiction can and must make a choice **[*8]** between the conflicting decisions). Specifically, the Court finds that it is not sufficient for Plaintiff to merely put forth a class definition under which members can self-identify at the remedial stage of the proceedings. Because absent class members are bound by findings in a class of which they are a member it is a due process imperative that they be given the best possible notice under the circumstances and an opportunity to opt out *prior to* a liability finding if they do not desire to be bound by the Court's findings. Thus, as *Noel* recognized, in determining whether a class is ascertainable, Plaintiff bears the burden to show a *means* of identifying class members and a description of how notice might be given. As was aptly noted by the Court in *Sotelo v. Medianews Group, Inc., 207 Cal. App. 4th at 649*: "[W]here the proposed class contains an unknown number of members who have no recorded relationship with respondents, a serious notice issue results. The theoretical ability to self-identify as a member of the class is useless if one never receives notice of the action."

The Court further concurs that, as recognized in *Sotelo* and *Estrada*, where class members self-identify they must be able to objectively show that they are, in fact, members **[*9]** of the class.

Given these considerations this case has two ascertainability issues. First, the class definition is overly broad, as it includes both those who did and those who did not pay the surcharge at issue. Further, it contains no cut off period. Plaintiff concedes that if an individual did not pay the 3% surcharge he or she should not be included in the class. This includes those individuals who patronized restaurants that did not impose the surcharge (Reply ISO Motion for Class Certification at page 2:27- 3: 2).

Plaintiff asks that the Court modify the class definition to include only those that actually paid the surcharge. The Court may undoubtedly modify Plaintiff's proposal to define a narrower class. (*Hicks v. Kaufman & Broad Home Corp., supra, 89 Cal.App.4th at 916*.) However, there remains the fact that Plaintiff fails to show that there are objective records from which the class can be given personal notice of the action prior to establishing liability nor does she show that membership in the class can be confirmed at the remedial stage by defendants' records.

Plaintiff initially argued that this information could be derived from the defendants' credit card records, relying upon the opinion of her expert, Dan Montrenes. Mr. Montrenes **[*10]** opined in his Declaration in support of this motion that customers who dined at the restaurants in question could be identified from either the daily receipts issued to the merchants from their respective point of sale systems or the monthly merchant processing statements. It was asserted that from these records the credit card numbers of the purchasers could be obtained and that from that data the card issuers could then identify the customers at issue.

The difficulty with this testimony is that in deposition it became clear that Mr. Montrenes had no familiarity with any credit card processing system of any defendant nor did he review any of defendants' business records to determine whether the daily or monthly records he identifies exist, or, if they do, whether the data therein can then be used by the card issuer to identify class members or what time and expense might be involved in such an exercise.[2] (See Ex. B to Patrick Dec. at page 77, lines 5-7; page 118: 1-12.) Further, Montrenes testified that the data identifying specific persons using a credit card is maintained only by the card issuer, and that the first 5 digits of a patron's credit card are required for the issuer to **[*11]** identify the customer, but that Defendants' point of sale systems may not retain information to obtain a complete credit card number. (*Id.* at 34:19-35:10, 49:5-13, 130:3-10.) Further, the deposition showed that not all class members would be identified by Montrenes' proposed methodology even if the data were available. Class members who paid in cash, by gift card, and the like, would be excluded. Finally, the methodology would not determine who paid the credit card bill in question. (Id. at page 106, lines 8-15; 107:12-110:3; 110:8-112:25.) This would need to be determined by examination of individual diners' credit card receipts (See Exhibit B to Styne Dec), as there is no evidence that the amount that appears on the restaurants' daily or monthly records or the customers' monthly statements includes anything other than a gross amount charged. In short, it does not appear that there is a feasible way to give personal notice to class members.

This does not entirely foreclose the possibility of an ascertainable class. In her Reply, Plaintiff proposed that such notice may be dispensed with in favor of publication notice, either in newspapers or on defendants' websites, or by the placing of signage in **[*12]** defendants' restaurants. It is established that "where members of a class have a substantial claim, individual notice is required because it is essential for them to decide whether to remain as members of the class and become bound by the rule of res judicata; whether to intervene with their own counsel; or whether to "opt out" and pursue their independent remedies [W]hen the membership of the class is huge, the damages are minimal, and res judicata and the other problems listed in the first group are insignificant, notice by publication is adequate." (*Cooper v. American Sav. & Loan Assn. (1976) 55 Cal. App. 3d 274, 127 Cal. Rptr. 579*.)

From the limited evidence presented it would appear that the publication form of notice suggested may be appropriate. There is, however, no information available to Defendants to confirm the class' membership. Thus, once the notice is given, self-identifying class members' status as class members could only be confirmed by presentation of their individual receipt showing that they paid the surcharge.

Because the form of notice was first suggested in the Reply Defendants were given no opportunity to respond thereto. Further, no party has addressed the propriety of confirming class membership by reference to individual receipts. Accordingly, **[*13]** the Court tentatively finds that publication notice (i.e. on defendants' websites, in their newsletters, and with signage in their restaurants) would be adequate and that a class is ascertainable only to the extent it consists of:

"All natural persons who were customers at one or more of Defendants' California restaurants between September 1, 2014 and the date of certification who paid an employee benefit surcharge and who maintain a receipt showing such payment. Excluded from the class are: defendants' employees, corporate officers, members of the board of directors, and senior executives of Defendants; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation."

The parties shall have until February 20, 2018 to file any objection to this proposed definition or the proposed form of notice.

B. Numerosity

There is "[n]o set number ... required as a matter of law for the maintenance of a class action." (See *Rose v. City of Hayward (1981) 126 Cal.App.3d 926, 934, 179 Cal. Rptr. 287* [citing examples wherein classes of as little as 10

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[2] Insofar as the Court can ascertain, Plaintiff did not obtain any discovery from Defendants as to the type of records they or their card processers maintain.

[*Bowles v. Superior Court (1955) 44 Cal.2d 574, 283 P.2d 704]* and 28 [*Hebbard v. Colgrove (1972) 28 Cal.App.3d 1017, 105 Cal. Rptr. 172]* were upheld].)

Plaintiff states that "the precise number and specific identity of each class member is presently unknown to Plaintiff," but estimates that it can be inferred **[*14]** there are thousands of class members. (Mot. at p.8.) Plaintiff presents evidence that Lucques Catering, Inc. collected $177,106 in revenue as of August 5, 2016, and Rustic Canyon Food and Wine collected $149,755.84 in 2014 and 2015 from the surcharge (see Sterrett Decl., Exs. D [Lucques Form Interrogatory No. 17.1 Response] and F [Publication]).

This element is not disputed by Defendants and is established as to the proposed revised class defined above.

C. Commonality

"[T]he 'ultimate question' for predominance is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.]" (*Duran v. U.S. Bank Nat. Assn. (2014) 59 Cal.4th 1, 28, 172 Cal. Rptr. 3d 371, 325 P.3d 916* ("*Duran*"), quoting *Collins v. Rocha (1972) 7 Cal.3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225*.) "'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.'" (*Brinker at 1022*.) "However . . . class treatment is not appropriate 'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following **[*15]** the 'class judgment" on common issues." (*Duran at 28*, quoting *City of San Jose v. Superior Court (1974) 12 Cal.3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701*.) At the certification stage, the Court need not reach the merits of a case. (*Brinker at 1023*.)

Courts are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. (*See* *Under v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.) As the Supreme Court stated in *Duran*: "trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action." (*Duran at 27*.) Plaintiff must establish by a "preponderance of the evidence that the class action proceeding is superior to alternate means for a fair and efficient adjudication of the litigation." (*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 332, 17 Cal. Rptr. 3d 906, 96 P.3d 194*.) Thus, it is not sufficient to show that there are some common issues of law or fact. "Defenses that raise individual questions about the calculation of *damages* generally do not defeat certification. [Citation.] However, a defense in which *liability itself* is predicated on factual questions specific to individual claimants poses a much greater challenge to manageability. This distinction is important." (*Duran* 30, emphasis in original.)

(i) Common Issues Predominate [*16] With Respect to the Cartwright Act Claim

Plaintiff identifies several common questions of law and fact, including: (1) whether Defendants' conduct violated the Cartwright Act; (2) whether Defendants' conspiracy and associated agreements, or any one of them, constitute a per se violation of the Cartwright Act; (3) whether Defendants fraudulently concealed their conduct; (4) whether Defendants' conspiracy and associated agreements restrained trade, commerce, or competition in the Los Angeles restaurant industry; (5) whether, under principles of California ***antitrust law***, Plaintiff and the class suffered injury as a "but for" cause of Defendants' conduct; (6) the effect of Defendants' conduct upon, and the injury caused to, the business or property of Plaintiff and the class; (7) the type and measure of damages suffered by Plaintiff and the class; and (8) whether Defendants should be enjoined to prevent future harm to the class and other California residents. (Compl., ¶35; Mot. at p.11.)

With regard to a Cartwright Act claim, "[t]he basic considerations applicable to class certification have been summarized: Liability in an antitrust action requires proof of two sets of facts: (1) an antitrust **[*17]** violation and (2) a resultant injury to plaintiffs. This latter requirement is also known as 'impact,' 'causation,' 'fact of damage,' and 'fact of injury.' If plaintiffs have stated claims of illegality and impact which can be proved predominantly with facts applicable to the class as a whole, rather than by a series of facts relevant to only individual or small groups of plaintiffs, then prosecution of this case as a class action is appropriate and desirable. [Citation.] If classwide proof of illegality and impact is not possible, the class must be decertified." (*Rosack v. Volvo of America Corp. (1982) 131 Cal.App.3d 741, 752, 182 Cal. Rptr. 800* ("*Rosack*") [quoting *Presidio Golf Club v. National Linen Supply Corp.* (N.D. Cal. 1976) 1976-2 Trade Cases ¶61, 221, pp. 70, 627, 70, 629] [internal quotations omitted].) Proof of injury (impact) is more troublesome than proof of violation, but may be inferred, such that each class member must prove he/she absorbed some portion of the overcharges, when a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services. (*Rosack at 753*; *B.W.I Custom Kitchens v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1348-50, 235 Cal. Rptr. 228* ("*B.W.I.*").)

In this case whether a conspiracy existed is susceptible to common proof. The question applicable across the class is: was there a conspiratorial agreement? **[*18]** (*Id.* at 1349; *In re Cipro Cases I and II (2004) 121 Cal.App.4th 402, 410, 17 Cal. Rptr. 3d 1*.) Plaintiff provides various newsletters from several of the restaurants at issue showing that they agreed to include a 3% healthcare surcharge. For example, Rustic Canyon Wine Bar and Seasonal Kitchen's newsletter volume 45 provides a section entitled "3% Health Care Surcharge," wherein it states, "We've recently sat down with other like-minded local chefs and restaurant owners like Suzanne Goin, Carolyn Stein & David Lentz, John Shook & Vinny Dotolo, and Josiah Citrin to come up with a plan to offer coverage and have decided to implement a 3% employee benefit surcharge added to all of our checks beginning September 1st to pay the October 1 premium." (Sterrett Decl, Ex. B; see also Ex. C [The Hungry Cat restaurant's press release].) Defendant does not deny the existence of such newsletters or that some of the restaurants did in fact add 3% healthcare surcharges to the bills. They note, however, that the fact of the meeting and the discussion was not hidden but well publicized; some restaurants did not adopt the surcharge; others adopted a higher surcharge; some made clear that the charge was optional; others indicate their staffs were trained to explain the charge and removed **[*19]** it upon request. All of those facts make clear that whether an antitrust violation or conspiracy exists is a common question of law and fact that is susceptible to common proof.

Proof of injury (or impact/causation) is somewhat more nuanced. Under California law impact may be inferred when a conspiracy to fix prices has been proven and plaintiffs have established they purchased the price-fixed goods or services. (*B.W.I. at 1350*.) "Once a price-fixing conspiracy has been established, it follows that the class has been injured to some extent." (*Rosack at 760*.) Thus, "impact can be treated as a common question for certification purposes." (*Id. at 753*.) Plaintiff provides Defendant Lucques Catering, Inc.'s discovery responses showing aggregate $177,106 it collected from the 3% surcharge and Rustic Canyon's publication indicating it collected $149,755.84. (Sterrett Decl., Exs. D, F. See *Bruno v. Superior Court (1981) 127 Cal.App.3d 120, 129, 179 Cal. Rptr. 342* FN4 [stating that due process does not prevent calculation of damages on a class-wide basis and that an aggregate calculation is more accurate than summing all individual claims].) Defendants also admit that Rustic Canyon, Huckleberry, Milo & Olive, A.O.C., The Larder at Burton Way, Lucques, Melisse, and The Hungry Cat added a 3% charge, while **[*20]** The Larder at Maple Drive and Tavern added a 3.5% charge. (Patrick Decl., Ex. A [Chart]; Loeb Decl, ¶3, Exs. 1-11; Styne Decl, ¶¶3-5, 10, Exs. A-D; Imhoff Decl, Ex. 1.)

Accordingly, proof of injury is also susceptible to common proof and may be determined on a class wide basis.[3]

In opposition, Defendants argue that various defenses they plan to assert raise individual issues. Specifically, they argue that loss mitigation mechanisms were available to putative class members (i.e., they could agree to pay the surcharge, ask to remove it, or lower their tip to negate it), making this an individualized, restaurant-by-restaurant and meal-by-meal question. As an initial matter it is doubtful that loss mitigation defenses are permitted with respect to a Cartwright Act claim. (See *Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066* ["Passing on" defense rejected.]) The very issue of whether a mitigation defense is permissible is, of itself, a common question.

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[3] The unrefuted evidence is that Animal, Son of a Gun, Trois Mec, Petit Trois, John & Vinny's, and Sweet Rose Creamery did not impose the surcharge. (See Dec. of Josh Loeb, Vincent Dotolo, Jon Shook.)

Nor is Defendants' “but for” argument persuasive. The gist of this argument is that there is no showing that “but for” the alleged agreement prices would not have been raised. In this regard, defendants' expert notes that an increase in minimum wage as of July 1, 2014 and the adoption of **[*21]** the Affordable Care Act suggest that market forces would have caused the surcharge in any event. This too is a common factual question. See *Catalano, Inc. v. Target Sales, Inc. (1980) 446 U.S. 643, 649, 100 S. Ct. 1925, 64 L. Ed. 2d 580* [where Sherman Act violation based on competitors' agreement of horizontal price fixing of credit terms found although other “but for” causes such as other reasons to increase prices may arguably be relevant, “the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.”)

Defendants also take issue with Plaintiff's retained economist, Dr. Charles J. Cicchetti, Ph.D., and his opinion that damages can be established on a classwide basis. As an initial matter, and as noted *supra*, there is a presumption of impact (damages) when a horizontal market-wide restraint of trade is shown. (*In re Cipro Cases, supra, 121 Cal. App. 4th at 413*; *B.W.I. at 1350*.) Further, that there may be a difference of expert opinion as to how to calculate damages on a classwide basis does not counsel against class certification. Some of the defendants admitted in discovery that they have exact figures in their own records to show the amount they received as a result of imposition of the surcharge (see Sterrett Decl., Exs. D [Lucques Form Interrogatory No. 17.1 **[*22]** Response] and F [Publication]). Further, given that the class is to be limited to those that have receipts that show that they paid the surcharge, the calculation of damages either as a whole or individually amounts to a math exercise only.

In short, the Cartwright Act claim is susceptible to common proof and common questions of law and fact predominate. If the Court determines that Defendants' proposed defenses are legally viable and that individual inquiry will be need to establish liability as to class members, decertification can be requested at that time.

(ii) Common issues predominate with the UCL claim

The parties do not discuss the UCL claim in detail, and Plaintiff only attempts to do so in reply (at pp. 12-13). However, as evidenced by the complaint, the UCL claim is derivative of Plaintiff's first cause of action for violation of the Cartwright Act. (See Compl., ¶¶53-54.) Plaintiff seeks equitable class-wide relief for, among other things, restitution. (*Id.*, ¶57(c).) As this claim is derivative of the first cause of action, common issues predominate here as well. “[R]estitution under the UCL may be ordered without individualized proof of harm....” (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co. (2002) 104 Cal.App.4th 508, 532, 128 Cal. Rptr. 2d 463*.)

D. Superiority/Manageability

Closely **[*23]** related to the issue of commonality is that of manageability and superiority. Courts are required to carefully weigh the respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. (*See* *Under v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.) As the Supreme Court stated in *Duron*, “trial courts deciding whether to certify a class must consider not just whether common questions exist, but also whether it will be feasible to try the case as a class action.” (*Duran at 27*.)

“Manageability of the class with regard to proof of the amount of each class member's damages may present an independent ground for failure to certify the class.” (*Rosack at 754*.)

Here, a class action mechanism is a superior method to adjudicate the claims. Plaintiff states that individually, class members would not have the resources to pursue this action on their own and it would be inefficient for the Court to try as the injuries alleged are relatively small in amount, and thus a class action is a superior method. “Cartwright Act defendants should not be ‘permitted to retain ill gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in **[*24]** large amounts.’” (*Clayworth v. Pfizer, Inc. (2010) 49 Cal.4th 758, 784, 111 Cal. Rptr. 3d 666, 233 P.3d 1066* FN21.)

As for manageability, Plaintiff provides not trial plan. Nonetheless, in limiting the class as described above the Court does not foresee any significant manageability issues.

E. Adequacy and Typicality

"'The adequacy inquiry ... serves to uncover conflicts of interest between named parties and the class they seek to represent.' [Citation.] '... To assure "adequate" representation, the class representative's personal claim must not be inconsistent with the claims of other members of the class.' [Citations.] Similarly, the purpose of the typicality requirement 'is to assure that the interest of the named representative aligns with the interests of the class.' [Citation.] 'Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.' [Citations.] The test of typicality 'is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.' [Citation.]" (*Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal.App.4th 1497, 1509, 83 Cal. Rptr. 3d 607*.)

Furthermore, "[a]dequacy of representation depends on whether the plaintiff's **[*25]** attorney is qualified to conduct the proposed litigation and the plaintiff's interests are not antagonistic to the interests of the class." (*See* McGhee v. *Bank of America (1976) 60 Cal. App. 3d 442, 450, 131 Cal. Rptr. 482*.)

(i) Adequacy and Typicality of Plaintiff

Plaintiff states she has been actively involved in this action since its inception, understands the risk of pursuing this case, and is committed to pursue the case to completion to the best interest of the putative class members. (Imhoff Decl., ¶¶3-5.) In opposition, Defendant provides evidence of putative class members to show that Plaintiff's interests are antagonistic to their views—namely, that while she views the surcharge as a negative impact, various putative class members have indicated their support for such coverage. (See Lucques' Guest Declarations, Rustic Canyon's Customer Declarations.) Absent a widespread showing of antagonism in the class suit where the conflict goes to the very subject matter of the litigation, adequacy of representation will not be called into question. (*Richmond v. Dart Industs., Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*.) Here, Defendants have not upheld their burden in showing such widespread antagonism. Patrons who are opposed to the action can elect not to participate in it.

Defendants also argue that Plaintiff was a patron of **[*26]** only 1 of 17 restaurants at issue in this action on only one occasion and thus is not typical of other diners at other restaurants. Plaintiff alleges that on April 24, 2015 (during the class period), she dined at Rustic Canyon Restaurant and was charged a 3% health surcharge of $3.60, which she viewed as mandatory. (Imhoff Decl., ¶2, Ex. 1 [Receipt].) Plaintiff has identified 17 restaurants in her complaint. As the chart attached to the Patrick Decl., Ex. A, shows, the defendants were not entirely uniform in imposing the surcharge. Some did not impose it at all. Some imposed 3%. Some imposed 3.5%. Some indicated it was optional. For example, The Huckleberry Brunch Menu states, "*A 3% charge is added to all checks to cover the costs of offering fully covered healthcare to our employees. Feel free to ask us if you have any questions about the charge. Thank you for supporting a healthier and happier staff." (Loeb Decl., Ex. 2 [Huckleberry Menu].) In contrast, the Rustic Canyon receipt states, "A 3% charge is added to the restaurant to all checks to help offer fully covered healthcare to all of our employees. Please let us know if you have questions *or if you'd like the charge removed* **[*27]** . Thanks for supporting a healthier staff!" (Loeb Decl., Ex. 9 [Rustic Canyon Receipt] [emphasis added].) Similarly, Melisse's receipts and menu state. "A 3% Charge is added for Health Insurance Benefits for our employees. (This can be removed upon request)." (1104 Wilshire, LLC's Staff Declarations at Eric Szymanski Decl., Exs. A-B.)

The fact that Imhoff viewed the charge as "mandatory" when her receipt indicated the charge could be removed, does not render her inadequate. This fact is not shown to be unique to her nor necessarily show a defense unique to her given the current state of the law. Further, how Plaintiff is inadequate to represent those who dined at other establishments is not shown. While different diners may have had different experiences and some may have not been subject to the charge, either because the restaurant did not charge it at all or it was removed, there is no showing that Plaintiff's experience was unique or subjects her to unique defenses.

Adequacy is thus shown.

(ii) Adequacy of Counsel

Plaintiff's counsel, Sterrett Law and the Law Office of Ara Jabagchourian, are qualified to litigate this action as they have shown their experience in class actions, including **[*28]** antitrust actions. (Sterrett Decl., ¶¶4-9; Jabagchourian Decl., ¶¶5, 7-14, Exs. A-C.) This is not disputed by Defendants. Adequacy of counsel has been established.

IV. CONCLUSION

The Court tentatively finds that a class is certifiable to the extent it consists of:

“All natural persons who were customers at one or more of Defendants' California restaurants between September 1, 2014 and the date of certification who paid an employee benefit surcharge and who maintain a receipt showing such payment. Excluded from the class are: defendants' employees; corporate officers, members of the board of directors, and senior executives of Defendants; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.”

The parties shall have until February 20, 2018 to file any objection to this definition or to argue any further points regarding certification based upon the proposed definition and method of giving notice. A further hearing shall be held 3/21, 2018 at 11:00am Prior thereto counsel shall meet and confer and discuss the language of a proposed notice in the event the Court proceeds as indicated herein. Proposals for notice language shall **[*29]** be filed 5 court days in advance of 3/21, 2018.

January 16, 2018

/s/ Maren E. Nelson

MAREN E. NELSON

Judge of the Superior Court

[**Mayes v. Summit Entm't Corp.**](#)

United States District Court for the Eastern District of New York

January 18, 2018, Decided; January 18, 2018, Filed

1:16-CV-06533 (NGG) (ST)

Reporter

2018 U.S. Dist. LEXIS 8902 *; __ F.SUPP.3D __

URSULA MAYES, EVA PEPAJ, JAIME EDMONDSON, JAIME MIDDLETON, JENNIFER ARCHULETTA, RACHEL KOREN, TIFFANY TOTH, and VIDA GUERRA, Plaintiffs, -against- SUMMIT ENTERTAINMENT CORPORATION d/b/a GENTLEMEN'S QUARTERS and PHILLIP TRICOLLA, Defendants.

Subsequent History: Rejected by, in part, Adopted by, in part, Objection sustained by, in part, Objection overruled by, in part, Dismissed without prejudice by, in part *Mayes v. Summit Entm't Corp., 287 F. Supp. 3d 200, 2018 U.S. Dist. LEXIS 36555 (E.D.N.Y., Mar. 5, 2018)*

Core Terms

advertisements, consumers, endorsement, courts, deception, consumer confusion, punitive damages, trademark, allegations, recommends, trademark infringement, motion to dismiss, non-consumers, images, appears, consumer protection, consumer-oriented, decisions, cause of action, featuring, Practices, damages, cases, media, deceptive practices, public interest, celebrities, photograph, products, prayer

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

Upon a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must determine whether a complaint makes allegations that, if proven, would entitle a plaintiff to relief. In order to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Fed. R. Civ. P. 8* does not require detailed factual allegations, but a pleading that offers labels and conclusions or formulaic recitation of the elements of a cause of action will not do. A complaint may plausibly entitle a plaintiff to relief when there is factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

[HN2](#)[] **Motions to Dismiss, Failure to State Claim**

There are two working principles that guide analysis under *Fed. R. Civ. P. 12(b)(6)*: First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the non-moving party, and second, only a complaint that states a plausible claim for relief survives a motion to dismiss, and this determination is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.

Business & Corporate Compliance > ... > Trademark Law > Causes of Action Involving Trademarks > Infringement Actions

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Lanham Act > Scope

Business & Corporate Compliance > ... > Unfair Competition > Federal Unfair Competition Law > Lanham Act

[HN3](#)[] **Causes of Action Involving Trademarks, Infringement Actions**

Section 43(a) of the Lanham Act, *15 U.S.C.S. § 1125(a)*, is a broad federal unfair competition provision which protects unregistered trademarks similar to the way that *§ 32(1) of the Lanham Act*, *15 U.S.C.S. § 1114(1)*, protects registered marks. Courts have interpreted that section as granting celebrities a trademark-like interest in their name, likeness, and persona that may be vindicated through a false endorsement claim.

Torts > ... > Invasion of Privacy > Appropriation > Elements

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

[HN4](#)[] **Appropriation, Elements**

The protection against misappropriation of the right of publicity under *N.Y. Civ. Rights Law § 51* is meaningfully distinct from the right against trademark infringement. Whereas trademarks seek to simultaneously protect consumers from deceptive practices and trademark owners from the plundering of their brand's goodwill, the right of publicity only protects the right to control the commercial use of identity. This is a meaningful distinction. Because the *Lanham Act* is in part a consumer protection statute, a plaintiff must prove a likelihood of consumer confusion, whereas in a right of publicity claim the plaintiff need only prove misappropriation.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

[HN5](#)[] **Particular Subject Matter, Right of Publicity**

To prove a claim of false endorsement, a plaintiff must show that the defendant, (1) in commerce, (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer confusion as to the origin, sponsorship, or approval of the goods or services.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

[HN6](#)[] **Circuit Court Factors, 2nd Circuit Court**

In assessing the fourth element of a false endorsement claim—the likelihood of confusion—courts in the Second Circuit apply the eight-factor Polaroid test. Those factors are: (1) strength of the trademark; (2) similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the senior user may bridge the gap by developing a product for sale in the market of the alleged infringer's product; (5) evidence of actual consumer confusion; (6) evidence that the imitative mark was adopted in bad faith; (7) respective quality of the products; and (8) sophistication of consumers in the relevant market.

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN7[] **Circuit Court Factors, 2nd Circuit Court**

Application of the Polaroid factors is not rote, and the factors are neither exhaustive nor dispositive; rather, a court should keep in mind that the ultimate question is whether the use in its totality would likely confuse consumers. For that reason, courts often adjust the Polaroid factors for false endorsement claims, as they are tailored for more run-of-the-mill trademark infringement actions. For example, the quality of the products and bridging the gap are often not considered. Furthermore, the "mark" is the plaintiff's persona and the "strength of the mark" refers to the level of recognition that the plaintiff has among the consumers to whom the advertisements are directed.

Trademark Law > Likelihood of Confusion > Consumer Confusion

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN8[] **Likelihood of Confusion, Consumer Confusion**

The use of a person's persona cannot cause confusion unless the public recognizes the plaintiff to some degree. Thus, there is no bright line level of celebrity necessary to sustain a claim for false endorsement; rather, all that is necessary is that the plaintiff's identity carries some level of consumer recognition.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Trademark Law > ... > Consumer Confusion > Circuit Court Factors > 2nd Circuit Court

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN9[] **Motions to Dismiss, Failure to State Claim**

The standard of the Polaroid test for the likelihood of confusion imposes a high bar on a motion to dismiss, as normally the likelihood of confusion is a factual question, centering on the probable reactions of prospective purchasers. To prevail, defendants in a false endorsement action must show that, assuming the facts stated in the complaint are true, the court cannot conclude that plaintiff's identity carries enough recognition capable of causing confusion.

Trademark Law > Likelihood of Confusion > Consumer Confusion

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN10[] Likelihood of Confusion, Consumer Confusion

It is plain that the Lanham Act's protection against infringement is not limited to any particular type of consumer confusion. Rather, Section 43(a) protects against all representations likely to cause confusion as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities. 15 U.S.C.S. § 1125(a)(1)(A). Thus, confusion related to any type of association is sufficient in a false endorsement claim.

Trademark Law > Subject Matter of Trademarks > Particular Subject Matter > Right of Publicity

HN11[] Particular Subject Matter, Right of Publicity

Even if endorsement were the sole type of confusion capable of satisfying a false endorsement claim, the mere use of a celebrity's image can be sufficient.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12[] Deceptive & Unfair Trade Practices, State Regulation

To state a claim under N.Y. Gen. Bus. Law § 349, a plaintiff need only allege three elements: (1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Business & Corporate Compliance > ... > Trademark Law > Causes of Action Involving Trademarks > Infringement Actions

HN13[] Deceptive & Unfair Trade Practices, State Regulation

The minority of New York Federal District Courts have allowed non-consumer's trademark infringement claims to proceed under N.Y. Gen. Bus. Law § 349 when the alleged public harm was nothing more than consumer confusion.

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions

HN14[] Appellate Jurisdiction, Certified Questions

If New York's highest court has not addressed a question, then a New York Federal District Court must either (1) predict how the New York Court of Appeals would resolve the state law question, or, if state law is so uncertain that the court can make no reasonable prediction, (2) certify the question to the New York Court of Appeals for a definitive resolution.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN15[] Deceptive & Unfair Trade Practices, State Regulation

New York Courts have recognized that the purpose of *N.Y. Gen. Bus. Law § 349* is to protect consumers from whatever form deception may take, and have accordingly interpreted the remedial statute broadly. The law prohibits those acts or practices which undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice. In this sense, the deception itself is the harm that the statute seeks to remedy.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Continuing Tort Theory

Governments > Legislation > Statute of Limitations > Tolling

HN16[] **Deceptive & Unfair Trade Practices, State Regulation**

Private rights of action under *N.Y. Gen. Bus. Law § 349* are governed by a three-year statute of limitations. *N.Y. C.P.L.R. § 214(2)*. The private right of action accrues under *§ 349* when plaintiff has been injured by a deceptive act or practice violating *§ 349*. If there is a series of continuing violations, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Statute of Limitations

HN17[] **Motions to Dismiss, Failure to State Claim**

Ordinarily, a statute of limitations defense is inappropriate on a *Fed. R. Civ. P. 12(b)(6)* motion as that defense tends to rely on a factual dispute. But a statute of limitations defense may be decided on a *Rule 12(b)(6)* motion if the defense appears on the face of the complaint.

Business & Corporate Compliance > ... > Parties > Defendants > Personal Liability of Corporate Directors, Employees & Shareholders

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN18[] **Infringement Actions, Personal Liability of Corporate Directors, Employees & Shareholders**

On a motion to dismiss, it is sufficient to simply state that the individual defendant is in control of the operations of the business that has infringed on the trademark.

Trademark Law > ... > Damages > Types of Damages > Punitive Damages

HN19[] **Types of Damages, Punitive Damages**

Punitive damages are unavailable under the *Lanham Act*.

Trademark Law > ... > Damages > Types of Damages > Punitive Damages

Trademark Law > ... > Damages > Types of Damages > Treble Damages

HN20[] **Types of Damages, Punitive Damages**

There is a reason treble damages and punitive damages have different names; they are different measures of damages. Both may attempt to deter conduct by enhancing damage awards for conduct that regularly evades detection. But when a statute provides for a specific multiplier—such as treble damages—federal courts usually interpret that as a Congressional command not to exceed that multiplier.

Counsel: **[*1]** For Ursula Mayes, Eva Pepaj, Jaime Edmondson, Jaime Middleton, Jennifer Archuletta, Rachel Koren, Tiffany Toth, Vida Guerra, Plaintiffs: John Vincent Golaszewski, LEAD ATTORNEY, The Casas Law Firm, P.C., New York, NY USA.

For Summit Entertainment Corporation, doing business as Gentlemen's Quarters, Phillip Tricolla, Defendants: Adam Bialek, LEAD ATTORNEY, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York, NY USA; Stephen James Barrett, Willson Elser, New York, NY USA.

Judges: Steven L. Tiscione, United States Magistrate Judge.

Opinion by: Steven L. Tiscione

Opinion

REPORT AND RECOMMENDATION

TISCIONE, United States Magistrate Judge:

Plaintiffs allege that the Defendants—owners and operators of a strip club on Long Island—have unlawfully used Plaintiffs' images in social media advertisements. Plaintiffs claim this violated the *Lanham Act, 15 U.S.C. § 1051 et seq.*, and *New York's Deceptive Practices Act, New York General Business Law § 349*.

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, the Defendants now move to dismiss. This Court recommends that the entirety of Defendants' motion be denied with two exceptions: the Deceptive Practices Act claims brought by Plaintiffs Guerra, Koren, and Toth are time-barred and must be dismissed, and the prayer for punitive damages under the *Lanham Act* must be dismissed **[*2]** as punitive damages are unavailable under that law.

BACKGROUND

Plaintiffs are eight professional models and actresses. Am. Compl. ¶¶ 19-16, 24-63 (Dkt. No. 10).[1] They have a variety of public credits to their name. *See* Am. Compl. ¶ 24 (Plaintiff Mayes), ¶ 29 (Plaintiff Pepaj), ¶ 35 (Plaintiff Middleton), ¶ 40 (Plaintiff Edmondson), ¶ 45 (Plaintiff Guerra), ¶ 49 (Plaintiff Koren), ¶ 55 (Plaintiff Toth), ¶ 59 (Plaintiff Archuletta). Some of their more notable credits include:

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[1] As this is a motion to dismiss, this Court must accept all of the allegations made in Plaintiffs' operative complaint to be true. *Giambrone v. Meritplan Ins. Co., 2017 U.S. Dist. LEXIS 29128, 2017 WL 2303980, at *3 (E.D.N.Y. Feb. 28, 2017)* (citation omitted), *adopted* by, *2017 U.S. Dist. LEXIS 80062, 2017 WL 2303507 (E.D.N.Y. May 24, 2017)*.

• Appearances in national magazines such as Maxim, Vogue, and Cosmopolitan for Plaintiff Mayes (Am. Compl. ¶ 24), Playboy for Plaintiff Edmondson (*id.* ¶ 40), and Esquire for Plaintiff Koren (*id.* ¶ 49);

• Appearances on national television shows such as The Tonight Show and The Jay Leno Show for Plaintiff Mayes (*id.* ¶ 24), True Detective for Plaintiff Pepaj (Am. Compl. ¶ 29), Chappelle's Show for Plaintiff Guerra (*id.* ¶ 45), and Shark Tank for Plaintiff Koren (*id.* ¶ 49);

• Appearances in commercials for major products such as Diet Coke for Plaintiff Pepaj (*id.* ¶ 29), Burger King for Plaintiff Guerra (*id.* ¶ 45), and Nike for Plaintiff Koren (*id.* ¶ 49);

• Appearances alongside celebrities such as Kim Kardashian for Plaintiff **[*3]** Koren (*id.* ¶ 49) and Justin Timberlake for Plaintiff Archuletta (*id.* ¶ 59).

Plaintiffs also have significant social media followings. *See* Am. Compl. ¶ 35 (Plaintiff Middleton has "over 2 million social media followers"); *id.* ¶ 55 (same for Plaintiff Toth).

Defendants Summit Entertainment Corp. and Phillip Tricolla own and operate Gentlemen's Quarters, a strip club in Baldwin, New York. *Id.* ¶¶ 17-18. Plaintiffs allege that Defendants misappropriated Plaintiffs' images by altering photographs of Plaintiffs and using them in social media advertisements. *Id.* ¶¶ 19-86. These advertisements were primarily holiday or event themed, such as an advertisement featuring Plaintiff Mayes in a Native American costume before Thanksgiving (*id.* ¶¶ 24-25) or an advertisement featuring Plaintiff Middleton dressed as a cheerleader in advance of the Super Bowl (*id.* ¶ 30); *see also* Am. Compl. Exs. A-H (Dkt. No. 10-1) (selection of the advertisements at issue). According to Plaintiffs, they never gave consent or received remuneration for the advertisements (*id.* ¶¶ 24-63) and Defendants left some of these advertisements on their social media pages for months after they were put on notice of the misappropriations **[*4]** by the filing of this lawsuit (*see id.* ¶ 3, Exs. A-D, H). Plaintiffs do not allege that their names appeared in the advertisements, and the images they have attached to their complaint do not indicate otherwise. *See id.* ¶¶ 19-63, Exs. A-H.

Plaintiffs filed this action in December 2016 alleging eight causes of action, including claims for false endorsement under *§ 43 of the Lanham Act*, *15 U.S.C. § 1125*, and Deceptive Trade Practices under *New York's Deceptive Trade Practices Act, NYGBL § 349*. *See* Compl. ¶¶ 71-136 (Dkt. No. 1). Plaintiffs later removed their six other causes of action when they filed their amended complaint in March 2017. *Compare* Compl. ¶¶ 71-136 *with* Am. Compl. ¶¶ 87-103. In the operative complaint, they request actual damages, an injunction preventing Defendants from using Plaintiffs' images to promote Gentleman's Quarters, punitive damages, and costs and attorney's fees. *Id.* at 20.

Defendants moved to dismiss the amended complaint in April 2017 (*see* Dkt. No. 13), and the Honorable Nicholas G. Garaufis referred the motion to this Court for a report and recommendation.

DISCUSSION

HN1[] Upon a motion to dismiss under *Rule 12(b)(6)*, a court must determine whether a complaint makes allegations that, if proven, would entitle a plaintiff to relief. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In order to "survive a **[*5]** motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*); *accord Sarmiento v. United States, 678 F.3d 147, 152 (2d Cir. 2012)*. *Rule 8 of the Federal Rules of Civil Procedure* does not require detailed factual allegations, but "[a] pleading that offers 'labels and conclusions' or 'formulaic recitation of the elements of a cause of action will not do.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 555, 557)*. A complaint may plausibly entitle a plaintiff to relief when there is "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly, 550 U.S. at 556*); *see also Swanson v. Citibank, N.A., 614 F.3d 400, 404-05 (7th Cir. 2010)* ("[T]he plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself could these things have happened, not did they happen.").

HN2[] There are "'[t]wo working principles'" that guide this analysis: "First, the court must accept all factual allegations as true and draw all reasonable inferences in favor of the non-moving party," and "'[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss,' and this determination is a 'context-specific task that requires the reviewing court to draw **[*6]** on its judicial experience and common sense.'" *Giambrone v. Meritplan Ins. Co., 2017 U.S. Dist. LEXIS 29128, 2017 WL 2303980, at *3 (E.D.N.Y. Feb. 28, 2017)* (quoting *Iqbal, 556 U.S. at 678, 679)*, *adopted by*, *2017 U.S. Dist. LEXIS 80062, 2017 WL 2303507 (E.D.N.Y. May 24, 2017)*.

Defendants have raised arguments for dismissing Plaintiffs' *Lanham Act* and *Section 349* claims in their entirety. *See* Mem. of Law in Supp. of Def.'s Mot. to Dismiss at 4-13 (Dkt. No. 13-1) ("Mem. ISO"); Reply in Supp. of Def.'s Mot. to Dismiss at 1-7 (Dkt. No. 14) ("Reply ISO"). They also argue that Plaintiffs' claims against the individual Defendant, Mr. Tricolla, should be dismissed, as well as the prayer for punitive damages. Mem. ISO at 11-18. Plaintiffs have responded to almost all of Defendants' arguments. *See* Opposition to Def.'s Mot. to Dismiss (Dkt. No. 13-2) ("Opp.").

This Court addresses each argument in turn below.

I. Plaintiffs' Claims for of False Endorsement under the *Lanham Act*.

Plaintiffs' first claim is for false endorsement under *Section 43(a)* of the Lanham Act, *15 U.S.C. § 1125(a)*. Am. Compl. ¶¶ 87-95. HN3[] *Section 43(a)* "is a broad federal unfair competition provision which protects unregistered trademarks similar to the way that *section 32(1)* of the Lanham Act . . . protects registered marks." *Chambers v. Time Warner, Inc., 282 F.3d 147, 155 (2d Cir. 2002)* (citing *Wal—Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 209-10, 120 S. Ct. 1339, 146 L. Ed. 2d 182 (2000))*. Courts have interpreted that section as granting celebrities "a trademark-like interest in their name, likeness, and persona that may be vindicated through a false **[*7]** endorsement claim." *Bondar v. LASplash Cosmetics, 2012 U.S. Dist. LEXIS 175873, at *17-18 (S.D.N.Y. Dec. 11, 2012)* (collecting cases), *recons. den*. *2013 U.S. Dist. LEXIS 352 (S.D.N.Y. Jan. 2, 2013)*.[2]

HN5[] To prove that claim, Plaintiffs must show "that the defendant, (1) in commerce, (2) made a false or misleading representation of fact (3) in connection with goods or services (4) that is likely to cause consumer

[2] Defendants contend that this is not the appropriate remedy for Plaintiffs' alleged harms, which Defendants believe is more appropriately defined as a claim for the misappropriation of Plaintiffs' right of publicity under *New York Civil Rights Law § 51*. *See* Mem. ISO at 14. HN4[] The protection against misappropriation of the right of publicity is indeed meaningfully distinct from the right against trademark infringement. *See* Barbara A. Solomon, *Can the Lanham Act Protect Tiger Woods? An Analysis of Whether the Lanham Act Is A Proper Substitute for A Federal Right of Publicity*, 94 Trademark Rep. 1202, 1206-07 (2004). Whereas trademarks seek to simultaneously protect consumers from deceptive practices and trademark owners from the plundering of their brand's goodwill, the right of publicity only protects the right to control the commercial use of identity. *Id.* This is a meaningful distinction. Because the *Lanham Act* is in part a consumer protection statute, a plaintiff must prove a likelihood of consumer confusion, whereas in a right of publicity claim the plaintiff need only prove misappropriation. *Id.*

Defendants are correct that the true gravamen of Plaintiffs' claim is infringement on their right of publicity. *See, e.g.*, Am. Compl. ¶ 23 ("Defendants' misappropriation occurred without the Plaintiff's knowledge, consent or authorization, at no point did any Plaintiff ever receive any remuneration for Defendants' improper and illegal use of their Images."). But that observation has no legal traction. The cause of action for false endorsement under the *Lanham Act* is well-accepted in this and other circuits. *See* ***Jackson v. Odenat, 9 F. Supp. 3d 342, 355 (S.D.N.Y. 2014)*** (collecting cases). Plaintiffs' alleged harms, therefore, fall squarely within the protections of the *Lanham Act*. *See* *Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 306 (D.N.H. 2008)* (denying motion to dismiss claims under *§ 43(a)* for the unauthorized use of plaintiff's identity on adult dating website because the use "falls directly" within [the *Lanham Act's*] language").

confusion as to the origin, sponsorship, or approval of the goods or services." *Burck v. Mars, Inc., 571 F. Supp. 2d 446, 455 (S.D.N.Y. 2008)* (citations omitted).

Defendants assert that Plaintiffs have failed to state a claim for false endorsement in two respects: (1) Plaintiffs have failed to allege that they are sufficiently well known such that the misappropriation of their images would likely cause confusion (Mem. ISO at 5-8); and (2) Plaintiffs have failed to allege that the use of their images qualified as an endorsement capable of causing consumer confusion (Mem. ISO at 8-10). Neither argument is persuasive.

A. Whether Plaintiffs have Sufficiently Alleged Public Recognition Sufficient to Cause Consumer Confusion.

HN6[] In assessing the fourth element of a false endorsement claim—the likelihood of confusion—"courts in the Second **[*8]** Circuit apply the eight-factor test laid out in *Polaroid Corp. v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir.1961)*." *Jackson v. Odenat, 9 F. Supp. 3d 342, 355 (S.D.N.Y. 2014)* (citing *Kelly—Brown v. Winfrey, 717 F.3d 295, 307 (2d Cir. 2013))*, *recons. den*. *9 F. Supp. 3d 342, 368 (S.D.N.Y. 2014)*. Those factors are:

> (1) strength of the trademark; (2) similarity of the marks; (3) proximity of the products and their competitiveness with one another; (4) evidence that the senior user may "bridge the gap" by developing a product for sale in the market of the alleged infringer's product; (5) evidence of actual consumer confusion; (6) evidence that the imitative mark was adopted in bad faith; (7) respective quality of the products; and (8) sophistication of consumers in the relevant market.

Id. at 355-56. ***HN7***[] Application of these factors is not rote, and the factors are neither exhaustive nor dispositive; rather, "a court should keep in mind that the ultimate question is whether the use in its totality would likely confuse consumers." *Id. at 356*.[3] For that reason, courts often adjust the *Polaroid* factors for false endorsement claims, as they are tailored for more run-of-the-mill trademark infringement actions. *Id.* For example, the "quality of the products and 'bridging the gap' are often not considered." *Id.* (citing *Standard & Poor's Corp. v. Commodity Exch., Inc., 683 F.2d 704, 708 (2d Cir.1982))*. Furthermore, "the 'mark' is the plaintiff's persona and the 'strength of the mark' refers to the level of recognition **[*9]** that the plaintiff has among the consumers to whom the advertisements are directed." *Id.* (citing *Bruce Lee Enters. LLC v. A.V.E.L.A., Inc., 2011 U.S. Dist. LEXIS 36406, 2011 WL 1327137, at *20) (S.D.N.Y. Mar. 31, 2011)*.

HN9[] This standard imposes a high bar on Defendants' motion to dismiss, as normally "the likelihood of confusion is a factual question, centering on the probable reactions of prospective purchasers." *Pirone v. MacMillan, Inc., 894 F.2d 579, 584 (2d Cir. 1990)*. To prevail, Defendants must show that, assuming the facts stated in the complaint are true, this Court cannot conclude that Plaintiffs' identity carries enough recognition capable of causing confusion. *See* *Rubio v. Barnes & Noble, Inc., 2014 U.S. Dist. LEXIS 169147, 2014 WL 6769150, at *3 (S.D.N.Y. Nov. 12, 2014)*.

Defendants do not clear that bar, as the complaint's allegations are more than sufficient to support a likelihood of consumer confusion. Plaintiffs allege that they are all "well known professional models." Am. Compl. ¶¶ 9-16. And contrary to Defendants' claim that this is a bald allegation supported only with "a handful of modeling credits," Mem. ISO at 12, Plaintiffs have provided a thorough list including appearances in national magazines and television programs, as well as associations with other celebrities, *see* Am. Compl. ¶¶ 24, 29, 35, 40, 45, 49, 55, 59. It is borderline facetious to suggest that Plaintiffs who purportedly have appeared on the Jay Leno Show,

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[3] The parties dispute whether the question is consumer confusion or celebrity status. *Compare* Mem. ISO at 5-8 *with* Opp. at 7-10. But those two questions are obverse; ***HN8***[] the use of a person's persona cannot cause confusion unless the public recognizes the plaintiff to some degree. *See* *Rubio, 2014 U.S. Dist. LEXIS 169147, 2014 WL 6769150, at *3 (S.D.N.Y. Nov. 12, 2014)*. Thus, there is no bright line level of "celebrity" necessary to sustain a claim for false endorsement; rather, all that is necessary is that the plaintiff's "identity carries some 'level of consumer recognition.'" *Id.* (quoting *Bondar, 2012 U.S. Dist. LEXIS 175873, at *27*).

Chapelle's **[*10]** Show, and Shark Tank (*id.* ¶¶ 24, 45, 49), or who have appeared in magazines such as Vogue and Esquire (*id.* ¶¶ 24, 49), or who have publicly appeared with Kim Kardashian (*id.* ¶ 49) have failed to make plausible allegations of public recognition. *See* *Bondar, 2012 U.S. Dist. LEXIS 175873, at *28-29* (denying motion to dismiss because the plaintiff had "alleged that she is [a] 'well known' fashion model, who has appeared on catwalks for prestigious designers and been featured in a number of popular fashion magazines"). And the purported extent of Plaintiffs' social media following—as many as two million Facebook followers, seven-hundred thousand Instagram followers, and one-hundred thousand Twitter followers (*id.* ¶¶ 35, 55)—further corroborates those allegations with factual specifics. *See* *Lancaster v. Bottle Club, LLC, 2017 U.S. Dist. LEXIS 109230, at *18 (M.D. Fla. July 14, 2017)* ("The Court finds that Plaintiffs have alleged sufficient facts to state a plausible claim for relief. Plaintiffs . . . allege their extensive work history in the modeling industry and their numbers of followers on social media.").

The decisions upon which Defendants rely do not suggest otherwise. For example, in *Pelton v. Rexall Sundown, Inc., 2001 U.S. Dist. LEXIS 3825 (S.D.N.Y. Apr. 2, 2001)* the court granted summary judgment, finding that there was no issue of material fact because there was "simply no evidence that a consumer **[*11]** who sees this photograph is likely to recognize Plaintiff." *Id. at *10*. While that type of conclusion is appropriate at the summary judgment stage, it is premature on a 12(b)(6) motion. *See, e.g.,* *Bondar, 2012 U.S. Dist. LEXIS 175873, at *29* ("It is unlikely that the public at large is familiar with Bondar. However, it is possible that discovery will indicate that her mark is strong enough to cause a likelihood of consumer confusion."). In the other cases, the plaintiffs either failed to plead that they were well known (*see* *Rubio, 2014 U.S. Dist. LEXIS 169147, 2014 WL 6769150, at *3* ("[Plaintiff] fails to allege that her name carries any commercial value analogous to a trademark, or that it is recognized by consumers in the relevant market."); *Albert v. Apex Fitness, Inc., 1997 U.S. Dist. LEXIS 8535, at *3-4 (S.D.N.Y. June 12, 1997)* ("Plaintiff is a professional model who does not claim that he is well known or a celebrity.")) or the alleged infringement was clearly a parody protected by the *First Amendment* (*see* *Roberts v. Bliss, 229 F. Supp. 3d 240, 252 (S.D.N.Y. 2017)* ("Plaintiff here has not plausibly alleged that the advertisement creates consumer confusion because any viewer would understand the ad to be engaged in a parody.")).

Thus, Plaintiffs' allegations are more than sufficient to support the conclusion that their images carry some level of public recognition. *Accord* *Lancaster v. Bottle Club, LLC, 2017 U.S. Dist. LEXIS 109230, at *18 (M.D. Fla. July 14, 2017)*; *Bondar v. LASplash Cosmetics, 2012 U.S. Dist. LEXIS 175873, at *25-29 (S.D.N.Y. Dec. 11, 2012)*; *Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 306 (D.N.H. 2008)*.

B. Whether Plaintiffs have Sufficiently Alleged an Endorsement Causing Confusion [*12] .

Defendants next argue that there is no suggestion of endorsement in the advertisements in question because neither "their names or other identifying information . . . appeared in the advertisements." Mem. ISO at 9. They are, in effect, arguing that the mere use of a celebrity's image in an advertisement is legally insufficient to support a claim for false endorsement under the *Lanham Act*.

That argument rests on two mistakes. First, Defendants take the name of this type of action—false endorsement—much too literally. The name is just that, a name and nothing more; it distinguishes actions like these from more traditional claims of trademark infringement. That skin-deep analysis is shallow, as ***HN10***[] it "is plain from this statutory text . . . [that] the Act's protection against infringement is not limited to any particular type of consumer confusion." *Int'l Info. Sys. Sec. Certification Consortium, Inc. v. Sec. Univ., LLC, 823 F.3d 153, 161-62 (2d Cir. 2016)*. Rather, *Section 43(a)* protects against all representations likely to cause confusion "as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities." *15 U.S.C. § 1125(a)(1)(A)*. Thus, confusion related to any type of association is sufficient in a false endorsement **[*13]** claim. *E.g.* *Allen v. Nat'l Video, Inc., 610 F. Supp. 612, 627 (S.D.N.Y. 1985)* ("The court must . . . decide whether defendant's advertisement creates the likelihood of consumer confusion over whether plaintiff endorsed or was otherwise involved with National Video's goods and services.").

Second,*HN11*[] even if "endorsement" were the sole type of confusion capable of satisfying a false endorsement claim, the mere use of a celebrity's image can be sufficient. *Allen, 610 F. Supp. at 627 n.8* (citing *Negri v. Schering Corp., 333 F. Supp. 101, 102, 105 (S.D.N.Y. 1971))* ("When a public figure of Woody Allen's stature appears in an advertisement, his mere presence is inescapably to be interpreted as an endorsement."). Indeed, in *Allen*, the advertisements at issue did not even use Woody Allen's image; they used a lookalike. *Id. at 617-18*.

Defendants rely on two decisions—*Pirone* and *Pelton*—to support their position (Mem. ISO at 8-9), but neither is persuasive. First, *Pirone* appears to stand for, at most, a circuit split over factual questions not at issue here. In that case, the defendant used Babe Ruth's image in a calendar of baseball players and Babe Ruth's estate brought a false endorsement claim. *See Pirone v. MacMillan, Inc., 894 F.2d 579, 581 (2d Cir. 1990)*. The district court granted summary judgment against the estate and the Second Circuit affirmed because it believed that Ruth's image was the *content* of the product, not **[*14]** an indication of *sponsorship*:

> While these pictures of Ruth are in a sense symbols, they in no way indicate origin or represent sponsorship. Photographs of baseball, its players and assorted memorabilia, are the subject matter of the calendar. The pictures of Ruth no more indicate origin than does the back cover's picture of Jackie Robinson stealing home plate. Both covers are merely descriptive of the calendar's subject matter. In neither case would any consumer reasonably believe that Ruth or Robinson sponsored the calendar. Instead, the photographs identify great ballplayers and by so doing indicate the contents of the calendar, not its source.

Id. at 584.

Thus, *Pirone* stands at most for the proposition that the Second Circuit—unlike other circuits—believes that false endorsement claims only extend to uses related to advertisement and not to uses related to the content of products. *Compare Pirone, 894 F.2d 579 at 584 with Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc., 778 F.3d 1059, 1072 (9th Cir. 2015)* ("Here, the fact that Marley's image appears directly on Defendants' merchandise does not preclude relief under *§ 1125(a)*."); *but see Bruce Lee Enters., LLC v. A.V.E.L.A., Inc., 2013 U.S. Dist. LEXIS 31155, at *13-16 (S.D.N.Y. Mar. 6, 2013)* (denying summary judgment for false endorsement dispute arising from unlicensed use of Bruce Lee's image on t-shirts). Because Defendants used Plaintiffs' identity in advertisements, **[*15]** not merchandise, *Prione*'s holding has no impact here.[4]

Pelton is similarly unpersuasive. In that case, the court granted summary judgment on the plaintiff's false endorsement claim because the plaintiff did not appear in the same frame as the product:

> There is nothing about the use of Plaintiff's photograph that implies her endorsement of the CitraLean and Ultra CitraLean products. Her name does not appear anywhere on the label, and the product does not appear in the photograph with her. Rather, she appears sitting on the beach and shielding her face from the sun. Such an image in no way suggests that Defendants attempted to trade on her recognizability in selling CitraLean or Ultra CitraLean.

*Pelton, 2001 U.S. Dist. LEXIS 3825, at *9 (S.D.N.Y. Apr. 2, 2001)*. That holding appears to be an outlier, as other cases have found infringement without finding that the celebrity's image was juxtaposed with the product. *See, e.g., Bruce Lee Enters., LLC, 2013 U.S. Dist. LEXIS 31155, at *61-62*. Furthermore, it simply cannot be the case that

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[4] Even if the holding in *Pirone* were broader, there are innumerable ways of distinguishing that case. Some courts have distinguished it on the grounds that the case dealt with an infringement claim brought under *Section 32(1)*, not *43(a)*, as is the case here. *See Jackson, 9 F. Supp. 3d at 355* ("[Pirone] reject[s] a celebrity's persona as a trademark for purposes of *section 32(1)*, not *section 43(a)*."). Others have distinguished it on the grounds that the calendar in *Pirone* featured many baseball players, not just Ruth. *Bruce Lee Enters., LLC, 2013 U.S. Dist. LEXIS 31155, at *61-62* ("However, *Pirone* is distinguishable from this case: while Babe Ruth's likeness appeared as one of many photographs of baseball players, AVELA's t-shirts feature only an image of Bruce Lee."). Still others have noted that *Pirone* had the unique posture of affirming a grant of summary judgment after the realm of admissible evidence was fixed, rather than the more lenient standard in a motion to dismiss. *See A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC, 131 F. Supp. 3d 196, 209 (S.D.N.Y. 2015)* (denying motion to dismiss false endorsement claim for infringing uses of Marilyn Monroe's image on merchandise in part because "as noted, *Pirone* occurred at the summary judgment stage"). Any and all of these distinctions apply here.

false endorsement claims require visual juxtaposition in the same frame; an advertisement for Muscle Milk® featuring Dwayne "The Rock" Johnson implies sponsorship, even if he never appears in the same frame as the drink.

Regardless, *Pelton* is inapposite. **[*16]** First of all, the opinion was an order granting summary judgment. *2001 U.S. Dist. LEXIS 3825 at *13*. Second of all, the plaintiff in that case failed to offer sufficient evidence that she was well known to the public, which was an independent reason for granting summary judgment. *Id. at * 10*. ("There is simply no evidence that a consumer who sees this photograph is likely to recognize Plaintiff.").

Thus, neither *Pirone* nor *Pelton* suggests that the alleged use of Plaintiffs' images falls outside of uses cognizable under the *Lanham Act*. To avoid dismissal, Plaintiffs must allege that consumers were likely confused to believe that Plaintiffs were associated with Gentlemen's Quarters in some fashion—whether it be endorsement or employment at the club—and they have done so more than adequately.

II. Plaintiffs' Claims of Deceptive Practices under General Business Law *Section 349*.

Defendants advance two arguments for dismissing Plaintiffs' claims under *New York General Business Law § 349*. First, they argue that Plaintiffs have failed to allege a public harm recognized by the statute. Mem. ISO at 11-12. Second, they argue that some claims are time-barred. Mem. ISO at 12-13.

This Court recommends that Plaintiffs' claims should not be dismissed in their entirety because consumer confusion—the **[*17]** harm alleged by Plaintiffs—is a sufficiently consumer-directed harm under the Act. This Court does recommend, however, that the *Section 349* claims of Plaintiffs Guerra, Koren, and Toth be dismissed, as the entirety of their allegations pertain to conduct that occurred outside the limitations period.

A. Whether Plaintiffs have Alleged a Cognizable Harm.

HN12[] To state a claim under *New York's General Business Law § 349*, a plaintiff need only allege three elements: "(1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." *Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009)* (citing *Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000))*.

Nonetheless, Defendants argue that *Section 349*, as a consumer protection statute, only grants a cause of action to non-consumers for harms that have significant ramifications for the public at large, and that courts routinely dismiss trademark infringement actions alleging mere consumer confusion. Mem. ISO at 11-12. Plaintiffs respond that they have alleged consumer-oriented behavior sufficient to state a claim. Opp. at 12.

Defendants are correct that courts routinely dismiss trademark actions brought under *Section 349*. But they have not done so uniformly. There is a split in authority, as a minority of courts have allowed trademark actions to proceed **[*18]** under *Section 349*. *See* *Pulse Creations, Inc. v. Vesture Grp., Inc., 154 F. Supp. 3d 48, 58 (S.D.N.Y. 2015)*; *see also* Hugh C. Hansen, *Consumer Protection Provisions Prohibiting "Deceptive Practices" and "False Advertising": Proper Vehicles for the Protection of Intellectual Property*, 2 Fordham Intell. Prop. Media & Ent. L.J. 31 (1991) (discussing the budding split in authority).[5]

The majority of courts have found that "trademark infringement claims are not cognizable under . . . *§ 349* unless there is specific and substantial injury to the public interest over and above the ordinary trademark infringement." *Pulse Creations, Inc., 154 F. Supp. 3d at 58*.[6] A non-consumer may bring an action for trademark infringement, but

[5] Mr. Hansen's article is available at http://ir.lawnet.fordham.edu/iplj/vol2/iss1/3 .

"the injury to consumers or the public interest must be more than 'the general variety of consumer confusion that is the gravamen' of such a claim." *Ivy Mar Co. v. C.R. Seasons, Ltd., 1998 U.S. Dist. LEXIS 15902, at *22 (E.D.N.Y. Oct. 7, 1998)* (quoting *Mastercard Int'l Inc. v. Arbel Corp., 1989 U.S. Dist. LEXIS 12433, at *30 (S.D.N.Y. 1989))*. ***HN13***[] The minority, however, have allowed non-consumer's claims to proceed when the alleged public harm was nothing more than consumer confusion. *See, e.g., GTFM, Inc. v. Solid Clothing, Inc., 215 F. Supp. 2d 273, 302 (S.D.N.Y. 2002)* (Cote, J.) ("By intentionally using the '05' designation in a manner confusingly similar to GTFM's use of the '05' trademark, and causing actual confusion, Solid engaged in a consumer-oriented act that was misleading in a material way.").[7]

The only public-oriented harm that Plaintiffs allege is consumer confusion. *See* Am. Compl. ¶ 94 ("Defendants **[*19]** use of Plaintiffs' Images did in fact cause consumer confusion as to Plaintiffs['] employment at and/or endorsement of the Clubs, and the goods and services provided by the Clubs."), ¶ 101 ("Defendants' publication of Plaintiffs' Images . . . was misleading in a material respect because it created the impression that Plaintiffs were strippers working at the Clubs, or endorsed the Clubs."). Thus, this Court must consider whether mere confusion is sufficient under *Section 349* to grant a non-consumer a viable cause of action.[8]

To do so, this Court must first look to whether the New York Court of Appeals has addressed the question. *DiBella v. Hopkins, 403 F.3d 102, 111 (2d Cir. 2005)* (citing *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc., 344 F.3d 211, 220-21 (2d Cir.2003))*. ***HN14***[] If New York's highest court has not addressed the question, then this Court "must either (1) predict how the New York Court of Appeals would resolve the state law question, or, if state law is so uncertain that we can make no reasonable prediction, (2) certify the question to the New York Court of Appeals for a definitive resolution." *Id.*

This Court has not found, nor have the parties cited, any case from the New York Court of Appeals addressing this question. Thus, this Court will attempt to predict how the New York Court of Appeals would rule.

1. The Legislative [*20] History of *NYGBL 349* and Origin of the Split in Authority.

This issue is similar to one that has played out throughout the country as states enacted their own versions of the *Federal Trade Commission Act* ("FTCA"). Congress created the FTC in 1914 and later expanded its powers in 1938, thereby outlawing all "deceptive acts or practices" that harmed consumers. *See Holloway v. Bristol-Myers Corp., 485 F.2d 986, 990-91, 158 U.S. App. D.C. 207 (D.C. Cir. 1973)* (detailing the legislative history of the *FTCA*). Congress paired that capacious prohibition with significant safeguards against over-enforcement, only empowering the FTC to bring enforcement actions and limiting such actions to instances that would be in "the interest of the public." *See 15 U.S.C. § 45(b)*.

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[6] *E.g., Jenny Yoo Collection, Inc. v. Watters Design Inc., 2017 U.S. Dist. LEXIS 175399, at *35-36 (S.D.N.Y. Oct. 20, 2017)* (Broderick, J.); *Sara Designs, Inc. v. A Classic Time Watch Co., 234 F. Supp. 3d 548, 557-58 (S.D.N.Y. 2017)* (Swain, J.); *Pulse Creations, Inc., 154 F. Supp. 3d at 58 (S.D.N.Y. 2015)* (Failla, J.); *Romeo & Juliette Laser Hair Removal, Inc., 2014 U.S. Dist. LEXIS 133839, at *10-12 (S.D.N.Y. Sep. 23, 2014)* (Griesa, J.); *Seat Sack, Inc. v. Childcraft Educ. Corp., 2010 U.S. Dist. LEXIS 142577, at *39 (S.D.N.Y. Jan. 22, 2010)* (Eaton, J.); *Hi-Tech Pharmacal Co. v. Hi-Tech Pharm., 2007 U.S. Dist. LEXIS 48644, at *38-39 (E.D.N.Y. July 5, 2007)* (Gold, M.J.); *Sports Traveler, Inc. v. Advance Magazine Publrs., Inc., 1997 U.S. Dist. LEXIS 3403, at *7 (S.D.N.Y. Mar. 24, 1997)* (Keenan, J.).

[7] *E.g., Casper Sleep, Inc. v. Hales, 2016 U.S. Dist. LEXIS 150706, at *22-23 (S.D.N.Y. Oct. 20, 2016)* (McMahon, J.); *Casper Sleep, Inc. v. Mitcham, 204 F. Supp. 3d 632, 643 (S.D.N.Y. 2016)* (Rakoff, J.); *Burberry Ltd. & Burberry USA v. Designers Imports, Inc., 2010 U.S. Dist. LEXIS 3605, 2010 WL 199906, at *8 (S.D.N.Y. Jan. 19, 2010)* (Crotty, J.).

[8] Plaintiffs attempt to evade this question by arguing that they have not brought an ordinary trademark dispute but rather a claim for false endorsement. Opp at 12. Even if that were a legally meaningful distinction, the simple fact is that the only consumer-oriented harm they allege is consumer confusion. *See* Am. Compl. ¶¶ 92-93.

Over time, however, the perception developed that the FTC was unable or unwilling to adequately police deceptive practices. *See* Staci Zaretsky, *Trademark Law and Consumer Protection Law-Deception Is A Cruel Act: "Uniform" State Deceptive Trade Practices Acts and Their Deceptive Effects on the Trademark Claims of Corporate Competitors*, *32 W. New Eng. L. Rev. 549, 567-68 (2010)*. In response, consumer rights activists pushed for states to adopt "Little FTC Acts," and by the early 1980s all fifty states and the District of Columbia had enacted some form of a Little FTC Act. *Id.*

Although **[*21]** many of the Little FTC Acts initially limited enforcement authority to some government agency, many were amended to add a private right of action. *Id. at 549-50*. Those amendments greatly expanded the pool of potential plaintiffs, thereby stripping away the safeguards against over-enforcement in the *FTCA* such as political accountability, finite resources, and a statutory public interest requirement. *See* Kevin M. Lemley, *Resolving the Circuit Split on Standing in False Advertising Claims and Incorporation of Prudential Standing in State Deceptive Trade Practices Law: the Quest for Optimal Levels of Accurate Information in the Marketplace*, *29 U. Ark. Little Rock L. Rev. 283, 320 (2007)*.

Many courts were troubled by the pairing of broad prohibitions with a private right of action. *See* Jeff Sovern, *Private Actions Under the Deceptive Trade Practices Acts: Reconsidering the FTC Act As Rule Model*, *52 Ohio St. L.J. 437, 457-62 (1991)* (surveying judicial responses to private actions brought under the Little FTC Acts). In response, they invented limiting principles to restrict the scope of litigation. *See* *Haroco, Inc. v. Am. Nat. Bank & Tr. Co. of Chicago, 647 F. Supp. 1026, 1034 (N.D. Ill. 1986)* ("Courts, aghast at the apparent breadth of these statutes, have searched for means to limit their reach."). Unfortunately, "these judges have generally, in the words of Justice Cardozo, **[*22]** 'fumble[d] about, feeling in a vague way that some . . . problem is involved, but missing the universal element which would have quickened . . . decision with the inspiration of a principle.'" Sovern, *52 Ohio St. L.J. at 459* (quoting B. Cardozo, Growth of the Law 99-103 (1924)).

This is what happened in New York. The Legislature first enacted *Section 349* in 1970, but that law only allowed the Attorney General to bring actions in instances when he or she "shall believe from evidence satisfactory to him [or her] that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful." *NYGBL § 349(b)*. Later, in 1980, the Legislature extended a cause of action to "any person who has been injured by reason of any violation of this section," thereby allowing such a person to bring an action for the greater of actual damages or fifty dollars, along with treble damages and attorney's fees. *See* *NYGBL § 349(h)*.

That broad language invited the inevitable question: is a non-consumer—such as a business—a "person" who may bring suit for deceptive actions, or is the cause of action limited to consumers? Courts definitively answered that question, deciding that non-consumers **[*23]** may bring actions under *Section 349* (*e.g.,* *Securitron Magnalock Corp. v. Schnabolk, 65 F.3d 256, 264 (2d Cir. 1995))*, which is sensible as the statute refers to a "party" rather than a "consumer," as some Little FTC Acts do (*e.g.*, *Vt. Stat. Ann. tit. 9, § 2461(b)*).

Courts grew concerned, however, as some businesses tacked *Section 349* claims onto ordinary commercial disputes. *See, e.g.*, *Genesco Entm't, Div. of Lymutt Indus., Inc. v. Koch, 593 F. Supp. 743, 750-1 (S.D.N.Y. 1984)*. Allowing such claims to proceed would clearly exceed the statute's purpose and "would alter completely the legal duties governing commercial relationships in New York," *id.*, as the statute does not require proof of intent to deceive—like fraud—and it provides for treble damages in addition to one-way fee shifting. Thus, to stay true to the statute's purpose, Courts have limited standing to conduct that is "consumer-oriented." *See* *Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009)* (citing*Maurizio v. Goldsmith, 230 F.3d 518, 521 (2d Cir. 2000))*.

Again, this is a sensible rule. It strikes an appropriate balance by preventing businesses from tacking deceptive practices claims onto their purely commercial disputes (*e.g.,* *Genesco, 593 F. Supp. at 751*) while also allowing affected businesses to act as vicarious defenders of consumers (*e.g.,* *N. State Autobahn, Inc. v. Progressive Ins. Grp. Co., 102 A.D.3d 5, 953 N.Y.S.2d 96, 100-07 (N.Y. App. Div. 2012))*.

That limitation was not enough for some, however. In 1988, McKinney's published a practice commentary by Richard A. Givens, a former regional director of the FTC.[9] In that commentary, Mr. Givens invented the principle that trademark **[*24]** infringement actions fall outside of the scope of Section 349. *See* Hansen, 2 Fordham Intell. Prop. Media & Ent. L.J. at 39. Before the commentary, "[m]any courts . . . simply assumed that these sections are applicable" to trademark disputes. *Id.* (collecting cases). Afterwards, "two courts, without independent analysis . . . followed the McKinney's Practice Commentary and refused to apply these sections." *Id.* Since then, Givens' opinion has propagated into the majority view.[10]

Under that view, consumer confusion is a *de minimis* harm insufficient to satisfy the "consumer-oriented" element for non-consumers. *See* Mastercard Int'l, Inc., 1989 U.S. Dist. LEXIS 12433, at *30 ("Arbel . . . asserts no injury to consumers or to the public interest, other than the general variety of consumer confusion that is the gravamen of its trademark claim."). With this heightened standard, a non-consumer's claims may proceed so long as "there is specific and substantial injury to the public interest over and above the ordinary trademark infringement." Romeo & Juliette Laser Hair Removal, Inc. v. Assara I LLC, 2014 U.S. Dist. LEXIS 133839, at *10-11 (S.D.N.Y. Sep. 23, 2014) (quoting Perfect Pearl Co. v. Majestic Pearl & Stone, Inc., 887 F. Supp. 2d 519, 543 (S.D.N.Y. 2012)); *see also* Fischer v. Forrest, 2015 U.S. Dist. LEXIS 4395, at *35 (S.D.N.Y. Jan. 13, 2015) (denying motion to dismiss trademark infringement action because confusion over the origin of a honey harvesting aid allegedly could have caused health problems, ruined harvests, and loss of certifications).[11]

The minority of courts **[*25]** believe that "the elevated requirements that some district courts have apparently engrafted onto the 'consumer-oriented' element of § 349 claims lack a basis in governing New York law." Casper Sleep, Inc. v. Mitcham, 204 F. Supp. 3d 632, 643 (S.D.N.Y. 2016), *recons. denied*, 2016 U.S. Dist. LEXIS 165508 , 2016 WL 7188788 (S.D.N.Y. Nov. 17, 2016); *accord* Hansen, 2 Fordham Intell. Prop. Media & Ent. L.J. at 39 (arguing that the text and the purpose of Section 349 support recognizing trademark claims as cognizable harms). Without that heightened standard, mere confusion, such as the placing "into the stream of commerce goods likely to confuse consumers as to their true source of origin . . . . is sufficient to demonstrate an injury under the statute." Burberry Ltd. v. Euro Moda, Inc., 2009 U.S. Dist. LEXIS 53250, at *44-47 (S.D.N.Y. June 10, 2009).

This split in authority has led courts to divergent opinions on identical questions. *Compare id.* ("Burberry has demonstrated that Defendants . . . engaged in a 'consumer oriented act' meant to deceive consumers that the products they sold were authentic Burberry merchandise.") *with DePinto v. Ashley Scott, Inc., 222 A.D.2d 288, 289,*

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[9] McKinney's no longer includes Mr. Given's commentary in its published compilations. The most recent edition to include his commentary was the 2004 edition. *See* Richard. A Givens, Practice Commentary, N.Y. Gen. Bus. Law. § 349 (McKinney 2004).

[10] Indeed, each of the cases relied upon by Defendants in their motion papers appear to stem from the uncritical acceptance of Givens' position. For example, they rely on RCA Trademark Mgmt. S.A.S. v. VOXX Int'l Corp., 2015 U.S. Dist. LEXIS 111823, at *10 (S.D.N.Y. Aug. 24, 2015). That case cites Gucci Am., Inc. v. Duty Free Apparel, Ltd., 277 F. Supp. 2d 269, 273-74 (S.D.N.Y. 2003), which cites Sports Traveler, Inc. v. Advance Magazine Publrs., Inc., 1997 U.S. Dist. LEXIS 3403, at *7-8 (S.D.N.Y. Mar. 24, 1997), which cites EFS Mktg. v. Russ Berrie & Co., 836 F. Supp. 128, 136-37 (S.D.N.Y. 1993), which cites Jaret Int'l, Inc. v. Promotion in Motion, Inc., 826 F. Supp. 69, 78 (E.D.N.Y. 1993), which cites Givens' commentary.

[11] A non-consumer is a party who was not the direct victim of the deceptive conduct but nevertheless suffered harms that the deceptive conduct caused. For example, in *Fischer*, the plaintiff was the inventor and producer of a honey harvesting aid for beekeepers who brought an action against a mailorder business that sold a knock-off version of the product. 2015 U.S. Dist. LEXIS 4395, at *3. The beekeepers who purchased the knockoff were the victims of the deceptive conduct while the plaintiff was an affected non-consumer.

Under the majority's rule, a non-consumer like the plaintiff in *Fischer* must allege that the direct victims of the deception suffered or were likely to suffer harms more significant than mere confusion. Id. at *35. Plaintiffs who were the target market for the deception, however, need not allege that the deception posed any risk to health, safety, or a significant public interest. *See, e.g.*, Koch v. Greenberg, 626 F. App'x 335, 340 (2d Cir. 2015) ("[G]iven that the defendant provided wine to be sold at auction to other consumers similarly situated to [plaintiff], the consumer-oriented conduct requirement has been met.").

635 N.Y.S.2d 215 (NY App. Div. 1995) ("Ashley Scott's claims . . . are based on . . . the alleged use of confusing labels in the manufacture of women's coats which does not pose a significant risk of harm to the public health or interest."). Nevertheless, like other state laws that parallel federal actions, this issue has persisted in federal court without resolution from New York's Court of Appeals. **[*26]** *E.g. Yong Kui Chen v. Wai Yin Chan, 615 F. App'x 10, 14 (2d Cir. 2015)* (surveying split of federal authority over the availability of tip-credit under NYLL).

Thus, this Court must decide whether consumer confusion is too *de minimis* a harm to provide non-consumers with standing under *Section 349*.

2. The Majority's View is Unpersuasive.

After a careful review, this Court respectfully recommends that the District Court follow the lead of the minority. The text, legislative history, and purpose of the statute all weigh against imposing a heightened standard on non-consumers. Though several courts have held otherwise, those courts do not point to, nor has this Court found, any independent basis for the rule in New York State's law.

The text of the statute outlaws all deceptive conduct, *see NYGBL § 349(a)*, which would appear to include trademark infringement claims, *see* Hansen, 2 Fordham Intell. Prop. Media & Ent. L.J. at 38 ("[I]t takes no stretch of the imagination to conclude that deceiving consumers as to the source of the goods that they are buying is a 'deceptive practice.'"). The text may not be dispositive, but there must at least be a reason to depart from such clear language. None of the theories discussed below comes close.

First, the majority has assumed that the Legislature's intent was not to include trademark infringement **[*27]** in its consumer protection statute. Mr. Givens, for example, offers that allowing trademark disputes to arise under *Section 349* would be "contrary to the history of the statutes." *See* Richard. A Givens, Practice Commentary, *N.Y. Gen. Bus. Law. § 349* (McKinney 2004). In support, Givens offers no evidence, and this Court has been unable to find any. *Id.*

The motivating concern behind *Section 349* was the perceived inadequacy of the existing set of consumer protection laws targeted at specific conduct. *See* 1968 Report of the Committee on New York State ***Antitrust Law*** of the ***Antitrust Law*** Section of the New York State Bar Association at 117 (1968), *reprinted in* L. 1970, ch. 43 at 22-30.[12] After a review of existing statutes, the drafters issued a report concluding that the "laws do not fully protect the consumer from all the varied forms which fraud and deception may take, since these laws are limited to specific types of deceptive conduct." *Id.* To ameliorate this patchwork protection, they drafted *Section 349* to be an umbrella covering *all* forms of deceptive conduct. *See id.* ("Its broad language provides public enforcement officials with the flexibility needed to protect both consumers and honest businessmen from the many varied forms of deception, present and future, whether committed intentionally or not."). So significant was this concern that the drafters intentionally chose not to **[*28]** reject other proposed legislation that included enumerated prohibitions so as to avoid the possibility that courts would limit it to acts of a similar nature. *See id.* at 128 ("The Council's . . . . proposed statute with its twelve categories of prohibited conduct does not have the flexibility of . . . the statute proposed herein dealing with the new and varied forms which consumer deception may take."). Included among those specific prohibitions that the drafters deemed to be too narrow were practices likely to cause "confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another." Richard F. Dole, Jr.,

[12] The Governor's Bill Jacket is an authoritative public record that collects documents that bear on the legislative history of New York's laws. *See Spiro v. Healthport Techs., LLC, 73 F. Supp. 3d 259, 264 n.1 (S.D.N.Y. 2014)*. It consists of "material gathered by the Governor's Counsel to assist the Governor in deciding whether to sign a bill passed by the legislature." *City of N.Y. v. A-1 Jewelry & Pawn, Inc., 501 F. Supp. 2d 369, 412 (E.D.N.Y. 2007)*. The Bill Jacket for *Section 349* contains a report and study from the Committee on New York State ***Antitrust Law*** of the ***Antitrust Law*** Section of the New York State Bar Association because that committee drafted the law that was introduced in the legislature. *See* Letter from Seymour D. Lewis to Nelson A. Rockefeller (Feb. 10, 1970), *reprinted in* L. 1970, ch. 43 at 10-11.

Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act, 51 Minn. L.Rev. 1005, 1016 (1967).[13]

Given this background, the logical conclusion is that the legislature intended to include trademark infringement in the ambit of *Section 349*. After all, despite Mr. Given's view, trademark protections are a form of consumer protection. *See* *Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 782, 112 S. Ct. 2753, 120 L. Ed. 2d 615 (1992)* (Stevens, J. concurring) (quoting S.Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946)) ("By protecting trademarks, Congress hoped [in part] 'to protect the public from deceit.'"). And there is no reason to **[*29]** think the New York Legislature, the Governor, or anyone else involved in the law's drafting thought otherwise. Indeed, the drafters included trademark protections in their survey of existing consumer protection laws that they hoped to encompass and expand upon. *See* Study by the Committee on New York State ***Antitrust Law*** at 80 n.3, *reprinted in* L. 1970, ch. 43 at 31-73 (surveying laws including those "prohibiting a wide range of offenses against trademarks"). And the Governor's signing memorandum reflects that understanding. *See* L. 1970 ch. 43 at 21 (*Section 349* "adds an important new assurance to the people of this State that the goods and services they purchase are as represented."). Other than explicitly including trademark infringement within the ambit of the law—which, ironically, the drafters specifically chose not to do so as to prevent courts from limiting the law with *ejusdem generis*—it is difficult to imagine what more the drafters could have done to make their intentions clear.

Second, the policy concerns for heightened scrutiny of non-consumer standing crumble under modest inspection. For example, Mr. Givens focuses on the inappropriate nature of one-way attorney's fee shifting in trademark disputes, but that concern is unfounded as awards of attorneys' **[*30]** fees under the statute are discretionary. *See* *Riordan v. Nationwide Mut. Fire Ins. Co., 977 F.2d 47, 54 (2d Cir. 1992)*. Likewise, the concern that actions for mere confusion will open the floodgates to actions unrelated to consumer protection is baseless as the "requirement that the consumer-oriented conduct be materially misleading limits the availability of *section 349 (a)* to cases where the deception pertains to an issue that may bear on a consumer's decision to participate in a particular transaction." *N. State Autobahn, Inc., 953 N.Y.S.2d at 102 (N.Y. App. Div. 2012)*. Thus, a plaintiff by definition cannot prevail without proving that deception is likely to misdirect consumers' purchases, which is precisely the harm that the statute seeks to prevent. *Id.*

Third, although courts in the majority have justified their position by arguing that non-consumers must allege consumer-oriented harm "which would trigger FTC intervention under *15 U.S.C.A. § 45*," *Horn's, Inc. v. Sanofi Beaute, Inc., 963 F. Supp. 318, 328 (S.D.N.Y. 1997)* (citation omitted), that analogy to federal law supports the opposite conclusion.

There are several problems with this analysis,[14] but the most glaring is that the Supreme Court itself has found that mere confusion is sufficiently within the public interest to warrant FTC intervention:

> If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of **[*31]** manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. . . . The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or

[13] The National Conference of Commissioners on Uniform State Laws has since removed the Uniform Deceptive Trade Practices Act from its proposed legislation, but Mr. Dole's article includes the act in full as proposed in 1967. *See* 51 Minn. L.Rev. at 1015-16.

[14] As an initial matter, it is unclear that importing the *FTCA's* public interest requirement into *Section 349* is appropriate. The *FTCA* may limit the FTC's enforcement authority to actions that are "in the interest of the public," *15 U.S.C. 45(b)*, but *Section 349* imposes no such limitation on the Attorney General or on private parties. *See* *NYGBL § 349(b)*, *(h)*. Analogizing to the *FTCA* cases therefore appears to be inappropriate, as the choice to omit that requirement in a statute modeled after the *FTCA* suggests an intentional choice to omit that barrier. *Accord* Sovern, *52 Ohio St. L.J. at 460* ("[T]he states which borrowed the wording of the FTC Act did not copy the public interest requirement . . . . [therefore the] rather clear implication is that the limitation does not apply to actions under the state statutes, at least not in the way it has been construed by the courts and the FTC.").

> intend to buy, and which they might or might not buy if correctly informed as to its origin. We are of opinion that the purchasing public is entitled to be protected against that species of deception, and that its interest in such protection is specific and substantial.

FTC v. Royal Milling Co., 288 U.S. 212, 216-217, 53 S. Ct. 335, 77 L. Ed. 706, 17 F.T.C. 664 (1933). In accordance with that view, the Court has found FTC actions for deceptive conduct related to mundane goods and commodities such as the provenance of wheat flour (*id.*), the amount of wool in underwear (*FTC v. Winsted Hosiery Co., 258 U.S. 483, 493, 42 S. Ct. 384, 66 L. Ed. 729, 4 F.T.C. 610 (1922)*), or the appropriate name for a species of pine tree (*FTC v. Algoma Lumber Co., 291 U.S. 67, 81, 54 S. Ct. 315, 78 L. Ed. 655, 18 F.T.C. 669 (1934)*) to be in the interest of the public. Furthermore, the FTC itself has expressed an interest in the deceptive use of endorsements—the conduct at issue here—regardless of the subject matter. *See, e.g.*, *16 C.F.R. §§ 255.0 et seq.* Thus, the "suggestion that the allegedly deceptive practice must pose some danger to the public health or safety, or have 'significant ramifications' for the public, **[*32]** is simply wrong." *Mitcham, 204 F. Supp. 3d at 643 (S.D.N.Y. 2016)* (Rakoff, J.).

Fourth, and finally, this Court agrees with Judge Rakoff that "the elevated requirements that some district courts have apparently engrafted onto the 'consumer-oriented' element of *§ 349* claims lack a basis in governing New York law." *Id.* (citations omitted). Some New York decisions may have sided with the majority, but they are not persuasive and thus are not strong evidence of how the New York Court of Appeals would rule. *See In re Rezulin Products Liability Litigation, 178 F. Supp. 2d 412, 414 (S.D.N.Y. 2001)* (refusing to follow the precedent set by an unpersuasive intermediate appellate court decision).

To this Court's knowledge, the only New York Courts to address this question are one intermediate appellate court, which has sided with the majority (*see DePinto, 635 N.Y.S.2d at 217 (N.Y. App. Div. 1995)*) along with two trial courts (*see Ivy League Sch., Inc. v. Danick Indus., Inc., 44 Misc. 3d 1223(A), 999 N.Y.S.2d 797, 2014 NY Slip Op 51284[U] (N.Y. Sup. Ct. 2014)*; *The Gameologist Grp., LLC v. N.Y. Div. of Lottery, 2009 N.Y. Misc. LEXIS 4403, at * 13, 2009 NY Slip Op 32914[U] (N.Y. Sup. Ct. 2009)*). None are persuasive. Each summarily adopted the majority view of federal decisions that themselves wholesale lifted the Givens commentary. Take, for instance, the sum total of the *DePinto* decision's reasoning:

> The IAS Court also properly dismissed the sixth and seventh counterclaims, which purport to allege violations of the New York Consumer Protection Act. Ashley Scott's claims under *sections 349* and *350* of the General Business Law are based on theories **[*33]** of trademark infringement and unfair competition, involving the alleged use of confusing labels in the manufacture of women's coats which does not pose a significant risk of harm to the public health or interest. (*EFS Mktg. v Berrie & Co., 836 F. Supp. 128, 136*, citing *Bristol-Myers Squibb Co. v McNeil-P.P.C., Inc., 786 F. Supp. 182, 215*, *affd in part and revd in part on other grounds 973 F.2d 1033*).

DePinto, 635 N.Y.S.2d at 217. Those federal decisions rest on the same flawed foundations discussed above: a belief that general consumer confusion "would not trigger FTC intervention under *15 U.S.C.A. § 45*" and that such confusion "is not within the ambit of 'harm to the public interest' contemplated by the statute." *Bristol-Myers Squibb Co. v. McNeil-P.P.C., Inc., 786 F. Supp. 182, 216 (E.D.N.Y. 1992)*; *see also EFS Mktg. v. Russ Berrie & Co., 836 F. Supp. 128, 136-7 (S.D.N.Y. 1993)* (same). Nothing about these decisions suggests to this Court that the New York Court of Appeals would agree.

Indeed, as Judge Rakoff illustrated in a well-reasoned opinion, New York Law outside of those three decisions strongly favors the minority view. *Mitcham, 204 F. Supp. 3d at 643-4*. For instance, in contexts uninfluenced by federal decisions, ***HN15***[] New York Courts have recognized that the purpose of the law is to protect consumers from whatever form deception may take, and have accordingly interpreted the remedial statute broadly. *Id.* (reviewing state decisions). In one decision, a New York intermediate appellate court found that a non-consumer plaintiff had alleged **[*34]** sufficiently consumer-oriented conduct when the deception at issue merely affected the choice of auto repair shop. *N. State Autobahn, Inc., 953 N.Y.S.2d at 102 (N.Y. App. Div. 2012)* ("[T]he complaint alleges that the Progressive defendants . . . misled customers of the plaintiffs and other independent shops into believing that they must have their vehicles repaired at repair shops that were members of the [Progressive affiliate program]."). The appellate court went on to say that the law prohibits "those acts or practices which undermine a consumer's ability to evaluate his or her market options and to make a free and intelligent choice. In this sense, the deception itself is the harm that the statute seeks to remedy." *Id.* (citing Mem. of Governor Rockefeller, 1970 N.Y. Legis. Ann., at 472).

This Court, therefore, agrees with Judge Rakoff. Cases such as *N. State Autobahn, Inc.* more accurately reflect how the New York Court of Appeals would rule than the other federal and state decisions. The imposition of a heightened standing requirement on non-consumer actions lacks a firm foundation in New York's law. Rather, the weight of evidence and logic favors a conclusion that the New York Court of Appeals would disagree with Mr. Givens and the *DePinto* court's **[*35]** summary decision. Consequently, this Court recommends rejecting Defendants' argument that Plaintiffs have pled unviable harms under *Section 349* and recommends against dismissing the entirety of Plaintiffs' claims under the law.

C. Whether the Statute of Limitations Bars Plaintiffs' Claims.

Defendants also argue that the statute of limitations bars the claims of Plaintiffs Guerra, Koren, and Toth. Mem. ISO at 12-13. Their argument is correct, and Plaintiffs have not offered any response to suggest otherwise. *See* Opp. at 1-16.

HN16[] Private "rights of action under *section 349* are governed by a three-year statute of limitations." *Schandler v. N.Y. Life Ins. Co., 2011 U.S. Dist. LEXIS 46322, at *12 (S.D.N.Y. Apr. 26, 2011)* (citing *C.P.L.R. § 214(2)*); *see also* *Gaidon v. Guardian Life Ins. Co., 96 N.Y.2d 201, 209-10, 750 N.E.2d 1078, 727 N.Y.S.2d 30 (N.Y. 2001)* (Gaidon II) (holding that the six-year statute of limitations for common law fraud does not apply to a claim under *Section 349* because it is a statutory cause of action); *Gristede's Foods, Inc. v. Unkechauge Nation, 532 F. Supp. 2d 439, 452 (E.D.N.Y. 2007)* ("Since Gaidon II, New York courts have uniformly applied a three-year statute of limitations to *section 349* and *section 350* cases."). The private right of action accrues under *Section 349* "when plaintiff has been injured by a deceptive act or practice violating *section 349*." *Schandler v. N.Y. Life Ins. Co., 2011 U.S. Dist. LEXIS 46322, at *12 (S.D.N.Y. Apr. 26, 2011)* (quoting *Gaidon II, 96 N.Y.2d at 210*). If there is a series of continuing violations, "the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act." *Palmeri v. Wilkie Farr & Gallagher LLP, 156 A.D.3d 564, 69 N.Y.S.3d 267, 2017 N.Y. App. Div. LEXIS 9320, at *8 (N.Y. App. Div. Dec. 28, 2017)* (citations omitted). **[*36]**

Plaintiffs filed their action on November 23, 2016, meaning that Plaintiffs must allege conduct that occurred no earlier than November 24, 2013. The exhibits containing screenshots of advertisements featuring Plaintiffs Guerra, Koren and Toth, however, exhibit older dates. *See* Dkt. Nos. 1-1 at 18-20, 10-1 at 23-25 (advertisement featuring Plaintiff Guerra was published on November 11, 2013); Dkt. No. 10-1 at 26-28 (advertisements featuring Plaintiff Koren were published on January 17, 2012 and December 3, 2012); *id.* at 29-32 (advertisements featuring Plaintiff Toth were published on February 26, 2012 and December 19, 2012). The complaint does not help them, as it contains no allegations of continuing conduct that occurred more recently. *See* Am. Compl. ¶ 46 (alleging that advertisement featuring Plaintiff Guerra was published on November 11, 2013); *id. ¶¶ 49-54* (failing to allege any dates of conduct for Plaintiff Koren); *id. ¶¶ 55-58* (same for Plaintiff Toth).

HN17[] Ordinarily, a statute of limitations defense is inappropriate on a *Rule 12(b)(6)* motion as that defense tends to rely on a factual dispute. *See* *Luv N' Care, Ltd. v. Shiboleth LLP, 2017 U.S. Dist. LEXIS 128060, at *14-15 (S.D.N.Y. Aug. 8, 2017)* (citing *Ellul v. Congregation of Christian Bros., 774 F.3d 791, 798 n.12 (2d Cir. 2014))*. But "a statute of limitations defense may be decided on a *Rule 12(b)(6)* motion if the defense appears on the face **[*37]** of the complaint." *Id.* That is the case here. The entirety of the allegations contained in the complaint for these three plaintiffs predate the limitations period. This Court, therefore, must recommend dismissal of the *Section 349* claims of Plaintiffs Guerra, Koren, and Toth.

III. Individual Claims.

Plaintiffs have also named the owner of Summit, Mr. Tricolla, as a defendant. Defendants argue that Plaintiffs have failed to plead that Mr. Tricolla was involved with the alleged conduct and have instead relied on his ownership of Summit Entertainment Corp. to support their claims. *See* Mem. ISO at 13-14.

Defendants correctly point out that an individual is not automatically liable for the violations of the company whose stock he or she owns. *See* *Alki Partners, L.P. v. Vatas Holding GmbH, 769 F. Supp. 2d 478, 490-91 (S.D.N.Y. 2011)* (citing *United States v. Bestfoods, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998))*. But Plaintiffs do not rely on such a flimsy theory; they allege that Mr. Tricolla, "in his capacity as principal of Summit, maintains operational control over Gentlemen's Quarters, including all advertising relating thereto." *See* Am. Compl. ¶ 18.

Nevertheless, Defendants argue that these allegations are insufficient. On the one hand, they are correct that an action against an individual defendant must include allegations of individual involvement in **[*38]** some capacity. *See* *Martal Cosmetics, Ltd. v. Int'l Beauty Exch. Inc., 2011 U.S. Dist. LEXIS 95021, at *60-1 (E.D.N.Y. Aug. 23, 2011)* (citations omitted). But their argument here mistakes the standard on a motion to dismiss for the standard at other steps in litigation; the cases they rely upon assess the sufficiency of evidence after trial (*see* *id. at *3*) or the sufficiency of evidence after a motion for default judgment (*see* *Eu YNo, 2010 U.S. Dist. LEXIS 99836, at *1-2 (E.D.N.Y. Sep. 8, 2010))*. ***HN18***[] On a motion to dismiss, it is sufficient to simply state that the individual defendant is in control of the operations of the business that has infringed on the trademark. *See* *Int'l Diamond Imps., Inc. v. Oriental Gemco Ny, Inc., 64 F. Supp. 3d 494, 525-26 (S.D.N.Y. 2014)* (denying motion to dismiss claims against individual defendant because the plaintiff alleged that the defendant "'is responsible for the control, management, operation, and maintenance of the affairs of Oriental NY,' and '[t]he acts and wrongful conduct complained of were done with [his] active assistance, cooperation, acquiescence, and procurement, and he derives financial benefit therefrom."). That is what Plaintiffs have alleged. *See* Am. Compl. ¶ 18.

This Court, therefore, does not recommend dismissing Plaintiffs' *Lanham Act* claim against the individual defendant, Mr. Tricolla.[15]

IV. Plaintiffs' Prayer for Punitive Damages.

Defendants also move to dismiss Plaintiffs' request for punitive damages. Mem. **[*39]** ISO at 14-18. They argue that punitive damages are unavailable under the *Lanham Act* and that Plaintiffs have not alleged conduct sufficient to support punitive damages under *Section 349*. *Id.*

Regarding the *Lanham Act* prayer for damages, Defendants are correct. ***HN19***[] Punitive damages are unavailable under the act. *See* *Alzheimer's Disease Res. Ctr., Inc. v. Alzheimer's Disease & Related Disorders Ass'n., 981 F. Supp. 2d 153, 165 (E.D.N.Y. 2013)* (quoting *H & R Indus., Inc. v. Kirshner, 899 F. Supp. 995, 1011-12 (E.D.N.Y. 1995))*.

Plaintiffs try to side step the issue, pointing out that the *Lanham Act* allows for treble damages. *See* Opp. at 14. But ***HN20***[] there is a reason treble damages and punitive damages have different names; they are different measures of damages. *See* *MQDC, Inc. v. Steadfast Ins. Co., 2013 U.S. Dist. LEXIS 172444, at *13-15 (E.D.N.Y. Dec. 6, 2013)*. Both may attempt to deter conduct by enhancing damage awards for conduct that regularly evades detection. *See* *Perez v. Z Frank Oldsmobile, Inc., 223 F.3d 617, 621-4 (7th Cir. 2000)* (Easterbrook, J.). But when a

[15] Although Defendants do not specifically aim their arguments at Plaintiffs' *Lanham Act* or *Section 349* claims, they only cite to decisions pertaining to the *Lanham Act*. *See* Mem. ISO at 13-14. Thus, Defendants have not raised an argument about Plaintiffs' *Section 349* claim against the individual defendant that may be granted by this Court. *See* *Tylena M. v. Heartshare Human Servs., 2004 U.S. Dist. LEXIS 10398, 2004 WL 1252945, at *3 (S.D.N.Y. June 7, 2004)* (denying motion because the moving party failed to cite any legal authority in support of its application).

statute provides for a specific multiplier—such as treble damages—federal courts usually interpret that as a Congressional command not to exceed that multiplier. *Id. at 621-2*. Consequently, this Court recommends that Plaintiffs' prayer for punitive damages under the *Lanham Act* be dismissed.

Regarding *Section 349*, Plaintiffs have alleged conduct sufficient to support a claim for punitive damages.[16] Taking the operative complaint's allegations as true, Defendants have engaged in a regular policy for years of misappropriating the images of **[*40]** models who are unaffiliated with their strip club. *See* Am. Compl. ¶¶ 19-86. Furthermore, Defendants were on notice of the misappropriation of Plaintiffs' images no later than December 2016 and yet they allowed Plaintiffs' images to remain on their social media pages until at least March 2017. *Id. ¶ 3*. Those allegations support the inference that Defendants acted willfully, which is sufficient for their prayer for punitive damages to survive a motion to dismiss. *See* *Roy Exp. Co. Establishment of Vaduz v. CBS, 672 F.2d 1095, 1106 (2d Cir. 1982)* (citing *Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491, 402 N.Y.S.2d 815, 817 (N.Y. App. Div. 1978))* (affirming award of punitive damages for common-law unfair competition and copyright infringement claims because "New York law clearly permits punitive damages where a wrong is aggravated by recklessness or willfulness"). This Court therefore recommends that Plaintiffs' prayer for punitive damages arising under *Section 349* not be dismissed.

CONCLUSION

For the reasons detailed above, this Court recommends: (1) denying Defendants' motion to dismiss Plaintiffs' First Cause of Action for violations of the *Lanham Act*; (2) denying Defendants' motion to dismiss the Second Cause of Action for violations of *New York's General Business Law § 349* for Plaintiffs Mayes, Pepaj, Edmondson, Middleton, and Archuletta; (3) granting Defendants' motion to dismiss the Second **[*41]** Cause of Action for Plaintiffs Guerra, Koren, and Toth; (4) denying Defendants' motion to dismiss the claims against Defendant Tricolla; (5) granting Defendants' motion to strike Plaintiffs' punitive damages request under the *Lanham Act*; and (6) denying Defendants' motion to strike Plaintiffs' punitive damages request under *New York's General Business Law § 349*.

OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to *28 U.S.C. § 636(b)(1)* and *Rule 72(b)(2) of the Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. Failure to file timely objections shall constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. *See* *Marcella v. Capital Dist. Physicians' Health Plan, Inc., 293 F.3d 42, 46 (2d Cir. 2002)*; *Small v. Sec'y of Health & Human Servs., 892 F.2d 15, 16 (2d Cir. 1989)*; *see also* *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*.

SO ORDERED.

/s/ Steven L. Tiscione

United States Magistrate Judge

Eastern District of New York

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[16] There appears to be some dispute over whether the combined award of actual, treble, and punitive damages may exceed $1,000. *See* *Bueno v. LR Credit 18, LLC, 269 F. Supp. 3d 16, 2017 U.S. Dist. LEXIS 145388, at *4-6 (E.D.N.Y. Sep. 7, 2017)*. Neither party, however, has raised or briefed this issue, so this Court will not consider the question. Nevertheless, the issue may not amount to much, as at least one court in this district has said that "federal courts within the Second Circuit, as well as state courts, have" decided that punitive damages may exceed $1,000. *Id.* (citing *Cohen v. Narragansett Bay Ins. Co., 2014 U.S. Dist. LEXIS 134092 (E.D.N.Y. Sept. 23, 2014))*.

Dated: Brooklyn, New York

January 18, 2018

Gilmour v. Aetna Health, Inc.

United States District Court for the Western District of Texas, San Antonio Division

January 19, 2018, Decided; January 19, 2018, Filed

SA-17-CV-00510-FB

Reporter

2018 U.S. Dist. LEXIS 99537 *

NEIL GILMOUR III, TRUSTEE FOR THE GRANTOR TRUSTS OF VICTORY PARENT COMPANY, LLC; VICTORY MEDICAL CENTER CRAIG RANCH, LP, VICTORY MEDICAL CENTER LANDMARK, LP, VICTORY MEDICAL CENTER MID-CITIES, LP, VICTORY MEDICAL CENTER PLANO, LP, VICTORY MEDICAL CENTER SOUTHCROSS, LP, VICTORY SURGICAL HOSPITAL EAST HOUSTON, LP, VICTORY MEDICAL CENTER BEAUMONT, LP, Plaintiffs, vs. AETNA HEALTH, INC., AETNA HEALTH INSURANCE COMPANY, AETNA LIFE INSURANCE COMPANY, Defendants.

Subsequent History: Related proceeding at *Gilmour v. Blue Cross, 2018 U.S. Dist. LEXIS 36823 (W.D. Tex., Mar. 6, 2018)*

Adopted by, Motion denied by *Gilmour v. Aetna Health Inc., 2018 U.S. Dist. LEXIS 99536 (W.D. Tex., Apr. 25, 2018)*

Magistrate's recommendation at *Gilmour v. Aetna Health, Inc., 2018 U.S. Dist. LEXIS 175027 (W.D. Tex., Oct. 11, 2018)*

Motion granted by, in part, Motion denied by, in part *Gilmour v. Aetna Health, Inc., 2019 U.S. Dist. LEXIS 148232 (W.D. Tex., Aug. 30, 2019)*

Motion granted by, in part, Motion denied by, in part, Motion denied by *Gilmour v. Aetna Health, Inc., 2020 U.S. Dist. LEXIS 3390 (W.D. Tex., Jan. 9, 2020)*

Magistrate's recommendation at *Gilmour v. Aetna Health, Inc., 2020 U.S. Dist. LEXIS 103877 (W.D. Tex., June 12, 2020)*

Core Terms

benefits, plans, alleges, undersigned, provider, motion to dismiss, fiduciary duty, disclosure statement, reservation, promissory estoppel, claim for breach, recommend, unpaid, preemption, insured, breach of fiduciary duty, preempted, statutory penalty, documents, patients, Counts, terms, negligent misrepresentation, cause of action, benefit plan, coverage, argues, insurance company, confirmation, district court

Counsel: **[*1]** For Neil Gilmour, III, Trustee for the Grantor Trusts of Victory Parent Company, LLC, Victory Medical Center Craig Ranch, LP, Victory Medical Center Landmark, LP, Victory Medical Center Mid-Cities, LP, Victory Medical Center Plano, LP, Victory Medical Center Southcross, LP, Victory Surgical Hospital East Houston, LP, Victory Medical Center Beaumont, LP, Plaintiffs, Counter Defendants: Andrew Cookingham, LEAD ATTORNEY, Thompson & Knight-Dallas, Dallas, TX USA; Jennifer Rudenick Ecklund, LEAD ATTORNEY, Reed Cullen Randel, Thompson & Knight, LLP, Dallas, TX USA.

For Aetna Health, Inc., Aetna Health Insurance Company, Aetna Life Insurance Company, Defendants, Counter Plaintiffs: John Bruce Shely, LEAD ATTORNEY, Andrews Kurth Kenyon LLP, Houston, TX USA; Bridget Burke Vick, Mary Katherine Strahan, Hunton Andrews Kurth LLP, Houston, TX USA.

Judges: ELIZABETH S. ("BETSY") CHESTNEY, UNITED STATES MAGISTRATE JUDGE.

Opinion by: ELIZABETH S. ("BETSY") CHESTNEY

Opinion

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable United States District Judge Fred Biery:

This Report and Recommendation concerns Defendants' Motion to Dismiss Plaintiffs' Complaint and Brief in Support [#5], Victory's Response to Defendant's **[*2]** Motion to Dismiss [#14], and Defendants' Reply in Support of Motion to Dismiss Plaintiffs' Complaint [#15]. All pretrial matters in this case have been referred to the undersigned for disposition pursuant to Rules CV-72 and 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas [#18]. In reviewing the motion to dismiss, the undersigned has also reviewed Defendant's Notice of New Authority [#21] and Victory's Response to Defendants' Notice of New Authority [#22]. The undersigned has authority to enter this recommendation pursuant to *28 U.S.C. § 636(b)(1)(B)*. For the reasons set forth below, it is recommended that Defendants' motion be granted in part and denied in part.

I. Procedural Background

Plaintiff Neil Gilmour, III filed this action in his capacity as Trustee for the Grantor Trusts of seven former orthopedic hospitals and their parent company—Victory Parent Company, LLC; Victory Medical Center Beaumont, LP; Victory Medical Center Craig Ranch, LP; Victory Medical Center Landmark, LP; Victory Medical Center Mid-Cities, LP; Victory Medical Center Plano, LP; Victory Medical Center Southcross, LP; and Victory Surgical Hospital East Houston, LP (collectively **[*3]** "Victory")—against Defendants Aetna Health, Inc., Aetna Health Insurance Company, and Aetna Life Insurance Company (collectively "Aetna"). (Compl. [#1] at 1.) According to Victory's Complaint, Victory's medical centers and hospitals provided medical procedures, including high-cost orthopedic surgeries, to thousands of Aetna's plan members. (*Id.* at ¶ 1.) The Complaint alleges a number of claims under various provisions of the *Employment Retirement Income Security Act ("ERISA")*, *29 U.S.C. §§ 1001 et seq.*, the Texas Insurance Code, and Texas common law. (*Id.* at ¶¶ 64-103.)

The basic thrust of Victory's Complaint is that Aetna failed to pay or underpaid certain out-of-network claims for covered services that Victory provided to Aetna plan members in operating its hospitals and other medical facilities throughout Texas. (*Id.* at ¶ 1.) Victory was not a participating provider in Aetna's network at the time period at issue, and is therefore considered an out-of-network provider for purposes of this litigation. (*Id.*) Victory alleges that Aetna delayed processing, then incorrectly denied or underpaid many of Victory's claims, and accused Victory of engaging in "highly suspicious billing patterns" without any substantiating **[*4]** evidence. (*Id.*) As a result of this accusation, Aetna allegedly placed a flag on every single one of Victory's tax ID numbers, which resulted in Victory's claims being handled by Aetna's Special Investigative Unit rather than its ordinary claims department. (*Id.*) This Special Investigative Unit allegedly failed to adjudicate Victory's claims within the statutory time frame or denied the claims altogether, failing to pay the rate provided in the patient's health benefit plan or the rates promised to Victory in verifying benefits pre-surgery. (*Id.*) Victory also alleges that Aetna intentionally withheld the plan documents and plan language that formed the basis for payment of each of Victory's claims in an attempt to mislead Victory about the level of benefits covered. (*Id.* at ¶ 4.)

Victory alleges that there are two types of plans at issue in this case: plans that Victory funded but Aetna administered (self-funded plans) and plans that Aetna both funded and insured (fully-funded plans). (*Id.* at ¶ 26.) Aetna alleges that Victory acts as an ERISA fiduciary with respect to the fully-funded plans it insures, as well as those self-funded plans which over which it has discretionary authority **[*5]** or control. (*Id.*) Victory alleges that some of the plans at issue in this suit are not governed by ERISA. (*Id.* at ¶ 92.)

Altogether, Victory claims that Aetna underpaid 2,943 medically-appropriate claims and denied 45 medically-appropriate procedures for which Victory billed approximately $1.6 million. (*Id.* at ¶ 2.) Victory contends all of these actions were taken by Aetna with the express intent to force Victory into an in-network contract with Aetna or force Victory out of business. (*Id.* at ¶ 5.) Victory ultimately filed for bankruptcy in June or July 2015 due to cash-flow issues it alleges resulted from Aetna's actions. (*Id.* at ¶¶ 5, 54.) The last patient to receive medical services from a Victory hospital was in January 2016. (*Id.* at ¶ 54.)

Victory asserts seven separate counts against Aetna: (Count 1) failure to comply with applicable plans in violation of ERISA; (Count 2) breach of fiduciary duties under ERISA; (Count 3) failure to provide full and fair review under ERISA; (Count 4) violations of claims procedures under ERISA; (Count 5) violations of the Texas Insurance Code; (Count 6) breach of contract; and (Count 7) promissory estoppel and negligent misrepresentation. For all **[*6]** the claims at issue in this lawsuit, Victory alleges that the patient irrevocably assigned to the Victory facilities the right for Victory to step into the shoes of the patients and both be paid by and seek payment from Aetna for the services Victory rendered, as well as the right to receive all relevant plan documents as a beneficiary of the applicable plans. (*Id.* at ¶ 58.)

By its claims, Victory seeks as damages the amounts it should have been paid for those surgeries under either ERISA—for those patients whose plans are governed by ERISA—or under Texas common law for breach of contract—for those patients whose benefit plans are not. (*Id.*) For those instances in which Aetna misrepresented the terms of a patient's plan during the verification process, Victory seeks to recover under Texas law the payment level that Aetna promised to pay. (*Id.* at ¶ 3.) For those instances in which Aetna actively misled Victory about the level of benefits available, Victory seeks exemplary damages. (*Id.* at ¶ 4.)

Aetna filed its motion to dismiss on September 8, 2017, arguing that each of these causes of action must be dismissed under *Rule 12(b)(1)* for lack of standing and/or under *Rule 12(b)(6)* for failure to state a claim.

II. [*7] Analysis

Aetna moves this Court to dismiss all of Victory's claims on the basis that they are either barred for lack of standing or fail to state a claim upon which relief can be granted. The Court should deny Aetna's 12(b)(1) motion because Victory has standing. It should only grant Aetna's 12(b)(6) motion with regard to Victory's claims under *ERISA Section 502(a)(3)* (Counts 2, 3, and 4) and Victory's claim for statutory penalties under ERISA insofar as Victory relies on the *de facto* administrator theory. Victory has met its pleading burden with regard to its other claims, and Aetna has failed to satisfy its burden to demonstrate that these claims fail as a matter of law at this preliminary stage of the proceedings.

A. Aetna's motion to dismiss for lack of jurisdiction should be denied.

In the Fifth Circuit, there are two avenues for a defendant to challenge standing in regard to subject matter jurisdiction—facial and factual attacks. *Lewis v. Knutson, 699 F.2d 230, 237 (5th Cir. 1983)* (citing *Williamson v. Tucker, 645 F.2d 404, 412-14 (5th Cir. 1981))*. If a defendant files an unsupported *Rule 12(b)(1)* motion, the challenge is a facial attack, and the trial court is only required to look at the sufficiency of the allegations in the complaint and assume them as true. *Paterson v. Weinberger, 644 F.2d 521, 523 (5th Cir. 1981)*. If the allegations are sufficient to allege jurisdiction, the **[*8]** court must deny the motion. *Id.* If the defendant provides affidavits, testimony, or other evidence challenging the court's jurisdiction with its 12(b)(1) motion, it is a factual attack, and the plaintiff is required to submit facts in support of jurisdiction. *Id.* In a factual attack, the plaintiff has the burden of proving by a preponderance of the credible evidence that the trial court has subject matter jurisdiction over the claims. [*Doe v. Tangipahoa Parish Sch. Bd., 494 F.3d 494, 496-97 (5th Cir. 2007)*] (en banc) ("Standing to sue must be proven, not merely asserted").

i. Victory has derivative standing to pursue ERISA claims on behalf of plan participants and beneficiaries.

Victory asserts its ERISA claims against Aetna as the assignee of certain rights held by Aetna plan members. (Compl. [#1] at ¶ 26.) Victory alleges that Aetna plan members assigned these rights and benefits to Victory when they received services at Victory facilities, and that these assignments confer standing on Victory to bring the ERISA claims at issue in this lawsuit. (*Id.* at ¶¶ 26, 31.) Victory's Complaint states that for each claim that Victory brings in this action, it has an assignment of benefits and rights from the patient, who in each case is an insured under an Aetna-administered **[*9]** benefit plan. (*Id.* at ¶¶ 31, 58.)

Aetna argues that these assignments do not confer standing on Victory to pursue its ERISA claims for breach of fiduciary duty or claims for alleged procedural violations or statutory penalties under *29 U.S.C. § 1132(c)(1)* (Counts 2, 3, and 4). By these counts, Victory alleges that Aetna breached its fiduciary duties as plan and claims administrator by underpaying claims for covered services; failing to provide a full and fair review of claims; and failing to make necessary statutory disclosures so as to maximize benefits to Aetna rather than making determinations based on the actual terms of the plan. (*Id.* at ¶¶ 70-81.) Victory also seeks statutory penalties against Aetna for its failure to comply with ERISA's requirements. (*Id.* at ¶¶ 82-86.) Aetna seeks dismissal of these claims for lack of standing under ERISA. Having considered the arguments of the parties, the undersigned finds that Victory has derivative standing to bring its claims for breach of fiduciary duty, ERISA procedural violations, and statutory penalties as alleged in Counts 2, 3, and 4 of its Complaint.

ERISA authorizes claims for breach of fiduciary duty under both *Sections 502(a)(2)* and *502(a)(3)*. *29 U.S.C. § 1132(a)(2)*, *(3)*. Claims under *Section 502(a)(2)* must be brought **[*10]** against the plan itself. *See* *Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)* (holding that *Section 502(a)(2)* is "primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary"). Victory does not present a claim under *Section 502(a)(2)*. Rather, it asserts a right to relief for an alleged breach of fiduciary duty under *Section 502(a)(3)*. (Compl. [#1] at ¶¶ 70-77.)

The list of parties permitted to bring an action under *Section 502(a)(3)* is limited to participants, beneficiaries, or fiduciaries of plans. *29 U.S.C. § 1132(a)(3)*. A valid assignment of rights, however, gives rise to derivative standing to individuals and entities beyond those enumerated by statute. *See* *Tex. Life, Acc. Health & Hosp. Serv. Ins. Guar. Ass'n v. Gaylord Entm't Co., 105 F.3d 210, 214-15 (5th Cir. 1997)*; *see also* *Harris Methodist Fort Worth v. Sales Support Servs. Inc. Emp. Health Care Plan, 426 F.3d 330, 333-334 (5th Cir. 2005)* ("It is well established that a healthcare provider, though not a statutorily designated ERISA beneficiary, may obtain standing to sue derivatively to enforce an ERISA plan beneficiary's claim."). The Fifth Circuit has expressly held that assignees of breach of fiduciary duty claims may assert derivative standing under ERISA as to both welfare and pension plans. *Id.*; *Hermann Hosp. v. MEBA Med. & Benefits Plan, 845 F.2d 1286, 1289 (5th Cir. 1988)*, *overruled on other grounds by* *Access Mediquip, L.L.C. v. UnitedHealthcare Ins. Co., 698 F.3d 229 (5th Cir. 2012))*. For a third-party to obtain standing to assert an ERISA claim for the breach of a fiduciary duty under *Section 502(a)(3)*, however, the claim must be expressly **[*11]** assigned to that party. *See* *Tex. Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n, 105 F.3d at 218* ("[O]nly an express and knowing assignment of an ERISA fiduciary breach claim is valid.").

Victory attaches to its response to Aetna's motion to dismiss two examples of the assignments executed by Aetna plan members. (*See* Assignments [#14-1] at 2-3.) This Court is permitted to consider documents outside of a complaint in the limited circumstance where the documents are both referred to in the complaint and are central to the claims at issue. *Scanlan v. Tex. A&M Univ., 343 F.3d 533, 536 (5th Cir. 2003)*. Because Victory both refers to the assignments in its Complaint and these assignments are central to the predicate question of whether Victory even has standing to bring its claims, the undersigned considers the assignments in ruling on Aetna's motion to dismiss. These assignments state that the assignor

> does hereby sell, transfer, convey, grant and irrevocably and forever assign to [Victory] all known and unknown, past, present, and future rights, title and interest in all claims, *causes of action* (i.e., pursuant to common law, statute, or in equity and whether based upon tort, breach of contract, *breach of fiduciary duty*, or otherwise), insurance benefits, health care benefits and all other legal rights or recovery **[*12]** from/against . . . (ii) any and all health plans pursuant to which Assignor and/or Patient are entitled to receive health benefits an/or money to pay for medical care, hospital care, medical devices or treatment . . . .

(Assignments [#14-1] at 2-3 (emphasis added).) These assignments expressly assigned to Victory any claim for breach of fiduciary duty held by the Aetna plan member executing the assignment. Accordingly, the assignment is valid, and Victory has derivative standing to assert a claim for breach of fiduciary duty under ERISA. *See Tex. Life, Accident, Health & Hosp. Serv. Ins. Guar. Ass'n, 105 F.3d at 218*.

It is less well settled, however, whether Victory has standing to assert its claim for procedural violations and statutory penalties under *29 U.S.C. § 1132(c)(1)*. Aetna argues that an assignment of this category of claim is impermissible, and even if it were permissible, the assignments are insufficient as to these claims because the assignments do not specifically reference *Section 502(c)*, the right to request plan documents, assert procedural violations based on the failure of Aetna to respond, or seek statutory penalties under this section. (Def.'s Reply [#15] at 4-5.) The undersigned disagrees.

Despite the lack of explicit guidance from any Fifth Circuit decision regarding the **[*13]** availability of derivative standing for claims arising under *Section 502(c)*, the undersigned is persuaded by the case law finding that plan participants and beneficiaries can indeed assign these rights, so long as the assignment is sufficiently broad so as to cover the claims. *See, e.g., Total Sleep Diagnostics, Inc. v. United Healthcare Ins. Co., No. CIV A 06-4153, 2009 U.S. Dist. LEXIS 6808, 2009 WL 152537, at *2 (E.D. La. Jan. 21, 2009)*, *reconsideration denied in part by Total Sleep Diagnostics, Inc. v. United Healthcare Ins. Co., No. CIV.A. 06-4153, 2009 U.S. Dist. LEXIS 27572, 2009 WL 928646, at *4 (E.D. La. Mar. 31, 2009)* (holding that an assignee may seek penalties for failure to produce plan documents when specifically assigned such right). ERISA contains no anti-assignment provision with regard to health care benefits of ERISA-governed medical plans, and the same references to "participant" and "beneficiary" appear in both *Section 502(a)*—which the Fifth Circuit has held is subject to assignment—and *Section 502(c)*. *See Hermann Hosp., 845 F.2d at 1289* (holding that derivative actions under *Section 502(a)* are allowable for health care benefits).

Both parties in this case agree that "the mere fact that a participant or beneficiary assigns payment for unpaid charges directly to the provider . . . does not constitute an assignment of every right or cause of action the participant or beneficiary may have under ERISA." *Total Sleep Diagnostics, Inc., 2009 U.S. Dist. LEXIS 6808, 2009 WL 152537, at *3*. To be valid, the assignment must expressly include the right to sue and pursue claims that the insured would have against the insurance company. *2009 U.S. Dist. LEXIS 6808, [WL] at *4* ("This **[*14]** assignment includes the assignment of the right to sue the undersigned's medical insurance company in the undersigned's/insured's name and assert all claims that the undersigned/insured will have against the insurance company resulting from, or in any way pertaining to, the [sic] medial insurance coverage that the undersigned is alleged to have had with his or her insurance company . . . ."). The assignment here does precisely that, as it assigns not only the right to pursue payment for unpaid benefits to Victory but also "all claims, causes of action, . . . and all other legal rights or recovery from/against . . . any and all health plans." Additionally, the assignment specifies that the causes of action include actions arising under common law or by statute. The assignments at issue in this case are therefore sufficiently broad to confer Victory with derivative standing to pursue statutory penalties under *29 U.S.C. § 1132(c)*.

ii. The Victory Debtors have standing to pursue claims under ERISA and state law based on a reservation of these claims in the Chapter 11 proceedings.

Aetna also asserts that Victory lacks standing under bankruptcy law to bring its claims due to the voluntary Chapter 11 bankruptcy **[*15]** proceedings filed by Victory Parent Company, LLC ("Victory Parent") and five Victory hospitals (collectively "Victory Debtors"). Aetna claims that Victory Parent lacks standing under bankruptcy law to assert its claims under the Texas Insurance Code (Count 5), its claim of promissory estoppel (Count 7), and its claim for exemplary damages. Aetna contends the Victory hospitals lack standing to assert these claims, as well as Counts 2, 3, and 4 under ERISA. The question before the Court is whether the Victory Debtors, as reorganized debtors, have standing to pursue these claims after the confirmation of a plan of reorganization in bankruptcy court. The Court finds that the Victory Debtors have such standing.

Victory's Complaint alleges that Victory Parent and certain Victory hospitals filed a petition for relief under Chapter 11 of the Bankruptcy Code on June 12, 2015. (Compl. [#1] at ¶ 7-11, 13.) The First Amended Plan of Reorganization was confirmed on March 28, 2016 in Case No. 15-42373 in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division. (*Id.* at ¶ 14.) Aetna attaches to its motion to dismiss a copy of the First Amended Plan of Reorganization **[*16]** [#5-2].

In some cases the Bankruptcy Code allows a reorganized debtor to bring a post-confirmation action on a "claim or interest belonging to the debtor or to the estate." *In re United Operating, LLC, 540 F.3d 351, 355 (5th Cir. 2008)* (citing *11 U.S.C. § 1123(b)(3)*). A debtor may preserve its standing to bring such a claim (e.g., for fraud or breach of fiduciary duty), but only if the plan of reorganization expressly provides for the claim's "retention and enforcement by the debtor." *Id.* (citing *11 U.S.C. § 1123(b)(3)(B)*). Such reservation must be "specific and unequivocal" to be valid, such that a debtor's creditors are on notice of any claim the debtor wishes to pursue after confirmation. *Id.* (internal quotation and citation omitted). With such notice of their potential liabilities, creditors are able to make an informed decision as to whether they want to vote for or against a plan. *Id.* It is well settled that a generic blanket reservation of "any and all claims" is not "specific and unequivocal" and therefore insufficient to give notice to creditors and to preserve the right to pursue claims of the estate by a reorganized debtor. *In re Texas Wyoming Drilling, Inc., 422 B.R. 612, 625 (Bankr. N.D. Tex. 2010)* (citing *United Operating, 540 F.3d at 355*). "After confirmation of a plan, the ability of the [debtor] to enforce a claim once held by the estate is limited to that which has been retained **[*17]** in the plan." *United Operating, 540 F.3d at 355* (internal citations omitted).

The First Amended Plan of Reorganization here ("the Plan") reserves the "[c]ollection of accounts receivable and any and all related claims cognizable under applicable law" against Aetna and each of its affiliates. (Ex. 1 to Plan of Reorganization [#5-2] at 45.) Aetna argues this reservation is insufficient to reserve any claims under Fifth Circuit authority. According to Aetna, the only specific reference in the Plan to any causes of action against Aetna is contained in section XI of the First Amended Disclosure Statement, which is also attached to Aetna's motion [#5-3]. The Disclosure Statement references a separate petition filed on February 25, 2014 by Victory Parent against Aetna in Harris County, Texas in state court, prior to the Chapter 11 proceeding, asserting claims of negligent misrepresentation and certain ERISA claims. (Disclosure Statement [#5-3] at 47-48.) Aetna argues only these pre-petition claims could have been preserved under the Plan.

Aetna neglects to mention that, in addition to specifically reserving the "collection of accounts receivable and any and all related claims cognizable under applicable law" against Aetna, **[*18]** the Plan also reserves "[a]ll claims and litigation mentioned, described, or discussed in [Section XI of the Disclosure Statement]." (Ex. 1 to Plan of Reorganization [#5-2] at 45.) Section XI is entitled "Pending and Potential Litigation" and is not limited to the reservation of litigation already in process at the time of plan confirmation; rather, the Disclosure Statement expressly reserves the right to future suit against insurance companies such as Aetna. (*Id.*) Section XI.F of the Disclosure Statement is entitled "Potential Non-Chapter 5 Litigation that Victory Debtors May Pursue" and states the following:

> [T]he Debtors reserve all rights to sue all insurance companies, former patients, any third-party payor, or any other person or entity who is liable—under any contract, agreement, regulation, procedure, statute, or any other applicable law, including without limitation ERISA—for accounts receivables or any other indebtedness owed whatsoever to one or more Debtor as a result of the provision of healthcare provided by one or more Debtor.

(Disclosure Statement [#5-3] at § XI.F, at 53.) The Fifth Circuit has expressly held that a court may consider the disclosure statement in addition to the **[*19]** plan itself to determine whether a post-confirmation debtor has standing to pursue a specific claim. *In re Texas Wyoming Drilling, Inc., 647 F.3d 547, 551 (5th Cir. 2011)*.

Having considered the language in both the Plan and the Disclosure Statement, the undersigned finds it to be sufficiently specific and unequivocal so as to put Aetna on notice that the Victory Debtors anticipated pursuing claims against Aetna after confirmation. *See* *In re Crescent Res., LLC, 463 B.R. 423, 437 (Bankr. W.D. Tex. 2011)* (citing *In re Texas Wyoming Drilling, Inc., 422 B.R. at 626*). As the lower courts in this Circuit have recognized, there is no Fifth Circuit opinion requiring a plan to identify specific individuals or entities as prospective defendants in order to preserve the claims, and a categorical reservation of a specific type of claim is sufficient to preserve standing. *Brickley for CryptoMetrics, Inc. Creditors' Tr. v. ScanTech Identification Beams Sys., LLC, 566 B.R. 815, 834 (W.D. Tex. 2017)*. *See also* *United Operating, 540 F.3d at 355* (citing *In re Ice Cream Liquidation, Inc., 319 B.R. 324, 337-38 (Bankr. D. Conn. 2005)* (language generally reserving debtor's right to pursue "preference claims" without specifically identifying alleged preferential transfers or recipients thereof was sufficient to preserve debtor's standing)).

Here, the Plan and the Disclosure Statement do not contain a mere generic reservation of all claims. Rather, the Plan and Disclosure Statement, when read in conjunction with one another as directed by the Plan, identify both the categories of causes of action and the potential Defendants **[*20]** in future litigation reserved under the Plan, identifying Aetna by name and insurance companies generally. The categories of identified claims include any claims for the "collection of accounts receivable" and "any and all related claims cognizable under applicable law" against Aetna specifically, as well as all any claim against insurance companies pertaining to accounts receivable or other indebtedness arising "under any contract, agreement, regulation, procedure, statute, or any other applicable law, including without limitation ERISA." (Ex. 1 to Plan of Reorganization [#5-2] at 45; Disclosure Statement [#5-3] at § XI.F, at 53.)

Aetna attempts to limit the reservation of claims to "accounts receivables," arguing that the Plan and Disclosure Statement do not contain any reference to claims "related to" such accounts, and thus the Victory Debtors only have standing to pursue claims to recover unpaid benefits, i.e., claims of breach of contract and under *Section 502(a) of ERISA*. This argument misrepresents the language of the Plan, which expressly reserves both "accounts receivables" and "any and all *related* claims" against Aetna and its affiliates. (Ex. 1 to Plan of Reorganization [#5-2] at 45.) Additionally, the Plan **[*21]** reserves "all claims and litigation" described in the Disclosure Statement, which in turn reserves "all rights to sue all insurance companies . . . for accounts receivables or any other indebtedness . . . as a result of the provision of healthcare," naming specifically claims arising "under any contract, agreement, regulation, procedure, statute, or any other applicable law, including without limitation ERISA." (Ex. 1 to Plan of Reorganization [#5-2] at 45; Disclosure Statement [#5-3] at § XI.F, at 53.) Again, this language places Aetna on notice that the Victory Debtors intended to later pursue claims to recover unpaid health benefits as well as claims related to Aetna's denial of benefits as have been asserted here, whether these claims encompass statutory procedural violations arising under ERISA or state-law claims arising under the Texas Insurance Code.

Finally, the undersigned is not persuaded by Aetna's argument that Victory Parent only has standing to assert those claims brought against Aetna by Victory Parent in the federal district court litigation that was pending prior to Chapter 11 proceedings. (*See* Disclosure Statement [#5-3] at § XI.B, at 47.) Section XI.F of the Disclosure Statement addresses **[*22]** future litigation that the Victory Debtors generally may pursue. This Section does not exclude Victory Parent from the reservation of claims such that Victory Parent is barred from pursuing future litigation. Victory Parent and the Victory hospitals involved in the Chapter 11 proceedings are all Debtors for purposes of the bankruptcy and reservation of claims.

In summary, the Victory Debtors have standing to pursue all the claims arising under ERISA that are challenged by Aetna (Counts 2, 3, and 4), as ERISA is categorically identified in the Amended Disclosure Statement. (Disclosure Statement [#5-3] at § XI.F, at 53.) The Victory Debtors also have standing to pursue their claims arising under the Texas Insurance Code (Count 5) and promissory estoppel and negligent misrepresentation (Count 7), as the Amended Disclosure Statement categorically refers to any statute or any other applicable law pertaining to liability for accounts receivables or any other indebtedness owed to an insurance company as a result of the provision of healthcare. (*Id.*) Both of these counts concern the failure to reimburse Victory for healthcare benefits: Count 5 seeks payment and prompt-pay penalties for the failure to **[*23]** reimburse Victory as an out-of-network provider of emergency services at the usual and customary rate (Compl. [#1] at ¶¶ 88-90), and Count 7 seeks damages based on Aetna's misrepresentation in confirming coverage—making a promise to pay Victory and subsequently denying or underpaying benefits (Compl. [#1] at ¶¶ 94-103). As to Victory's claim for exemplary damages, Aetna has not directed the Court to any authority demonstrating that a post-confirmation debtor is not entitled to the full available damages under governing law in a subsequent lawsuit on properly reserved claims.

B. Aetna's motion to dismiss for failure to state a claim should be granted in part and denied in part.

Aetna has also moved to dismiss Victory's claims under *Rule 12(b)(6)*. "A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)*, *cert. denied*, *459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983)* (quoting Wright & Miller, Federal Practice and Procedure § 1357 (1969)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw **[*24]** the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Although a complaint "does not need detailed factual allegations," the "allegations must be enough to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555*. The allegations pleaded must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678*.

In reviewing a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, a court "accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Martin K. Eby Const. Co. v. Dallas Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)* (internal quotation omitted). However, a Court need not credit conclusory allegations or allegations that merely restate the legal elements of a claim. *Chhim v. Univ. of Tex. at Austin, 836 F.3d 467, 469 (5th Cir. 2016)* (citing *Iqbal, 556 U.S. at 678*). In short, a claim should not be dismissed unless the court determines that it is beyond doubt that the plaintiff cannot prove a plausible set of facts that support the claim and would justify relief. *See Twombly, 550 U.S. at 570*. Applying these standards, the only claims that fail to survive Aetna's *Rule 12(b)(6)* challenge are Victory's claims under *Section 502(a)(3)* (Counts 2, 3, and 4) and Victory's claim for statutory penalties under ERISA, which should be dismissed in part insofar as Victory relies on a theory of Aetna as *de facto* administrator of fully-funded plans. As to all **[*25]** other claims, Aetna has failed to establish Victory cannot prove a plausible set of facts that would support the claim and justify relief.

i. Victory states a plausible claim to recover unpaid plan benefits under ERISA (Count 1) and for breach of contract (Count 5) as to non-ERISA plans.

Section 502(a)(1)(B) of ERISA authorizes a suit by a plan participant or beneficiary "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *29 U.S.C. § 1132(a)(1)(B)*. The existence of an employee welfare benefit plan is thus an essential element of a claim for benefits under *Section 502(a)(1)(B)* and must be sufficiently pleaded to survive a *Rule 12(b)(6)* challenge. *Elite Ctr. for Minimally Invasive Surgery, LLC v. Health Care Serv. Corp., 221 F. Supp. 3d 853, 856 (S.D. Tex. 2016)*. Aetna does not argue that Victory has not pleaded the existence of an employee welfare benefit plan. Rather, Aetna argues that Victory's claim for unpaid plan benefits should be dismissed for failure to state a claim because "Plaintiffs make only conclusory allegations that Aetna underpaid under [the alleged plan] terms" and fails to "specifically allege how Aetna violated specific terms of any plans references." (Mot. to Dismiss [#5] at 9-10.) The undersigned disagrees with Aetna's position.

Victory's **[*26]** Complaint contains extensive factual allegations in support of its claim that Aetna failed to adjudicate and pay patient claims in accordance with the terms of the benefits plans at issue. Victory alleges that Aetna failed to reimburse Victory at the usual and customary rate for out-of-network providers and failed to pay for covered services under the proper payment methodology and gives numerous examples of the undercompensation of specific patients whose claims were allegedly improperly adjudicated. (Compl. [#1] at ¶¶ 30, 35, 37, 50-53, 66). Victory's Complaint also quotes the relevant plan terms and language from ten different benefits plans obtained by Victory during the bankruptcy process as to the methodology for determining the allowable amount of a given claim. (*Id.* at ¶ 59.) Victory alleges that none of these methodologies were used correctly by Aetna in determining the allowable amount for the claims at issue in this case, when Aetna made payments to Victory by applying 140% of the Medicare allowable instead of the reasonable and customary rate applicable, as well as miscalculating the value of the Medicare allowable itself. (*Id.* at ¶ 60.) These allegations are sufficient **[*27]** to state a plausible claim under *Section 502(a) of ERISA*, and the cases cited by Aetna in their motion do not dictate otherwise. *Cf. e.g., Slater v. Sw. Research Inst., No. SA-12-CV-01205-XR, 2013 U.S. Dist. LEXIS 82231, 2013 WL 2896848, at *4 (W.D. Tex. June 11, 2013)* (granting motion to dismiss for failure to state a claim where complaint failed to mention any provision of ERISA or explain how any of factual allegations supported an ERISA claim).

For those plans not governed by ERISA, Victory alleges a claim for breach of contract. Aetna argues that this claim should be dismissed for the same reason Aetna argues for dismissal of Victory's claim to recover plan benefits under ERISA *Section 502(a)(1)(B) of ERISA*—insufficient factual allegations of wrongful denial or underpayment of benefits. For the same reasons the undersigned recommends denying dismissal of Victory's ERISA claim for unpaid benefits, the undersigned will also recommend denying dismissal of Victory's breach of contract claim. There are sufficient factual allegations in Victory's Complaint to state a plausible claim that Aetna failed to process or pay claims under the terms of the applicable plans and under the payment methodology contained therein as to those plans that are not governed by ERISA.

ii. Victory's other ERISA claims for breach of fiduciary **[*28]** duty (Count 2) and for procedural violations of ERISA (Counts 3 and 4) should be dismissed as duplicative of Victory's ERISA claim for unpaid benefits.

Aetna contends that Victory's ERISA claims for breach of fiduciary duty and procedural violations pursuant to *Section 502(a)(3)* must be dismissed because they are duplicative of Victory's ERISA claim for unpaid benefits. The undersigned agrees. *ERISA Section 502(a)(3)* permits a party to bring a civil action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." *29 U.S.C. § 1132(a)(3)*. The Supreme Court has held that *Section 502(a)(3)* authorizes ERISA plan beneficiaries to bring a suit for individual relief based on an administrator's breach of fiduciary duty. *Varity Corp. v. Howe, 516 U.S. 489, 512, 116 S. Ct. 1065, 134 L. Ed. 2d 130 (1996)*.

Victory's Complaint alleges in Count 2 that Aetna breached its fiduciary duties to plan participants, and in turn to Victory as assignee, by not paying and by underpaying claims for covered services and by maximizing benefits to Aetna rather than making determinations based on the terms of the applicable plans. (Compl. [#3] at ¶¶ 70-77.) By this **[*29]** claim, Victory seeks restitution, injunctive and declaratory relief, and Aetna's removal as breaching fiduciary. (*Id.* at ¶ 76.)

Lower courts in the Fifth Circuit have diverged on the question of whether the simultaneous pleading of both a claim for unpaid benefits under *Section 502(a)(1)(B)* and a claim for breach of fiduciary duty under *Section 502(a)(3)* is permissible, despite a well-developed rule in the Circuit that alternative pleading of these two types of claims is impermissible. In *Varity Corp. v. Howe*, the Supreme Court considered the viability of a plaintiff's *Section 502(a)(3)* claims against a plan administrator where plaintiffs alleged they relied on the administrator's false assurances in agreeing to change to a different benefits plan that ultimately reduced their coverage. *516 U.S. at 507-515*. In its discussion regarding the proper scope of *Section 502(a)(3)* claims, the Supreme Court observed that *Section 502(a)(3)* serves as a "catchall" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that *[Section] 502* does not elsewhere adequately remedy." *Id. at 512*. The Court further explained that "we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable **[*30]** relief, in which case such relief normally would not be appropriate." *Id. at 515* (internal quotations omitted).

Fifth Circuit decisions interpreting *Varity* created a rule that plaintiffs may only assert a claim pursuant to Section 502(a)(3) for breach of fiduciary duty where "no other appropriate equitable relief is available." Tolson v. Avondale Indus., Inc., 141 F.3d 604, 610 (5th Cir. 1998) (affirming district court's grant of summary judgment against plaintiff on Section 502(a)(3) claim because plaintiff had redress that was theoretically available pursuant to Section 502(a)(1)(B), even though plaintiff did not ultimately prevail on this claim). The rule in this Circuit has become that "[w]hen a beneficiary wants what was supposed to have been distributed under a plan, the appropriate remedy is a claim for denial of benefits under [Section] 502(a)(1)(B) of ERISA rather than a fiduciary duty claim brought pursuant to [Section] 502(a)(3)." McCall v. Burlington N./Santa Fe Co., 237 F.3d 506, 512 (5th Cir. 2000). *See also* Rhorer v. Raytheon Eng'rs & Constructors, Inc., 181 F.3d 634, 639 (5th Cir. 1999), *abrogated on other grounds by grounds by* CIGNA Corp. v. Amara, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011) ("[A]n ERISA plaintiff may bring a private action for breach of fiduciary duty only when no other remedy is available under 29 U.S.C. § 1132.").

This has led the majority of lower courts in this Circuit to dismiss claims for breach of fiduciary duty as a matter of law where a claim to recover plan benefits was the predominant action in the suit and afforded the plaintiff of avenue for **[*31]** legal redress against the plan administrator. Constantine v. Am. Airlines Pension Benefit, 162 F. Supp. 2d 552, 557 (N.D. Tex. 2001) ("Because Plaintiff has resorted to the principal remedy for ERISA claimants [Section 1132(a)(1)(B)], she has also failed to state a claim under § 1132(a)(3) as described by the Supreme Court in *Varity.*"*);* Hager v. NationsBank Corp. Pension, No. 3:97-CV-1726G, 1999 U.S. Dist. LEXIS 17931, 1999 WL 1044498, *3 (N.D. Tex. 1999) (dismissing breach of fiduciary duty claim where plaintiff also sued plan administrator for unpaid benefits). Despite this authority, some courts in this Circuit have still taken a more expansive approach—at least at the pleading stage—and have allowed plaintiffs to plead claims under several subsections of Section 502(a) simultaneously. *See e.g.,* N. Cypress Med. Ctr. Operating Co. v. CIGNA Healthcare, 782 F. Supp. 2d 294, 309 (S.D. Tex. 2011), *aff'd sub nom.* N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare, 781 F.3d 182 (5th Cir. 2015). The Court in *N. Cypress Med Ctr.*, for example, reasoned that *Varity* and its Fifth Circuit progeny merely prohibit a plaintiff from ultimately *recovering* on both a claim for unpaid benefits and a claim for breach of fiduciary duty but do not prevent the pleading of both claims to "preserve alternative grounds for relief until a later stage in the litigation." *Id.*

The court's holding in *N. Cypress Med Ctr.* was more or less an outlier at the time it was written, but in the wake of the Supreme Court's 2011 decision in CIGNA Corp. v. Amara, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011), a few other lower courts have followed suit. In ***[*32]*** *Amara*, the Supreme Court considered a district court's ruling in favor of pension plan beneficiaries who alleged that CIGNA had failed to give them proper notice of changes to their benefits through the summary plan documents that were provided, and the change resulted in their receiving less generous coverage. 563 U.S. 421, 424-25, 131 S. Ct. 1866, 179 L. Ed. 2d 843. The district court agreed with plaintiffs that the disclosures made by CIGNA violated its obligations under ERISA, and the court attempted to provide relief under Section 502(a)(1)(B) by reforming the benefits plan and ordering CIGNA to pay benefits accordingly. Id. at 425. Although the plaintiffs had also asserted a Section 502(a)(3) claim, the district court declined to decide whether that claim was sustainable, finding it unnecessary in light of its holding that Section 502(a)(1)(B) provided an appropriate remedy. Id. at 434.

Upon review, the Supreme Court vacated the lower court judgment and held that reformation of the plan was an equitable remedy not available under Section 502(a)(1)(B). Id. at 435-38. The Court reasoned that Section 502(a)(1)(B) only empowers courts to award beneficiaries the benefits they are due "under the terms of the plan" and that summary documents only provide communication about the plan and do not constitute terms of the plan that are enforceable via Section 502(a)(1)(B). Id. at 438. Accordingly, the **[*33]** Supreme Court held that reformation of the plan to match the terms of the summary documents was an equitable remedy only available under Section 502(a)(3) and remanded the case for a determination of whether such relief was appropriate under that Section. Id. at 439-442, 445.

Some lower courts in this Circuit have interpreted *Amara* as implicitly sanctioning the pleading of alternative means of relief under ERISA and have adopted the more expansive approach allowing the simultaneous pleading of claims under Sections 502(a)(1)(B) and 502(a)(3).[1] *E.g.,* Peterson v. Liberty Life Assurance Co. of Boston, No. 1:15-CV-00204-SADAS, 2016 U.S. Dist. LEXIS 91021, 2016 WL 3849693, at *3 (N.D. Miss. July 13, 2016) (denying motion to dismiss and allowing plaintiff to plead both claim for denial of benefits and claim for breach of fiduciary duty); Currier v. Entergy Corp. Employee Benefits Comm., No. CV 16-2793, 2016 U.S. Dist. LEXIS 142471, 2016 WL 6024531, at *3-4 (E.D. La. Oct. 14, 2016) (same). As the *Peterson* court observed, "[h]ad the district court in *Amara* dismissed the breach of fiduciary duty claim at the pleading stage based on the mere presence of the legal claim for benefits, the equitable relief sanctioned by the Supreme Court would not have been available." Peterson, 2016 U.S. Dist. LEXIS 91021, 2016 WL 3849693, at *3. This position is also more in keeping with general federal pleading practice, which allows a party to plead alternative claims and defenses, even if ultimately **[*34]** inconsistent. *See also* Fed. R. Civ. P. 8(d)(3) (providing that "a party may state as many separate claims or defenses as it has, regardless of consistency").

However, the majority of district court cases in this Circuit continue to dismiss claims under Section 502(a)(3) where a claim for unpaid benefits is also pleaded, particularly where the two claims are "substantively indistinct" and both stem from the same underlying conduct—the alleged improper denial of benefits. *E.g.,* Horne v. J.C. Penney Corp., No. 14CV2383, 2014 U.S. Dist. LEXIS 159366, 2014 WL 6060434, at *5 (W.D. La. Nov. 12, 2014) (dismissing breach of fiduciary duty claim as duplicative of claim for unpaid benefits under pre-*Amara* Fifth Circuit authority); Lopez v. Liberty Life Assur. Co. of Boston, No. CIV.A. H-13-2460, 2013 U.S. Dist. LEXIS 152755, 2013 WL 5774878, at *4 (S.D. Tex. Oct. 24, 2013) (rejecting argument that *Amara* changed general rule that if relief is available under Section 502(a)(1)(B), equitable relief is not available under Section 502(a)(3), and dismissing breach of fiduciary duty claim in light of potential remedy for unpaid benefits).

Additionally, the few Fifth Circuit cases addressing breach of fiduciary duty claims post-*Amara* have not directly addressed the impact the decision might have on Circuit precedent. Rather, the Fifth Circuit has continued to follow pre-*Amara* case law without discussion **[*35]** and enforce a blanket prohibition on the simultaneous pleading of claims for unpaid benefits and breach of fiduciary duty. *See, e.g.,* Swenson v. United of Omaha Life Ins. Co., 876 F.3d 809, 812 (5th Cir. 2017) (reciting the standard set forth in *Tolson* and affirming dismissal of equitable claims in a case that involved a widow seeking benefits from an individual life insurance policy); Hollingshead v. Aetna Health Inc., 589 F. App'x 732, 737 (5th Cir. 2014) (affirming denial of leave to amend on basis that claim for fiduciary duty was futile in light of claim for unpaid benefits).

Although the undersigned is persuaded that the better reading of *Varity* is that it bars duplicative recovery as opposed to alternative pleading, the undersigned is bound by Fifth Circuit precedent insofar as it has held that an ERISA plaintiff may not simultaneously pursue both a claim for unpaid benefits and for breach of fiduciary duty, at least where the claims are both premised on the denial of plan benefits, as opposed to some other wrongful act. The undersigned also agrees with Victory that *Amara* lends further support to a more expansive interpretation of *Varity*, but until the Fifth Circuit directly addresses the question of whether *Amara* implicitly overrules its prior precedent, this Court must dismiss any claim for breach of fiduciary duty that **[*36]** is based on a denial of benefits and pleaded alongside a claim under Section 502(a)(1)(B) complaining of the same. Victory's claim for breach of fiduciary duty, as stated in Count 2, is premised exclusively on Aetna's alleged failure to properly adjudicate the claims of its members by denying or underpaying such claims. (*Id.* at ¶ 75.) Because Victory has already alleged this claim for benefits denied as a cause of action under Section 502(a)(1)(B), the undersigned will recommend that

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[1] Multiple circuit courts have also recently interpreted the *Amara* decision as clarifying that a Section 502(a)(3) claim is not automatically undermined by the presence of a Section 502(a)(1)(B) claim. *See* N.Y. State Psychiatric Ass'n, Inc. v. UnitedHealth Group, 798 F.3d 125, 134 (2d Cir. 2015) ("[I]t is not clear at the motion-to-dismiss stage of the litigation that monetary benefits under § 502(a)(1)(B) alone will provide him a sufficient remedy. In other words, it is too early to tell if his claims under § 502(a)(3) are in effect repackaged claims under § 502(a)(1)(B)."); Silva v. Metro. Life Ins. Co., 762 F.3d 711, 727 (8th Cir. 2014) (holding, in light of *Amara*, that "*Varity* only bars duplicate recovery and does not address pleading alternate theories of liability"); Moyle v. Liberty Mut. Ret. Ben. Plan, 823 F.3d 948, 961 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Aug. 18, 2016) (interpreting *Amara* as allowing the pursuit of simultaneous claims under both Section 502(a)(1)(B) and Section 502(a)(3), so long as there is ultimately no double recovery prohibited by *Varity*).

the Court dismiss his claim for breach of fiduciary duty pursuant to *Section 502(a)(3)*. *See* *Tolson, 141 F.3d at 610*; *Rhorer, 181 F.3d at 639*.

Aetna focuses its arguments in its motion to dismiss on Varity's *Section 502(a)(3)* claim for breach of fiduciary duty, but Aetna also seeks dismissal of Varity's other two claims arising under *Section 502(a)(3)*—Counts 3 and 4. These claims allege Aetna's failure to provide a full and fair review of claims and for other procedural violations of ERISA. (*See* Compl. ¶¶ 78-86.) These claims do raise factual allegations beyond the mere act of denying a claim for benefits, such as the failure to follow claims procedures, but the ultimate harm complained of is part and parcel to the claims denial itself. Accordingly, the same Fifth Circuit precedent that bars the simultaneous pleading of *Section 502(a)(1)(B)* and a breach of fiduciary **[*37]** duty claim under *Section 502(a)(3)*, also compels the undersigned to recommend dismissal of Victory's other two claims arising under *Section 502(a)(3)*.

iii. Victory's state-law claims (Counts 5 and 7) should not be dismissed—yet—as preempted by ERISA.

Aetna seeks dismissal of Victory's claims under the Texas Insurance Code (Count 5) and claims of promissory estoppel and negligent misrepresentation (Count 7) as preempted by ERISA. ERISA provides a uniform regulatory regime over employee benefit plans and includes expansive preemption provisions, preempting any state law that relates to an ERISA plan or conflicts with ERISA's regulatory scheme. *29 U.S.C. § 1144(a)*; *Aetna Health Inc. v. Davila, 542 U.S. 200, 208-09, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004)*. "Conflict preemption, also known as ordinary preemption, arises when a federal law conflicts with state law, thus providing a federal defense to a state law claim, but does not completely preempt the field of state law so as to transform a state law claim into a federal claim." *Arana v. Ochsner Health Plan, 338 F.3d 433, 439 (5th Cir. 2003)*. A defendant arguing for conflict or ordinary preemption based on ERISA's preemption clause must prove that: (1) the claim addresses an area of exclusive federal concern, such as the right to receive benefits under the terms of the ERISA Plan; and (2) the claim directly affects the relationship among **[*38]** traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries. *Mayeaux v. La. Health Serv. and Indem. Co., 376 F.3d 420, 432 (5th Cir. 2004)*. Because ERISA conflict preemption is an affirmative defense, Aetna bears the burden of proof on both elements. *See* *Bank of La. v. Aetna U.S. Healthcare Inc., 468 F.3d 237, 242 (5th Cir. 2006)*.

According to Aetna, Victory's Texas Insurance Code claims are preempted under ERISA's preemption clause, *29 U.S.C. § 1144*, because they are all based upon an alleged failure to pay plan benefits and are necessarily derivative of and dependent upon the right to recover benefits under various ERISA plans. It is true that Victory's claims under the Texas Insurance Code implicate the alleged failure to Aetna to reimburse Victory in accordance with the terms of various plans. (Compl. [#1] at ¶ 88.) It is also true that claims processing and payment are areas that both the Fifth Circuit and the Supreme Court have characterized as areas of exclusive federal concern governed by ERISA. *See* *Bank of La., 468 F.3d at 242*. However, ERISA preemption is more nuanced than Aetna's arguments for preemption would suggest, especially in a case involving both self-funded and fully-funded plans, as well as plans allegedly not governed by ERISA, and allegations of both a failure to pay claims and underpayment of claims.

Again, **[*39]** Aetna bears the burden of proof on both elements of the preemption doctrine. *See id.* Aetna has failed to satisfy this burden, as it is unclear to the Court at this preliminary stage of the proceedings whether Victory's claims under the Texas Insurance Code all directly affect the relationship among traditional ERISA entities or concern other plans not governed by ERISA that are also at issue in this lawsuit. Additionally, the Fifth Circuit has distinguished between a claim that implicates the *rate* of payment as set out in a Provider Agreement, rather than the *right* to payment under the terms of the benefit plan. *Lone Star OB/GYN Assocs. v. Aetna Health Inc., 579 F.3d 525, 530 (5th Cir. 2009)*; *see also* *Electrostim v. Health Care Serv. Corp., 614 Fed App'x 731, 737 (5th Cir. 2015)* (finding plaintiff's state law claims based on a failure to pay were preempted but state-law underpayment claims were not). Victory's Texas Insurance Code claim alleges the underpayment of claims "at an amount less than the usual and customary rate." (Compl. [#1] at ¶ 88.) Aetna has not briefed the Court as to whether this distinction is relevant for purposes of Victory's claims. Nor has Aetna briefed the Court on the impact, if any, of the *ERISA Savings Clause, 29 USC § 1144(b)(2)(A)*, or the exception to it found in the *"Deemer Clause," 29 U.S.C.*

§1144(b)(2)(B). "The Supreme Court had held that only insured plans are exempted from ERISA preemption **[*40]** by the Savings Clause, and that the Deemer Clause preserves ERISA preemption for self-funded plans." *Emergency Health Ctr. at Willowbrook, L.L.C. v. UnitedHealthcare of Texas, Inc., 892 F. Supp. 2d 847, 859 (S.D. Tex. 2012)* (citing *FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990))*. Victory has alleged that both types of plans are at issue here.

Aetna's arguments for the preemption of Victory's promissory estoppel and negligent misrepresentation claims (Count 7) are even less adequate. In a mere footnote in Aetna's motion to dismiss, Aetna argues that Victory's promissory estoppel and negligent misrepresentation claims are "likely also preempted by ERISA." (Mot. to Dismiss [#5] at 19 n.32.) These claims are based on allegations that Aetna made promises to pay for plan participants' medical bills and then subsequently denied or underpaid claims. The Fifth Circuit has held that similar claims are not preempted by ERISA, as these claims—though concerning statements about the extent of coverage available under an ERISA plan—do not require consultation of a given plan's terms and instead focus on the representations made by an insurer about the extent to which it would pay for services. *See Access Mediquip L.L.C. v. UnitedHealthcare Ins. Co., 662 F.3d 376, 384-85 (5th Cir. 2011)*. *See also Mid-Town Surgical Ctr., L.L.P. v. Humana Health Plan of Texas, Inc., 16 F. Supp. 3d 767, 780-81 (S.D. Tex. 2014)* (claims of promissory estoppel and negligent misrepresentation based on insured's promises of payment for services were not preempted by ERISA). Moreover, even if this argument had merit, **[*41]** the undersigned finds that arguing in one sentence in a footnote that a claim "is likely" preempted does not sufficiently brief the Court on this issue so as to satisfy Defendant's burden to establish preemption.

In summary, Aetna has not carried its burden to demonstrate that Victory's Texas Insurance Code claims are preempted by ERISA as to all of the plans at issue in this case or, more accurately, Aetna has failed to distinguish the various plans at issue in this case and to adequately identify which plans are preempted by ERISA. Aetna has also failed to satisfy its burden to establish preemption as to Victory's negligent misrepresentation and promissory estoppel claims. Certainly some of Victory's claims are preempted, namely those that involve claims regarding the alleged inappropriate denial of benefits and traditional ERISA entities. But the Court cannot ascertain without a more robust record and more detailed briefing what subset of these claims must be dismissed as preempted and which can proceed. Accordingly, the preemption issue should be revisited at the summary judgment stage after the parties have engaged in some discovery as to the plans at issue in this lawsuit. Aetna's **[*42]** motion to dismiss Victory's Texas Insurance Code and negligent misrepresentation and promissory estoppel claims based on preemption should be denied without prejudice to raising this issue on a properly briefed motion for summary judgment.

iv. Victory states plausible claims under the Texas Insurance Code.

Victory's Complaint alleges various violations of the Texas Insurance Code with respect to emergency services, claiming that Texas law requires the reimbursement of an out-of-network provider at the usual and customary rate, regardless of the terms of the plan, *Tex. Ins. Code § 1271.155*; *28 Tex. Admin. Code § 3.3725*. (Compl. [#1] at ¶ 88.) Victory also alleges violations of Texas's Prompt Pay Statute for Aetna's alleged failure to timely pay claims under *Tex. Ins. Code § 542.058*; seeks prompt pay penalties under 28 Tex. Admin. Code § 21.283, *Tex. Ins. Code §§ 843.338*, *1301.103*; and alleges unfair competition under *Tex. Ins. Code § 541.003*. (Compl. [#1] at ¶ 89.) Aetna argues that even if Victory's Texas Insurance Code claims are not preempted, these claims should still be dismissed for failure to state a claim. The undersigned disagrees.

a) Tex. Ins. Code § 1271.155 and 28 Tex. Admin. Code § 3.3725

Section 1271.155(a) of the Texas Insurance Code provides that a health maintenance organization "shall pay for emergency care performed by non-network physicians or providers at the usual and customary rate or **[*43]** at an agreed rate." *Section 3.3725(a) of Chapter 28* of the Texas Administrative Code similarly provides that "the insurer must fully reimburse a nonpreferred provider for [certain] emergency care services at the usual and customary rate or at a rate agreed to by the insurer and the nonpreferred provider until the insured can reasonably be expected to transfer to a preferred provider." Aetna contends these provisions do not provide a private right of action and therefore must be dismissed as a matter of law. The Court agrees with respect to the administrative code provision. The administrative code provision cited by Victory in its Complaint is located in Subchapter X of the Code, which in separate section provides that "[t]hese sections do not create a private cause of action for damages or create a standard of care, obligation, or duty that provides a basis for a private cause of action." *28 Tex. Admin. Code § 3.3701(d)*.

However, the Court is not persuaded based on the current briefing that *Section 1271.155(a) of the Texas Insurance Code* does not give rise to a private right of action, either on its own or in conjunction with other provisions of the Texas Insurance Code. Aetna cites no authority for this position, and the undersigned did identify at least two federal court cases **[*44]** reviewing state-law claims that were based in least in part on alleged violations of this provision. *See Emergency Health Ctr. at Willowbrook, L.L.C. v. UnitedHealthcare of Tex., Inc., 892 F. Supp. 2d 847, 857 (S.D. Tex. 2012)* (denying summary judgment on claim brought pursuant to Chapter 541 of the Texas Insurance Code, which relied on *Section 1271.155*'s requirement to pay a fee for emergency services provided); *St. Michael's Emergency Ctr., LLC v. Aetna Health Mgmt., LLC., CV H-08-2336, 2011 U.S. Dist. LEXIS 155623, 2011 WL 12896736, at *10 (S.D. Tex. Aug. 22, 2011)* (denying summary judgment on claim seeking facility fees under *Section 1271.155* due to question as to whether plaintiff was a "hospital emergent facility or comparable facility" as defined by Texas law). The undersigned finds that Aetna has failed to demonstrate that as a matter of law that there is no private right of action available under *Section 1271.155(a) of the Texas Insurance Code*.

b) Tex. Ins. Code § 542.058

Section 542.058 of the Texas Insurance Code requires an insurer to promptly pay claims or pay damages as provided in *Section 542.060*. *Tex. Ins. Code. § 542.058(a)*. Aetna seeks dismissal of this claim on the basis that Victory is not a proper party to bring this claim. Aetna bases its argument for dismissal on the definition of "claim" set forth in *Section 542.051*, which provides that "claim" for purposes of the statute means "a first-party claim that (A) is made by an insured or policyholder under an insurance policy or contract or by a beneficiary named in the policy or contract; and (B) must be paid by the insurer directly to the insured or beneficiary." *Tex. Ins. Code § 542.051(2)*. Because Victory is not **[*45]** an insured, policyholder, or beneficiary, Aetna argues it cannot maintain a claim under *Section 542.058*. The undersigned disagrees.

The undersigned has already engaged in a thorough discussion of the assignments at issue in this case, which assigned to Victory all claims and causes of action against "any and all health plans" and specifically references the assignment of claims pursuant to common law or statute. (*See* Section III.A.i *supra*; Assignments [#14-1] at 2-3.) Aetna provides the Court with no additional authority not previously addressed in this report and recommendation as to why these assignments would not confer the right of Victory to pursue the statutory claims under the Texas Insurance Code previously belonging to plan participants. Finding that these assignments cover Victory's claim pursuant to *Section 542.058*, the undersigned recommends denying dismissal of this claim.

c) Tex. Ins. Code §§ 843.338, 1301.103

The *Texas Prompt Payment of Physicians and Providers Act* sets time standards for claim determinations, specifying how long health maintenance organizations and preferred provider benefit plans have to pay providers. *See Tex. Ins. Code § 843.338* (rules for HMOs) and *Tex. Ins. Code § 1301.103* (rules for preferred provider plan benefits). Aetna seeks dismissal of these claims on **[*46]** the basis that these claims fail as a matter of law because they do not apply to out-ofnetwork providers like Victory. Victory's Complaint states that its hospitals are "considered non-participating or out-of-network providers for purposes of this litigation," Compl. [#1] at ¶ 1, and Victory concedes the same in its response to Aetna's motion.

However, *Section 843.351* clarifies that the prompt payment provisions in this Chapter do apply to out-of-network providers in instances where those providers provide "care related to an emergency or its attendant episode." *Tex. Ins. Code § 843.351*; *N. Cypress Med. Ctr. Operating Co., Ltd., 781 F.3d at 198 n.76*. Victory argues that it only seeks prompt payment penalties for its emergency services. Aetna contends that Victory's Complaint fails to sufficiently allege that it maintains any emergency health facility or provides emergency care such that Victory would fall under this exception.

Victory argues that it provided a list of claims to Aetna which were incorporated by reference into its Complaint and that more than 470 of these claims are labeled "EMERGENCY ROOM" and represent a claim for emergency services. (Resp. [#14] at 11-12.) This list of claims has not been presented to the Court for its review, and the Court agrees with Aetna that Victory's **[*47]** Complaint does not contain any explicit factual allegations that Victory rendered emergency services or that Victory is an emergency facility, only that it is a group of medical centers and hospitals providing high-cost orthopedic surgeries. (Compl. [#1] at ¶1.) Nonetheless, Count 5 of Victory's Complaint does refer to the provision of emergency services in conjunction with its claims under the Texas Insurance Code, and the undersigned finds that it is plausible at the pleading stage that the Victory hospitals at issue had emergency departments and provided emergency services as part of their health care. (Compl. [#1] at ¶¶ 88-89.)

d) Tex. Ins. Code § 541.003

Finally, *Section 541.003 of the Texas Insurance Code* provides that "[a] person may not engage in this state in a trade practice that is defined in this chapter as or determined under this chapter to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." The Texas Insurance Code "defines one such practice as a concerted or agreed-upon 'act of boycott, coercion, or intimidation that results in or tends to result in the unreasonable restraint of or a monopoly in the business of insurance.'" *Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 749 (5th Cir. 2015)* (citing *Tex. Ins. Code § 541.054*). Aetna seeks dismissal of this claim on the **[*48]** basis that Victory cannot rely on this provision as a means to complain about the mishandling of insurance claims. Victory responds that it has alleged that Aetna engaged in premeditated and calculated conduct to restrain trade by either forcing Victory into an in-network contract or out of business and that this conduct was consistent with Aetna's nationwide strategy regarding out-of-network providers. (Compl. [#1] at ¶¶ 4-5, 45-46). The undersigned agrees with Victory that these allegations could theoretically state a claim regarding an act of coercion with the potential to result in a monopoly in the business of insurance.[2]

v. Victory states plausible claims for promissory estoppel and negligent misrepresentation (Count 7).

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[2] The undersigned notes, however, that the Fifth Circuit has recognized that the language of *Section 541.054* tracks the language of the "boycott, coercion, or intimidation" exemption contained in the McCarran—Ferguson Act, and has held that the two laws "should be interpreted in harmony." *Sanger Ins. Agency, 802 F.3d at 749*. The *McCarran-Ferguson Act* is a reverse preemption clause, aimed at restoring the primacy of the states in regulating insurance by providing that general federal laws not directed at insurance do not invalidate or supersede state law governing insurance. *15 U.S.C. § 1012(b)*; *Sanger, 802 F.3d at 741*. The Act contains an exemption for federal ***antitrust law***, which remains applicable to any "act of boycott, coercion, or intimidation." *15 U.S.C. § 1013(b)*.

A boycott for purposes of the McCarran—Ferguson Act exemption occurs where, in order to coerce a target into certain terms on one transaction, parties refuse to engage in other unrelated transactions with the target. *See* *Hartford Fire Ins. v. California, 509 U.S. 764, 803-04, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*. It is not a boycott within the meaning of the exemption where the challenged conduct is not concerted activity, i.e., it is only undertaken by individual actors. *Sanger Ins. Agency, 802 F.3d at 746* (citing *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 555, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978))*. Although the parties have not addressed this case law in their brief, it appears Victory's claim may be barred because it does not involve an allegation that Aetna acted in concert with another entity.

Victory's claims for promissory estoppel and negligent misrepresentation allege that before scheduling any non-emergent procedure for Aetna members, Victory contacted Aetna to confirm whether coverage was available and to obtain specific coverage details. (Compl. [#1] at ¶¶ 94-103.) According to Victory, Aetna's representatives falsely confirmed coverage and then denied or underpaid claims to Victory's detriment. To succeed on a promissory estoppel cause of **[*49]** action, a plaintiff must show: (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial reliance by the promisee to his detriment. *English v. Fischer, 660 S.W.2d 521, 524 (Tex. 1983)*.

Aetna seeks dismissal of Victory's claims of promissory estoppel on the basis that these claims are barred due to the existence of an express contract that covers the parties' dispute, i.e., the health benefit plans issued by Aetna to its members, and that Victory fails to allege any promise made outside of the contract. Aetna is correct that a claim of promissory estoppel is "utterly displaced" in light of a valid contract between the parties covering the alleged promise. *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist., 786 F.3d 400, 414 (5th Cir. 2015)*. However, the contract identified by Aetna here is between the plan members and Aetna, not Victory, and Victory's Complaint plainly states that it brings this claim not as assignee of the plan members but as a third-party provider in its own right. (Compl. [#1] at ¶ 95.) Victory, as an out-of-network provider, alleges it did not have access to the health plan contracts between its patients and Aetna and was not a party to any other contract with Aetna. Victory's promissory estoppel claims concern promises made directly to Victory by Aetna representatives **[*50]** and alleges that Aetna supplied misinformation regarding coverage confirmation and that Victory relief on this information to its detriment. The undersigned finds that these allegations state a plausible claim for promissory estoppel separate and apart from any claim that plan members would have had based on a failure to pay under the contract. *See* *Mid-Town Surgical Ctr., L.L.P., 16 F. Supp. 3d at 781-82* (denying motion to dismiss promissory estoppel claim seeking to enforce alleged oral promise by Humana to pay healthcare provider for medical procedures at a certain rate); *but see* *Fustok v. UnitedHealth Grp., Inc., No. 12-cv-787, 2012 U.S. Dist. LEXIS 200455, 2012 WL 12937486, at *5 (S.D. Tex. Sept. 6, 2012)* (dismissing promissory estoppel claim because "preapprovals" did not waive United's right to evaluate the claim when it was later submitted for reimbursement and it was unreasonable for plaintiff to assume payment was guaranteed).

To succeed on a claim for negligent misrepresentation the plaintiff must prove that: (1) the defendant in the course of his business or a transaction in which he had an interest; (2) supplied false information for the guidance of others; (3) without exercising reasonable care or competence in communicating the information; (4) the plaintiff justifiably relied on the information; (5) **[*51]** proximately causing the plaintiff's injury. *Kastner v. Jenkens & Gilchrist, P.C., 231 S.W.3d 571, 577 (Tex. App.—Dallas 2007, no pet.)*. Victory also sufficiently pleads this claim. Victory alleges that Aetna falsely confirmed coverage; that based on these representations, Victory provided services to Aetna members; and that Victory's reliance upon Aetna's coverage promises was detrimental to Victory's business operations and cash flow. (Compl. [#1] at ¶¶ 98-101.) These allegations are also sufficient to satisfy *Rule 8*'s notice pleading standard. *See* *Mid-Town Surgical Ctr., L.L.P., 16 F. Supp. 3d at 782-83* (denying motion to dismiss negligent misrepresentation claim where healthcare provider alleged reliance on false verification from Humana as to preauthorization and coverage); *but see* *Innova Hosp. San Antonio, L.P. v. Cross & Blue Shield of Ga., Inc., 995 F. Supp. 2d 587, 605 (N.D. Tex. 2014)* (dismissing negligent misrepresentation claim on basis that pleadings were not sufficient to infer that the information supplied was false and that Defendant did not exercise reasonable care or competence in communicating the information)

vi. Victory sufficiently alleges exemplary damages, but its claim for statutory penalties under ERISA should be dismissed in part insofar as Victory relies on a theory of Aetna as *de facto* administrator of fully-funded plans.

Aetna seeks dismissal of Victory's claim for exemplary damages on the basis that the only claim **[*52]** that supports the recovery of exemplary damages is Victory's claim of negligent misrepresentation and that claim, according to Aetna, should be dismissed as a matter of law for the reasons already discussed and rejected. The undersigned has already discussed its reasons for recommending denial of Aetna's motion to dismiss as to Victory's claim of negligent misrepresentation. If the Court agrees with this recommendation, and Victory's negligent misrepresentation claim remains in this suit, the Court should also deny Aetna's motion to dismiss as Victory's claim for exemplary damages.

Victory also pleads certain ERISA penalties under *29 U.S.C. § 1132(c)(1)*, which subjects an ERISA "administrator" who fails to supply requested information to a plan participant to penalties in the amount of $100 a day from the date of such refusal. Aetna asks the Court to dismiss this claim on the basis that the Complaint fails to sufficiently allege that Aetna is an "administrator" for purposes of this section or that a written request for plan information was ever made. *ERISA Section 3(16)(A)* defines "administrator" as: "(i) the person specifically so designated by the terms of the instrument under which the plan is operated; (ii) if an administrator **[*53]** is not so designated, the plan sponsor; or (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe." *29 U.S.C. § 1002(16)(A)*.

The Court is required to accept the well-pleaded allegations in a plaintiff's complaint as true for purposes of ruling on a motion to dismiss. *Martin K. Eby Const. Co., 369 F.3d at 467*. Victory's Complaint alleges that Aetna is the plan administrator as to self-funded plans and it is the *de facto* administrator for the fully-funded plans which Aetna insures. (Compl. [#1] at ¶¶ 26, 62.) However, during the pendency of Aetna's motion, the Fifth Circuit issued its opinion in *Conn. Gen. Life Ins. Co. v. Humble Surgical Hosp., L.L.C., 878 F.3d 478, 2017 WL 6460150 (Dec. 19, 2017)*, which squarely rejected the theory that a *de facto* plan administrator could be subject to *Section 502(c)* penalties and held that the statutory penalty only applies to named plan administrators. *878 F.3d 478, at [WL] *5* (reversing a district court's award of *Section 502(c)* penalties against Cigna based on its conduct and admissions, despite the fact that it was not a named plan administrator). Accordingly, the undersigned will recommend that the Court grant Aetna's motion to dismiss as to Victory's claim for statutory penalties under *Section 502(c)* with respect to the fully-funded plans which Aetna insures **[*54]** but recommend denying dismissal as to the self-funded plans in which Victory alleges Aetna is the designated plan administrator.

Finally, the undersigned also rejects Aetna's argument that Victory failed to adequately plead the failure to provide plan documents for purposes of its claim for ERISA's statutory penalty. Victory alleges that it requested both plan and plan associated documents on claims; Aetna refused to provide these documents in the normal course of business; and Victory did not receive any documents until Aetna produced a handful of plans through the bankruptcy process. (Compl. [#1] at ¶ 63.) These allegations are sufficient to state a plausible claim for relief under *Rule 8*, and the undersigned will recommend denial of the motion to dismiss on this ground.

III. Conclusion and Recommendation

Having considered Victory's Complaint in light of the arguments raised in Aetna's motion, as well as the response and reply thereto, the undersigned recommends that Defendants' Motion to Dismiss Plaintiffs' Complaint and Brief in Support [#5] be **GRANTED IN PART** as follows:

- Victory's claim for breach of fiduciary duty and other procedural violations under *Section 502(a)(3) of ERISA* (Counts 2, 3, and 4) should be **[*55]** dismissed.

- Victory's claim to recover statutory penalties under *Section 502(c) of ERISA* should be dismissed insofar as Victory relies on a theory of Aetna as *de facto* administrator.

In all other respects, the undersigned recommends that the motion be **DENIED**.

IV. Instructions for Service and Notice of Right to Object/Appeal.

The United States District Clerk shall serve a copy of this report and recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 72(b)*. The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure **[*56]** to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn, 474 U.S. 140, 149-52, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Acuna v. Brown & Root, Inc., 200 F.3d 335, 340 (5th Cir. 2000)*. Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this report and recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428-29 (5th Cir. 1996)* (en banc).

SIGNED this 19th day of January, 2018.

/s/ Elizabeth S. ("Betsy") Chestney

ELIZABETH S. ("BETSY") CHESTNEY

UNITED STATES MAGISTRATE JUDGE

Hu Honua Bioenergy, LLC v. Hawaiian Elec. Co.

United States District Court for the District of Hawaii

January 19, 2018, Decided; January 19, 2018, Filed

Civ. No. 16-00634 JMS-KJM

Reporter

2018 U.S. Dist. LEXIS 8835 *; 2018 WL 491780

HU HONUA BIOENERGY, LLC, a Delaware Limited Liability Company, Plaintiff, vs. HAWAIIAN ELECTRIC INDUSTRIES, INC., a Hawaii Corporation; HAWAIIAN ELECTRIC COMPANY, a Hawaii Corporation; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawaii Corporation; NEXTERA ENERGY, INC., a Florida Corporation; HAMAKUA ENERGY PARTNERS, L.P., a Hawaii Limited Partnership, Defendants.

Prior History: *Hu Honua Bioenergy v. Hawaiian Elec. Indus., 2017 U.S. Dist. LEXIS 208236 (D. Haw., Dec. 19, 2017)*

Core Terms

antitrust, monopolize, Electric, alleges, conspiracy, Island, termination, wholesale, Merger, energy, power plant, competitor, qualifying, motion to dismiss, power generation, monopoly, electric utility, anti trust law, facilities, cancellation, consumers, fuel, restraint of trade, generation, plant, state-law, damages, prices, costs, fails

LexisNexis® Headnotes

Evidence > Judicial Notice > Adjudicative Facts > Public Records

HN1[] **Adjudicative Facts, Public Records**

The court may take judicial notice of matters of public record as long as the facts noticed are not subject to reasonable dispute. Matters of public record that may be judicially noticed include records and reports of administrative bodies, and documents filed with courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN2[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a dismissal is proper based on the lack of a cognizable legal theory or the absence of sufficient facts alleged. In resolving a *Rule 12(b)(6)* motion, the court accepts as true all well-pleaded allegations of material fact, and construes them in the light most favorable to the non-moving party. But a formulaic recitation of the elements of a cause of action will not defeat a motion to dismiss. The complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. This tenet—that the court must accept as true all of the allegations contained in the complaint—is inapplicable to legal conclusions. Accordingly, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] **Motions to Dismiss, Failure to State Claim**

The plausibility standard asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. Determining plausibility is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. And in analyzing these principles in the antitrust context, Twombly recognized that proceeding to antitrust discovery can be expensive, and reiterated that a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > Conspiracy to Monopolize

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN4[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Although Twombly did not impose a heightened pleading standard for antitrust conspiracy cases, in this context allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws. And so, when considering plausibility, courts must also consider an obvious alternative explanation, for defendant's behavior.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) review is generally limited to the contents of the complaint. Nevertheless, courts may consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. Courts may also take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN6[] **Amendment of Pleadings, Leave of Court**

When a complaint is dismissed, the court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts. Leave to amend is properly denied, however, if amendment would be futile.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN7[] Actual Monopolization, Claims

A Sherman Act § 2 monopolization claim has three essential elements: (a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury. Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. And to prove a conspiracy to monopolize in violation of § 2, a plaintiff must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN8[] Conspiracy to Monopolize, Elements

Motivation to enter a conspiracy is never enough to establish a traditional conspiracy.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] Standing, Requirements

To establish an antitrust injury, a plaintiff must allege facts that show (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. The inquiry focuses on injury to competition not competitors. Where the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury. This requirement stems from the principle that the antitrust laws' prohibitions focus on protecting the competitive process and not on the success or failure of individual competitors.

Business & Corporate Compliance > ... > Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act

HN10[] Cogeneration & Independent Companies, Public Utility Regulatory Policies Act

The federal Public Utility Regulatory Policies Act (PURPA) was enacted in 1978, among other reasons, to ensure sustained long-term economic growth by shifting the nation's reliance on oil and gas to more abundant domestically produced fuels. To support development of non-traditional generating facilities, PURPA and its implementing regulations require electric utilities (a) to sell electric energy and capacity to qualifying facilities upon request, (b) to purchase electric energy and capacity from qualifying facilities and (c) to make all necessary interconnections with any qualifying facility in order to accomplish the aforementioned purchases and sales provided that each qualifying facility pay its share of the interconnection costs. PURPA's regulations mandate that an electric utility offer a qualifying facility built after the enactment of PURPA a purchase rate equal to, but no more than, the utility's full avoided costs.

Business & Corporate Compliance > ... > Energy & Utilities Law > Cogeneration & Independent Companies > Public Utility Regulatory Policies Act

HN11[] Cogeneration & Independent Companies, Public Utility Regulatory Policies Act

While the federal *Public Utility Regulatory Policies Act (PURPA)* was not intended to protect utilities from the reach of the antitrust laws, neither was it meant to create antitrust liability where none existed previously. In short, *PURPA* was designed to be antitrust-neutral.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN12[] Conspiracy to Monopolize, Sherman Act

The *Sherman Act* does not attack every monopoly. That is, the antitrust laws tolerate both efficient monopolies and natural monopolies. Government regulation, as opposed to treble damages and criminal liability under the *Sherman Act*, is generally thought to be the appropriate remedy for difficulties posed by natural monopolies.

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

HN13[] Private Actions, Standing

The structure of a regulated industry may create a lack of antitrust standing. The comprehensive regulatory framework significantly restricts the nature of the competition which is permitted.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN14[] Sherman Act, Claims

To state a claim of alleged violations of *§ 1 of Sherman Act*, *15 U.S.C.S. § 1*, which prohibits conspiracies in restraint of trade or commerce, a plaintiff must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition. And allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN15[] Sherman Act, Claims

Antitrust injury is required for both a *Sherman Act § 1* claim and a *§ 2* claim. Stated differently, causal antitrust injury is an element of all antitrust suits brought by private parties seeking damages under *Section 4 of the Clayton Act*, *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN16[] **Standing, Requirements**

Termination of a higher priced supplier, without more, is not antitrust injury. The threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN17[] **Conspiracy to Monopolize, Elements**

To allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a specific time, place, or person involved in the alleged conspiracies to give a defendant seeking to respond to allegations of a conspiracy an idea of where to begin.

Antitrust & Trade Law > Sherman Act > Claims

HN18[] **Sherman Act, Claims**

Antitrust claims must make economic sense.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Supplemental Jurisdiction

HN19[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

In the usual case in which all federal-law claims are eliminated before trial, the balance of factors will point toward declining to exercise jurisdiction over the remaining state-law claims. However, the court cannot exercise its discretion under *28 U.S.C.S. § 1367(c)* until it has dismissed all claims over which it has original jurisdiction.

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Judges: J. Michael Seabright, Chief United States District Judge.

Opinion by: J. Michael Seabright

Opinion

AMENDED ORDER GRANTING IN PART DEFENDANTS NEXTERA ENERGY, INC.'S AND HAMAKUA ENERGY PARTNERS, L.P.'S MOTIONS TO DISMISS, ECF NOS. 73 & 95, WITH LEAVE TO AMEND

I. INTRODUCTION

Plaintiff Hu Honua Bioenergy, LLC ("Hu Honua") contracted with Defendant Hawaii Electric Light Company, Inc. ("HELCO") to build an independent power plant run on biomass to supply energy to HELCO on the Big Island of Hawaii. Given problems with the construction contractor and other labor issues, Hu Honua was unable to complete the facility on time. After unsuccessful negotiations to extend deadlines, HELCO cancelled the contract.

Hu Honua filed this suit contending that HELCO's cancellation was, among other things, the result of an illegal conspiracy in violation of antitrust laws. **[*3]** The suit alleges federal antitrust and related state-law claims against HELCO; Hawaiian Electric Company, Inc. ("HECO"); Hawaiian Electric Industries, Inc. ("HEI"); NextEra Energy, Inc. ("NextEra"); and Hamakua Energy Partners, L.P. ("HEP"). It also alleges that HELCO breached the contract by refusing to extend deadlines under the contract's terms.

The court now addresses Motions to Dismiss brought by NextEra and HEP under *Federal Rule of Civil Procedure 12(b)(6)*. ECF Nos. 73, 95. Based on the following, the Motions are GRANTED in part. The federal antitrust claims are DISMISSED as to NextEra and HEP, with leave to amend. The Motions are DENIED without prejudice as to the state-law claims against NextEra and HEP. Hu Honua may file a Second Amended Complaint by January 29, 2018.[1]

II. BACKGROUND

A. Factual Background

Hu Honua's 96-page First Amended Complaint ("FAC"), ECF No. 27, describes the structure of the electric utility market in Hawaii —in particular, on the island of Hawaii (the Big Island)—and alleges in detail a scheme (although ultimately deficiently, at least as to its antitrust claims) whereby HELCO's cancellation of the contract not only breached certain of its terms but was also part of a conspiracy or conspiracies **[*4]** among NextEra, HEP and the other Hawaiian Electric Defendants[2] to monopolize or restrain trade in violation of antitrust laws.

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[1] This Order amends and supersedes the court's December 19, 2017 Order regarding NextEra's and HEP's Motions to Dismiss to add minor changes as reflected in the court's concurrently-filed Order (1) Granting In Limited Part Plaintiff Hu Honua Bioenergy, LLC's First Amended Motion for Reconsideration or Clarification, ECF No.133; and (2) Amending December 19, 2017 Order.

[2] The court sometimes refers to HELCO, HECO, and HEI collectively as the "Hawaiian Electric Defendants."

After suit was filed, Hu Honua and the Hawaiian Electric Defendants reached a settlement in conjunction with a renegotiated contract for Hu Honua to complete its biomass power plant. ECF No. 122. Consummation of that settlement is awaiting final completion of the approval process involving the Hawaii Public Utilities Commission ("PUC").[3] Perhaps because of that settlement, the Hawaiian Electric Defendants have not moved to dismiss the FAC. (Earlier, they filed a motion seeking to compel arbitration, but asked the court to hold that motion in abeyance, pending consummation of the settlement, ECF No. 126). Because only NextEra and HEP have moved to dismiss, the court focuses on setting forth the essential factual allegations against them. That is, the court need not (and does not) reiterate all the details alleged in the lengthy FAC as to the Hawaiian Electric Defendants, but describes those facts necessary to put the claims against NextEra and HEP into proper context. And some of the relevant factual allegations are set forth later, in the appropriate discussion **[*5]** sections analyzing particular claims. For present purposes, the court assumes as true any well-pleaded factual allegations set forth in the FAC.

1. The Basic Structure of the Electric Utility Market in Hawaii

Unlike on the continental United States—where states and utilities may utilize large interconnected, interstate power grids comprised of high-voltage transmission lines —each island in the State of Hawaii has its own isolated grid and power supplies. FAC ¶¶ 14-16. HECO is such an electric utility providing electricity to consumers on the island of Oahu; likewise, HELCO is the electric utility providing electricity to the Big Island. *Id.* ¶ 17. (Although not a defendant, Maui Electric Company ("MECO") powers the islands of Maui, Lanai, and Molokai. *Id.*[4]) HEI is a holding company, with HECO as one of its subsidiaries. In turn, HELCO and MECO are subsidiaries of HECO. *Id.* ¶¶ 3-5.

Power supplied to electric utilities (which utilities then provide to retail consumers) is divided into two basic categories: "firm power" and "intermittent power." *Id.* ¶ 18. "Firm power" (generated by fossil fuels, geothermal, biomass, and similar sources) is power that is intended always to be available **[*6]** during "the period covered by a guaranteed commitment to deliver." *Id.* In contrast, "intermittent" power consists of sources such as wind or solar that are not always available, "with output controlled by the natural variability of the energy resource rather than power dispatched based on system requirements." *Id.*

Much of Hawaii's power currently comes from fossil fuels. "77% of Hawaii's electricity is generated by petroleum, making the State's utility the most oil dependent in the country. All of the petroleum consumed in the State is generated from crude oil imported from South East Asia and other off-shore locations." *Id.* ¶ 11. And so, "[t]o mitigate the risk of dependence on foreign fuel sources, the Hawaii state government policies and legislation have sought to place greater emphasis on the development of renewable energy resources[.]" *Id.* ¶ 13. "[I]n June 2015, the Hawaii Legislature amended Hawaii's Renewable Portfolio Standard statute to require Hawaii to move towards achievement of 100% renewable energy by 2045." *Id.*

HELCO serves approximately 85,000 customers on the Big Island. *Id.* ¶ 21. "HELCO currently owns fossil fuel plants that generate in excess of 65% of the [Big] Island's **[*7]** dispatchable firm electrical capacity." *Id.* Specifically, it "owns and operates six oil-fired power generation plants, accounting for 184 MW [(megawatts)] of firm power capacity[.]" *Id.* ¶ 28. "In addition to its own fossil fuel plants, HELCO purchases firm power generation capacity [and electrical energy] from HEP, which owns a 60 MW fossil-fuel combined cycle power plant, pursuant to a 1997 Power Purchase Agreement." *Id.* ¶ 22. "HEP is one of only two independent power producers ('IPPs') on the Island of Hawaii that provides firm power generating capacity." *Id.* ¶ 23. The other is Puna Geothermal Venture "whose power capacity is 34.6 MW, only part of which is firm." *Id.*

"HELCO is compensated differently for the power that it generates itself through the power plants that it owns versus the power that it purchases from IPPs." *Id.* ¶ 32. "In fact, as a result of HELCO's ability to recover its capital costs, and an annual fixed rate of return on those costs, HELCO receives more revenue through the rates paid by

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[3] The PUC has approved the renegotiated contract, and construction of the facility is ongoing, although the final settlement with the Hawaiian Electric Defendants is awaiting disposition of a related state-court appeal of the PUC-approval. *See* ECF No. 122.

[4] The island of Kauai is served by Kauai Island Utility Cooperative, which is an entity not related to any of the Defendants.

its customers for the sale of power that HELCO generates from running its own units than from the power it purchases from IPPs." *Id.*

"In Hawaii, IPPs must sell power to a public utility **[*8]** because Hawaii's utilities have not permitted the use of their grids for the 'wheeling' or transmission of power to power purchasers, and because it would be economically impractical for IPPs to build their own transmission and distribution system." *Id.* ¶ 24. "As a result, HELCO is not only the monopoly retail seller of electricity on the Island of Hawaii, but also the monopoly owner of electricity transmission and distribution infrastructure and monopoly purchaser of wholesale electricity." *Id.*

2. The Hu Honua Power Purchase Agreement

In May 2012, Hu Honua entered into a Power Purchase Agreement for Renewable Dispatchable Firm Energy and Capacity ("the Hu Honua PPA" or "the Contract") with HELCO under which Hu Honua would develop an independent power plant on the Hamakua Coast of the Big Island, with a renewable biomass fuel source (e.g., eucalyptus trees) of firm power. *Id.* ¶¶ 1, 34, 38. "The trees were to be 100% locally grown and harvested on a sustainable rotational basis and would have provided an important means to reduce Hawaii's dependence on imported fossil fuels." *Id.* ¶ 34.

Hu Honua's power plant would supply HELCO with "no less than 10 MW of electricity capacity at all times," **[*9]** with the facility having a "maximum 'Available Capacity' of approximately 30 net MW." *Id.* ¶ 46. Hu Honua began construction in late October 2012, but was unable to complete the facility by the end of 2015, as contemplated by the Hu Honua PPA, because of disputes with its construction contractor, labor union issues, and related litigation. *Id.* ¶ 51, 58.[5] After unsuccessful negotiations between Hu Honua and HELCO to extend milestone dates as provided in the Hu Honua PPA (where milestone-date extension requests "shall not be unreasonably withheld," *id.* ¶ 42), HELCO cancelled the Contract on March 1, 2016. *Id.* ¶ 60.

3. NextEra's Proposed Merger with HEI, and HELCO's Proposed Purchase of HEP's Power Plant

Meanwhile, two other relevant things happened: First, "the proposed merger" —on December 3, 2014, NextEra, which is a large Florida-based utility holding company, and HEI entered into an Agreement and Plan of Merger (the "NextEra/HEI Merger Agreement" or "Merger Agreement") under which HEI subsidiaries HELCO and HECO would become wholly-owned subsidiaries of NextEra. *Id. ¶¶ 6, 52*.[6] And second, "the proposed purchase" —on December 23, 2015, HECO and HELCO publicly disclosed that HELCO would **[*10]** purchase HEP's 60 MW fossil-fuel power plant for over $88 million. *Id. ¶¶ 22, 91*.[7]

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[5] HEP provides a listing from Hawaii state court records of "28 different legal actions against Hu Honua during this time period, including one that resulted in Hu Honua losing control of the facility until it paid a stipulated judgment." ECF No. 95-1, Mem. at 8-9 (citing Egesdal Decl., Ex. D, ECF No. 95-6). Although the court has not reviewed the substance of these actions, the court takes judicial notice of the existence and number of state court actions. *Lee v. City of L.A., 250 F.3d 668, 689 (9th Cir. 2001)*. And, according to the FAC, "Hu Honua's disputes with its former construction contractor and the labor union jurisdiction dispute caused an irretrievable loss of time . . . [such that] Hu Honua realized that it would not be able to achieve two milestone[] dates set forth in the PPA[.]" FAC ¶ 58.

[6] The Merger Agreement required approval by the PUC. But after several months of hearings, the PUC rejected the Merger Agreement on July 15, 2016. *See, e.g.*, Kathryn Mykleseth, *PUC Rejects NextEra's Purchase of Hawaiian Electric, Honolulu Star-Advertiser*, July 15, 2016 (*available at* http://www.staradvertiser.com/2016/07/15/business/business-breaking/puc-rejects-nexteras-purchase-of-hawaiian-electric/(last visited Dec. 15, 2017).

[7] On May 4, 2017, the PUC rejected HELCO and HECO's application to approve the purchase of HEP's facility. *See* Egesdal Decl., Ex. B., ECF No. 95-4 (*In re Hawaiian Electric Co. (Hawaii P.U.C. May 4, 2017) (Decision and Order No. 34536), 2017 Haw. PUC LEXIS 236*). The court takes judicial notice of publicly-available decisions of the PUC. *See, e.g., Bartolotti v. Maui Mem'l Med. Ctr., 2015 U.S. Dist. LEXIS 98121, 2015 WL 4545818, at *3 (D. Haw. July 28, 2015)* (***HN1***[] "The court may 'take

"Article V of the Merger Agreement addresses certain issues relating to HECO's conduct of its and its subsidiaries' business during the pendency of the merger. Among other things, Article V prohibited HECO from engaging in several activities without NextEra's prior consent." *Id. ¶ 56*. Specifically, "§ 5.01(a)(xii) provides that HECO/HELCO shall not:

(1) enter into, terminate or amend in any material respect any material Contract,
(2) consent to any extension or continuation of any material Contract . . . or
(3) waive any material right on any material Contract[.]"

FAC ¶ 56.[8] Based on this consent provision, Hu Honua alleges that NextEra "exercised total control over HECO's/HELCO's conduct of their important business actions and material agreements, including the fate of Hu Honua's PPA." *Id.*

As for HELCO's proposed purchase of the HEP power plant, Hu Honua alleges that its biomass facility "would have been a direct competitor to the HEP Power Plant in the supply of wholesale electricity capacity to HELCO." *Id. ¶ 90*. Hu Honua alleged "[o]n information and belief, HELCO planned to acquire the HEP Power Plant in order to further HELCO's strategy to increase its monopoly over power generation on the Island of Hawaii." *Id. ¶ 92*. "On information and belief, HELCO favors its own power generation instead of purchasing power from Hu Honua, because HELCO generates more profit by owning its own power generation." *Id.* And, as for HEP's motivation, it alleges that

> HEP had its own reasons for wanting the Hu Honua PPA terminated. As early as 2012, HEP recognized that the proposed Hu Honua Facility was a direct competitive threat. On September 19, 2012, it filed a motion to intervene in the Commission's **[*12]** docket for HELCO's Application for Approval of the Hu Honua PPA, which it vigorously opposed on the grounds that "[t]he introduction of the proposed Hu Honua plant would, according to [the] HELCO plan outlined in its application, reduce the HEP Plant's dispatch." In sum, HEP, as the operator of the largest power plant on the Island, attempted unsuccessfully to exclude Hu Honua as a competitor in the power generation market. It was presented with another opportunity three years later to accomplish that objective. Hu Honua is informed and believes, and on that basis alleges, that HEP participated in and supported the termination of Hu Honua's PPA, as alleged [in the FAC].

Id. ¶ 99.[9]

4. Hu Honua Files This Action

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judicial notice of 'matters of public record[,]' 'as long as the facts noticed are not 'subject to reasonable dispute.'") (quoting *Intri—Plex Techs., Inc. v. Crest Grp., Inc., 499 F.3d 1048, 1052 (9th Cir. 2007))*; *id.* ("'Matters of public record that may be judicially noticed include records and reports of administrative bodies,' and documents filed with courts, 'both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue.'") (quoting *Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994)* & *United States v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992))*.

[8] Paragraph 5.01(a) of the Merger Agreement also provides that such consent "shall not be unreasonably withheld, conditioned or delayed." ECF No. 73-3 at 5, Merger Agreement at 38. And Paragraph 5.01(c) reads in part:

> No Control of [HEI's] Business. [NextEra] acknowledges and agrees that (i) nothing contained in this Agreement is intended to give [NextEra], directly or indirectly, the right to control or **[*11]** direct the operations of [HEI] or an [HEI] Subsidiary prior to the Effective Time and . . . prior to the Effective Time, [HEI] shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and [HEI's] Subsidiaries' respective operations.

ECF No. 73-3 at 10, Merger Agreement at 43.

[9] HEP challenges the FAC's allegation that it "vigorously opposed" Hu Honua's application, pointing to a public document (a 2012 "Statement of Position" before the Hawaii PUC) stating in part: "HEP does not take a position as to the prudence of approving the power purchase agreement. . . . Rather, HEP's position is that if the Commission *does* approve the Hu Honua PPA, it should not do so without requiring that HELCO adequate[ly] consider and plan to deal with the excess generating capacity that the Hu Honua asset would add[.]" Egesdal Decl. Ex. D at 2, ECF No. 95-3 at 3.

After HELCO cancelled the Hu Honua PPA in March of 2016 (and after the PUC rejected the proposed NextEra/HEI Merger Agreement in July 2016), Hu Honua filed the original Complaint in this action on November 30, 2016, ECF No. 1. It filed the FAC on January 27, 2017, ECF No. 27, alleging the following counts:

- Count One —Violation of *Section Two of the Sherman Act*, *15 U.S.C. § 2* (attempted monopolization, conspiracy to monopolize, and monopolization) against the Hawaiian Electric Defendants **[*13]** and NextEra;

- Count Two —Violation of *Section One of the Sherman Act*, *15 U.S.C. § 1* (conspiracy to restrain trade) against all Defendants;
- Count Three —Breach of Contract against HELCO;
- Count Four —Promissory Estoppel against HELCO;
- Count Five —Breach of the Covenant of Good Faith and Fair Dealing against HELCO;
- Count Six —Breach of Fiduciary Duty against HELCO;
- Count Seven —Tortious Interference with Contract against NextEra;
- Count Eight —Unfair Competition in Violation of HRS Chapter 480 against All Defendants;
- Count Nine —Declaratory Relief against HELCO; and
- Count Ten —Conversion against HELCO.

FAC at 69-93. Hu Honua claims it was damaged "in the amount of its investment of $120 million in the plant, plus lost profits of $435 million." *Id. ¶ 1*. It seeks treble damages and attorney fees, among other injunctive relief. *Id.* at 94-95.

Hu Honua alleges that HELCO's cancellation of the Hu Honua PPA was illegal under the *Sherman Act* in two ways. First, it alleges that, in conjunction with the proposed Merger Agreement, NextEra conspired with Hawaiian Electric Defendants to monopolize the market for wholesale firm power on the Island of Hawaii, in violation of *15 U.S.C. § 2*. FAC ¶¶ 135-55. Second, it alleges that HEP (with the proposed **[*14]** purchase by HELCO of HEP's power plant), NextEra and the Hawaiian Electric Defendants conspired to restrain trade in the market for wholesale firm power on the Big Island, in violation of *15 U.S.C. § 1*. *Id. ¶¶ 156-65*.

B. Procedural History

On February 16, 2017, the Hawaiian Electric Defendants filed a Motion to Compel Arbitration, ECF No. 33, which was set for hearing on May 22, 2017. But on May 12, 2017, the Hawaiian Electric Defendants notified the court of the preliminary settlement between them and Hu Honua, and the hearing was continued until August 7, 2017, to allow the Hawaii PUC to consider the renegotiated Hu Honua PPA. ECF No. 76, 77.

NextEra filed its Motion to Dismiss on May 3, 2017, ECF No. 73, and HEP filed its Motion on June 2, 2017, ECF No. 95. The Motions were also set for hearing on August 7, 2017. (Discovery has been stayed pending a ruling on these Motions. ECF Nos. 59, 105.) Hu Honua filed its Oppositions on July 17, 2017, ECF Nos. 108-09, and Replies were filed on July 24, 2017, ECF Nos. 112-13. On July 17, 2017, the Hawaiian Electric Defendants filed short joinders in both Motions to Dismiss. ECF Nos. 106-07.

The August 7, 2017 hearing was continued to allow further time for **[*15]** PUC approval of the renegotiated Hu Honua/HELCO PPA, ECF Nos. 115, 117, and was later rescheduled for November 6, 2017, upon request by the parties. ECF No. 119. The court then granted a request to hold the Hawaiian Electric Defendants' Motion to Compel Arbitration in abeyance, pending finalization of the settlement, ECF No. 126.[10] The court, however, proceeded to hear the Motions to Dismiss on November 6, 2017.

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[10] Given the pending settlement between Hu Honua and the Hawaiian Electric Defendants, the court is likewise deferring ruling on the joinders by Hawaiian Electric Defendants. For administrative purposes, as discussed at the November 6, 2017 hearing, the joinders are DENIED as MOOT without prejudice. ECF No. 127.

III. STANDARD OF REVIEW

A. *Rule 12(b)(6)*'s Plausibility Standard

HN2[] *Federal Rule of Civil Procedure 12(b)(6)* allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." Such a dismissal is proper "'based on the lack of a cognizable legal theory or the absence of sufficient facts alleged.'" *UMG Recordings, Inc. v. Shelter Capital Partners, LLC, 718 F.3d 1006, 1014 (9th Cir. 2013)* (quoting *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988))*.

In resolving a *Rule 12(b)(6)* motion, the court "accept[s] as true all well-pleaded allegations of material fact, and construe[s] them in the light most favorable to the non-moving party." *Sateriale v. R.J. Reynolds Tobacco Co., 697 F.3d 777, 784 (9th Cir. 2012)* (quoting *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010))*. But a "formulaic recitation of the elements of a cause of action" will not defeat a motion to dismiss. *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 570*). This tenet —that the court must accept as true all of the allegations **[*16]** contained in the complaint —"is inapplicable to legal conclusions." *Id.* Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly, 550 U.S. at 555*).

B. The Antitrust Context

HN3[] "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly, 550 U.S. at 557*). Determining plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id. at 679* (citation omitted). And in analyzing these principles in the *antitrust* context, *Twombly* recognized that "proceeding to antitrust discovery can be expensive," *550 U.S. at 558*, and reiterated that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Id.* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528 n.17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

Thus, ***HN4***[] although *Twombly* did not impose a heightened pleading standard for antitrust conspiracy cases, *550 U.S. at 569 n.14*, in this context "[a]llegations of facts that could **[*17]** just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1049 (9th Cir. 2008)* (citing *Twombly, 550 U.S. at 553-58 & n.5*); *see also* *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1130 (9th Cir. 2015)* ("We cannot, however, infer an anticompetitive agreement when factual allegations 'just as easily suggest rational, legal business behavior.'" (quoting *Kendall, 518 F.3d at 1049*)). "[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 n.21, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (citations omitted). And so, "[w]hen considering plausibility, courts must also consider an 'obvious alternative explanation,' for defendant's behavior." *Eclectic Props. E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)* (quoting *Iqbal, 556 U.S. at 682*).

C. General Principles

HN5[] *Rule 12(b)(6)* review is generally limited to the contents of the complaint. *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*. Nevertheless, courts may "consider certain materials —documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. Courts may also "take into account 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to **[*18]** the plaintiff's pleading.'" *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1160 (9th Cir. 2012)* (quoting *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)* (brackets omitted)).

HN6[] When a complaint is dismissed, the court "'should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts.'" *Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000)* (en banc) (quoting *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995))*. Leave to amend "is properly denied, however, if amendment would be futile." *Carrico v. City & Cty. of S.F., 656 F.3d 1002, 1008 (9th Cir. 2011)*.

IV. DISCUSSION

A. Count One (Monopolization) Fails to State a Plausible Claim Against NextEra

Section 4 of the Clayton Act allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages and costs of suit. *15 U.S.C. § 15(a)*. Count One asserts such a claim against each of the Hawaiian Electric Defendants and NextEra based upon alleged violations of *§ 2* of the Sherman Act, which makes it illegal for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States[.]" *15 U.S.C. § 2*. Hu Honua claims that "HELCO's, along with HECO's and HEI's, conduct and practices as described [in the FAC], and as controlled by NextEra, were undertaken for the purpose and have had **[*19]** the effect of monopolizing the market for firm generation of electricity on the Island of Hawaii." FAC ¶ 137. It alleges that "NextEra entered into a contract, combination, or conspiracy with HELCO in furtherance of HELCO's unlawful monopolizing and attempting to monopolize the relevant market in violation of *Section 2*," FAC ¶ 138, where "the relevant market" is "the market for wholesale firm baseload power generation on the Island of Hawaii." FAC ¶ 139.[11]

HN7[] A *§ 2* monopolization claim has three essential elements: "'(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.'" *Name.Space, Inc., 795 F.3d at 1131* (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 998 (9th Cir. 2010))*. "Similarly, to state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: '(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.'" *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 506 (9th Cir. 2010)* (quoting *Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 893 (9th Cir. 2008))*. And "[t]o prove a conspiracy to monopolize in violation of *§ 2*, [a plaintiff] must show four elements: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) **[*20]** the specific intent to monopolize; and (4) causal antitrust injury." *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)* (citation omitted).

1. The FAC Fails to State a Claim for Monopolization and Attempted Monopolization Against NextEra

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[11] As set forth previously, the Hawaiian Electric Defendants did not file a motion to dismiss (having instead filed joinders in NextEra's and HEP's Motions). Again — because the court has held any motions by the Hawaiian Electric Defendants in abeyance pending the settlement between Hu Honua and the Hawaiian Electric Defendants — this Order focuses on the FAC's allegations against NextEra and HEP. That is, the court is not specifically ruling on whether any claims (antitrust or otherwise) are stated (or not) as to the Hawaiian Electric Defendants.

NextEra argues that any monopolization and attempted monopolization claims against it fail at the outset because — as a power producer in *Florida* —it was never a competitor with Hu Honua in the wholesale firm baseload power generation market on the *island of Hawaii. See, e.g., Name.Space, Inc., 795 F.3d at 1131* ("Because [defendant] is not a competitor in any of the three markets, they cannot serve as the basis for a *§ 2* monopoly claim.") (citing *Mercy-Peninsula Ambulance, Inc. v. San Mateo Cty., 791 F.2d 755, 759 (9th Cir. 1986)* ("The gravamen of a *section 2* claim is the deliberate use of market power by a competitor[.]") (other citation omitted)); *Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003)* ("'[T]he party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator[.]'") (quoting *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987))*; *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1075 (11th Cir. 2004)* ("There is no question that [defendant] does not participate in the Spanish-language radio market. Thus, [defendant] cannot *attempt* to monopolize that market.") (emphasis added) (cited with approval in *Name.Space, Inc., 795 F.3d at 1131*).

In response, Hu Honua clarifies that it "only asserts a claim for *conspiracy* to monopolize against NextEra." ECF No. 109, **[*21]** Opp'n at 34-35 n.8 (emphasis added). In any event, the FAC fails to allege a prerequisite (competitor in the same market) to a *§ 2* monopolization or attempted monopolization claim against NextEra. Accordingly, Count One, to the extent it alleges *§ 2* claims for monopolization or attempted monopolization against NextEra, is DISMISSED with prejudice.[12] The court thus focuses on whether the FAC adequately alleges a conspiracy to monopolize as to NextEra.

2. Allegations of Conspiracy to Monopolize Against NextEra Also Fail

a. No specific intent to monopolize

NextEra initially challenges the conspiracy to monopolize claim by focusing on the third element of a *§ 2* conspiracy — "the specific intent to monopolize." *Paladin Assocs., Inc., 328 F.3d at 1158*. NextEra argues that, just because it agreed to merge with HEI and then approved HELCO's termination of Hu Honua's PPA, the conspiracy claim fails because the FAC lacks any facts that, even if true, would plausibly establish that NextEra specifically intended to monopolize the wholesale firm power generation market on the Island of Hawaii. *See Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1437 n.8 (9th Cir. 1995)* ("To prove a conspiracy to monopolize, Rebel must show that the independent dealers had the specific intent to conspire to monopolize; it is not enough **[*22]** to show that the dealers merely agreed to go along with ARCO's pricing."); *see also, e.g., Syufy Enters. v. Am. Multicinema, Inc., 793 F.2d 990, 1000 (9th Cir. 1986)* ("Nor is there any showing that any of the distributors shared with Syufy a common purpose in monopolizing the hardtop theater market in the San Jose area.").

In response, Hu Honua contends that NextEra's specific intent to monopolize can be inferred from the FAC's allegations that HELCO "has an incentive to favor its own generation over that of competitor power generation," FAC ¶ 142, and that incentive is shared by NextEra as part of its own business strategy. ECF No. 109, Opp'n at 33. Hu Honua emphasizes the FAC's allegations that, during the same time-frame as the proposed NextEra/HEI Merger Agreement, HECO (1) terminated three pending solar power purchase agreements on Oahu (similarly to HELCO's cancellation of Hu Honua's PPA), and (2) submitted plans to the Hawaii PUC to convert some power plants on Oahu to liquefied natural gas, FAC ¶¶ 128, 131, where NextEra also has natural gas assets, and planned to "help HECO execute on plans to bring liquid natural gas to Hawaii" with the merger. FAC ¶ 55 (citation omitted).

But even assuming the FAC adequately alleges that the *Hawaiian Electric Defendants* ***[*23]*** possessed or sought a monopoly in the relevant power production market, there are no facts pled that would suggest *NextEra* specifically intended to monopolize that market, merely by consenting to HELCO's termination of the Hu Honua PPA. *See Rebel Oil Co., 51 F.3d at 1438 n.8* ("[I]t is not enough to show that [a defendant] merely agreed to go along.");

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[12] To be clear, this dismissal is only as to monopolization or attempted monopolization claims against NextEra; the court is not reaching to any extent whether such claims are, or could be, properly stated against any other Defendant.

Syufy Enters., 793 F.2d at 1000 ("[A] supplier who licenses a product to another does not join the licensee in a conspiracy to monopolize merely because the licensee turns around and exploits the license for its own monopolistic purposes.").

In this regard, it is not enough to suggest—as Hu Honua does—that NextEra shared a motive to increase prices or profits with a similar strategy. *See, e.g.,* In re Baby Food Antitrust Litig., 166 F.3d 112, 133 (3d Cir. 1999) (rejecting argument, in a price-fixing context, that a motive to achieve higher prices could demonstrate conspiracy because if that were true "every company in every industry would have such a 'motive.'"). **HN8**[] "Motivation to enter a conspiracy is never enough to establish a traditional conspiracy." VI Philip E. Areeda & Herbert Hovenkamp, ***Antitrust Law****: An Analysis of Antitrust Principles and Their Application* ¶ 1411 (4th ed. 2017).[13]

b. No antitrust injury

More important, even if the FAC alleged enough factual content **[*24]** to support an inference that NextEra specifically intended to monopolize the market for wholesale firm power on the Big Island, the § 2 conspiracy claim nevertheless fails for lack of the fourth element — "causal antitrust injury." Paladin Assocs., Inc., 328 F.3d at 1158. **HN9**[] To establish such injury, Hu Honua must allege facts that show "(1) unlawful conduct, (2) causing an injury to [Hu Honua], (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013) (quoting Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)). The inquiry focuses on injury to "competition not competitors." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)); *see also* Paladin Assocs., Inc., 328 F.3d at 1158 ("Where the defendant's conduct harms the plaintiff without adversely affecting competition generally, there is no antitrust injury."). This requirement stems from "the principle that the antitrust laws' prohibitions focus on protecting the competitive process and not on the success or failure of individual competitors." *Cascade Health Sols., 515 F.3d at 902* (citations omitted).

Applying these principles, the FAC's allegations of harm to the "competitive process" in the market for wholesale firm power on the Big Island are implausible. Notably, as alleged in the FAC, Hu Honua's biomass power plant was a "Qualifying Facility under the federal Public Utility Regulatory Policies Act ("PURPA") **[*25]** [.]" FAC ¶ 45. As such a facility, "Hu Honua was entitled to receive special rate and regulatory treatment." *Id.* (Indeed, the Hu Honua PPA was negotiated under a *waiver* by the PUC from its competitive bidding framework. FAC ¶ 49).

HN10[] PURPA was enacted in 1978, among other reasons, to "ensure sustained long-term economic growth by shifting the nation's reliance on oil and gas to more abundant domestically produced fuels." Greensboro Lumber Co. v. Georgia Power Co., 643 F. Supp. 1345, 1371 (N.D. Ga. 1986) (citation omitted). To support development of non-traditional generating facilities, PURPA and its implementing regulations

> require electric utilities (a) to sell electric energy and capacity to qualifying facilities upon request, (b) to purchase electric energy and capacity from qualifying facilities and (c) to make all necessary interconnections with any qualifying facility in order to accomplish the aforementioned purchases and sales provided that each qualifying facility pay its share of the interconnection costs.

Id. at 1372 (footnotes omitted). PURPA's "regulations mandate that an electric utility offer a qualifying facility built after the enactment of PURPA a purchase rate equal to, but no more than, the utility's 'full avoided costs.'" **[*26]** *Id.* (citations and footnote omitted); *see also* Schuylkill Energy Res., Inc. v. Penn. Power & Light Co., 113 F.3d 405, 411 (3d Cir. 1997) ("Pursuant to regulations promulgated . . . under the authority of PURPA, PP&L is required to purchase electric energy from SER."). The Hu Honua PPA contained such power-purchase provisions. *See* FAC ¶ 46.

[13] Furthermore, as analyzed in detail when the court considers Count Two to follow in discussion section B.2.a, the FAC's allegations that NextEra totally controlled HELCO's decisions after the Merger Agreement lack plausibility and thus cannot form the basis of NextEra's specific intent to monopolize.

Effectively, then, Hu Honua does not (or would not) "compete" in the power production market with its qualifying facility, and thus competition could not be harmed by termination of its PPA (even if the FAC otherwise states a claim for breach of contract against HELCO). As *Greensboro Lumber Co.* explained

> In establishing PURPA . . . Congress did not intend to place qualifying facilities in competition with public utilities. To the contrary, Congress has sought to encourage the development of qualifying facilities by insulating them from competition. Qualifying facilities are not authorized under PURPA to sell at retail.

643 F. Supp. at 1373 (citation omitted); *see also* Schuylkill Energy Res., 113 F.3d at 415 (finding no antitrust injury for PURPA power-producer, primarily because "state and federal laws prohibit [plaintiff] from competing in the relevant market"); Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp., 908 F. Supp. 1194, 1207 (W.D.N.Y. 1995) (finding no likelihood of an antitrust injury at a preliminary injunction stage, reasoning in part that "[t]he PPA, which [PURPA-producer] **[*27]** Kamine is attempting to enforce, was not created as a result of market forces or a competitive process; it is a creature of a statutory scheme [(PURPA)] set up for reasons that have nothing to do with competition *per se*"); Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc., 969 F. Supp. 907, 915 (D.N.J. 1997) (finding no antitrust injury in action brought by PURPA-producer, reasoning that "Defendant's actions may have caused injury to plaintiff, but they did not cause injury to competition in a defined market [and was] not the sort of injury the antitrust laws were meant to prevent"), *rev'd on other grounds*, 159 F.3d 129 (3d Cir. 1998)). "PURPA was created as a vehicle to reduce the nation's dependency on foreign oil and to conserve energy, not to foster competition." Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1204.[14]

Hu Honua attempts to distinguish this authority by arguing that it is not claiming harm to competition in the *retail* market (i.e., energy to consumers who pay HELCO for electricity), but rather harm to competition in the wholesale market for firm power to HELCO.[15] But Hu Honua is largely not a competitor with HELCO in that market either—Hu Honua would have been HELCO's *supplier*, with HELCO in turn providing electricity to retail rate-paying consumers. *See* Schuylkill Energy Res., 113 F.3d at 415 (rejecting argument that defendant's policy of favoring its **[*28]** owned-power producers over an independent producer could harm competition because "[plaintiff] is not [defendant's] *competitor* —it is [defendant's] *supplier*").

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[14] The court is not suggesting that, just because Hu Honua's facility was a qualifying facility under PURPA, the antitrust laws can never apply. *See* 16 U.S.C. § 2603(1) ("Nothing in this Act or in any amendment made by this Act affects — (1) the applicability of the antitrust laws to any electric utility[.]"). Rather, ***HN11***[] "while PURPA was not intended to *protect* utilities from the reach of the antitrust laws, neither was it meant to *create* antitrust liability where none existed previously. In short, PURPA was designed to be antitrust-neutral." Kamine/Besicorp Allegany L.P., 908 F. Supp. at 1204. And, in this instance, "[h]owever consonant with PURPA's aims it may be to shield a [qualifying facility] like [plaintiff's] from price competition, that end is not something that the antitrust laws were designed to protect." Id. at 1205.

[15] Nevertheless, the FAC's allegations of antitrust injury rely in significant part on harm to retail consumers. Specifically, the FAC alleges that:

> HELCO's anticompetitive acts have caused substantial economic injury to Hu Honua and have also injured competition in the relevant markets by, inter alia, foreclosing, lessening, and eliminating potential competition *and depriving consumers from securing lower rates paid for power*.

FAC ¶ 151 (emphasis added).

> The aforesaid conduct of HELCO has produced antitrust injury to Hu Honua, competition, and consumers, and unless enjoined by this Court, will continue to produce at least the following anticompetitive, exclusionary and injurious effects upon competition in interstate commerce:
>
> (a) competition for the wholesale generation of power on the Island of Hawaii has been substantially and unreasonably restricted, lessened, foreclosed, and eliminated, *and consumers will be forced to pay supra-competitive prices for power as a result*;

FAC ¶ 152 (emphasis added).

The court also recognizes that HELCO is also a supplier to itself (through HELCO-owned power plants). But it is difficult to find plausible harm to competition from Hu Honua in that limited "market," even considering that HEP also **[*29]** provides wholesale power with its independent fossil-fuel power plant. Indeed, the cases cited previously also found no antitrust injury where independent power producers also claimed harm in wholesale markets. *Greensboro Lumber Co.* reasoned that,

> [I]n the wholesale market, PURPA establishes a guaranteed price which is equal to, or greater than, the price that would be received in a competitive market. In addition to providing a guaranteed price to qualifying facilities, PURPA also provides a guaranteed market for the power generated by qualifying facilities by making it a requirement that utilities purchase available energy and capacity from qualifying facilities before buying power from anywhere else; *no amount of price cutting or other competition can change this result*.

643 F. Supp. at 1373 (emphasis added). "In general, qualifying facilities produce a component which is used by public utilities and consume utility service; but, they are not competitors of public utilities." *Id.; see also* Schuylkill Energy Res., 113 F.3d at 416-17; Kamine/Besicorp Allegany, 908 F. Supp. at 1203-05. *But cf.* Long Lake Energy Corp. v. Niagara Mohawk Power Corp., 700 F. Supp. 186, 188 (S.D.N.Y. 1988).

Additionally, the primary "antitrust injury" that Hu Honua alleges from the purported loss of competition for wholesale generation of power — "consumers will be forced to pay supra-competitive prices for **[*30]** power as a result," FAC ¶ 152(a) — is not only speculative (depending upon an assumption, for example, that "fossil fuel costs on the Island of Hawaii could exceed $250 per barrel by 2037 and over $300 per barrel by 2045," FAC ¶ 122) but is also largely controlled by the Hawaii PUC. *See* HRS § 269-16(a) ("All rates, fares, charges, classifications, schedules, rules, and practices made, charged, or observed by any public utility or by two or more public utilities jointly shall be just and reasonable and shall be filed with the public utilities commission."); HRS § 269-16.22 ("All power purchase costs, including costs related to capacity, operations and maintenance, and other costs that are incurred by an electric utility company, arising out of power purchase agreements that have been approved by the public utilities commission and are binding obligations on the electric utility company, shall be allowed to be recovered by the utility from the customer base of the electric utility company through one or more adjustable surcharges, which shall be established by the public utilities commission."). This alleged injury "is simply too speculative to permit relief under the antitrust laws." City of Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 269 (3d Cir. 1998); *see also* Schuylkill Energy Res., 113 F.3d at 414 ("[W]hether and **[*31]** to what extent [the utility] maintains an artificially high rate base [by favoring its own facilities] is not within the purview of the antitrust laws," and "[d]epriving consumers of 'energy sources' is not, however, cognizable antitrust injury.").

HN12[] "[T]he Sherman Act does not attack every monopoly." Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 547 (9th Cir. 1991) (citations omitted). That is, "[t]he antitrust laws tolerate both efficient monopolies and natural monopolies." Id. at 548 (citation omitted). "Government regulation, as opposed to treble damages and criminal liability under the Sherman Act, is generally thought to be the appropriate remedy for difficulties posed by natural monopolies." *Id.* (citations omitted). And here, Hu Honua has alleged anticompetitive behavior in a highly regulated industry. This context is important.

The court is not suggesting that PUC involvement *necessarily* immunizes any of the Defendants from antitrust laws, but **HN13**[] "the structure of [a] regulated industry" may create a "lack of antitrust standing." West Penn Power Co., 147 F.3d at 269 (acknowledging that regulated industries such as utilities are not exempt from antitrust laws under Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973), but finding no antitrust injury in a suit challenging aspects of a merger between two electric utilities controlled by the Pennsylvania **[*32]** Public Utility Commission). *West Penn Power Co.* reasoned in part that "the comprehensive regulatory framework significantly restricts the nature of the competition which is permitted." Id. at 263.

In actuality, then — as most of the FAC alleges, *see, e.g.*, FAC ¶¶ 38-51, 58-89, 101-126, 166-184 — this is little if anything more than a breach of contract action between Hu Honua and HELCO. The fundamental dispute revolves around HELCO's alleged breach of the Hu Honua PPA by unreasonably withholding milestone-date extensions, or otherwise wrongfully terminating that contract. FAC ¶¶ 60, 65, 110-11, 168-71. "As the First Circuit has observed, '[s]ome antitrust cases are intrinsically hopeless because . . . they merely dress up in antitrust garb what is, at best, a business tort or contract violation.'" *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1087 (11th Cir. 2016)* (quoting *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 69 (1st Cir. 2004))*. And this is such a case.

Like *Schuylkill Energy Resources*, "[t]he fundamental dispute between [Hu Honua] and [HELCO] concerns the interpretation of the Power Purchase Agreement . . . and should be resolved pursuant to common-law contract principles," not through the antitrust laws. *113 F.3d at 418*. Like *Kamine/Besicorp Allegany L.P.*, "whether [HELCO] has breached the PPA or not, [Hu Honua] has not sufficiently **[*33]** demonstrated an *antitrust* injury[.]" *908 F. Supp. at 1208*. And like *Crossroads Cogeneration*, "[HELCO's] actions may have caused injury to plaintiff, but they did not cause injury to competition in a defined market. This is not the sort of injury the antitrust laws were meant to prevent." *969 F. Supp. at 915*.

Moreover, outside the utility context, Ninth Circuit authority is also on point — Hu Honua "has [at best] suffered a breach of contract, not an antitrust injury." *Orion Pictures Distrib. Corp. v. Syufy Enters., 829 F.2d 946, 949 (9th Cir. 1987)* (reasoning that, where duties were fixed by "contractual commitment" prior to the alleged anticompetitive behavior, "competition was no longer a factor in determining [defendant's] obligation," such that "[plaintiff's] injury does not reflect the anticompetitive effect of [defendant's] alleged monopolization.") (internal quotation marks omitted). As NextEra points out, ECF No. 73-1, Mot. at 24, the "antitrust" damages Hu Honua seeks ("the loss of revenue and profits that would otherwise have been earned from wholesale power generation on the Island of Hawaii," "the loss of market share," loss of "invested capital in its 50% completed Facility," FAC ¶¶ 154-55) appear to be the same damages it seeks in Count Three for breach of contract. *See* FAC ¶ 172.

In short, **[*34]** the claim fails for lack of antitrust injury. Count One is dismissed as to NextEra.

B. Count Two (Restraint of Trade) Fails to State a Plausible Claim Under *15 U.S.C. § 1* Against Either NextEra or HEP

Count Two seeks treble damages under *15 U.S.C. § 15(a)* against all Defendants based on alleged violations of *§ 1* of Sherman Act, *15 U.S.C. § 1*, which prohibits conspiracies "in restraint of trade or commerce." ***HN14***[] To state such a claim, "[a plaintiff] must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall, 518 F.3d at 1047* (citation omitted). And, to reiterate, "[a]llegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws." *Id. at 1049*.

Count Two alleges, in pertinent part, that "the coordinated and collective actions of Defendants HELCO, HECO, HEI, NextEra, and HEP have had the purpose and effect **[*35]** of eliminating or substantially restricting competition in the market for wholesale firm power generation and raising the price of power above competitive levels by eliminating sources of less expensive power where HELCO is required to dispatch lower cost sources." FAC ¶ 159. "These arrangements have had, and continue to have, the effect of unreasonably restraining competition in the market for wholesale firm power generation on the Island of Hawaii." *Id. ¶ 160*.

1. No Antitrust Injury

Count Two fails (against both NextEra and HEP) for the same primary reason that Count One fails — lack of antitrust injury (the third element reiterated in *Kendall*, a conspiracy that "actually injures competition"). *See, e.g., Am. Ad Mgmt., Inc., 190 F.3d at 1055* (requiring antitrust injury in a *§ 1* action). That is, ***HN15***[] antitrust injury is required for both a *§ 1* claim and a *§ 2* claim. *See, e.g., Glen Holly Entm't, Inc., 343 F.3d at 1007-08*. Stated differently, "causal antitrust injury . . . is an element of all antitrust suits brought by private parties seeking damages under *Section 4* of the Clayton Act." *Rebel Oil, 51 F.3d at 1433* (citation omitted). The previous analysis explaining the lack of such injury for a § 2 claim applies equally to the § 1 claim here, which alleges the same "antitrust injury" as Count One, FAC ¶ 162, including **[*36]** "inflated prices for power, and consumers [being] forced to pay supra-competitive prices for power."

In this regard, HEP adds another persuasive reason for lack of the requisite harmful effect on competition. The FAC alleges facts indicating that the Hu Honua PPA offered *higher* prices than other "competition," and was terminated by HELCO after Hu Honua failed to meet HELCO's demand for sufficient price reductions when seeking contract-deadline extensions. FAC ¶¶ 64, 67-71. ***HN16***[] Termination of a higher priced supplier, without more, is not antitrust injury. According to the FAC, because Hu Honua's PPA was cancelled, Hu Honua stands to lose profits of $435 million over a 20-year PPA term. FAC ¶ 165. But "the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. And if Hu Honua did not present a "lower-cost alternative," damage from cancellation of its contract for nonperformance is not antitrust injury. *See, e.g., Indeck Energy Servs., Inc. v. Consumers Energy Co., 250 F.3d 972, 977 (6th Cir. 2000)* (finding no antitrust injury, reasoning in part that marketplace competitors "must at least allege that exclusion of the competitor from the marketplace results in the elimination of a superior product **[*37]** or a lower-cost alternative").

2. A Lack of Plausibility

Count Two is deficient for another reason as well — fundamentally, it fails to allege a plausible illegal "contract, combination, or conspiracy" to restrain trade.

a. The § 1 claim against NextEra

As to NextEra, Hu Honua bases its conspiracy theory on allegations that NextEra controlled the HEI Defendants after the NextEra/HEI Merger Agreement. Specifically, the FAC alleges that, after the Merger Agreement was signed, NextEra controlled HELCO's decision regarding termination of the Hu Honua PPA, and HECO's termination of three solar power projects on Oahu. *See, e.g.*, FAC ¶¶ 63, 132-34.

These allegations of control, however, are insufficient to establish a § 1 conspiracy claim as to NextEra. Hu Honua relies on the Merger Agreement itself. FAC ¶ 56; *See* Pl.'s NextEra Opp'n at 26-27; ECF No. 109 at 35-36 (arguing that "Hu Honua unquestionably connects NextEra to Defendants' scheme. . . . The Merger Agreement alone connects NextEra"). In particular, it bases the control allegation on express language in the Merger Agreement that required NextEra's "prior written consent" before HEI, HECO, or HELCO could, among other things, "(1) enter into, **[*38]** terminate or amend in any material respect any material Contract, [or] (2) consent to any extension or continuation or any material Contract[.]" FAC ¶ 56; NextEra Mot., Ex.A, ECF No. 73-3 at 5, 9. But that Merger Agreement also specifically *precludes* such control by NextEra. *See* ECF No. 73-3 at 10 (paragraph 5.01(c) ("No Control of [HEI's] Business. [NextEra] acknowledges and agrees that (i) nothing contained in this Agreement is intended to give [NextEra], directly or indirectly, the right to control or direct the operations of [HEI] or an [HEI] Subsidiary prior to the Effective Time and . . . prior to the Effective Time, [HEI] shall exercise, consistent with the terms and conditions of this Agreement, complete control and supervision over its and [HEI's] Subsidiaries' respective operations."). And the FAC fails to allege *facts* indicating that NextEra violated that preclusive language.[16]

Moreover, NextEra could not have withheld consent to HELCO's actions without good reason because, under § 5.01(a), NextEra's prior written consent "shall not be unreasonably withheld, conditioned or delayed." ECF No. 73-3 at 5. Rather than establishing unbridled control by NextEra (and its joinder in an illegal **[*39]** conspiracy), the

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[16] NextEra explains that these types of material-change provisions (which prevent a company from making significant changes to material contracts during the pendency of a merger) are standard terms which protect the parties' legitimate interests in a pre-merger context. *See* NextEra Mot. at 16-17, ECF No. 73-1.

contract itself establishes no more than NextEra's routine consent in *HELCO's* decision. That is, the FAC "just as easily suggests rational, legal business behavior" by NextEra, rather than an illegal conspiracy to restrain trade. *See* [Kendall, 518 F.3d at 1049] ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

The FAC's allegations of control by NextEra also lack plausibility given the "obvious alternative explanation" in the FAC that HELCO cancelled the Hu Honua PPA because of Hu Honua's own nonperformance. *See* [Eclectic Props. E., LLC, 751 F.3d at 996] (requiring a court to consider an "obvious alternative explanation," when assessing plausibility). The FAC itself details such obvious reasons for HELCO's termination. FAC ¶ 51. Specifically, "[d]uring the construction [of its facility], disputes arose with the Facility construction contractor that became insoluble." *Id.* Hu Honua became involved in extensive litigation with its contractor and vendors, and a separate labor union dispute. *Id.* "[T]he construction contract and labor disputes, together with corresponding financing **[*40]** interruptions, caused an extended loss of time and delayed the completion of construction of the Hu Honua facility[.]" *Id.* "Hu Honua's disputes with its former construction contractor and the labor union jurisdiction dispute caused an irretrievable loss of time in the construction of the Hu Honua Facility. As a result, Hu Honua realized that it would not be able to achieve two milestone[] dates set forth in the PPA[.]" FAC ¶ 58.

Also unavailing is Hu Honua's argument that the FAC's allegations are sufficient under [Starr v. Baca, 652 F.3d 1202 (9th Cir. 2011)]. *Starr* held that "[i]f there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, *both of which are plausible*, plaintiff's complaint survives a motion to dismiss under [Rule 12(b)(6)]." [Id. at 1216] (emphasis added). Although Hu Honua's theories are not impossible (at least at this stage of the litigation), they are not *plausible*, which is what *Twombly/Iqbal* requires. *See, e.g., In re Century Aluminum Co. Secs. Litig., 729 F.3d 1104, 1108 (9th Cir. 2013)* (distinguishing *Starr* because "[h]ere, [unlike in *Starr*,] plaintiffs' explanation is merely *possible* rather than plausible. To render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing **[*41]** explanation.") (citing [Iqbal, 556 U.S. at 678]); [Eclectic Props E., LLC, 751 F.3d at 997] ("Applying *Twombly, Iqbal, Starr*, and *Century* . . . Plaintiffs have not made the kind of factual allegations that 'nudg[e] their claims across the line from conceivable to plausible.'") (citing [Twombly, 550 U.S. at 570])).

b. The [§ 1] claim against HEP

Similarly, the FAC lacks a plausible conspiracy theory as to HEP. The FAC alleges that "[a]s early as 2012, HEP recognized that the proposed Hu Honua facility was a direct competitive threat" and that "as the operator of the largest power plant on [Hawaii] Island . . . [HEP] attempted unsuccessfully to exclude Hu Honua as a competitor in the power generation market [when HELCO applied to the PUC for the approval of the original Hu Honua PPA in 2012]." FAC ¶ 99. "Hu Honua is informed and believes, and on that basis alleges, that HEP participated in and supported the termination of Hu Honua's PPA [in 2015.]" *Id.* But this allegation is deficient as it offers no facts indicating what HEP might have done to "participate[] in and support[] the termination." *See* [Kendall, 518 F.3d at 1047] (***HN17***[]) "[T]o allege an agreement between antitrust co-conspirators, the complaint must allege facts such as a 'specific time, place, or person involved in the alleged conspiracies' to give a **[*42]** defendant seeking to respond to allegations of a conspiracy an idea of where to begin.") (quoting [Twombly, 550 U.S. at 565 n.10]).

What's more, the FAC also alleges — in support of its monopolization claim against HELCO—that in 2015 HELCO and HEP agreed for HELCO to acquire HEP's fossil fuel plant for some $88 million. FAC ¶¶ 91-97. That is, HEP was *exiting* the very wholesale power market from which it allegedly sought to eliminate Hu Honua. Whatever these allegations might mean as to HELCO, they are inconsistent as to *HEP's* participation in a conspiracy to restrain trade as to Hu Honua. As HEP argues, "HEP's decision to sell [its] Hamakua Facility in 2015 and exit the relevant market removes any economic incentive for HEP to conspire to terminate the Hu Honua PPA [in 2016.]" HEP Opp'n at 20, ECF No. 95-1 at 27. That is, the FAC's conspiracy theory as to HEP makes no "economic sense." [Adaptive Power Sols., LLC v. Hughes Missile Sys. Co., 141 F.3d 947, 952 (9th Cir. 1998)] (***HN18***[]) "Antitrust claims must make economic sense") (citing *Eastman Kodak Co. v. Image Tech. Servs. Inc., 504 U.S. 451, 468, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992))*.

In response, Hu Honua offers an implausible explanation that is not pled in the FAC. It claims that HEP wanted to remove Hu Honua from the wholesale firm power market so that HEP's power plant would become more valuable when selling it. Opp'n at 12-13, ECF No. 108 at 20-21. But **[*43]** nothing in the FAC indicates HEP knew, when it entered into the agreement for HELCO to acquire HEP's facility (in 2015), that HELCO would later (in 2016) terminate the Hu Honua PPA. And, even assuming HEP would want to increase its facility's selling price, why would HELCO be part of that conspiracy to pay more for HEP's facility? Again, the theory makes no economic sense. *See Adaptive Power Sols., LLC, 141 F.3d at 952*.

And, as with the *§ 1* claim as to NextEra, the claim as to HEP lacks plausibility when considering the "obvious alternative explanation" pled in the FAC that HELCO terminated the Hu Honua PPA for lack of performance by Hu Honua, and Hu Honua's subsequent refusal to meet HELCO's terms in renegotiating the PPA. *See Eclectic Props. E., LLC, 751 F.3d at 996*. Whether or not the FAC adequately alleges that HELCO breached the PPA in unreasonably refusing to approve Hu Honua's requests to extend milestones, there is no plausible antitrust conspiracy theory pled as to HEP. There are no facts in the FAC suggesting that HEP's decision to sell to HELCO was anything but a rational business decision. *See Kendall, 518 F.3d at 1049*.[17]

C. State Law Counts Against NextEra and HEP

Count Seven asserts state-law antitrust or unfair competition claims against all Defendants under HRS chapter 480 **[*44]** . Similarly, Count Eight asserts a state-law claim for Tortious Interference with Contract against NextEra. But because the court has dismissed the federal antitrust claims as to NextEra and HEP (and the suit was not based on diversity jurisdiction), the court intends to dismiss both of the state-law claims without prejudice under *28 U.S.C. § 1367(c)(3)* ("The district courts may decline to exercise supplemental jurisdiction over a claim under *subsection (a)* [regarding Article III jurisdiction] if — . . . the district court has dismissed all claims over which it has original jurisdiction[.]"). *See Acri v. Varian Assocs., Inc., 114 F.3d 999, 1001 (9th Cir. 1997)* (en banc) (***HN19***[]] "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.").[18]

But it is premature to dismiss these state-law claims because, under the present procedural posture (where all claims as to the Hawaiian Electric Defendants have been held in abeyance), the Hawaiian Electric Defendants still remain in the action with federal claims against them. That is, the court cannot exercise its discretion under *§ 1367(c)* until it "has dismissed all claims over which it has original jurisdiction." **[*45]** Accordingly, the court DEFERS ruling on Counts Seven and Eight until the conditional settlement as to the Hawaiian Electric Defendants is completely finalized. For administrative purposes, the court DENIES — without prejudice — NextEra's and HEP's Motions to Dismiss as to Counts Seven and Eight.

V. CONCLUSION

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[17] Given that Count Two fails as to HEP for lack of antitrust injury and lack of a plausible conspiracy theory, the court need not reach HEP's alternative argument that its acts are shielded from antitrust scrutiny by the *Noerr-Pennington* or State Action Doctrines.

[18] It is unlikely that the chapter 480 antitrust claims could otherwise survive. *See HRS § 480-3* ("This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes[.]"); *Int'l Healthcare Mgmt. v. Haw. Coalition for Health, 332 F.3d 600, 609 (9th Cir. 2003)* ("[Plaintiff's] state antitrust claims fail for the same reasons as their federal claims because Hawaii antitrust statutes are interpreted 'in accordance with judicial interpretations of similar federal antitrust statutes.'") (quoting *HRS § 480-3*). Nevertheless, the court has not fully analyzed the state-law allegations to determine whether the FAC states a claim under chapter 480.

Hu Honua's federal antitrust claims lack plausibility as to both NextEra and HEP. The Motions to Dismiss are GRANTED as to Counts One and Two, and those claims are DISMISSED without prejudice. Because the court DEFERS ruling on the state-law claims, the Motions as to Counts Seven and Eight are DENIED without prejudice. The court will allow Hu Honua an opportunity to file a Second Amended Complaint that cures the FAC's deficiencies, if it believes it can do so. *See* *Lopez, 203 F.3d at 1130*. A Second Amended Complaint (or a statement indicating that a Second Amended Complaint will not be filed) is due by **January 29, 2018**.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 19, 2018.

/s/ J. Michael Seabright

J. Michael Seabright

Chief United States District Judge

[Dvorak v. St. Clair Cty.](#)

United States District Court for the Southern District of Illinois

January 23, 2018, Decided; January 23, 2018, Filed

Case No. 14-CV-1119-SMY-RJD

Reporter

2018 U.S. Dist. LEXIS 10585 *; 2018-1 Trade Cas. (CCH) P80,261; 2018 WL 514326

KEVIN DVORAK, et al., Individually and as the Representative of a Class of Similarly Situated Persons, Plaintiffs, vs. ST. CLAIR COUNTY, ILLINOIS, et al., Defendants.

Prior History: *Bloyer v. St. Clair Cnty., 2016 U.S. Dist. LEXIS 10801 (S.D. Ill., Jan. 28, 2016)*

Core Terms

auction, redeem, properties, class member, bids, antitrust, Purchaser, class certification, certification, conspiracy, proposed class, predominance, parcel, sales, percent, bidder, property owner, class action, tax year, adequacy, damages, statute of limitations, alleged conspiracy, real estate tax, tax sale, redemption, grounds, discovery rule, commonality, numerosity

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Judges: STACI M. YANDLE, United States District Judge.

Opinion by: STACI M. YANDLE

Opinion

MEMORANDUM AND ORDER

Plaintiffs Kevin Dvorak and Kathleen Dvorak[1] are proceeding on an eight count class action Complaint (Doc. 2). The case involves an alleged conspiracy to fix St. Clair County, Illinois real estate tax sales so that owners were required to pay artificially high interest penalties to redeem their properties. The defendants include St. Clair County, St. Clair County Treasurer Charles Suarez, and a number of individual and business purchasers who are alleged to have participated in the conspiracy (collectively, "Purchaser Defendants"). Now pending before the Court is Plaintiffs' Motion for Class Certification (Doc. 208). Defendants have all replied (Docs. 219, 221, 222, 224, and 230). For the following reasons, Plaintiffs' Motion for Class Certification is **DENIED**.

Background

This case revolves around St. Clair County, Illinois real estate tax sales for properties for which the prior year's property taxes are delinquent. The County Collector (an *ex officio* role **[*4]** of the County Treasurer) conducts the sales. Purchasers do not receive clear title to the property at issue, but rather a Certificate of Purchase and the right to collect the amount of unpaid taxes from the owner plus a "penalty" ranging from 0 to 18 percent interest. Each successful bidder pays the county the amount of the delinquency. The winning bidder for a given parcel is the one who is willing to accept the lowest penalty rate if the owner exercises his/her/its right of redemption. The maximum penalty percentage that may be bid is 18 percent, and if no bids are received on a given property, it reverts to the County at the maximum penalty rate.

For example, a property with a $2000 overall delinquency is offered at the tax sale. One bidder offers 18 percent - meaning that he will pay the $2000 to the county and charge the property owner an additional 18 percent, if she wishes to redeem the property. Another bidder offers 13 percent - meaning that the property owner would pay less to redeem the property. If no lower bids are received, the second bidder receives the Certificate of Purchase.

If a property owner fails to redeem a property within the statutory redemption period, the successful **[*5]** bidder may file a Petition for a tax deed. Once a tax deed is issued, it conveys merchantable title, free and clear from most previous interests in the property.

If the property is redeemed, the purchaser of the tax lien receives the certificate amount (what is owed to the county) plus the penalty percentage. The penalty rate increases every six months by the amount of the penalty rate that was originally bid. Using the above example, the property owner would owe the winning bidder $2,260 if redeemed within six months, $2,520 if redeemed between six months and a year, $2,780 if redeemed between a

[1] The named plaintiffs originally included John R. Bloyer, Jr. and Adrianne L. Bloyer. They have voluntarily dismissed their individual claims. (Doc. 120).

year and 18 months, etc. The holder of a tax lien may also pay subsequent unpaid real estate taxes on a property and claim an automatic 12 percent penalty on the subsequent taxes.

Because the cost of redemption is usually significantly less than the market value of the property, there is a strong incentive for anyone holding a sizeable ownership or security interest in the property to redeem it following a tax sale. If a property owner is unable to pay the cost of redemption, it is common for a mortgage holder or other lienholder to redeem on behalf of the property owner in order to preserve **[*6]** their interest. The amount paid on the owner's behalf is then added to the owner's outstanding obligation.

Here, Plaintiffs maintain that something went very wrong with this process at the St. Clair County tax sales conducted in 2007 and 2008. Specifically, they allege that Defendant Suarez—in exchange for political contributions for himself and the "Democrat Party of St. Clair County"— arranged for the auctioneer to recognize the Purchaser Defendants as winning bidders (presumably in cases of identical bids) and to distribute the winning bids from the various auctions between the Purchaser Defendants. (Doc. 2 at ¶¶74, 79). They also allege that Suarez arranged for the Purchaser Defendants to have advantageous seating positions and caused the auctioneer to ignore subsequent lower bids, thereby artificially inflating the penalty rates. For their part, the Purchaser Defendants are alleged to have agreed to keep their bids at or near the 18 percent statutory maximum penalty rate. (*Id.* at ¶74).

Plaintiffs Kevin and Kathleen Dvorak owned two properties that were sold at the 2007 St. Clair County real estate tax sale conducted in November 2008. (*Id.* at ¶¶6-11). The first property is located **[*7]** at 518 E. Washington St., O'Fallon, Illinois ("Washington Property"); the second property is located at 619 W. Schuetz St., Lebanon, Illinois ("Schuetz Property"). Both properties were purchased by Defendant White Oak Securities at a penalty rate of 18 percent and redeemed on November 8, 2011 by mortgage holder, First Federal Savings Bank (Docs. 208-4 at 2; 208-5 at 3). Because the redemption took place nearly three years after the sale, $1,725.03 in penalty interest was assessed on a $1,597.25 tax bill for the Washington Property. (Doc. 208-5 at 3). Redemption of the Schuetz Property cost $2,018.22 in penalty interest on a $1,868.72 2007 tax bill, which was paid by the same mortgage holder. (Doc. 208-4 at 2). Both properties were sold at tax sales before and after the 2006 and 2007 tax year sales at penalty rates ranging from one to three percent. (Docs. 278-2 and 278-3).

Plaintiffs assert eight causes of actions, including claims against all defendants for Civil Conspiracy (Count I), violations of the Sherman Anti-Trust Act (Counts III and IV) and violations of the Illinois Antitrust Act, *740 ILCS 10/1, et seq.* (Counts V-VII). They also assert claims for Money Had and Received against all defendants except **[*8]** Suarez (Count II) and breach of fiduciary duty against Suarez alone (Count VIII). In each Count, Plaintiffs allege damages "based on the difference [between] the amount redeemed and the amount that would have been needed to redeem the property at a reasonable and appropriate penalty rate[,]" plus attorneys' fees, expenses and trebling of damages where allowed by statute. (Doc. 2)

Legal Standard

Plaintiffs move for class certification under *Rules 23(a)* and *23(b)(3) of the Federal Rules of Civil Procedure*, seeking to certify a plaintiff class consisting of:

> all owners of real estate parcels that were sold at a St. Clair County Tax sale auction for unpaid real estate taxes for the 2006 and 2007 tax years with respect to which a Certificate of Purchase was obtained at such auction in response to a penalty rate bid in excess of 0 percent, excluding the owners of parcels for which there were no bids and therefore were "sold" to St. Clair County at penalty rate of 18% by operation of statute.

(Doc. 208 at ¶ 3).

To be certifiable, a class must be definable and must meet the requirements of numerosity, commonality, typicality and adequacy of representation. *See* *Fed. R. Civ. P. 23(a)*; *Alliance to End Repression v. Rochford, 565 F.2d 975, 977 (7th Cir. 1977)*. The case must also fall within one of the three enumerated *Rule 23(b)* categories. *Spano v. The Boeing Co., 633 F.3d 574, 583 (7th Cir. 2011)* ("(1) a mandatory **[*9]** class action (2) an action seeking final injunctive or declaratory relief, or (3) a case in which the common questions predominate and class treatment is superior.").

A class may be certified only if a district court is "satisfied, after a rigorous analysis," that compliance with *Rule 23* has been shown, even if the analysis entails some overlap with the merits. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. Although a plaintiff bears the burden of showing that the proposed class satisfies the *Rule 23* requirements, he "need not make that showing to a degree of absolute certainty." *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012)* (internal citation omitted).

Discussion

As an initial matter, Defendants Dennis Ballinger Sr., Dennis Ballinger Jr., Empire Tax Corp. and Vista Securities, Inc. (collectively "Ballinger Defendants") challenge the proposed class definition as "fatally overbroad." (Doc. 230 at 23). They object to the inclusion of every owner whose property was purchased or a penalty rate above 0% in the 2006 and 2007 tax sales, arguing that definition may encompass a significant number of property owners (1) whose penalty rate was at or below what it would have been in a "normal" year, (2) whose property was not redeemed and therefore did not pay the allegedly inflated penalty rates, **[*10]** or (3) whose claims would be barred by the statute of limitations.

A class may be overbroad "if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Messner, 669 F.3d at 825* *citing* *Kohen v. Pac. Inv. Mgmt. Co. LLC & PIMCO Funds, 571 F.3d 672, 677 (7th Cir.2009)*. However, the mere fact that a proposed class contains members who ultimately will not be able to recover once the merits of the case are reached does not preclude certification of the class. *See* *Kohen, 571 F.3d at 677* ("[a] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification[.]") The determining factor is whether the class includes a significant number of individuals who *could not* have been harmed by a defendant's allegedly unlawful conduct. *Messner, 669 F.3d at 824*.

It is possible that Plaintiffs' proposed class contains owners who received the same rate they would have received in an auction that was not (allegedly) "rigged" and who therefore, would not have compensable damages. But sorting them out from those **[*11]** who did sustain an injury is an issue to be decided on the merits. By contrast, it is not possible for owners who did not redeem their property to have sustained the damages alleged in the Complaint. Because they did not actually pay the inflated rate, they cannot recover the difference between what they paid and the amount due under a "reasonable and appropriate" penalty rate.[2] Because it is unclear from the pleadings and the parties' submissions whether the proposed class includes a significant or trivial number of such owners, Court cannot conclude at this juncture that the proposed class is fatally overbroad.

Rule 23(a) Requirements

Numerosity

In order to meet the numerosity requirement, Plaintiffs must establish that there are a sufficient number of class members that joinder would be impractical. "Although there is no 'bright line' test for numerosity, a class of forty is

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[2] Conceivably, an owner of an unredeemed property could claim that it would have redeemed it at the "reasonable and appropriate" penalty rate, but that the inflated rate caused them to forego the option. However, that is neither the claim before the Court, nor one that would be appropriate for class treatment as it would be speculative and would require extensive individual inquiries.

generally sufficient." *McCabe v. Crawford & Co., 210 F.R.D. 631, 643 (N.D. Ill. 2002)* (citation omitted). This is not a hard-and-fast rule, however. "A class can be certified without determination of its size, so long as it's reasonable to believe it's large enough to make joinder impracticable and thus justify a class action suit." *Arnold Chapman and Paldo Sign & Display Co. v. Wagener Equities Inc., 747 F.3d 489, 492 (7th Cir. 2014)*.

Here, the proposed class is sufficiently numerous. **[*12]** The auction results for the 2006 tax year show in excess of 3700 properties that were bid upon and awarded at rates over 0%. (Doc. 230-2 at 208-311). There were more than 3500 such properties purchased at the 2007 tax year auction. (*Id.* at 313-432). While there may be a number of owners with multiple properties within this group, it is reasonable to assume that the class would number at least in the hundreds, if not thousands. The numerosity requirement is therefore satisfied.

Commonality

Rule 23(a) also requires the existence of at least one question of law or fact common to the class. *Fed. R. Civ. P. 23(a)(2)*; *Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998)*. The putative class members' "claims must depend on a common contention" and "[t]hat common contention...must be of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 564 U.S. at 350*. "A common nucleus of operative fact is usually enough to satisfy the commonality requirement." *Keele, 149 F.3d at 594*.

The existence of the alleged conspiracy between Suarez and the Purchaser Defendants in this case is the type of common issue contemplated by the rule. All of the claims asserted in the Complaint require proof **[*13]** of the existence of a conspiracy to manipulate the penalty rates at these two auctions. This meets the commonality threshold.

Typicality

To satisfy typicality, "there must be enough congruence between the named representative's claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group." *Spano, 633 F.3d at 586*. The typicality requirement addresses concerns that (1) the representative's claim may fail on unique grounds, dooming meritorious claims of absent class members or that (2) the representative's claims may prevail on unique grounds, and the representative may therefore fail to adequately present alternative grounds under which the unnamed class members could prevail on their own claims. *CE Design Ltd. v. King Architectural Metals, Inc., 637 F.3d 721, 724 (7th Cir. 2011)*. The "presence of even an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation." *Id. at 726*, *citing* *J.H. Cohn & Co. v. American Appraisal Associates, Inc., 628 F.2d 994, 999 (7th Cir. 1980)*. Here, Plaintiffs' claims are not sufficiently typical of the class to support certification because their claims are subject to a statute of limitations defense.

The statutes of limitations for claims **[*14]** grounded in state law are governed by the applicable state law. *Indep. Tr. Corp. v. Stewart Info. Servs. Corp., 665 F.3d 930, 935 (7th Cir. 2012)*. Conspiracy, standing alone, is not a separate and distinct tort in Illinois. *See* *Weber v. Cueto, 253 Ill. App. 3d 509, 624 N.E.2d 442, 449, 191 Ill. Dec. 593 (1993)*. Rather, a civil conspiracy claim is subject to the same statute of limitations as the underlying tort on which the claim is based. *Mauvais-Jarvis v. Wong, 2013 IL App (1st) 120070, 987 N.E.2d 864, 894, 370 Ill. Dec. 98 (2013)*. A private action for violation of the *Illinois Antitrust Act, 740 ILCS 10/1, et seq.* (Counts V-VII) must be commenced within 4 years after the cause of action accrued. *740 ILCS 10/7(2)*. In the context of an antitrust conspiracy, accrual is generally triggered by the last overt act in furtherance of the alleged conspiracy. *People ex rel. Hartigan v. Moore, 143 Ill. App. 3d 410, 493 N.E.2d 85, 86, 97 Ill. Dec. 603 (1986)*.

Claims for "money had and received" (Count II) and breach of fiduciary duty (Count VIII) must be commenced within five years after the cause of action accrued. *735 ILCS 5/13-205*. The *Sherman Act* carries a statute of limitations of four years (*15 U.S.C. § 15b*), and generally, a federal antitrust cause of action "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)* *quoting* *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)*.

The last tax sale involved in this case was on November 10, 2008, which is when the tax liens on Plaintiffs' properties were sold. (Doc. 230-4 at 78). Plaintiffs have not alleged any overt acts in furtherance of the alleged conspiracy **[*15]** after that sale. While they claim that Defendants "actively and fraudulently concealed these violations," this allegation appears to relate to meetings that occurred prior to the auctions at issue. Nor do Plaintiffs claim that their injury arose from any act committed after November 10, 2008. Because the instant action was filed on October 17, 2014 - five years, eleven months and four days later (Doc. 2), facially, Plaintiffs' claims were filed out of time.

The Plaintiffs contend that application of the "discovery rule" moves the accrual for their claims forward to at least a press conference in May of 2014, making the filing of the Complaint timely. Under the discovery rule, the accrual date for statute of limitations purposes "is not determined when the injury occurs but when it is discovered or should have been discovered." *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004)*. When the discovery rule applies, a statute of limitation begins to run "once a plaintiff has knowledge which would lead a reasonable person to investigate the possibility that her legal rights had been infringed." *CSC Holdings, Inc. v. Redisi, 309 F.3d 988, 992-93 (7th Cir. 2002)*; *citing* *LaSalle v. Medco Research, Inc., 54 F.3d 443, 446 (7th Cir. 1995)*; *Khan v. Deutsche Bank AG, 2012 IL 112219, 978 N.E.2d 1020, 1029, 365 Ill. Dec. 517 (2012)* (citation omitted) ("When a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, **[*16]** the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed").

The question of when the Dvoraks knew or should have known that they had been wrongfully injured renders their claims vulnerable to a statute of limitations defense not necessarily applicable to other members of the putative class. There is some discrepancy between the Complaint allegations and Plaintiffs' discovery responses regarding how and when they first became aware of their potential claims against Defendants. In the Complaint, Plaintiffs allege that they and members of the class

> "...were unaware of and did not learn of Defendants' conspiracy until approximately June of 2014, when it was publicly disclosed by the Treasurer of Madison County, Kurt Prenzler, after much research and analyzing different and seemingly unrelated records, that Defendant, Charles Suarez, had accepted "political contributions" from the Defendants and that these same Defendants had purchased properties in St. Clair County at the maximum 18% interest rate. The connection between Charles Suarez and Defendants Rothman, Vassen and McClean and that Defendants had engaged **[*17]** in a conspiracy to rig public auctions for the real estate tax sales in St. Clair County during the Class Period was disclosed for the first time in June 2014."

(Doc. 2 at ¶¶90-91).

Plaintiffs further allege that Defendants and those involved in the alleged conspiracy "actively and fraudulently concealed these violations to obscure their illegal activity by meeting and discussing amongst themselves for the express purpose of rigging the public auction." (*Id.*). Essentially, in the Complaint, Plaintiffs assert that they did not know, and that reasonable diligence would not have uncovered, the information indicating wrongful conduct and injury until Kurt Prenzler's press conference.

But Kathleen Dvorak's deposition testimony is inconsistent with the Complaint allegations. She testified that she and her husband did not become aware of any possible issues with the property tax auctions until October 2014 (Deposition of Kathleen Dvorak, Doc. 271-4 at 5), and that she first learned of a potential issue when a letter from Ken Brosh was left at the Washington Property.[3] She also testified that, "[t]he high interest rate" led her to believe

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[3] Kevin Dvorak testified in his deposition that his wife handles the financial matters in the household, that he was not significantly involved with the current matter and had no personal knowledge of any of the allegations in the Complaint other than the fact

that the sales were illegally conducted or rigged, and **[*18]** the 18 percent rate "on its face struck [her] as being wrong based on [her] prior experience of redeeming at a much lower interest rate," (*Id.* at 4, 10), and that she knew that their properties had been sold at the 18 percent rate for the 2007 tax year shortly after the sale had occurred. (*Id.* at 11).[4]

Given Mrs. Dvorak's testimony, that her sole basis for believing that she and her husband's rights had been infringed was the abnormally high penalty rate that the Washington and Schuetz Properties were sold for at the 2007 tax year auction compared to prior years, and her admission that she was aware of the 18 percent rate shortly after the sale took place in November 2008, one could reasonably find that the statutes of limitations began to run for the Dvoraks when Kathleen Dvorak received the 18 percent rate information. Depending on when that information was received, some or all of the Dvoraks' claims may be time-barred, notwithstanding the application of the discovery rule.

Application of the discovery rule may yield a different result for some or all of the remainder of the putative class. For example, the Dvoraks had significant experience dealing with property tax sales on their properties, which is **[*19]** a central explanation given for how Kathleen Dvorak "knows" that something improper happened at the 2007 tax year sale. On the other hand, the same information would not necessarily put another putative class member with no prior experience with tax sales on notice that further investigation was warranted. In that instance, Kurt Prenzler's May 2014 press conference could arguably be the first notice they had that their "injury" (paying a higher than normal rate) may have been wrongfully caused. Because the Dvoraks' claims may be dismissed on grounds not applicable to absent class members, their claims are not sufficiently typical to support class certification.

Adequacy

For purposes of *Rule 23(a)(4)*, "adequacy of representation is composed of two parts: the adequacy of the named plaintiff's counsel, and the adequacy of representation provided in protecting the different, separate, and distinct interest of the class members." *Retired Chicago Police Ass'n v. City of Chicago, 7 F.3d 584, 598 (7th Cir. 1993)* (quotation omitted). The adequacy requirement is satisfied when the named representative has "a sufficient interest in the outcome of the case to ensure vigorous advocacy" and "does not have interests antagonistic to those of the class." *Saltzman v. Pella Corp., 257 F.R.D. 471, 480 (N.D. Ill. 2009)*.

A class representative may be found **[*20]** inadequate if they are subject to a unique defense that could compromise his or her ability to adequately represent the class. The fear is that the named plaintiff will become distracted by the presence of a possible defense applicable only to him so that the representation of the rest of the class will suffer." *CE Design, 637 F.3d at 726*. Because the Dvoraks' claims may uniquely be subject to a statute of limitations defense, certification of a class with them as the only class representatives would be inappropriate.

Rule 23(b) **Requirements**

Even if a named plaintiff satisfies *Rule 23(a)*, they must also satisfy one of *Rule 23(b)*'s three subsections. Here, the Dvoraks proceed under *Rule 23(b)(3)*, which allows for certification upon a finding that "questions of law or fact common to members of the class predominate over any questions affecting only individual members," and that "a class action is superior to other available methods for resolving the controversy." *Fed. R. Civ. P. 23(b)(3)*. Their motion also fails on this basis.

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that he owned the properties, and that they were sold for delinquent taxes and eventually redeemed. (Docs. 271-5 at 3 and 278-6 at 4-5).

[4] Brosh, a competing tax auction buyer, steered Kathleen Dvorak to attorney Don Weber, who in turn referred her to Plaintiffs' Counsel's law firm. (*Id.* at 6-7).

"*Rule 23(b)(3)*'s predominance requirement is met when common questions represent a significant aspect of a case and can be resolved for all members of a class in a single adjudication." *Messner, 669 F.3d at 815* (quotation omitted). "If, to make a prima facie showing on a given question, the **[*21]** members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question." *Id.* (quotation omitted).

Predominance "trains on the legal or factual questions that qualify each class member's case as a genuine controversy" and "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The predominance requirement overlaps considerably with *Rule 23(a)(2)*'s commonality requirement, but is "far more demanding." *Id.* "Where liability determinations are both individual and fact intensive, class certification under *Rule 23(b)(3)* is improper." *Miller v. Janssen Pharmaceutica Prods., L.P., No. 05-CV-4076-DRH, 2007 U.S. Dist. LEXIS 31863, 2007 WL 1295824, at *7 (S.D. Ill. May 1, 2007)*.

"Analysis of predominance under *Rule 23(b)(3)* begins, of course, with the elements of the underlying cause of action." *Messner, 669 F.3d at 818*, *quoting* *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)*. Antitrust claims require that a plaintiff prove: (1) that the defendant violated ***antitrust law***; and (2) that the antitrust violation caused them some injury. *Id.* (citations omitted). "[I]ndividual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, **[*22]** every class member must prove at least some antitrust impact resulting from the alleged violation." *Reed v. Advocate Health Care, 268 F.R.D. 573, 581 (N.D. Ill. 2009)* *quoting* *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)*, as amended (Jan. 16, 2009). A plaintiff's burden at the class certification stage is to "demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members." *Messner, 669 F.3d at 818* (quotations omitted).

In this case, the "fact of injury" is not susceptible to common class proof, and would require individualized inquiry to determine whether the sale of a given parcel was actually higher than it would have been in the absence of the alleged conspiracy. As the defendants note, "[o]ut of all of the parcels that sold to tax buyers for 2006 and 2007 at a rate of 1-18% that also were up for auction for 2004-2005 and 2008-2012, 59% sold at the same or higher rate in at least one other year." (Doc. 230 at 11). This suggests that a significant number of properties owned by putative class members were not in fact impacted by the alleged anticompetitive behavior.

Plaintiffs have not identified a class-wide applicable method for determining whether a given parcel was impacted by the conspiracy. They merely assert that **[*23]** "[t]he bids at the 2006 and 2007 St. Clair County taxes sales were significantly higher than those of the years preceding and after," and "[i]t will also be the same evidence for all class members." (Doc. 231 at 6). These conclusory assertions alone do not survive the "rigorous analysis" required for class certification.[5] *See* *Parko v. Shell Oil Co., 739 F.3d 1083, 1085 (7th Cir. 2014)* ("Mere assertion by class counsel that common issues predominate is not enough.")

Plaintiffs fare no better on the question of whether individualized damages defeat certification in this case. Defendants correctly point out that a number of factors influence what a potential tax purchaser would bid on a property, including location, size, terrain, zoning, condition of any structures and accessibility. (Doc. 221 at 17). Obviously, these factors vary from parcel to parcel. In the absence of a class-wide factual or statistical methodology for determining which properties were affected by the alleged antitrust violations, the Court would be forced to engage in a complicated and tedious property-by-property analysis of whether each property was purchased at a higher rate than it would have in a non-tainted auction - presumably by taking into consideration a

[5] Subsequent to filing their Motion for Class Certification, Plaintiffs disclosed Dr. Carl Peters as an expert. Dr. Peters appears to have conducted some statistical analyses regarding the overall results of the 2006 and 2007 tax year auctions and how they compare with other years and other counties. (Peters Expert Report, Doc. 255-1). While Dr. Peters posits an overall potential damage figure, he offers no figures or methodology which would enable a finder of fact to determine whether any given parcel had been impacted by the alleged anticompetitive behavior.

combination **[*24]** of historical data (if a given property had been sold in other years) and expert testimony as to that parcel's characteristics as viewed by a disinterested tax auction purchaser.

Plaintiffs concede that the class claims will require individualized proof for damages, but emphasize that the need for individualized damage determinations is not necessarily grounds to deny certification. *See* *Mullins v. Direct Digital, LLC, 795 F.3d 654 671, (7th Cir. 2015)*. That is true, but if "...fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats *Rule 23(b)(3)* predominance" (quotation omitted) *Reed, 268 F.R.D. at 582 (N.D. Ill. 2009)*.

Moreover, *Rule 23(b)(3)* also requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. Factors relative to this determination include the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action. *Id.*

Class **[*25]** action is not the superior vehicle for litigation of this matter. Rather, a class action would rapidly become unmanageable. While it would be more efficient to consolidate the litigation as it relates to that existence of a conspiracy, that benefit is outweighed by the necessity of conducting hundreds or thousands of individualized hearings on impact and damages. The Court acknowledges that because of (relatively) low individual recovery potential, individual class members would not likely be interested in personally controlling their claims. On balance, however, this Court concludes that, based on the above-detailed issues with respect to predominance and superiority, class certification is inappropriate under *Rule 23(b)(3)*.

Conclusion

For the foregoing reasons, Plaintiffs' Motion for Class Certification (Doc. 208) is **DENIED**. Plaintiffs' Motion for Leave to File Supplemental Exhibit (Doc. 264) is **DENIED** as moot.

IT IS SO ORDERED.

DATED: January 23, 2018

/s/ Staci M. Yandle

STACI M. YANDLE

United States District Judge

Ixchel Pharma, LLC v. Biogen Inc.

United States District Court for the Eastern District of California

January 25, 2018, Decided; January 25, 2018, Filed

CIV. NO.: 2:17-00715 WBS EFB

Reporter
2018 U.S. Dist. LEXIS 13548 *; 2018 WL 558781

IXCHEL PHARMA, LLC, Plaintiff, v. BIOGEN INC., Defendant.

Prior History: *Ixchel Pharma, LLC v. Biogen Inc., 2017 U.S. Dist. LEXIS 147742 (E.D. Cal., Sept. 12, 2017)*

Core Terms

antitrust, non-compete, tortious interference, rule of reason, terminate, unfair competition, allegations, speculative, induced, harms, Unfairness

Counsel: [*1] For Ixchel Pharma, LLC., Plaintiff: Jennifer Lu Gilbert, Richard Cheng-Hong Lin, LEAD ATTORNEY, Christopher David Banys, Banys, P.C., Santa Clara, CA.

For Biogen Inc., Defendant: Mark Samuel Popofsky, LEAD ATTORNEY, Ropes & Gray LLP, Washington, DC; Rocky Chiu-feng Tsai, LEAD ATTORNEY, Ropes & Gray LLP, San Francisco, CA.

Judges: WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE.

Opinion by: WILLIAM B. SHUBB

Opinion

MEMORANDUM AND ORDER RE: MOTION TO DISMISS SECOND AMENDED COMPLAINT

Plaintiff Ixchel Pharma, LLC ("Ixchel") brought this action against defendant Biogen Inc. ("Biogen") asserting federal and state antitrust and state tort claims arising from an agreement that plaintiff entered into with non-party Forward Pharma FA ApS ("Forward") regarding the development of a pharmaceutical drug and a settlement agreement defendant entered into with Forward. Before the court is defendant's Motion to Dismiss the Second Amended Complaint pursuant to *Federal Rule of Civil Procedure 12(b)(1)* and *12(b)(6)*. (Docket No. 37.)

I. Procedural History

Plaintiff initiated this action alleging: (1) violation of the *Sherman Act, 15 U.S.C. § 1*; (2) tortious interference with contract; (3) intentional and negligent interference with prospective economic advantage; (4) violation of the **[*2]** *California Cartwright Act, Cal. Bus. & Prof. Code § 16700, et seq.*; and (5) violation of California's Unfair Competition Law ("UCL"). Plaintiff filed a First Amended Complaint ("FAC") on June 14, 2017 (Docket No. 17), which the court dismissed on September 14, 2017 for four reasons: (1) plaintiff did not appear to have Article III standing because it had not allegedly suffered an actual or imminent injury in fact; (2) plaintiff was not a current or potential competitor in the alleged market and therefore did not allege antitrust injury; (3) plaintiff's tortious interference claim failed to allege "wrongful means"; and (4) plaintiff could not satisfy either the UCL's "unlawful" or "unfairness" prongs because plaintiff's other claims had been dismissed and plaintiff's allegations of harm were speculative. (Sept. 12 Order Re: Mot. to Dismiss (Docket No. 25).)

On October 2, 2017, plaintiff filed a Second Amended Complaint ("SAC") asserting all of the same claims the court previously dismissed. (Docket No. 34.) In the Second Amended Complaint, plaintiff's Sherman and Cartwright Act claims remain unchanged from the First Amended Complaint. Plaintiff has amended its other claims and added (1) an allegation that defendant included an illegal "non-compete" **[*3]** provision in its agreement with Forward; (2) an allegation that Forward did not wait the necessary amount of time before it stopped working for plaintiff; and (3) additional facts related to speculative harms plaintiff allegedly suffered.

II. Discussion

A. Sherman Act and Cartwright Act

To bring a Sherman Act or Cartwright Act claim, a plaintiff must establish antitrust standing.[1] See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; *Dang v. S.F. Forty Niners, 964 F. Supp. 2d 1097, 1110 (N.D. Cal. 2013)*. For a plaintiff to have antitrust standing, it must have an antitrust injury. See *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; see also *Am. Ad Mgmt., 190 F.3d at 1055*. Antitrust injury requires that a plaintiff be "a participant in the same market as the alleged malefactors." *Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 n.3 (9th Cir. 1985)*.

The court previously dismissed plaintiff's Sherman and Cartwright Act claims because it held that plaintiff had not alleged an antitrust injury. (Docket No. 25 at 7.) Plaintiff concedes its allegations as to these claims are identical to those in the First Amended Complaint. (Pl.'s Opp'n at 1 (Docket No. 40).) The court therefore dismisses them for the reasons discussed in the court's September 12 Order. (Docket No. 25 at 4-7.)

B. Tortious Interference with Contract

Although plaintiff's Second Amended Complaint pleads additional facts related to defendant's alleged tortious interference with contract, **[*4]** this claim continues to suffer from the same shortfalls this court identified in its September 12, 2017 Order granting defendant's Motion to dismiss the First Amended Complaint.

A claim for tortious interference with a contract requires the plaintiff allege: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship and (5) resulting damage." *Quelimane Co. v. Stewart Title Guar. Co., 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513 (1998)*. While tortious interference with a contract does not generally require independent wrongfulness, see id., interference with an at-will contract requires a pleading of wrongful means. *Reeves v. Hanlon, 33 Cal. 4th 1140, 1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513 (2004)*. The court previously held that the Forward-Ixchel Agreement was an at-will contract because Forward could terminate it at any time, and thus in order to plead tortious

[1] Antitrust standing is distinct from Article III standing. As the court noted when it dismissed plaintiff's First Amended Complaint, plaintiff also does not appear to have Article III standing because it has not allegedly suffered an actual or imminent injury in fact, and this alone would be enough to dismiss the Second Amended Complaint. See *Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)*; *Maya v. Centex Corp., 658 F.3d 1060, 1067 (9th Cir. 2011)* (injury in fact must be "actual or imminent, not conjectural or hypothetical"); cf. *Brotech Corp. v. White Eagle Int'l Techs. Grp., Inc., No. Civ.A.03-232, 2004 U.S. Dist. LEXIS 11552, 2004 WL 1427136, at *6 (E.D. Pa. June 21, 2004)* (antitrust injury was too speculative where there were insufficient allegations regarding how far plaintiff had gone in seeking "FDA approval, when such approval may be anticipated, or whether it will be prepared to enter the product to market" upon FDA approval).

interference plaintiff must also allege "that the defendant engaged in an independently wrongful act." (Id.; see also Docket No. 25 at 8-10.)[2]

In the Second Amended Complaint, plaintiff identifies two allegedly "wrongful means": (1) Forward's cessation of clinical trial work following termination **[*5]** of its agreement with plaintiff (SAC ¶ 64) and (2) Forward's failure to wait the required 60 days before ceasing its work with plaintiff after serving its notice of termination (SAC ¶ 62).

With regard to the first claim, plaintiff alleges that Forward breached an obligation to conduct clinical trials after its Collaboration Agreement with plaintiff had terminated. (FAC 34; SAC 64.) However, the court previously noted that such an obligation to continue with trials post-termination did not exist. (Docket No. 25 at 10.) Thus, defendant cannot be liable for inducing Forward to breach this nonexistent duty.

As to plaintiff's new claim that Forward failed to honor the full 60-day notice period, plaintiff does not allege that defendant instructed Forward not to wait the requisite time period. In fact, plaintiff merely indicates that defendant instructed Forward to terminate its existing contract with plaintiff, but has not alleged that defendant instructed Forward to in any way breach the existing contract or terminate it in such a way that would constitute a violation. To state a valid claim for tortious interference with a contract, plaintiff must allege that defendant's "intentional acts **[*6]** [were] designed to induce a breach or disruption of the contractual relationship" between Forward and plaintiff. See *Quelimane Co., 19 Cal. 4th at 55*. Here, plaintiff has pled that defendant induced Forward to terminate its contracts with plaintiff, but plaintiff has not identified any evidence that indicates that defendant specifically told Forward to terminate its contract with plaintiff before the requisite 60 days had elapsed, or to breach its contract in any other way. Accordingly, plaintiff has failed to aver that defendant intentionally directed this alleged breach.

Additionally, plaintiff fails to allege any harm that resulted from this alleged early termination. Plaintiff does not, and seemingly cannot, allege that had Forward waited 60 days to cease its work on the clinical trials, plaintiff would have avoided the alleged speculative harms it asserts. Accordingly, even if plaintiff had satisfied the other requirements of a claim for tortious interference with a contract, plaintiff's failure to plead "resulting damage" means that its tortious interference claim based on this supposed breach would still warrant dismissal. See **[*7]** *Sebastian Int'l, Inc. v. Russolillo, Civ. No. 00-3476 SVW JWJX, 2005 U.S. Dist. LEXIS 45828, 2005 WL 1323127, at *7 (C.D. Cal. Feb. 22, 2005)*(plaintiff claiming intentional interference with contract based on induced breach must show damages "attributable to" the alleged induced breach "and not other causes unrelated to the alleged wrong").

C. Intentional and Negligent Interference with Prospective Economic Advantage

As with plaintiff's claim for intentional interference with a contract, plaintiff fails to allege independently wrongful conduct, a necessary requirement to sustain its claims for intentional and negligent interference with prospective economic advantage. (Docket No. 25 at 11.) Accordingly, the court must dismiss plaintiff's third and fourth causes of action.

D. UCL

California's Unfair Competition Law prohibits unfair competition, which is defined to include "any unlawful, unfair, or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*.

1. Unlawfulness

Because the court would dismiss all of plaintiff's other claims, as discussed above, the unlawful prong of the Unfair Competition Law is not met. See *name.space, Inc. v. Internet Corp. for Assigned Names & Numbers, Civ. No. 12-8676 PA (PLAx), 2013 U.S. Dist. LEXIS 72790, 2013 WL 2151478, at *9 (C.D. Cal. Mar. 4, 2013)*; *Berryman v. Merit Prop. Mgmt., Inc., 152 Cal. App. 4th 1544, 1554, 62 Cal. Rptr. 3d 177 (4th Dist. 2007)* ("[T]he UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.").

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[2] Plaintiff again attempts to argue, using the same reasoning the court previously rejected, that there is no independently wrongful act requirement in this case. However, the court remains unpersuaded by plaintiff's argument and again holds that independent wrongfulness is a required element.

In an **[*8]** attempt to otherwise satisfy the unlawfulness requirement, plaintiff argues that defendant's inclusion of § 2.13 in the Forward-Biogen Agreement is an allegedly illegal "non-compete" provision that violates *California Business & Professions Code § 16600* and New York common law. (SAC ¶¶ 56, 59, 113.) However, the court does not find that § 2.13 is in fact a non-compete agreement. The Forward-Biogen Agreement expressly preserves Forward's ability to compete against Biogen under the terms of a co-exclusive license. In fact, the Agreement explicitly permits Forward to "authoriz[e] contractors to perform services for [Forward], including services to manufacture or import products and to perform wholesale and distribution services for [Forward]." Forward-Biogen Agreement § 3.01. Therefore, § 2.13 clearly does not prevent Forward from developing and selling any pharmaceutical products containing DMF, as plaintiff asserts, and thus does not prevent Forward from competing with Biogen. Accordingly, this section cannot be classified as a "non-compete covenant," which Black's Law Dictionary defines as a commitment "not to engage in the same type of business." Black's Law Dictionary 420 (9th ed. 2009).

Rather than defining § 2.13 as some sort of illegal non-compete agreement, **[*9]** the court views it instead as an ancillary restraint, one that is subordinate to the larger, lawful agreement between Forward and defendant. Section 2.13 is merely a restriction that prevents Forward from competing with defendant in very limited and defined circumstances, and as such is not subject to the principles that govern non-competes as a matter of law. See *Educ. Impact, Inc. v. Danielson, Civ. No. 14-937 FLW, LGHG, 2015 U.S. Dist. LEXIS 9467, 2015 WL 381332, at *8 (D.N.J. Jan. 28, 2014)*(principles that govern "non-compete clause" were "not applicable" when license "restricted [licensor] from competing with [licensee] in only defined circumstances").

The Supreme Court has explained that the Rule of Reason "has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Whether or not § 2.13 is a non-compete clause, because it falls outside of the employment context, the court would analyze its legality under the ***antitrust law***'s Rule of Reason and not the narrower rule of per se illegality *§ 16600* applies to non-compete agreements in employment contracts. See, e.g., *Martikian v. Hong, 164 Cal. App. 3d 1130, 1133, 211 Cal. Rptr. 66 (2nd Dist. 1985)*; *Ikon Office Solutions, Inc. v. Rezente, Civ. No. 2:10-1704 WBS KJM, 2010 WL 5129293, at *4 n.5 (E.D. Cal. Dec. 9, 2010)* (explaining that **[*10]** *Section 16600* "bars restrictive covenants in employment contracts"); *Dayton Time Lock Service, Inc. v. Silent Watchman Corp., 52 Cal. App. 3d 1, 6, 124 Cal. Rptr. 678 (1975)*(applying the Rule of Reason to a *Section 16600* challenge to an exclusive dealing arrangement).

Although plaintiff argues that *Section 16600*, and not the Rule of Reason, should be applied in this case, California courts have concluded that *Section 16600* does not apply outside of the employment context. The case law plaintiff relies on, notably *Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282, 189 P.3d 285 (2008)*, indicates that *Section 16600*, rather than the Rule of Reason, applies when assessing "employee noncompetition agreements," but plaintiff has identified no case law expanding the Edwards decision to situations outside of the narrow employee context. When restraints, whether ancillary restraints as is the case here, or non-compete clauses, do not involve an employment agreement, a court must apply the ***antitrust law***'s Rule of Reason. See, e.g., *Martikian v. Hong, 164 Cal. App. 3d 1130, 1133, 211 Cal. Rptr. 66 (2d Dist. 1985)* (upholding restrictive covenant in commercial lease under antitrust principles and explaining that "from earliest times there has been developed a 'rule of reason' whereby any given restraint is to be tested as lawful or unlawful" (citing *Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*). Accordingly, the court finds that the legality of § 2.13 must be analyzed according to the Rule of Reason. See *USS-POSCO Indus. v. Case, 244 Cal. App. 4th 197, 209, 197 Cal. Rptr. 3d 791 (1st Dist. 2016)*(holding Edwards inapplicable unless the provision at issue **[*11]** is a "quintessential noncompete agreement that expressly restrain[s] an employee").

The Rule of Reason states that "the antitrust laws prohibit only those contracts which unreasonably restrain competition." *Centeno v. Roseville Community Hosp., 107 Cal. App. 3d 62, 72, 167 Cal. Rptr. 183 (3rd Dist. 1979)*. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 n. 15, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (citing *Board of Trade of City of Chicago v. U.S., 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*. Because all inquiry conducted under the Rule of

Reason "is confined to a consideration of impact on competitive conditions," *Nat'l Soc. of Prof'l Engineers, 435 U.S. at 690*, it requires that plaintiff file well-pleaded allegations of harm to competition. See *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)*.

The court previously rejected plaintiff's First Amended Complaint, holding that the "allegations are limited to speculative harms to competition." (Docket No. 25 at 12.) The court finds that the Second Amended Complaint adds nothing new, and thus again must dismiss this cause of action for failure to plead harm to competition. Plaintiff re-invokes its allegation that, due to defendant's actions, it lost a $150,000 grant, (Pl.'s Opp'n at 49), but this allegation does not establish injury in fact as a lost grant does not constitute a harm to competition. Further, although **[*12]** plaintiff claims that the Second Amended Complaint added allegations that § 2.13 completely blocks Forward from competing with defendant, (*id. at 17-18*), as described above, the Forward-Biogen Agreement explicitly granted Forward the right to compete in particular situations. Accordingly, the court holds that plaintiff's purported harms remain entirely speculative and do not sufficiently allege harm to competition.[3]

2. Unfairness

In the antitrust context, the unfairness prong of the Unfair Competition Law requires conduct "that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Unfairness must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." *Id. at 186-87*.

Here, plaintiff fails to identify and sufficiently allege conduct tethered to an actual or threatened impact on competition. As with the First Amended Complaint, plaintiff's allegations are limited to speculative harms to competition, as discussed above. (See Docket No. 25 at 12.) Accordingly, the court must **[*13]** dismiss plaintiff's sixth cause of action for violation of California's Unfair Competition Law.

IT IS THEREFORE ORDERED that defendant's Motion to Dismiss (Docket No. 37) be, and the same hereby is, GRANTED. The Second Amended Complaint is hereby DISMISSED. Plaintiff has already amended its complaint two times, and the court finds that further amendment as to plaintiff's first, second, third, and fourth claims would be futile. However, because plaintiff presented a new argument related to defendant's alleged violation of the California Unfair Competition Law, the court will grant plaintiff one more opportunity to amend its complaint with regard to this claim. Plaintiff has twenty days from the date this Order is signed to file a Third Amended Complaint, if it can do so consistent with this order.

Dated: January 25, 2018

/s/ William B. Shubb

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

End of Document

[3] In its Opposition to the Motion to Dismiss, plaintiff makes a weak argument that § 2.13 also violates New York Law. (Id. at 28-19.) However, plaintiff previously disavowed reliance on New York law in its Complaint (SAC ¶ 60) and thus cannot now attempt to rely on it.

[LBM Props. LLC v. DirecTV Inc.](#)

Superior Court of California, County of Los Angeles

January 25, 2018, Decided; January 25, 2018, Filed

LASC Case No: BC540043

Reporter

2018 Cal. Super. LEXIS 4046 *

LBM PROPERTIES, LLC ("LBM"), a California Limited Liability Company, POSAMAR, LLC ("Posamar"), a California Limited Liability Company, AMILA, LLC ("Amila"), a California Limited Liability Company, and GEORGE KEFALAS, an individual, on behalf of themselves and all others similarly situated, Plaintiffs, v. DIRECTV, Inc., a Delaware corporation, et al., Defendants.

Prior History: *LBM Props., LLC v. DirecTV, LLC, 2016 Cal. Super. LEXIS 14844 (Cal. Super. Ct., Nov. 7, 2016)*

Core Terms

installation, landlord, injunction, consumers, dishes, class certification, injunctive relief, ascertainable, preliminary injunction, class action, class member, Plaintiffs', predominate, permission, documents, roof, unfair, satellite, merits, tenant, installation of equipment, authorization, questions, damages, courts, class representative, likely to suffer, satellite dish, certification, permanently

Judges: [*1] Kenneth Freeman, Judge of the Superior Court.

Opinion by: Kenneth Freeman

Opinion

COURT'S RULING AND ORDER RE:

1) PLAINTIFFS' MOTION FOR CLASS CERTIFICATION; AND

2) PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I.

BACKGROUND

Plaintiffs, a group of owners of Multi-Dwelling Units ("MDUs"), brought this putative class action against Defendant DirecTV. Plaintiffs allege that DirecTV "uses an illegal sham process which enables it to violate the rights of the owners of MDUs in, *inter alia*, the State of California by permanently affixing its satellite dishes and associated equipment to rooftops, external walls and other common or restricted areas without Landlord consent.[1] Plaintiffs bring this action to stop this alleged policy and practice.[2]

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[1] Complaint, ¶2.

Plaintiffs allege that DirecTV delivers its satellite television service to subscribers who reside in MDUs by means of satellite dishes and associated equipment that it installs in, on, or near the MDUs.[3] Because the DirecTV system requires unrestricted "line of sight" access to a satellite, the Equipment is typically affixed permanently to the exterior of the MDU in which the subscriber resides and in which the subscriber's television is to be used.[4] Plaintiffs allege that DirecTV **[*2]** knows that it is, and at all times relevant, was, improper and illegal to permanently affix its Equipment to common or restricted areas of an MDU, such as the MDU's exterior walls or rooftop, without first obtaining the authorization of the Landlord.[5]

The Plaintiffs allege that while the Federal Communications Commission had issued a regulation that limits restrictions by Landlords on attachment of devices (such as DirecTV's equipment) to property "within the exclusive use or control" of a tenant, it did not diminish the ability of Landlords of MDUs to prohibit the installation or use of such equipment in common or restricted access areas not within the tenant's exclusive use or control.[6] DirecTV allegedly knows that it cannot permanently attach its equipment to the exterior wall or roof of an MDU without Landlord consent. However, DirecTV's policy and procedure for obtaining authorization for such attachment purportedly fails to take proper account of the Landlord's rights.[7]

According to the Complaint, DirecTV requests that its *subscribers* submit to it a written authorization form ("the Form"). The Form allegedly acknowledges that installation of the Equipment is improper without prior **[*3]** approval of the Landlord, and purports to release DirecTV from any liability arising from the installation of the Equipment.[8] The Installation Form gives MDU tenants two alternatives: i) either obtain the landlord's written authorization for the installation of the equipment by getting the Landlord to sign and return Part 1 of the installation form to DirecTV; or ii) simply sign the Form themselves and return to DirecTV Part 2 of the Installation Form, which states: "Landlord approval of a DirecTV System installation at [address] has been verbally approved by my landlord (or is not required pursuant to my lease or rental agreement)."[9]

However, the Plaintiffs allege that DirecTV's purpose in allowing customers to obtain "consent" through part 2 of the Form is to help it circumvent the requirement that it obtain the required Landlord consent, thereby enabling DirecTV to sell its services to prospective customers.[10] Part 2 of the Form allegedly enables DirecTV "to document and perpetuate the fiction that it has obtained the required Landlord consent when it knows that it has not."[11] Plaintiffs allege that DirecTV has had and adheres to a uniform sham practice and policy designed to evidence **[*4]** the fiction that it has obtained consent from the Landlord and thereby justify the wrongful installation of the Equipment — a policy and practice that was conceived by, is directed by, and is implemented under the direction of, the corporate decision-makers in DirecTV's Los Angeles County corporate headquarters.[12]

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[2] *Id.*

[3] Complaint, ¶9.

[4] *Id.*

[5] Complaint, ¶11.

[6] Complaint, ¶11.

[7] Complaint, ¶11.

[8] Complaint, ¶12.

[9] Complaint, ¶12.

[10] Complaint, ¶14.

[11] *Id.*

[12] Complaint, ¶15.

Plaintiffs allege that DirecTV has a duty to avoid actions which are likely to breach a legal duty and injure a foreseeable class of persons such as Landlords.[13] It is allegedly reasonable for companies to obtain actual permission from Landlords prior to permanently installing their equipment on a Landlord's MDU, and it is unreasonable to have a policy of making installations without Landlord permission.[14] Rather than meet this reasonable standard of care, Plaintiff alleges that DirecTV instead authorized installation of its Equipment "based on nothing more than the representation of tenants by accepting Part 2 of the Installation Form."[15]

Based on these allegations and the other allegations more fully set forth in the operative pleading (and following Defendant's prior motion to strike), Plaintiffs allege a sole claim for violation of *Business & Professions Code §§17200 et seq.*

Plaintiffs have two (2) motions before **[*5]** the Court. In the first motion, Plaintiffs seek an order certifying the following injunctive relief class:

> All persons or entities ("Landlords") that own and rent or lease residential MDUs in the State of California upon or in common or restricted areas of which Defendant DIRECTV, LLC, or its agents ("DIRECTV") have permanently installed DIRECTV Equipment.

In the second motion, Plaintiffs move for a preliminary injunction, restraining Defendant DirecTV, LLC or its agents during the pendency of this action from entering into common or restricted areas and/or attaching its equipment thereto, of residential multi-dwelling units in the State of California based solely on the representation of a renter who wishes to subscribe to DirecTV's services that the landlord has authorized the installation or that no permission of the landlord is required for the installation.

For the reasons discussed *infra*, the motion for class certification of the injunctive relief class is granted. The motion for a preliminary injunction is denied.

II.

ISSUE WITH DOCUMENTS LODGED UNDER SEAL

Plaintiffs have lodged with the Court copies of unredacted documents in support of the motion for class certification, pursuant **[*6]** to the parties' stipulated protective order. However, where a party wants to use at trial (or on a summary judgment motion) documents that are subject to a confidentiality agreement or protective order, and does *not* want the documents sealed, he or she must:

> — lodge the unredacted documents with the court clerk as required on a motion to seal (¶ *9:417*);
> — file redacted copies of the documents (redacted so as to conceal the protected portions); and
>
> — give notice to opposing parties that the documents will become part of the public court file unless they file a timely motion to seal. See California Practice Guide, Civil Procedure Before Trial, ¶9:420 (The Rutter Group 2017) (citing *CRC 2.551(b)(3)* and Savaglio v. Wal-Mart Stores, Inc., supra, 149 CA4th at 601, 57 CR3d at 224).

Under *CRC 2.551(b)(3)(B)*, if the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly transfer all the unredacted records subject to the

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[13] Complaint, ¶17.

[14] *Id.*

[15] *Id.*

confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records from the envelope, container, **[*7]** or secure electronic file to the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court. See *CRC 2.551(b)(3)(B)*.

Thus, the Court can and has considered the lodged, unredacted documents. In doing so, however, the Court notes that either party may file an application to seal the documents within 10 days of this order. The application must include an appropriate proposed order for the Court's signature. Unless a non-filing party objects, no hearing will be required for the application. The application must state clearly on the first page that, pursuant to today's Ruling and Order, no hearing date was required by the Court or requested by any non-filing party. If no application to seal is made within 10 days, the lodged documents will be publicly filed.

III.

MOTION FOR CLASS CERTIFICATION

A. Standards governing motions for class certification

CCP § 382 allows the Court to certify a class action "when the question is one of a common interest, of many persons, or when the parties are numerous, **[*8]** and it is impracticable to bring them all before the court..." Additionally, "[T]here must be questions of law or fact common to the class that are substantially similar and predominate over the questions affecting the individual members; the claims of the representatives must be typical of the claims or defenses of the class; and the class representatives must be able to fairly and adequately protect the interests of the class." *Wershba v. Apple Computer, Inc. (2001) 91 Cal.App. 4th 224, 237-238, 110 Cal. Rptr. 2d 145*.

Stated differently, there are two broad requirements for a class action: 1) an ascertainable class; and 2) a well-defined community of interest. *Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 913, 107 Cal. Rptr. 2d 761*. *See also* *Brinker Rest. Corp. v. Sup. Ct. (2012) 53 Cal.4th 1004, 1021, 139 Cal. Rptr. 3d 315, 273 P.3d 513* (a plaintiff seeking certification "must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives").

In determining whether the class is ascertainable, courts consider the size of the class, the class definition, and the means to identify class members. *Reyes v. San Diego County Board of Supervisors (1987) 89 Cal. App. 3d 1263, 1274*. The community of interest factor is established by showing: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) **[*9]** class representatives who can adequately represent the class. *Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.

Further, under California law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Court (Lands Unlimited) (1974) 12 Cal.3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701*.

California follows the procedures set forth under *Federal Rules of Civil Procedure 23* for class actions, whenever California authority is lacking. *City of San Jose v. Superior Court, supra, 12 Cal. 3d at 453*.

The potentially mandatory and discretionary factors applicable to class certification include:

- whether there is an ascertainable class (mandatory);

- ■ whether there is a well-defined community of interest as to common questions of law or fact that predominate (mandatory);
- ■ whether the class is so numerous that joinder of all members is impractical;
- ■ whether the claims of the representative plaintiff are typical of the class;
- ■ whether substantial benefits accrue to the litigants and courts;
- ■ whether the proposed class is manageable;
- ■ whether the person representing the class is able to fairly and adequately protect the interests of the class; and
- ■ whether a class action is superior (including whether individual plaintiffs would bring claims for small sums).

E.g., Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal.App.4th 997, 1014, 36 Cal. Rptr. 3d 592; *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*; *Prince v. CLS Transp., Inc. (2004) 118 Cal.App.4th 1320, 1324, 13 Cal. Rptr. 3d 725*; *In re Cipro Cases I and* ***[*10]*** *II (2004) 121 Cal.App.4th 402, 409*.

The burden of proof on a motion for class certification is on the party seeking certification. *Washington Mutual Bank, NA. v. Superior Court (Briseno) (2001) 24 Cal. 4th 906, 922, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*; *Soderstedt v. CBIZ S. California, LLC (2011) 197 Cal.App.4th 133, 154, 127 Cal. Rptr. 3d 394*. This usually requires demonstration of predominance of common issues of law and fact, and manageability of the proposed class. *Lockheed Martin Corp. v. Sup.Ct. (Carrillo) (2003) 29 Cal.4th 1096, 1103-1104, 131 Cal. Rptr. 2d 1, 63 P.3d 913*; California Practice Guide, Civil Procedure Before Trial, ¶14:99.2 (The Rutter Group 2017). In making the determination as to whether the requirements for a class action have been met, the court may consider not only the parties' pleadings but also extrinsic evidence, including declarations and discovery responses. California Practice Guide, Civil Procedure Before Trial, ¶14:99 (The Rutter Group 2017). The court must examine together all of the evidence presented by the moving and opposing parties "under the prism of plaintiffs theory of recovery." *Department of Fish & Game v. Sup.Ct. (Adams) (2011) 197 Cal.App.4th 1323, 1349, 129 Cal. Rptr. 3d 719*

The burden is on the party seeking class certification to establish each of the class prerequisites through substantial evidence. *Say-On Drug Stores, Inc. v. Superior Court (2004) 34 Cal.4th 319, 327*. In weighing the evidence, the Court does not evaluate whether the claims asserted are legally or factually meritorious. *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 439-440, 97 Cal. Rptr. 2d 179, 2 P.3d 27*.

B. *CCP §382* controls, not the Federal Rules of Civil Procedure, for the putative injunctive relief class

Plaintiffs argue that the standards of *Federal Rule of Civil Procedure 23(b)(1)(A)* and *23(b)(2)* govern the motion for certification **[*11]** of this injunctive relief class. Recently, however, the Court of Appeal for the Fourth District stated:

> [T]here is no gap in California precedent to be filled by reference to *Federal Rules of Civil Procedure, rule 23(b)(1)(A)* or *(b)(2)*(28 U.S.C.) on the issue of what class certification standards must be met when a plaintiff seeks only declaratory or injunctive relief on behalf of a class. *Even when the plaintiff seeks solely declaratory or injunctive relief*, California case law follows the well-established requirements that our Supreme Court has consistently stated, namely, (as relevant here) that the plaintiff must establish that (1) the class is ascertainable; (2) common Questions predominate; and (3) a class action would provide substantial benefits, making it superior to other procedures for resolving the controversy. *Hefczyc v. Rady Children's Hospital-San Diego (2017) 17 Cal.App.5th 518, 535-536, 225 Cal. Rptr. 3d 641* (emphasis added).

In light of this authority, Plaintiffs' reliance on Federal *Rule 23(b)(2)* for the notion that "the party seeking certification must show that 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole'"[16] is not persuasive. Nor is the Plaintiffs' argument that **[*12]** "[f]or a class to be certified under these

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[16] Motion at 11:14-17 (citing FRCivPro 23(b)(2)).

sections, '[it is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole,' even if not all class members have been injured by the challenged practice."[17]

Accordingly, Plaintiffs must demonstrate that the class certification requirements as set forth under California law (referenced *supra*) are satisfied.

C. Discussion

With the above standards in mind, Plaintiffs seek an order certifying the following injunctive relief class:

> All persons or entities ("Landlords") that own and rent or lease residential MDUs in the State of California upon or in common or restricted areas of which Defendant DIRECTV, LLC, or its agents ("DIRECTV") have permanently installed DIRECTV Equipment.

As the party moving for class certification, the evidentiary burden to demonstrate the class elements are satisfied falls on Plaintiffs.

Ascertainability/Numerosity

"Ascertainability requires a class definition that is 'precise, objective and *presently* ascertainable.' Otherwise, it is not possible to give adequate notice to class members or to determine after the litigation has concluded who is barred from relitigating." California **[*13]** Practice Guide, Civil Procedure Before Trial, ¶14:23 (The Rutter Group 2017) (citing *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.) (2003) 113 Cal.App.4th 836, 858, 7 Cal. Rptr. 3d 28* (emphasis added)). The class should be defined in terms of objective characteristics and common transactional facts that will enable identification of the class members when such identification becomes necessary. *Hicks v. Kaufman & Broad Home Corp., supra, 89 Cal.App.4th at 915*.

The goal is to use terminology that will convey sufficient meaning "to enable persons hearing it to determine whether they are members of the class plaintiffs wish to represent." *Global Minerals & Metals Corp. v. Sup.Ct. (National Metals, Inc.), supra, 113 Cal.App.4th at 858*. Importantly, a class may be ascertainable even if the definition includes ultimate facts or conclusions of law. *Hicks, supra, 89 Cal.App.4th at 915-916*. "Class members are 'ascertainable' *where they may be readily identified without unreasonable expense or time by reference to official records*." *Thompson v. Automobile Club of Southern California, supra, 217 Cal.App.4th 719, 728* (internal citations omitted; emphasis added); *see also* *Bridgeford v. PacificHealth Corp. (2012) 202 Cal.App.4th 1034, 1041, 135 Cal. Rptr. 3d 905*. "In determining whether a class is ascertainable, the trial court examines the class definition, the size of the class and the means of identifying class members. [Citation.]" *Lee v. Dynamax, Inc. (2008) 166 Cal.App.4th 1325, 1334*.

"Courts have recognized that 'class certification can be denied for lack of ascertainability when the proposed definition is overbroad and the plaintiff offers no means by which only those class members who have claims can be **[*14]** identified from those who should not be included in the class.' [Citation.]" *Sevidal v. Target Corp. (2010) 189 Cal.App.4th 905, 921, 117 Cal. Rptr. 3d 66*.

Further, no set number is required as a matter of law for the maintenance of a class action. *Hebbard v. Colgrove (1972) 28 Cal.App.3d 1017, 1030, 105 Cal. Rptr. 172*. California case law indicates that as few as ten (10) or twenty-eight (28) members satisfies numerosity. *Bowles v. Superior Court (1955) 44 Cal.2d 574, 283 P.2d 704*; *Hebbard, 28 Cal.App.3d at 1030*.

Numerosity

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[17] Motion at 11:17-20 (citing *Walters v. Reno (9th Cir. 1998) 145 F.3d 1032, 1047)*.

In support of numerosity, Plaintiffs reference the deposition of DirecTV's Person Most Knowledgeable ("PMK"), Adrian Dimech. Dimech testified that DirecTV installs over one million systems per year.[18] Plaintiffs also reference the 38,000 electronic signatures appearing on Part 2 of its consent form, which DirecTV produced in discovery.[19]

This evidence establishes that the putative class is sufficiently numerous.

Ascertainability

With respect to ascertainability, the Court previously determined in its earlier motion to strike that the class was ascertainable. The Court's September 11, 2015 Ruling and Order Re: Defendants' Motion to Strike Class Allegations stated:

> [A]t the pleading stage, the Court determines that class 2 is ascertainable, with respect to the UCL claim. The Court recognizes that the UCL does not "authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never **[*15]** exposed in any way to an allegedly wrongful business practice." *Davis-Miller v. Automobile Club of Southern California (2011) 201 Cal.App.4th 106, 121, 134 Cal. Rptr. 3d 551*. However, in the Court's view, subclass 2 would not necessarily be overbroad as to the UCL class. The named Plaintiffs themselves have alleged injury in fact pursuant to the UCL's standing requirements, as articulated in *In re Tobacco II Cases (2009) 46 Cal.4th 98* and its progeny (holding that only the class representatives in a UCL claim must meet the standing requirements of injury and causation). In the Court's view, subclass 2 is ascertainable, insofar as it seeks relief pursuant to the UCL.[20]

Here, the class is defined in a straightforward manner. Persons who hear the class definition would know whether they are landlords that own and rent or lease residential multi-dwelling units where DirecTV has installed equipment in common or restricted areas. Further, the class is defined in terms of objective characteristics.

As alleged in the complaint, DirecTV requests that its subscribers submit to it a written authorization form ("the Form"). The Form allegedly acknowledges that installation of the Equipment is improper without prior approval of the Landlord, and purports to release DirecTV from any liability arising from the installation of the Equipment.[21] The Installation **[*16]** Form gives MDU tenants two alternatives: i) either obtain the landlord's written authorization for the installation of the equipment by getting the Landlord to sign and return Part 1 of the installation form to DirecTV; or ii) simply sign the Form themselves and return to DirecTV Part 2 of the Installation Form, which states: "Landlord approval of a DirecTV System installation at [address] has been verbally approved by my landlord (or is not required pursuant to my lease or rental agreement)."[22]

In the Court's view, actual consent by certain landlords would not be relevant in assessing whether, on a going-forward basis, DirecTV continues to implement a policy that would allow installations to occur potentially *without* a landlord's consent.

For these reasons, ascertainability is satisfied at the class certification stage.

Do common questions predominate?

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[18] Dimech Depo. at 26:7-8 (Exh. 2 to Rosenberg Decl.).

[19] A portion of these forms for Orange County DirecTV installations from October 18, 2013 through October 27, 2013 is attached as Exhibit 7 to the Rosenberg Declaration.

[20] September 11, 2015 Ruling and Order re: Defendants' Motion to Strike Class Allegations at 8:17-9:4.

[21] Complaint, ¶12.

[22] Complaint, ¶12.

a. General standards on the "commonality" element

In deciding whether the common questions "predominate," the courts must identify the common and individual issues; consider the manageability of those issues; and, taking into account the available management tools, weigh the common issues against the individual issues to determine which of **[*17]** them predominate. California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2017) (referencing *Dunbar v. Albertson's, Inc. (2006) 141 Cal.App.4th 1422, 1432-1433, 47 Cal. Rptr. 3d 83)*.

Additionally, a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing as to his or her eligibility for recovery or as to the amount of his or her damages. *Vasquez v. Superior Court (1971) 4 Cal.3d 800, 815-816, 94 Cal. Rptr. 796, 484 P.2d 964*. However, a class action "will not be permitted...where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Brown v. Regents of Univ. of Calif (1984) 151 Cal. App. 3d 982, 988-89, 198 Cal. Rptr. 916*. "[E]ach member must not be required to individually litigate numerous and substantial questions to determine his right to recover following the class judgment." *City of San Jose, supra, at 460*.

In *Arenas v. El Torito, Inc. (2010) 183 Cal.App.4th 723, 108 Cal. Rptr. 3d 15*, the Court of Appeal observed:

> The focus in a class certification dispute is not entirely on the merits but on the procedural issue of what types of questions are likely to arise in the litigation—common or individual. Thus, the existence of some common issues of law and fact does not dispose of the class certification issue. (Rather, in order to justify class certification, the Supreme Court held, "[T]he proponent of certification must show ... that questions of law or fact common to the class predominate over **[*18]** the questions affecting the individual members ...." *Arenas v. El Torito, Inc., 183 Cal.App.4th at 732* (citations omitted).

Critically, the court in *Jaimez v. Daiohs USA, Inc. (2009) 181 Cal.App.4th 1286, 1298, 105 Cal. Rptr. 3d 443* recognized that that 'the trial court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment ...." (citing *Ghazaryan v. Diva Limousine, Ltd. (2008) 169 Cal.App.4th 1524, 1531, 87 Cal. Rptr. 3d 518)* (emphasis added).

However, "when the merits of the claim are enmeshed with class action requirements, the trial court must consider evidence bearing on the factual elements necessary to determine whether to certify the class." *Bartold v. Glendale Fed'l Bank (2000) 81 Cal.App.4th 816, 829, 97 Cal. Rptr. 2d 226*; *Brinker Restaurant Corp. v. Sup. Ct. (Hohnbaum), supra, 53 Cal.4th at 1023-1024*; *JP. Morgan & Co., Inc. v. Sup.Ct. (Heliotrope Gen., Inc.) (2003) 113 Cal.App.4th 195, 222, 6 Cal. Rptr. 3d 214*; *see* *Wal-Mart Stores, Inc. v. Dukes (2011) 131 S.Ct. 2541, 2551—*class determination will "(Orequently. . . entail some overlap with the merits of the plaintiffs underlying claim"]

Such issues include, e.g., "whether substantially similar questions are common to the class and predominate over individual questions or whether the claims or defenses of the representative plaintiffs are typical of class claims or defenses." *Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27*; *see* *Brinker Restaurant Corp. v. Sup. Ct. (Hohnbaum), supra, 53 Cal.4th at 1024* ("whether common or individual questions predominate will often depend upon resolution of issues closely tied to the merits"); *Morgan v. Wet Seal, Inc. (2012) 210 Cal.App.4th 1341, 1358, 149 Cal. Rptr. 3d 70*.

Predominance is a comparative concept, and 'the necessity for class members to individually establish eligibility does not mean individual fact questions predominate.' [Citation.]" *Medrazo v. Honda of North Hollywood, supra*, 166 Cal.App.4th at 99-100 (emphasis added). **[*19]** Common issues are predominant when such issues would be primary to each individual action. *Caro v. Procter & Gamble Co. (1993) 18 Cal.App.4th 644,447*-48.

b. Discussion on commonality

According to Plaintiffs, DirecTV employs a policy of depending on the tenant to provide consent for installation of the equipment. Specifically, Plaintiffs reference the Demich Deposition, where he testified that DirecTV employs such a policy.[23] Demich confirms that DirecTV accepts a dwelling occupant's representation that an owner or authorized agent of the owner has consented to the installation of DirecTV equipment in common areas of an MDU as sufficient authorization to go ahead with the installation.[24] Demich confirmed that it is DirecTV's general policy that if a customer who provides a signature in §2 of the consent form, DirecTV does not independently verify the installation has actually been approved by the landlord.[25]

DirecTV's training manual sets forth its policy with obtaining permission for installation. The manual states in applicable part as follows:

> **Landlord Permission Form**
>
> This form is only required if the customer is renting the property where you will be installing DIRECTV service. Because you are modifying the property..., it is important that the customer **[*20]** has received permission from their landlord to do so.
> The form is signed by the customer, not the landlord. The form states that the customer has, in fact, received permission from the landlord to install DIRECTV equipment. You do not need to speak with or receive a signature from the landlord. The customer is responsible for getting this permission.[26]

Michael Kefalas, one of the managers of Plaintiff LBM Properties, states that he has never succeeded in having DirecTV remove an unauthorized satellite dish, and is unable to identify which dish on a roof belongs to which tenant (and DirecTV has never assisted him in doing so).[27]

Frederick Nichols, another putative class member, testified that in 2013, he and his wife discovered that DirecTV, without having sought or obtained permission, and without his prior knowledge, had installed a satellite dish on the roofs of two of his multi-unit rental properties in Torrance.[28] He says that the installations damaged the roofs.[29] Nichols said that had he been asked, he would not have agreed to the installation of these dishes on the roofs of his properties.[30]

Mark Sanger states that two DirecTV satellite dishes were installed on the rooftop of his building **[*21]** without his prior knowledge or consent.[31] He states that in November 2014, he contacted DirecTV and demanded the dishes be removed; however, DirecTV did not remove them.[32]

Ken Wayte states that in December 2014, following installation of a new roof, he was surprised to discover that DirecTV had installed a satellite dish on the roof of the Property.[33] He says he did not consent to the installation of

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[23] Demich Depo., Exh. 2 to Rosenberg Decl. at 20:9-20:25, 17:21-18:2, and 22:24-24:7.

[24] Denich Depo., Exh. 2 to Rosenberg Decl. at 17:21-18:2.

[25] Demich Depo. at 20:18-25.

[26] See Exh. 5 to Rosenberg Decl. at DTVPROD0005886.

[27] Kefalas Decl., ¶4.

[28] Nichols Decl., ¶3.

[29] Nichols Decl., ¶6.

[30] Nichols Decl., ¶8.

[31] Sanger Decl., ¶3

[32] *Id.*

[33] Wayte Decl., ¶3.

that dish, and that nobody ever contacted him to ask permission to make the installation.[34] Wayte says that had he been asked, he *would* not have agreed to the installation of a dish on the roof of the property.[35]

William Risconsin similarly states that in August 2016, he discovered that a new DirecTV satellite dish had been improperly installed directly onto his roof without his knowledge or consent, with wires attached to the newly refurbished building exterior.[36] He also became aware that a second DirecTV satellite dish had earlier been improperly installed directly onto the roof without his knowledge or consent.[37] A third older DirecTV satellite dish installation that he had been aware of was properly mounted onto a vertical faux chimney, but for some unknown reason was not being used.[38] Risconsin **[*22]** states that he did not agree to the installation of these two satellite dishes, and DirecTV never asked him for permission to install them.[39] Risoncon says that had he been asked, he would not have agreed to installation of these dishes on the roof of the property.[40]

John Landsberger says that in March 2015, he discovered that about nine new DirecTV satellite dishes had been improperly installed directly onto the roof of his building.[41] He says that DirecTV told him that of the nine satellite dishes that had been installed on the property, there were only three signed authorization documents in its records.[42] The others had been installed by subcontractors or retailers who sold DirecTV service.[43] Landsberger states that he did not agree to the installation of any of these satellite dishes, and DirecTV never asked him for permission to install them.[44] Had he been asked, he would not have agreed to the installation of these dishes on the roof of the property.[45]

Katharine Beckwith states that in 2014 or earlier, she discovered that DirecTV, without having sought or obtained her permission, and without her prior knowledge, had installed a satellite dish on the roof of the property.[46]

The **[*23]** evidence before the Court indicates that DirecTV has a uniform policy with respect to its authorization form. DirecTV's company-wide policy is that it accepts a tenant's representation that the landlord has authorized the installation of the equipment in common areas (in the event that the landlord has not provided written authorization for the installation). This is a common question which predominates among the class. Even if individual landlords provide written authorization, this same policy would have applied equally to them, as well. The question is whether this policy constitutes an unfair business practice in violation of the UCL. Such a question would be suitable on a class-wide basis for this putative class seeking injunctive relief.

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[34] Wayte Decl., ¶4.

[35] *Id.*

[36] Risconsin Decl., ¶3.

[37] *Id.*

[38] *Id.*

[39] Risconsin Decl., ¶5

[40] *Id.*

[41] Landsberger Decl., ¶3.

[42] *Id.*, ¶5.

[43] *Id.*

[44] Landsberger Decl., ¶7.

[45] *Id.*

[46] Beckwith Decl., ¶3.

The Court is not persuaded that it would be required to conduct individualized determinations with respect to consent (including examining individual leases to determine if a tenant had a lawful right to have a satellite dish installed) and whether an individual class member's rights were violated by DirecTV. While this argument may be persuasive in assessing whether a given tenant suffered damages (or otherwise is entitled to restitution under **[*24]** the UCL), Plaintiffs here solely seek certification of an injunctive relief class. If unlawful, the Court would be empowered to issue an injunction to prohibit the policy on a going-forward basis.

For these reasons, the Court finds that Plaintiffs have submitted substantial evidence supporting the notion that common questions predominate over individualized assessments.

Typicality

The purported class representative's claim must be "typical" but not necessarily identical to the claims of other class members. It is sufficient that the representative is similarly situated so that he or she will have the motive to litigate on behalf of all class members. *Classen v. Weller (1983) 145 Cal.App.3d 27, 45, 192 Cal. Rptr. 914*. Thus, it is not necessary that the class representative have personally incurred all of the damages suffered by each of the other class members. *Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at 228*.

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." **[*25]** *Seastrom v. Neways, Inc. (2007) 149 Cal.App.4th 1496, 1502, 57 Cal. Rptr. 3d 903*.

Here, Plaintiffs' claims are typical. Mr. Kefalas, the managing agent for each of the Plaintiffs, has testified about Plaintiffs' experiences with the installations of DirecTV equipment on the properties. Kefalas claims that the Plaintiffs did not authorize the installation of the equipment, and that DirecTV has refused to remove the equipment when asked to do so. The Plaintiffs' experience is similar to those of the other putative class members who have submitted declarations (as set forth above).

DirecTV raises a number of arguments in opposition to typicality. First, Defendant attacks the notion that there is no evidence that the putative class of landlords was subjected to similar unauthorized attachments. Again, however, it is the allegedly unlawful policy, on a going-forward basis, which Plaintiffs seek to enjoin. They were all subjected to the same policy; whether a given landlord suffered damages does not detract from typicality for purposes of the injunctive relief class.

DirecTV also argues that Plaintiffs do not satisfy typicality because they are subject to unique defenses, including that their claim for injunctive relief is moot. Specifically, DirecTV says it has formulated **[*26]** a Restricted Address List, meaning that its satellite dishes no longer will be installed on the properties of those on the list (including Plaintiffs). This, according to DirecTV, renders the Plaintiffs' claim moot and renders their claim atypical.

The argument, however, is not persuasive. As Plaintiffs note in the reply, DirecTV's mootness argument is based on its unilateral placement of Plaintiffs' properties on the "Resident Address List." There was no voluntary settlement with the Plaintiffs (which, if this was the case, would likely be grounds for a finding that Plaintiffs lack typicality). If DirecTV's argument was followed to its logical conclusion, any time it was sued by a putative class member challenging the authorization policy, it could simply place that person or entity on its "Resident Address List" and avoid litigation of the allegedly unlawful policy. Absent a court order prohibiting an allegedly unlawful policy, a defendant could resume its practice in the future.

For these reasons, the Court determines Plaintiffs have satisfied the typicality requirement.

Adequacy of Representation

"The primary criterion in determining adequacy of representation is whether the representative, **[*27]** through qualified counsel, vigorously and tenaciously protected the interests of the class." *Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 846, 199 Cal. Rptr. 134*. Additionally, the class representative must "raise claims reasonably expected to be raised by the members of the class." *City of San Jose, supra, 12 Cal. 3d at 464*. The fiduciary duty must be undertaken free of demonstrable conflicts of interest with other class members. *Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625-26, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. The "adequacy of representation" requirement has not been precisely differentiated from the typicality requirement. *Caro v. Procter & Gamble*, supra, 18 Cal. App. 4th at 670. Other cases have stated that "adequacy of representation" depends on whether plaintiffs attorney is qualified to conduct the proposed litigation and plaintiffs interests are not antagonistic to the interests of the class. *McGhee v. Bank of America (1976) 60 Cal. App 3d 442, 450, 131 Cal. Rptr. 482*.

Here, since typicality has not been "precisely differentiated" from the adequacy requirement, and since Plaintiffs have claims typical of those of the class, they are adequate class representatives. The Court is not persuaded by DirecTV's arguments in opposition that the Plaintiffs' interests are in conflict with those of the putative class members because "the issuance of Plaintiffs' requested injunction would narrow landlords' choices and impose additional administrative costs and burdens upon them."[47] Again, the injunctive relief **[*28]** class seeks a remedy on a prospective basis. In any event, there is nothing which indicates that there would in fact be administrative costs or burdens to landlords if the injunction were to issue.

Mr. Kefalas, for his part, states that he has reviewed the complaint and written discovery in this action; has assisted in responding to said discovery on behalf of all Plaintiffs; has searched Plaintiffs' files to retrieve documents to produce; has acted as designee to testify on behalf of Plaintiff (and spent a day testifying in that capacity); has spent hours in in-person meetings and conferring by telephone with counsel; and continues to act on behalf of Plaintiffs and the class.[48]

DirecTV does not challenge the qualifications of class counsel. Class counsel Rosenberg notes that her firm, Bramson, Plutzik, Mahler & Birkhaeuser, prosecutes class actions, derivative suits, and other complex litigation nationwide.[49] These cases include consumer protection, business torts, securities, antitrust, and communications, with particular emphasis on class actions, in both state and federal courts. The firm, Ms. Rosenberg represents, has been appointed lead or co-lead counsel or a member of a litigation **[*29]** executive committee dozens of times, and in those capacities has recovered millions of dollars for class members.[50] Ms. Rosenberg attaches as Exhibit 10 a copy of the firm's resume.

Similarly, co-counsel Mark Kindall of Izard, Kindall & Raabe, states that his firm has been appointed, or has acted, as lead counsel or co-led counsel in over 60 cases throughout the country.[51] Plainly, class counsel is qualified.

For these reasons, Plaintiffs have demonstrated they are adequate class representatives, and that their counsel is adequate.

<u>Superiority</u>

In deciding whether a class action would be "superior" to individual lawsuits, the Court will usually consider:

1) The interest of each member in controlling his or her own case personally;
2) The difficulties, if any, that are likely to be encountered in managing a class action;

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[47] Opposition at 7:26-27.

[48] Kefalas Decl., ¶3.

[49] Rosenberg Decl., ¶3.

[50] Rosenberg Decl., ¶3.

[51] Kindall Decl., ¶2.

3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; and
4) The desirability of consolidating all claims in a single action before a single court.

California Practice Guide, Civil Procedure Before Trial, ¶14:16 (The Rutter Group 2017) (citing FRCivPro 23(b)(3)); *see also Basurco v. 21st Century Ins. Co. (2003) 108 Cal.App.4th 110, 120, 133 Cal. Rptr. 2d 367* and *Newell v. State Farm Gen. Ins. Co. (2004) 118 Cal.App.4th 1094, 1101, 13 Cal. Rptr. 3d 343*.

Further, under California **[*30]** law, a class action is not "superior" where there are numerous and substantial questions affecting each class member's right to recover, following determination of liability to the class as a whole. *City of San Jose v. Superior Ct., supra, 12 Cal.3d 447, 459*.

Here, each member of the class would not have an interest in controlling his or her own case personally, given the fact that the Plaintiffs, by virtue of the instant motion, seek only injunctive relief. Obtaining such individual relief would not justify the costs of individually bringing such an action. There are not significant difficulties which are apparent, and which are likely to be encountered in a class of this nature (given the fact that the Court will be assessing the legality of DirecTV's use of the authorization form). It would be desirable to consolidate all such claims before a single court. As discussed *supra*, individualized issues would not outweigh the common issues, and thus, the case would be manageable, overall — given what appears to be a uniform policy of DirecTV not verifying a landlord's consent when Part 2 of the installation form is selected. There also does not appear to be any similar litigation already in progress involving the same controversy between Plaintiffs **[*31]** and Defendant DirecTV. On balance, it would be desirable to consolidate the injunctive relief claim under the UCL in a single action.

Accordingly, the Court finds that the superiority factor is satisfied.

Conclusion

The Court determines that Plaintiffs have demonstrated, by substantial evidence, that the criteria supporting class certification are satisfied. For these reasons, the motion for certification of the injunctive relief class is granted.

IV.

MOTION FOR PRELIMINARY INJUNCTION

A. General standards on preliminary injunctions

CCP §526 provides the basis for which the Court may issue (or deny issuance of) an injunction. *CCP §527(a)* authorizes issuance of injunctions before trial "if sufficient grounds exist therefor."

Injunctions will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Center, Inc. v. Chrysler Motors (1967) 255 Cal.App.2d 300, 307, 63 Cal. Rptr. 148*; Pacific *Designs Sciences Corp. v. Sup.Ct. (Maudlin) (2004) 121 Cal.App.4th 1100, 1110*. Conversely, injunctive relief is more likely to be granted where a damages remedy is precluded by law. *Department of Fish & Game v. Anderson-Cottonwood Irrig. Dist. (1992) 8 Cal.App.4th 1554, 1564, 11 Cal. Rptr. 2d 222*.

Further, *CCP §526(a)(2)* lists the traditional consideration of "irreparable harm." Irreparable harm is often related to the "inadequate legal remedy" (i.e., the damages remedy is inadequate because some immeasurable harm is threatened). But it is also a separate consideration. **[*32]** Courts look for more than a mere dispute. Relief is unlikely unless someone will be badly hurt in a way which cannot be later repaired. California Practice Guide, Civil

Procedure Before Trial, ¶9:522 (The Rutter Group 2017) (referencing *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal.App.3d 863, 870-871, 173 Cal. Rptr. 476*.

Moreover, the threat of irreparable harm must be imminent, as opposed to a mere possibility of harm some time in the future: "An injunction cannot issue in a vacuum based on the proponents' fears about something that may happen in the future. It must be supported by actual evidence that there is a realistic prospect that the party enjoined intends to engage in the prohibited activity." California Practice Guide, Civil Procedure Before Trial, ¶9:522 (The Rutter Group 2017) (referencing *Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal.App.4th 1069, 1084, 92 Cal. Rptr. 2d 275)*.

While the statute makes no reference to the traditional equitable concern of "balancing equities," it is a crucial factor in the judge's determination: i.e., the court must exercise its discretion "in favor of the party most likely to be injured.. ..If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." *Robbins v. Sup. Ct. (1985) 38 Cal.3d 199, 205, 211 Cal. Rptr. 398, 695 P.2d 695*.

While **[*33]** the Court has broad discretion in ruling on an application for preliminary injunction, such discretion must be exercised in light of the following interrelated factors:

1) Are the plaintiffs likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted? *Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th 618, 633, 43 Cal. Rptr. 2d 774*.

2) Is there a reasonable probability that plaintiffs will prevail on the merits? *Robbins, supra, 38 Cal.3d at 206*.

The Court's determination must be guided by a "mix" of the potential-merit and interim-harm factors: the greater plaintiff's showing on one, the less must be shown on the other to support an injunction. *Butt v. State of California (1992) 4 Cal.4th 668, 678, 15 Cal. Rptr. 2d 480, 842 P.2d 1240*; *Pleasant Hill Bayshore Disposal, Inc. v. chip-It Recycling, Inc.* (2001) 91 Cla.App.4th 678, 696.

Importantly, the avowed purpose of a preliminary injunction is to preserve the status quo pending a trial on the merits. *Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889*. See also California Practice Guide, Civil Procedure Before Trial, ¶9:558 (The Rutter Group 2017) (referencing *White v. Davis (2003) 30 Cal.4th 528, 554, 133 Cal. Rptr. 2d 648, 68 P.3d 74*; *Costa Mesa City Employees' Ass'n. v. City of Costa Mesa (2012) 209 Cal.App.4th 298, 305)*. It is not an adjudication of the ultimate rights in controversy; it merely represents the trial court's discretionary decision whether the defendant should be restrained from exercising a claimed right pending trial. California Practice Guide, Civil Procedure Before Trial, **[*34]** ¶9:639 (The Rutter Group 2017); *Cohen v. Board of Supervisors (1985) 40 Cal.3d 277, 286, 219 Cal. Rptr. 467, 707 P.2d 840*. For "affirmative" or "mandatory" injunctions that alter the status quo, rather than simply preserve it, many courts hold the party seeking the injunction to the higher standard of showing a "clear" or "substantial" likelihood of success. *Dahl v. HEM Pharmaceuticals Corp., 7 F.3d 1399, 1403 (9th Cir.1993)*; *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc. (S.D. Cal. 2001) 158 F.Supp.2d 1178, 1180*.

The burden is on the plaintiff to show all elements necessary to support issuance of a preliminary injunction. California Practice Guide, Civil Procedure Before Trial, ¶9:632.1 (The Rutter Group 2017); *O'Connell v. Sup.Ct. (Valenzuela) (2006) 141 Cal.App.4th 1452, 1481, 47 Cal. Rptr. 3d 147*.

B. Discussion

Plaintiffs have moved for a preliminary injunction restraining Defendant DirecTV, LLC or its agents during the pendency of this action from entering into common or restricted areas and/or attaching its equipment thereto, of residential multi-dwelling units in the State of California based solely on the representation of a renter who wishes to subscribe to DirecTV's services that the landlord has authorized the installation or that no permission of the landlord is required for the installation

As noted above, the Court must weigh two interrelated factors in assessing whether to impose an injunction: whether there is a reasonable probability that Plaintiffs will prevail on the merits at trial; and whether **[*35]** plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted. The Court must also consider whether Plaintiffs have an adequate remedy at law.

1. Likelihood of success on the merits

The first consideration is whether Plaintiffs have demonstrated a likelihood of success on the merits on the sole remaining claim in the case, violation of the UCL.

a. Standing Issue

At the outset, Defendant DirecTV contends that Plaintiffs do not have standing to sue under the UCL because they are neither consumers nor competitors.

Under Business and Professions Code ("B&P Code") *§ 17200*, "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *B&P Code §17203* provides:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to **[*36]** restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others *only if the claimant meets the standing requirements of* *Section 17204* and complies with *Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state. (Emphasis added.)

In turn, *B&P Code §17204*, which was amended by Proposition 64, allows a private person to bring an action for violation of the UCL when *he "has suffered injury in fact* and has lost money or property *as a result of* such unfair competition." *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1359, 108 Cal. Rptr. 3d 682* (emphasis added).

In *Camacho v. Automobile Club of Southern California (2006) 142 Cal.App.4th 1394, 1403, 48 Cal. Rptr. 3d 770*, the Court applied the following test for an "unfair" IJCL claim by a consumer: (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided. *See also* *Klein v. Chevron U.S.A., Inc. (2012) 202 Cal.App.4th 1342, 1376, 137 Cal. Rptr. 3d 293* (citing *Camacho*). Whether a practice is unfair is generally a question of fact which requires consideration and weighing of evidence **[*37]** from both sides. *Klein, supra, 202 Cal.App.4th at 1376* (citing *Camacho, supra, at 1403*).

Defendants cite *Linear Technology Corp. v. Applied Materials, Inc. (2007) 152 Cal.App.4th 115, 61 Cal. Rptr. 3d 221* for the proposition that Plaintiffs do not have standing because they are neither business competitors or consumers. However, *Linear Technology Corp.* was distinguished by the Central District in *In re Yahoo! Litigation (2008) 251 F.R.D. 459*. The district court noted:

> Defendants argue that because the UCL "was enacted to protect consumers and competitors," *O'Brien v. Camisasca Automotive Mfg., Inc., 161 Cal.App.4th 388, 73 Cal.Rptr.3d 911, 918 (2008)*, plaintiffs, which are neither consumers nor defendants' competitors, lack standing under the UCL. Defendants rely on the following language in *Linear Tech. Corp. v. Applied Materials, Inc., 152 Cal.App.4th 115, 135, 61 Cal.Rptr.3d 221 (2007)*:

> "where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contracts, a corporate plaintiff may not rely on the UCL for the relief it seeks."
>
> The foregoing language in *Linear Tech.*, which was decided after the enactment of Proposition 64, appears not to have recognized the apparent change in the UCL's standing requirement that the Court recognized in its October 30, 2006 Order. The *Linear Tech.* court relied on the discussion in *Rosenbluth Ina, Inc. v. Super. Ct., 101 Cal.App.4th 1073, 124 Cal.Rptr.2d 844 (2002)*, regarding standing under the UCL pre-Proposition 64. However, even if this is the case, *Linear Tech.* and *Rosenbluth* do not preclude plaintiffs' claims under the UCL.
>
> Read in context, the above-quoted **[*38]** language from *Linear Tech.* does not necessarily prevent *any* corporate plaintiff from proceeding under the UCL in a case arising from a contract that does not involve either the public or individual consumers. The holdings of both *Linear Tech.* and *Rosenbluth* turn less on the fact that the alleged victims in those cases were businesses, and more on the fact that these entities were sophisticated and individually capable of seeking relief for their injuries. The alleged victims in *Linear Tech.* were Silicon Valley corporations—as distinct from "powerless, unwary consumers"—each of which "presumably [had] the resources to seek damages or other relief should it choose to do so." *Linear Tech., 152 Cal.App.4th at 135, 61 Cal.Rptr.3d 221* (quoting *Rosenbluth, 101 Cal.App.4th at 1078, 124 Cal.Rptr.2d 844*) (ellipses omitted). The potential UCL plaintiffs in *Rosenbluth* were "sophisticated corporations, most in the Fortune 1000 ..." *Rosenbluth, 101 Cal.App.4th at 1078, 124 Cal.Rptr.2d 844*.

See *In re Yahoo! Litigation (C.D. Cal. 2008) 251 F.R.D. 459, 474-475* (emphasis in original).

Thus, under *In re Yahoo!*, the focus is on the sophistication of the plaintiffs, rather than whether the plaintiffs were businesses or not. Here, as in *In re Yahoo!*, the Court cannot make a finding that the proposed class is "so uniformly sophisticated and capable of seeking relief against defendants." *In re: Yahoo! at 475*. Accordingly, Plaintiffs would have standing to **[*39]** prosecute the UCL claim.

(2) Mootness of individual claims

DirecTV also argues that Plaintiffs cannot demonstrate a likelihood of success because their individual claims are moot. DirecTV raises the mootness issue in opposing the class certification motion, arguing Plaintiffs' claims are atypical. As discussed *supra*, Defendants have not shown the claims are moot.

(3) Substantive discussion of likelihood of success

Separately, the Court must assess whether Plaintiffs have demonstrated a likelihood of success on the merits of their UCL claim. The claim is premised on the assertion that DirecTV's failure to seek or obtain permission from landlords before installing its equipment in common or restricted areas of MDUs is an unfair business practice under the UCL.

Plaintiffs' theory of the case is that DirecTV does not seek such permission in advance of installation on the putative class members' property. Plaintiffs have referenced the three tests determining whether a business practice is "unfair" under the UCL — the "Traditional Test," the "FTC Act Test," and the "Tethering Test."

The "traditional test" deems a business practice "unfair" where it "offends an established public policy or when **[*40]** the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *West v. JPMorgan Chase Bank, NA., 214 Cal.App.4th 780, 806, 154 Cal. Rptr. 3d 285 (2013)*. The determination of whether a practice is unfair under the statute "necessarily involves an examination of its impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer." *Motors, Inc., supra*, 102 Cal.App.3d at 740; *accord* *Progressive West Ins. Co. v. Superior Court, 135 Cal.App.4th 263, 286, 37 Cal. Rptr. 3d 434 (2005)*.

As noted above, in *Camacho v. Automobile Club of Southern California, supra, 142 Cal. App. 4th 1394*, the Court held that in determining whether or not a practice is "unfair" in a consumer context, courts should amity the test employed in assessing alleged violations of *§ 5* of the Federal Trade Commission Act, *15 U.S.C. § 45(a)*, under which a business practice is deemed unfair if it (1) causes substantial harm (2) that is not outweighed by countervailing benefits to consumers or competition, and (3) consumers could not reasonably have avoided the harm.

Finally, in *Cel-Tech Communications v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 186, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*, the Supreme Court held that in cases involving anticompetitive conduct by a competitor, conduct is "unfair" if it "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." As Plaintiffs note, some **[*41]** lower courts have extrapolated that test beyond claims between direct competitors, holding that a business practice is "unfair" where the public policy which is a predicate to the action is "tethered" to specific constitutional, statutory or regulatory provisions" that are or are threatened to be violated either in letter or spirit. E.g., ***Scripps Clinic v. Superior Court, 108*** *Cal.App.4th 917, 940, 134 Cal. Rptr. 2d 101 (2003)*.

With these standards in mind, as Plaintiffs note, "the landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Loretto v. Teleprompter Manhattan CA TV Corp. (1982) 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868* (citing *Kaiser Aetna v. United States (1979) 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332)*. *Loretto* invalidated a New York statute that provided a landlord must permit a cable television company to install its cable facilities upon his property and may not demand payment from the company in excess of an amount determined by a state commission to be reasonable. The Court held that the New York statute operated as a taking of a portion of the plaintiff's property for which she was entitled to just compensation under the Fifth Amendment (as made applicable to the States by the Fourteenth Amendment). The Court noted that the installation "of plates, boxes, wires, bolts, and screws to the building" or of wires and outlets in particular units constitutes a physical invasion of **[*42]** the property. *Loretto at 438*; *see also* *Gulf Power Co. v. United States (N.D. Fla. 1998) 998 F.Supp. 1386, 1391-92* (holding that *Loretto* established a *per se* takings rule, in that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve); affirmed at *187 F.3d 1324 (11th Cir. 1999)*.

Other courts have applied the *Loretto* rule to non-governmental actors. For instance, the U.S. District Court in *Daniels Cablevision, Inc. v. San Elijo Ranch, Inc. (S.D. Cal. 2001) 158 F.Supp.2d 1178* denied a cable company's motion for preliminary injunction in its suit against a real estate developer, claiming entitlement to lay cable in a utility trench without paying the fee demanded by the developer. *See also* *Century Sw. Cable Television, Inc. v. CHF Assocs. (9th Cir. 1994) 33 F.3d 1068, 1071*.

The question is whether DirecTV's admitted practice of relying on the word of tenants to obtain a landlord's consent is one which, consistent with the traditional UCL "unfair" test set forth above (which is the test the Court determines is appropriate to apply here), is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. Here, while this process is not immoral, unethical, oppressive, or unscrupulous, it could be substantially injurious to consumers (i.e., the members of the putative class of MDU owners) for DirecTV to rely solely on the word of tenants in installing the satellite dishes and related **[*43]** equipment on the MDU owners' property. While DirecTV argues that a tenant, and not DirecTV, has a preexisting relationship with his or her landlord (and is thus in the best position to obtain any needed consent), and that it is perfectly legal to install equipment with consent (*citing* *Church of Christ in Hollywood v. Sup. Ct. (2002) 99 Cal.App.4th 1244, 1252, 121 Cal. Rptr. 2d 810)*, the alleged practice may actually result in an end-run around the consent requirement.

Indeed, the Declarations of the putative class members submitted in support of the motion for class certification (the declarations are also submitted in support of the motion for preliminary injunction) all state that the dishes were installed without their prior knowledge or consent.[52] Without verifying that the MDU owner has provided consent, there is a significant risk that the practice could be injurious to consumers.

In sum, Plaintiffs have demonstrated a reasonable likelihood of success on the merits to support issuance of the preliminary injunction.

2. Whether Plaintiffs are likely to suffer greater injury from denial of the injunction than defendants are likely to suffer if it is granted

The next consideration is whether Plaintiffs are likely to suffer greater injury from denial of the injunction than defendants **[*44]** are likely to suffer if it is granted. It is here where issuance of the injunction would be problematic.

If the Court were to grant the motion for *preliminary* injunction, without litigating the ultimate issue in the case, it would be changing DirecTV's long-standing nationwide policy.[53] DirecTV represents that if its current practice is blocked pending trial, untold numbers of installations will necessarily be delayed or cancelled. This assuredly would result in significant injury to DirecTV. Further, as DirecTV states, changing the policy would require DirecTV to rewrite all training materials and consumer forms, and retraining all employees and contractors engaged in this type of work.[54] On the other hand, if the injunction is denied pending trial, it would preserve the current status quo and would keep DirecTV's policy in place. While Plaintiffs may in fact suffer some injury from denial of the preliminary injunction, this is outweighed by the injury DirecTV would suffer if the motion is granted at the present time, in advance of trial.

Related to the "balance of harms" inquiry is whether Plaintiffs have shown DirecTV's conduct threatens irreparable injury. According to Plaintiffs, unless **[*45]** enjoined, DirecTV's installation practices will lead to continued abuse of the property rights of Plaintiffs and other landlords — more unconsented entry, more unauthorized permanent installations of dishes and other hardware, and more damage to roofs and walls.[55] However, Plaintiffs have not demonstrated at this time that, pending an actual trial on the UCL claim, the harm would be "irreparable."

Plaintiffs argue that the harm is irreparable because DirecTV, as a matter of policy, refuses to remove these dishes.[56] Plaintiffs further contend that suing for damages would be infeasible, as "they are too difficult to assess and uneconomical to obtain."[57] At the present time, however, without having tried these issues, the Court is not in a position to determine that, in fact, Plaintiffs would suffer irreparable harm if the injunction were denied.

For these reasons, Defendant has shown that it is likely to suffer greater injury from granting the injunction than Plaintiffs would suffer from denial of the injunction

3. Adequacy of Remedy at Law

Another consideration for the Court in assessing whether to issue the preliminary injunction is whether Plaintiffs have an adequate remedy at law. Injunctions **[*46]** will rarely be granted (absent specific statutory authority) where a suit for damages provides a clear remedy. *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp. (1967) 255*

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[52] See, e.g., Nichols Decl., ¶3; Sanger Decl. ¶3; Wayte Del., ¶4; Risconsin Decl., Landsberger Decl., ¶7.

[53] Edelstein Decl., Exh. A (Dimech Tr. At 50:9-55:18.

[54] Opposition at 5:25-27.

[55] Motion at 14:26-29.

[56] Reply at 9:26-27.

[57] Reply at 10:1-2.

Cal.App.2d 300, 63 Cal. Rptr. 148; 307; *Pacific Decision Sciences Corp. v. Sup. Ct. (Maudlin) (2004) 121 Cal.App.4th 1100, 1110, 18 Cal. Rptr. 3d 104*.

Here, it is unclear whether the Plaintiffs' remedy at law is adequate. DirecTV denies causing any damage when it installs a satellite dish, but even so, DirecTV claims that any damages could be remedied by removal of the dish and/or repairs compensable in money damages (and putative class members have testified to the same).[58] At this time, and without having conducted a trial on the matter, Plaintiffs have not made the requisite showing that their remedy at law is inadequate.

V.

RULING AND ORDER

For the foregoing reasons, the motion for certification of the injunctive relief class is granted. The motion for preliminary injunction is denied. The Court sets a further status conference in this matter for March 21, 2018 at 2 p.m. The parties shall submit a joint statement by March 15, 2018, outlining their proposals for proceeding with the subsequent phases of the litigation.

Dated: January 25, 2018

/s/ Kenneth Freeman

Kenneth Freeman

Judge of the Superior Court

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[58] Edelstein Decl., Exhs. B-E, Risconsin Tr. At 26:3-27:19; Landsberger Tr. At 37:21-38:15; Sanger Tr. At 12:20-13:14, 21:2-15; Nichols Tr. At 14:10-15:9, 20:5-22:11, 34:22-36:16, 41:25-42:11.

GolTV, Inc. v. Fox Sports Latin Am., Ltd.

United States District Court for the Southern District of Florida

January 26, 2018, Decided; January 26, 2018, Entered on Docket

CASE NO. 16-24431-CIV-ALTONAGA/Turnoff

Reporter

2018 U.S. Dist. LEXIS 29836 *; 2018-1 Trade Cas. (CCH) P80,265

GOLTV, INC. and GLOBAL SPORTS PARTNERS LLP, Plaintiffs, v. FOX SPORTS LATIN AMERICA, LTD., et al., Defendants.

Prior History: *GolTV, Inc. v. Fox Sports Latin Am. Ltd., 2017 U.S. Dist. LEXIS 219094 (S.D. Fla., May 25, 2017)*

Core Terms

rights, television, Tournament, Plaintiffs', Sports, Defendants', alteration, bribery, conspiracy, bribes, bids, consumers, allegations, wire fraud, Sherman Act, quotation, marks, proximate cause, soccer, predicate act, domestic, fraudulent, tortious interference, antitrust claim, Counts, offers, commercial bribery, damages, parties, business relationship

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Judges: CECILIA M. ALTONAGA, UNITED STATES DISTRICT JUDGE.

Opinion by: CECILIA M. ALTONAGA

Opinion

ORDER

THIS CAUSE came before the Court at a December 15, 2017 hearing [ECF No. 288] on Defendants, Fox Sports Latin America, Ltd. ("FSLA"); Pan American Sports Enterprises Company ("PASEC"); Fox International Channels (US), Inc. ("FIC"); Fox Networks Group, Inc. ("FNG"); Torneos y Competencias, S.A. ("Torneos"); T&T Sports Marketing Ltd. ("T&T"); Hernan Lopez; Carlos Martinez; James Ganley; Alejandro Burzaco; and Juan Angel Napout's Motion to Dismiss [ECF No. 255], filed October 9, 2017. Defendants seek dismissal of Plaintiffs, GolTV, Inc. and Global Sports Partners LLP's eleven-count Amended Complaint [ECF No. 78] on the ground it fails to state a claim upon which relief may be granted. Plaintiffs filed a Memorandum of Law in Opposition [ECF No. 279], to which Defendants filed a Reply [ECF No. 286]. The Court has carefully considered the parties' oral arguments, written submissions, the record, and applicable law. For the **[*5]** reasons explained below, the Motion is granted in part and denied in part.

I. BACKGROUND

The Amended Complaint details how Defendants engaged in a bribery scheme between 2000 and 2015 to ensure Defendant, T&T, would secure exclusive television rights to Confederación Sudamericana de Fútbol's ("Conmebol[']s") prestigious international club soccer tournaments: the Copa Libertadores de America, the Copa Sudamericana, and the Recopa Sudamericana (collectively, the "Club Tournaments"). (*See* Am. Compl. ¶ 3). The Amended Complaint relies on a 92-count Superseding Indictment [ECF Nos. 78-1 through 78-3] from a parallel criminal case in the Eastern District of New York, in which 27 individual defendants have been charged with crimes including racketeering, conspiracy, wire fraud, and money laundering (*see* Am. Compl. ¶ 2 (citing *United States v. Webb*, No. 15-cr-0252 (E.D.N.Y. Nov. 25, 2015))); and Torneos's Deferred Prosecution Agreement [ECF No. 78-4] acknowledging criminal culpability for wire fraud conspiracy to pay bribes and kickbacks to Conmebol officials in exchange for their support in awarding Club Tournament television rights to T&T (*see* Am. Compl. ¶ 6 (citing *United States v. Torneos* ***[*6]*** *y Competencias S.A.*, No. 16-00634-PKC, ECF Nos. 4-1 & 4-2 (E.D.N.Y. Dec. 13, 2016))). Plaintiffs allege Defendants' scheme to obtain exclusive television rights for the Club Tournaments injured GolTV and Global Sports, who otherwise would have won bids for Club Tournament television rights. (*See generally* Am. Compl.).

A. Parties and Relevant Entities

On October 20, 2016, Plaintiffs, GolTV and Global Sports, filed an initial Complaint [ECF No. 1], alleging 16 defendants were involved in the bribery scheme to award and obtain exclusive television rights for the Club Tournaments. (*See generally* Compl.). On March 6, 2017, Plaintiffs filed the Amended Complaint against 14 defendants, voluntarily dismissing Hugo Jinkis and Mariano Jinkis from this action. (*See* Pls.' Third Status Report [ECF No. 77] 2). On September 19, 2017, the Court entered an Order [ECF No. 238] dismissing Conmebol and Full Play for lack of personal jurisdiction, further narrowing the list of defendants to those identified below.

While the Amended Complaint discusses multiple players and details several aspects of the bribery scheme, only the parties relevant to the present Motion are discussed.

1. Plaintiffs

GolTV, a Florida-based **[*7]** television channel, provides Spanish and English-language soccer programming in the United States. (*See* Am. Compl. ¶ 14). GolTV is the only TV channel in the U.S. media market devoted exclusively to soccer. (*See id.* ¶ 15). GolTV is owned by Francisco "Paco" Casal, a Uruguayan businessman and former soccer player; and Nelson Gutierrez and Enzo Francescoli, former members of the Uruguayan national soccer team. (*See id.*). GolTV partnered with Global Sports to make offers on the worldwide or Americas television rights from Conmebol, "with the understanding that GolTV would pay for and acquire the U.S. portion of those rights." (*Id.* ¶ 111).

Global Sports[1] is an English partnership formed by Casal and Gutierrez to acquire television and marketing rights to international soccer tournaments for GolTV. (*See id.* ¶ 16). Global Sports "acted, among other capacities, as an agent for GolTV to attempt to acquire television broadcasting rights to the Club Tournaments." (*Id.*). "GolTV controlled and coordinated the actions that Global Sports took on behalf of GolTV and Global Sports served the corporate interests of GolTV in seeking to acquire television rights to the Club Tournaments." (*Id.*).

2. Defendants

T&T is a Cayman Islands company, which during the relevant time period was owned by Torneos and Fox Pan American Sports LLC[2] — the predecessor company to PASEC. (*See id.* ¶¶ 5, 17). T&T paid tens of millions of dollars in bribes and kickbacks to Conmebol officials between 2000 and 2015 in exchange for the exclusive television rights to the Club Tournaments. (*See id.* ¶ 3 (citing Superseding Indictment ¶¶ 174-85)). Once the rights to Club Tournaments were licensed to T&T, T&T then sublicensed them to Fox Sports Latin America in order for the tournaments to broadcast on Fox Sports channels in the United States and abroad. (*See id.* ¶ 7).

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[1] Plaintiffs refer to GolTV and Global Sports collectively as GolTV in the Amended Complaint (*see* Am. Compl. ¶ 111), and throughout their Opposition (*see generally* ***[*8]*** Opp'n). The Court refers to GolTV and Global Sports as Plaintiffs unless it is necessary to refer to them separately.

[2] Unless otherwise necessary, the Court refers to the Fox parties collectively as "Fox" or the "Fox Defendants."

PASEC is the surviving entity and legal successor to Fox Pan American Sports LLC, a Delaware limited liability company that did business in Florida as Fox Sports Latin America. (*See id.* ¶ 18). Fox Pan American owned 75 percent of T&T during most of 2005 to 2015. (*See id.* ¶ 17). In 2015, Fox Pan American merged with PASEC, which became the surviving entity and legal successor to Fox Pan American. (*See id.* ¶ 19). PASEC continues to directly or indirectly own 75 percent of T&T. (*See id.*).

FIC has its principal place of business in Beverly Hills, California **[*9]** and offices in Florida. (*See id.* ¶ 20). FIC owned and operated Fox Pan American Sports, and now owns PASEC. (*See id.* ¶¶ 19-21).

FSLA owns and operates the Fox Sports networks in Latin America as well as Fox Deportes, a Spanish-language sports programming service distributed in the United States. (*See id.* ¶ 18).

FNG is a Delaware corporation and subsidiary of Twenty-First Century Fox, Inc. (*See id.* ¶ 22). In January 2016, a corporate reorganization announced FIC would be dissolved and FNG would assume operation of Fox Sports Latin America as the legal successor to FIC. (*See id.*).

Torneos is an Argentinean sports media and marketing corporation with a number of subsidiaries and affiliates. (*See id.* ¶ 24). Torneos has historically held exclusive agreements to produce and distribute television programming related to South American league soccer matches. (*See id.*). On December 13, 2016, Torneos acknowledged criminal culpability to the Department of Justice ("DOJ") for wire fraud conspiracy to pay bribes and kickbacks to Conmebol officials in exchange for their support in awarding the Club Tournament television rights to T&T. (*See id.* ¶ 6 (citing Torneos DPA)). Torneos agreed to pay over $112.8 **[*10]** million in forfeiture and criminal penalties after making admissions of its role in the bribery scheme. (*See id.* ¶ 11). Torneos admitted to paying and causing to be paid annual six-figure, and in some instances seven-figure, bribes and kickback payments in exchange for Club Tournament television rights. (*See id.* ¶ 7).

Martinez, a Florida resident, is President of FNG Latin America, responsible for the operations of Fox Sports Latin America. (*See id.* ¶ 26). Martinez was previously President of FIC Latin America, and as such operated Fox Pan American from the FIC offices in Florida. (*See id.*). Martinez was also on the board of T&T from approximately October 31, 2012 until December 11, 2013. (*See id.*). Martinez is alleged to have been personally involved in the bribery scheme, including signing an agreement on behalf of T&T to restructure the payment of bribes through intermediaries. (*See id.* ¶¶ 65, 78).

Lopez, a California resident, was the CEO of FIC from 2011 until January 2016, when he left the company. (*See id.* ¶ 27). Prior to that, Lopez was the Chief Operating Officer of FIC from 2008 to 2011 and General Manager of Fox Latin American Channels from 2000 to 2008. (*See id.*). Lopez served **[*11]** on the board of directors of T&T from approximately June 1, 2010 to December 10, 2013. (*See id.*).

Ganley, a citizen and resident of Florida, operated Fox Pan American as its Chief Operating Officer and was an employee of FSLA. (*See id.* ¶ 28). Ganley served on the board of directors of T&T from approximately April 28, 2005 to October 31, 2012. (*See id.*).

Martinez, Lopez, and Ganley allegedly participated in T&T's payment of bribes to Conmebol officials to ensure FSLA would obtain the television rights for the Club Tournaments through T&T. (*See id.* ¶¶ 7, 43, 64-66). These executives also served as directors of T&T. (*See id.* ¶ 8).

Burzaco, an Argentinean citizen, was a principal of T&T and a shareholder, director, and officer of Torneos. (*See id.* ¶¶ 8, 29). Burzaco was on the T&T board of directors from 2005 to 2013. (*See id.* ¶ 29). Burzaco had an ownership share in Torneos and served as the company's general manager, legal representative, and president of its board of directors between 2005 and 2015. (*See id.*). Burzaco was also a principal of Torneos's affiliates and shell companies, which he created and controlled off of Torneos's books. (*See id.*). He paid bribes to Conmebol officials. **[*12]** (*See id.* ¶ 69). In the criminal RICO action, Burzaco pled guilty to racketeering conspiracy, wire fraud conspiracy, and money laundering conspiracy involving the bribery of Conmebol officials, including bribery in connection with the television rights for the Club Tournaments. (*See id.* ¶¶ 4, 30 (citing *Webb*, Transcript of Criminal Case for Guilty Plea [ECF No. 312-2] 5, 26-28)).

Napout, a citizen of Paraguay who has long maintained a home in Florida, was the president of Conmebol from August 2014 to December 11, 2015. (*See id.* ¶ 34). Napout served as a Vice President of Conmebol from 2007 to 2014. (*See id.*). Napout was also a member of Conmebol's Executive Committee from 2007 to 2015. (*See id.*). Napout is alleged to have received annual six-figure bribe payments from Burzaco in exchange for his cooperation in providing T&T the television rights to the Copa Libertadores tournament from 2011 through 2015. (*See id.* ¶¶ 69, 76, 84). As the then-President of Conmebol, Napout rejected Plaintiffs' October 2015 offer for the 2019 to 2022 Club Tournament television rights. (*See id.* ¶¶ 129-31).

B. The Bribery Scheme

Fox and Plaintiffs have previously vied for and continue to compete for television **[*13]** broadcasting rights to the South American club soccer tournaments run by Conmebol. (*See id.* ¶¶ 56-58). Estimates suggest the United States accounts for 16 percent of the Copa Libertadores's audience. (*See id.* ¶ 55). Only Conmebol, by decision of its Executive Committee, can award television rights for the Club Tournaments. (*See id.* ¶ 59). The combined popularity of these soccer tournaments and Conmebol's unique monopoly over the television rights to telecast Club Tournaments ensure telecasters who obtain the Club Tournament television rights derive significant revenue, including advertising revenue, from the purchase of the rights. (*See id.* ¶ 58).

T&T acquired the exclusive television rights to the Club Tournaments through bribery and other criminal wrongdoing with the aid of co-conspirators. (*See id.* ¶ 62 (citing Superseding Indictment ¶¶ 174-75)). From 1999 through 2015, T&T held the exclusive worldwide television rights to the Copa Libertadores. (*See id.* ¶ 61). From approximately 2002 until 2015, T&T held the exclusive worldwide television rights to the Copa Sudamericana. (*See id.*). In 2008, T&T also acquired the exclusive worldwide television rights to Recopa Sudamericana. (*See* ***[*14]*** *id.*).

The bribery scheme began in 2000, at which time one of the founders of Torneos unlawfully agreed to pay, and began to pay, annual bribes of $1 million to Conmebol officials Eugenio Figueredo, Nicolas Leoz, Eduardo Deluca, and Romer Osuna; such payments continued for more than 10 years. (*See id.* ¶ 62). As a result, throughout this period, Conmebol awarded the Club Tournament television rights exclusively to T&T. (*See id.*).

In 2005, Burzaco began to manage the day-to-day operations of Torneos, learned of the annual bribe payments, and helped continue the bribery scheme. (*See id.* ¶ 67). That same year, soon after Fox increased its interest in T&T from 25 percent to 75 percent, Martinez, Lopez, Fox Pan American, Ganley, and FSLA agreed with Torneos, T&T, and Burzaco that Fox and Torneos would fund and facilitate T&T's payments of bribes to Conmebol officials Leoz, Figueredo, Deluca, and Osuna. (*See id.* ¶ 64). As part of this agreement, Conmebol officials would sell the Club Tournament television rights to T&T, with the understanding the rights would be sublicensed to FSLA, and Conmebol would refuse to sell the rights to T&T's competitors or Fox, including Plaintiffs. (*See id.*). Moreover, **[*15]** the terms of the license agreements between Conmebol and T&T expressly contemplated the sublicensing of those rights to Fox. (*See id.* ¶ 77).

In 2009, other presidents of member associations of Conmebol began to demand annual bribes. (*See id.* ¶ 69). In response, Burzaco agreed to pay and did pay bribes to several others, including Napout. (*See id.*). "DOJ has revealed that the annual bribe payments of at least $400,000 that were made to Napout for the 2011, 2012, 2013, 2014, and 2015 editions of the Copa Libertadores" were wired to bank accounts controlled by Hugo and Mariano Jinkis, who facilitated the payments to Napout. (*Id.* ¶ 76).

Co-conspirators also engaged in conduct designed to prevent the detection of their illegal activities. (*See id.* ¶ 73). To disguise bribe payments in connection with the Copa Libertadores and other tournaments, Fox Pan American and Torneos agreed T&T would enter into sham "consulting" contracts with companies owned by Jose Margulies and companies he controlled. (*See id.* ¶¶ 71, 82-92). T&T's payments of bribes to Conmebol officials were also made through Productora de Eventos, S.A., an affiliate of Torneos, which then paid FPT Sports S.A. in exchange for consulting **[*16]** services. (*See id.* ¶¶ 99-100). T&T did not receive any legitimate services from these financial intermediaries, but paid the companies as a way to facilitate the bribery of Conmebol. (*See id.* ¶¶ 71, 100). T&T, Torneos, Fox, and the financial intermediaries all knew the payments from T&T to the intermediaries, and from the intermediaries to Conmebol, were intended to serve as bribes to obtain Club Tournament television rights for the Fox Defendants. (*See id.* ¶¶ 77-78).

C. Conmebol Rejects Plaintiffs' Offers for Club Tournament Television Rights

The payment of tens of millions of dollars of bribes to Conmebol officials led to T&T securing the television rights for the Club Tournaments despite Plaintiffs' superior offers. (*See id.* ¶¶ 79, 108). Plaintiffs detail how Conmebol, its Executive Committee members (including Napout), and other Defendants agreed to prevent Plaintiffs from obtaining the Club Tournament television rights by misleading Plaintiffs about when proposals for the rights would be considered; licensing Club Tournament television rights in advance of expected offers from Plaintiffs; and refusing to revoke rights wrongfully awarded to T&T at below-market prices — all due to **[*17]** T&T's bribery. (*See id.* ¶ 139). Since there were no parties actively making offers to acquire the television rights apart from Plaintiffs and T&T (*see id.* ¶ 140), the only reason Conmebol did not accept Plaintiffs' offers was because T&T and its co-conspirators were paying illegal bribes to Conmebol officials (*see id.* ¶ 110). To the extent rights had already been awarded to T&T when Plaintiffs made more favorable offers, had it not been for the bribery scheme, Conmebol would have revoked T&T's rights and awarded them to Plaintiffs. (*See id.* ¶ 140).

1. Conmebol Rejects Plaintiffs' March 2010 Offer for Television Rights for Years 2011 to 2014 for the Copa Libertadores and Copa Sudamericana Tournaments

On March 3, 2010, one of GolTV and Global Sports's owners, Paco Casal, met with Nicolas Leoz, then President of Conmebol, to present a formal offer for the television rights for the Copa Libertadores and the Copa Sudamericana for years 2011 to 2014, which Conmebol had previously awarded to T&T. (*See id.* ¶ 111). Plaintiffs offered Conmebol a total of $270 million for the rights, representing a nearly 70 percent increase over the $164 million believed to have been paid by T&T for the same years. **[*18]** (*See id.* ¶ 112). Conmebol disclosed to T&T and Fox Plaintiffs' offer to purchase the television rights, at which time T&T, with Fox Pan American and Torneos's knowledge, urged Conmebol to reject the offer. (*See id.* ¶ 113). Conmebol did not accept Plaintiffs' superior offer. (*See id.* ¶ 114). Conmebol could have revoked its agreement with T&T, and its Executive Committee was legally obligated to revoke it in favor of Plaintiffs' superior offer based on fiduciary duties owed to Conmebol. (*See id.* ¶ 115).

2. Conmebol Rejects Plaintiffs' October 2012 Offer for Television Rights for Years 2015 to 2020 for the Copa Libertadores and Copa Sudamericana Tournaments

In 2012, Plaintiffs offered to purchase from Conmebol the 2015 to 2020 television rights for Copa Libertadores and Copa Sudamericana. (*See id.* ¶ 116). Again, the offer was far more than what was being received from T&T and Fox. (*See id.*). Conmebol President Leoz promised Plaintiffs that he and the Conmebol officials on the Executive Committee would formally consider the proposal at an October 24, 2012 Executive Committee meeting. (*See id.*). As a result, on October 21, 2012, Plaintiffs submitted a sealed proposal to purchase television **[*19]** rights to the Copa Libertadores and Copa Sudamericana for years 2015 to 2020, for a total price of $805 million. (*See id.* ¶ 117). Conmebol disclosed to T&T and Fox the offer made by Plaintiffs to purchase the television rights for the tournaments. (*See id.* ¶ 118). T&T and Conmebol again agreed Conmebol would reject Plaintiffs' offer and instead accepted a competing offer from T&T. (*See id.*).

Conmebol then invited Burzaco to attend its October 24, 2012 Executive Committee meeting on behalf of T&T and offer reasons why the Plaintiffs' offer should not be accepted. (*See id.* ¶ 119). Conmebol did not inform Plaintiffs that Burzaco would be present, nor did Conmebol invite a representative of Plaintiffs to present their offer. (*See id.*). Conmebol ultimately rejected Plaintiffs' offer and amended its agreement with T&T to increase the price for the 2015 to 2018 television rights for the Copa Libertadores and Copa Sudamericana tournaments. (*See id.* ¶ 120).

3. Conmebol Rejects Plaintiffs' November 2013 Offer for Television Rights for Years 2015 to 2024 for Club Tournaments

On November 18, 2013, Plaintiffs made a new offer to purchase the 2015 to 2024 television rights for all three Club Tournaments. **[*20]** (*See id.* ¶ 122). Plaintiffs offered Conmebol $2.1 billion for the television rights to the three tournaments, with the total price being four times higher than the $560 million paid by T&T and its affiliate. (*See id.* ¶ 123). Predictably, Conmebol disclosed to T&T and Fox Pan American that Plaintiffs had offered to buy tournament rights and again, Conmebol agreed to reject Plaintiffs' offer. (*See id.* ¶ 125).

4. Conmebol Rejects Plaintiffs' May and October 2015 Offers for Television Rights for Years 2016 to 2022 for Club Tournaments

By letter dated May 7, 2015, Plaintiffs renewed their November 2013 offer to pay $360 million per year for Club Tournament television rights for the years 2019 to 2022. (*See id.* ¶ 126). On May 27, 2015, the DOJ unsealed the indictment describing criminal wrongdoing associated with soccer tournaments, including charges against T&T principal, Burzaco. (*See id.* ¶ 127). On July 29, 2015, Conmebol released a statement advising it was reevaluating its commercial relationships with entities implicated in the wrongdoing. (*See id.* ¶ 128). Plaintiffs engaged in a series of meetings with Conmebol officials, including its then-president Napout, to propose acquiring the **[*21]** Club Tournament television rights on terms superior to those on which Conmebol had awarded the rights to T&T and a Torneos affiliate. (*See id.* ¶ 129). On October 16, 2015, Plaintiffs again formally renewed the offer for the Club Tournament television rights for years 2019 to 2022. (*See id.* ¶ 130). Plaintiffs additionally proposed acquiring the Club Tournament television rights for 2016 to 2017 for $170 million per year. (*See id.*). Conmebol did not accept either proposal. (*See id.* ¶ 131).

Instead, Fox negotiated an agreement with Napout, on behalf of Conmebol, under which Conmebol would award the Club Tournament television rights for years 2016 to 2018 that had previously been licensed to T&T, directly to FIC. (*See id.* ¶ 132). FIC paid between $135 million and $155 million per year, approximately $70 million to $90 million more than the $65 million to $69 million per year T&T previously agreed to pay. (*See id.*). This agreement was negotiated with FIC by Napout in secret and in violation of Conmebol's procedures. (*See id.* ¶ 132). Plaintiffs were not informed of the negotiations, nor were they invited to submit a competing bid. (*See id.* ¶ 134). Napout was subsequently indicted and arrested **[*22]** in connection with accepting bribes in exchange for awarding Club Tournament television rights to T&T. (*See id.* ¶ 135).

D. Claims

Plaintiffs allege they are victims of Defendants' bribery, as they repeatedly offered Conmebol substantially more for Club Tournament television rights than the amounts T&T paid or offered to Conmebol for those rights. (*See id.* ¶ 12). Plaintiffs seek compensation for the harm they suffered from the loss of the television rights they otherwise would have been able to obtain in a fair and competitive market. (*See id.* ¶ 13). Plaintiffs accordingly bring this action alleging injury under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, the Sherman Act, the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"); and Florida tort law. (*See id.* ¶¶ 183-329).

Plaintiffs assert eleven claims. (*See generally id.*). Count One is a civil RICO claim pursuant to *18 U.S.C. section 1962(c)* against all Defendants. (*See* Am. Compl. ¶¶ 183-269). Count Two is a civil RICO conspiracy claim brought under *18 U.S.C. section 1962(d)* against all Defendants. (*See* Am. Compl. ¶¶ 270-76).

Count Three is a claim of conspiracy in restraint of trade in the Americas Television Rights Market, in violation of *section 1* of the Sherman **[*23]** Act, *15 U.S.C section 1*, against all Defendants. (*See id.* ¶¶ 277-82). Count Four is a claim of conspiracy in restraint of trade in the U.S. Television Programming Market, in violation of *section 1* of the Sherman Act, against all Defendants. (*See id.* ¶¶ 283-87). Count Five is a claim of conspiracy in restraint of trade in the U.S. Television Advertising Airtime Market, in violation of *section 1* of the Sherman Act, against all Defendants. (*See id.* ¶¶ 288-92).

Count Six is a claim of monopsonization[3] of the Americas Television Rights Market, in violation of *section 2* of the Sherman Act, *15 U.S.C. section 2*, against T&T. (*See id.* ¶¶ 293-98). Count Seven is a claim of attempted monopsonization of the Americas Television Rights Market, in violation of *section 2* of the Sherman Act, against T&T. (*See id.* ¶¶ 299-303). Count Eight is a claim of conspiracy to monopsonize the Americas Television Rights Market, in violation of *Section 2* of the Sherman Act, against all Defendants. (*See id.* ¶¶ 304-11).

Count Nine is a claim of violation of the FDUTPA, *Fla. Stat. §§ 501.201 et seq.*, against all Defendants. (*See* Am. Compl. ¶¶ 312-17). Count Ten is a claim of tortious interference with prospective economic advantage against the Fox Defendants, Torneos, and T&T. (*See id.* ¶¶ 318-24). Count Eleven is a claim of **[*24]** civil conspiracy to commit tortious interference against all Defendants. (*See id.* ¶¶ 325-29). The underlying factual allegations pertaining to each count are discussed in greater detail below.

II. LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A plaintiff need not plead "detailed factual allegations," but the complaint must offer "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id.* (internal quotation marks omitted) (quoting *Twombly, 550 U.S. at 555*). "[A] plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (first alteration added; internal quotation marks omitted) (quoting *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986))*.

To meet the *Iqbal/Twombly* plausibility standard, a complaint must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556* (alteration added)). A claim will not survive "if it tenders naked assertions devoid of further factual enhancement." **[*25]** *Id.* (internal quotation marks and alteration omitted) (quoting *Twombly, 550 U.S. at 557*).

On a motion to dismiss, a court construes the complaint in the light most favorable to the plaintiff and accepts its factual allegations as true. *See Brooks v. Blue Cross Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997)* (citing *SEC v. ESM Grp., Inc., 835 F.2d 270, 272 (11th Cir. 1988))*. Unsupported allegations and conclusions of law, however, will not benefit from this favorable reading. *See Iqbal, 556 U.S. at 679* ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); *see also Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1261 (11th Cir. 2009)* ("[U]nwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of [a] plaintiff's allegations." (alterations added; internal quotation marks omitted) (quoting *Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005)))*.

While a court is generally limited to the allegations of the complaint in evaluating a *Rule 12(b)(6)* motion to dismiss, "where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the [c]ourt may consider the documents part of the pleadings for purposes of *Rule 12(b)(6)* dismissal." *Brooks, 116 F.3d at 1369* (alteration added; citation omitted). Where those "exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Crenshaw v. Lister, 556 F.3d 1283, 1292 (11th Cir. 2009)* (internal quotation marks omitted) (quoting *Griffin Indus., Inc. v. Irvin, 496 F.3d 1189, 1206 (11th Cir.*

[3] Monopsonization is an offense involving the control or monopoly of a market, which exists where an individual or organization is the only supplier of a particular good or commodity. *See In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1154 n.3 (5th Cir. 1979)*.

2007); **[*26]** other citation omitted). The court may also consider documents whose "authenticity and veracity are . . . unchallenged." *Long v. Slaton, 508 F.3d 576, 578 n.3 (11th Cir. 2007)* (alteration added) (considering investigative report plaintiffs submitted in opposing motion to dismiss).

III. DISCUSSION

Defendants[4] assert the Amended Complaint is deficient because Plaintiffs: (1) fail to state a RICO claim; (2) fail to state a claim under the Sherman Act; (3) lack standing to bring RICO and antitrust claims; and (4) fail to state claims under the FDUTPA and Florida tort law. (*See generally* Mot.). Burzaco writes separately, challenging the RICO claims for failure to show his underlying conduct was a proximate cause of injury to Plaintiffs; and, on behalf of all Defendants, asserts Plaintiffs' claims are time barred. (*See id.* 81-84[5]). Napout separately asserts all counts fall short of stating actionable causes of action against him. (*See id.* 84-89). The Court addresses these arguments in turn.

A. RICO Claims (Counts 1 and 2)

In Count One, Plaintiffs allege a civil RICO claim under *18 U.S.C. section 1962(c)* (*see* Am. Compl. ¶¶ 183-269); and in Count Two, they allege a civil RICO conspiracy claim under *section 1962(d)* (*see id.* ¶¶ 270-76).

A civil RICO claim under *section 1962(c)* requires a plaintiff allege defendants (1) **[*27]** operated or managed (2) an enterprise (3) through a pattern (4) of racketeering activity that included at least two racketeering acts that caused injury to plaintiff's business or property. *See* *Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1348 (11th Cir. 2016)* (citation omitted); *see also* *Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496-97, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)* (requiring conduct of an enterprise through a pattern of racketeering activity in order to state a claim for civil RICO). To establish a RICO conspiracy, a plaintiff must show defendants either (1) agreed with the objective of the conspiracy, or (2) agreed to commit two racketeering predicates. *See* *Rajput v. City Trading, LLC, 476 F. App'x 177, 180 (11th Cir. 2012)*.

Plaintiffs allege Defendants operated a scheme to bribe Conmebol officials in exchange for assurances T&T would receive Club Tournament television rights. (*See* Am. Compl. ¶ 188). Defendants' illicit actions, including wire fraud, commercial bribery, money laundering and monetary transactions in property derived from unlawful activity, over a period of 15 years, caused Conmebol to award T&T the television rights for the Club Tournaments, which otherwise would have gone to Plaintiffs because they were the only other bidders and they offered more favorable proposals. (*See id.* ¶¶ 108-37, 139, 268, 276). Plaintiffs suffered substantial injury to their business and property, **[*28]** including loss of revenues and profits, lower market share, and lessened profile in the sports telecasting marketplace, amounting to hundreds of millions of dollars or more in damages. (*See id.* ¶¶ 268, 276).

Notwithstanding the requisite elements are alleged, Defendants argue Plaintiffs fail to state a civil RICO claim because they do not show: (1) Defendants' actions were the proximate cause of an injury to Plaintiffs; (2) the underlying bribery scheme presents a pattern of racketeering; and (3) Defendants committed two or more predicate acts. (*See* Mot. 20-32).

1. Proximate Cause

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[4] All Defendants join the present Motion with the exception of Eugenio Figueredo, who has not appeared in the case. (*See* Mot. 12 n.1).

[5] The Court uses the pagination generated by the Case Management/Electronic Case Files system, which appears as a header on all court filings.

"When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*. To satisfy RICO's heightened proximate cause standard and withstand a motion to dismiss, a complaint must allege a "direct relationship" between the alleged RICO violations and the plaintiff's alleged injury. *E.g., Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010)*. The "direct relationship" test is more than "a mere pleading rule." *Id. at 13*. Although the unlawful conduct need not be the sole cause of the injury asserted, there must be a direct and identifiable connection between the fraud and a **[*29]** plaintiff's injury. *See Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 654-55, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*. A plaintiff cannot "circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense," because RICO only reaches harm that necessarily is caused by the predicate acts. *Hemi Grp., 559 U.S. at 13* (citation and quotation marks omitted).

When evaluating whether proximate cause exists, "courts should consider the motivating principles behind the directness component of the proximate-cause standard in RICO cases." *Corcel Corp., Inc. v. Ferguson Enters., Inc., 551 F. App'x 571, 576 (11th Cir. 2014)* (citations and internal quotation marks omitted). The motivating principles include: whether (1) difficulty would arise when a court attempts to ascertain damages caused by a remote action; (2) the nature of the proceedings would be speculative if the plaintiff were permitted to proceed; (3) the harm could have resulted from independent factors; (4) there is a risk of duplicative recoveries by other plaintiffs; and (5) other immediate victims of the RICO violation are better suited to vindicate the laws by pursuing their own claims. *See id.* (citing *Anza, 547 U.S. at 458-60*). The Supreme Court has cautioned "proximate cause is generally not amenable to bright-line rules." *Bridge, 553 U.S. at 659* (citation omitted).

Defendants assert Plaintiffs do not **[*30]** satisfy the proximate causation requirement because they were not direct victims of the bribery scheme and, as such, their alleged injuries are too remote. (*See* Mot. 23-24; Reply 10-15). Defendants supply several arguments in support of their remoteness characterization.

First, Defendants urge the Court find the RICO claims foreclosed because Plaintiffs are not the direct victims of the alleged RICO predicates. (*See* Mot. 23; Reply 10-12). But Defendants rely on authorities involving significantly different factual scenarios than that of a plaintiff, who but for its competitor's fraudulent activity during a bidding process, would have won the bid, as is the case here. (*See* Mot. 22-23 (citing cases)). Plaintiffs' position is the more persuasive because Plaintiffs rely on cases in which, had it not been for the fraudulent acts of competitors in bidding processes, the plaintiffs would have won the bids.

For example, Plaintiffs rely on *Bridge* for the proposition a plaintiff may be directly harmed by the acts of a rival bidder when, but for the fraudulent actions of the rival bidder, the plaintiff would have received the winning bid. (*See* Opp'n 25-26). The facts in *Bridge* involved an annual **[*31]** public auction at which a county government sold off tax liens on delinquent taxpayers' properties. *See Bridge, 553 U.S. at 642*. The county established an allocation system to ensure fair apportionment of the liens, including a requirement that any entity submitting a bid do so in its own name and a prohibition on the purchase of liens through agents or employees. *See id. at 643*. The plaintiffs in *Bridge*, would-be purchasers, alleged the defendants defrauded the county by attesting they were not purchasing liens through agents or employees, while engaging several related bidders to submit bids on their behalf. *See id. at 643-44*.

The predicate act in *Bridge* was mail fraud. *See id. 644*. The plaintiffs claimed they were injured as a result of the defendants' criminal actions because, based on the allocation system, but for the illicit actions of the defendants, the plaintiffs would have received a greater share of liens and financial benefits. *See id.* After noting "RICO's text provides no basis for imposing a first-party reliance requirement," *id. at 660*, the Supreme Court found the defendants' fraudulent acts proximately caused plaintiffs' injuries by causing competitors to win a county contract over the plaintiffs, *see id. at 660-61*.

In *Corcel Corp.*, the Eleventh **[*32]** Circuit similarly examined whether a pleading sufficiently demonstrated proximate causation where the plaintiff would have received a contract had it not been for the fraud of its competitors, the rival bidders. *551 F. App'x at 577-78*. The complaint there alleged "if the County had not relied on the defendants' false and fraudulent documents and actions[,] the County would have awarded plaintiff Corcel the supply and construction contract at issue because plaintiff Corcel was the next lowest [] bidder." *Id. at 577* (alterations added). This allegation was sufficient to show a direct relation between the claimed injury and the defendants' federal civil RICO violations, satisfying proximate causation. *See id.*

At the December 15 hearing, Defendants attempted to distinguish *Bridge*, stating the basis upon which tax liens were apportioned by the county government was a unique situation in which, unlike here, there was certainty the plaintiffs would have won because they were next in line. Defendants also attempted to distinguish this case from *Corcel Corp.* for the same reason, stating the facts of *Corcel* are inapplicable because Conmebol may not have accepted Plaintiffs' bids regardless of whether Defendants conspired and **[*33]** bribed Conmebol officials. In their oral arguments and their written briefing, Plaintiffs liken the facts of this case to the facts in *Bridge* and *Corcel Corp.*, emphasizing their allegation they were the only parties making offers to acquire the rights to the Club Tournaments other than T&T, and had Plaintiffs' competitors not been engaged in bribery and fraud, Plaintiffs would have prevailed and been awarded the television rights. (*See* Am. Compl. ¶ 140; Opp'n 23-24).

The Court is persuaded the facts in *Bridge* and the line of cases involving injuries of a bidder by a competitor are analogous to this case. Plaintiffs allege the relative certainty of their winning the bids for Club Tournament television rights in the absence of Defendants' wrongdoing, as the plaintiffs did in *Bridge* and *Corcel Corp.* As such, Plaintiffs sufficiently allege a plausible direct injury flowing from Defendants' bribery scheme.

Second, Defendants state the claims of injury are too remote and speculative because Plaintiffs' injuries depend on intervening and independent factors. (*See* Mot. 24-28; Reply 15-19). Defendants describe Plaintiffs' injuries as speculative because the bids were received after Conmebol had **[*34]** entered into contracts with T&T (*see* Mot. 25), and revoking the television rights from T&T and awarding them to Plaintiffs is necessarily an intervening step that breaks the chain of causation between the predicate acts alleged (wire fraud, commercial bribery, money laundering, etc.) and Plaintiffs' injuries (*see id.* 25-27). Defendants highlight Plaintiffs' failed last bid, made after the bribery scheme stopped, as evidence Plaintiffs would not have necessarily won the rights absent the fraudulent acts. (*See id.* 25-26).

Plaintiffs point to their allegation that had it not been for Defendants' illicit actions, no other factors supported awarding the licensing to T&T over Plaintiffs' higher bids. (*See* Opp'n 23 (citing Am. Compl. ¶ 110)). Plaintiffs explain not every proposal was under contract with T&T at the time of each offer. (*See* Opp'n 46). Indeed, the pleading does not identify whether the rights at issue in each proposal were under contract with T&T at the time of each offer. (*See* Am. Compl. ¶¶ 116-18). Furthermore, to the extent the television rights were already under contract, Conmebol would have revoked T&T's rights and awarded them to Plaintiffs in exchange for more favorable terms from Plaintiffs, **[*35]** but for Defendants' bribery of Conmebol officials. (*See id.* ¶ 140). Plaintiffs also refute Defendants' characterization of the circumstances of their last failed bid for Club Tournament television rights (*see* Opp'n 30), as the illegal activities continued throughout 2015, when the last bid was rejected (*see* Am. Compl. ¶¶ 3, 133). The Court is persuaded the claims of injury are not so remote and speculative as to defeat the causes of action, and agrees with Plaintiffs that many of the issues raised in this section of the briefing are factual disputes not appropriate for consideration on a *Rule 12(b)(6)* motion. (*See* Opp'n 31).

Defendants next assert that upon receiving the television rights, Plaintiffs would have had to exploit the rights to make a profit - yet another causal gap between Defendants' conduct and Plaintiffs' injuries. (*See* Reply 18). According to Plaintiffs, the proximate cause standard articulated in *Bridge* is concerned with the conduct and the allegation of injury, not the later steps a plaintiff would need to take to make a profit from winning a bid. (*See* Opp'n 31). The Court agrees. Alleging a loss of profits is sufficient to establish proximate cause, *see* *Bridge, 553 U.S. at 644 n.3*; whether Plaintiffs would **[*36]** have exploited the rights or in fact been successful in making a profit is not considered at this stage.

Third, Defendants assert determining damages will be very difficult because of the "numerous intervening decisions by Conmebol, TV viewers, and advertisers" (Mot. 28), and because there may be future plaintiffs in Conmebol and its member organizations that may have an incentive to vindicate the law (*see* Reply 14). With regard to the issue of calculating damages, Defendants rely on *Harris v. Orange S.A., 636 F. App'x 476 (11th Cir. 2015)*. There, the Eleventh Circuit found no proximate cause because it was difficult to determine what losses were attributable to the defendants' conduct, as opposed to market conditions and the like, as well as the fact another plaintiff was necessary to vindicate the same interest. (*See* Mot. 28 (citing *Harris, 636 F. App'x at 483*)).

Harris is distinguishable. In *Harris*, the plaintiff was a shareholder and employee of a company capable of vindicating the same interest as the plaintiff. *See* *Harris, 636 F. App'x at 483*. In order to calculate damages in *Harris*, the shareholder and employee's damages would have depended on the company's damages calculation. Here, there is no reason to believe Plaintiffs' damages calculation will depend on a potential damages calculation **[*37]** by Conmebol. Plaintiffs' damages calculation will likely come from their losses as a result of not receiving the bids, whereas Conmebol's loss in revenue will likely be calculated by looking at the difference between the revenue received and what Conmebol was offered by Plaintiffs for the Club Tournament rights.

Difficulty in ascertaining Plaintiffs' lost profits is not sufficient in and of itself to find a lack of proximate cause. *See* *Maiz v. Virani, 253 F.3d 641, 663 (11th Cir. 2001)* ("The touchstone of the inquiry . . . is proximate cause; there is no automatic rule against the recovery of any type of lost profits or lost value damages if proximate cause is shown." (alteration added)).

Last, Plaintiffs state Defendants implicitly concede there is no risk of duplicative recoveries, as they do not address the issue in the Motion. (*See* Opp'n 34-35). In any event, Plaintiffs argue there is minimal risk of duplicative recoveries from other disappointed bidders because Plaintiffs were next in line to receive the bids, similar to the plaintiff in *Corcel Corp.* vying for the county contract. (*See id.* 35 (citing *Corcel Corp., 551 F. App'x at 578*)).

In their Reply, Defendants insist there is a significant risk of duplicative recoveries, stating other media companies may claim that, **[*38]** absent the bribery scheme, they, too, could have obtained television rights for the Club Tournaments. (*See* Reply 13 n.3). Discovery may reveal if Defendants' supposition is correct. But as Plaintiffs allege they were the only other entities bidding on Club Tournament television rights, other than T&T (*see* Am. Compl. ¶ 140), Defendants' argument fails to persuade Counts One and Two fail to state claims for relief on the basis proximate cause is not sufficiently alleged.

2. "Pattern of Racketeering Activity"

To establish a "pattern of racketeering" under *section 1962(c)*, a plaintiff must allege the defendants committed (1) at least two predicate acts over a ten year period that (2) amount to, or threaten, continued criminal activity. *See* *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)* (A "pattern of racketeering activity . . . requires at least two acts of racketeering activity . . . within ten years" (alterations added; internal quotation marks and citation omitted)); *see also* *id. at 239* ("[T]o prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates . . . amount to or pose a threat of continued criminal activity." (alterations added)). A plaintiff must also allege either open-ended or closed-ended continuity. **[*39]** *See* *id. at 241*; *see also* *Profilet v. Cambridge Fin. Corp., 231 B.R. 373, 381 (S.D. Fla. 1999)* ("[T]he continuity requirement can be satisfied either by showing past conduct that by its nature shows a threat of future racketeering or by showing repeated racketeering acts over a substantial period of time." (alteration added)). Defendants argue Plaintiffs do not properly allege either open-ened or closed-ended continuity. (*See* Mot. 30-32).

"A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time." *H.J. Inc., 492 U.S. at 242*. According to Defendants, Plaintiffs do not properly allege closed-ended continuity because the RICO allegations concern "only a single scheme with a discrete goal." (Mot. 30 (quoting *Jackson v. Bell S. Telecomms., 372 F.3d 1250, 1267 (11th Cir. 2004)*; other citations omitted)). Defendants cite to several cases where courts found fraudulent activity that took place over several years was insufficient to establish continuity because in each case there was only one scheme. (*See id.* (collecting cases)). In *Daedalus Capital LLC v. Vinecombe*, for example, the Eleventh Circuit found a multi-year scheme to divert a company's proceeds and bleed the company of assets did not show closed-ended continuity because there was only one victim **[*40]** and a single scheme with "one discrete goal, directed at one individual." *625 F. App'x 975, 976 (11th Cir. 2015)* (internal quotation marks and citation omitted). Defendants argue the scheme to bribe Conmebol officials in exchange for Club Tournament television rights is similarly one multi-year scheme with one discrete goal.

The Amended Complaint details a number of illegal bribe payments: first in order to obtain the rights for the Copa Libertadores in 2000, then in 2002 to obtain the rights to the Copa Sudamericana, and again in 2008 for the rights to the Recopa Sudamericana. (*See* Am. Compl. ¶¶ 3, 61-62). Defendants are alleged to have engaged in several rounds of fraudulent acts with a series of distinct goals over a substantial period of time. While there is no precise definition of "substantial period of time," *H.J. Inc., 492 U.S. at 242-43*, the allegations of wrongdoing during a 15-year period satisfy the requirement.

Plaintiffs adequately allege closed-ended continuity. Consequently, the Court does not address the arguments directed to open-ended continuity.

3. Predicate Acts

A RICO claim under *18 U.S.C. section 1962* requires a plaintiff allege defendants "received . . . income derived, directly or indirectly," from "racketeering activity," and the proceeds of the racketeering **[*41]** activity were then used to engage in activities impacting "interstate or foreign commerce." *Id. § 1962(a)* (alteration added). The term "racketeering activity" includes a list of predicate acts that violate federal or state law. *Id. § 1961(1)*. "[A] private plaintiff who wants to recover under civil RICO must show some injury flowing from *one or more* predicate acts." *Pelletier v. Zweifel, 921 F.2d 1465, 1497 (11th Cir. 1991)* (alteration and emphasis added), *abrogated on other grounds by Bridge, 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*.

Plaintiffs allege Defendants committed the following RICO predicates: (1) wire fraud, in violation of *18 U.S.C. section 1343* (*see* Am. Compl. ¶¶ 193-204); (2) money laundering (promotion by international transfer), in violation of *18 U.S.C. section 1956(a)(2)(A)* (*see id.* ¶¶ 205-09); (3) money laundering (concealment by use of an international transfer), in violation of *18 U.S.C. section 1956(a)(2)(B)(i)* (*see id.* ¶¶ 210-17); (4) money laundering (promotional money laundering), in violation of *18 U.S.C. section 1956(a)(1)(A)(i)* (*see id.* ¶¶ 218-24); (5) money laundering (money laundering by concealment), in violation of *18 U.S.C. section 1956(a)(1)(B)(i)* (*see id.* ¶¶ 225-32); (6) monetary transactions in property derived from specified unlawful activity, in violation of *18 U.S.C. section 1957* (*see id.* ¶¶ 233-36); (7) bribery under New York state law, *N.Y. Penal Law sections 180.03* and *180.08* (*see id.* ¶¶ 237-47); and (8) violation of the Travel Act, *18 U.S.C. sections 1952(a)(1)* and *1952(a)(3)* (*see id.* ¶¶ 248-53). To recover on **[*42]** a RICO claim, a plaintiff need only allege two predicate acts constituting a pattern.

Defendants argue Plaintiffs do not properly allege any predicate acts because the wrongdoing occurred extraterritorially and cannot be tied to Plaintiffs' injury. (*See* Mot. 32-43). In this regard, the Court examines two of the RICO predicates alleged: wire fraud and New York commercial bribery.

i. Wire Fraud

When a plaintiff's *section 1962(c) RICO* claims are premised on the predicate act of wire fraud, the substantive RICO allegations must comply with *Federal Rule of Civil Procedure 9(b)*'s heightened pleading standard, requiring the plaintiff state, with particularity, the circumstances constituting fraud or mistake. *See Ambrosia Coal & Constr. Co. v. Pages Morales, 482 F.3d 1309, 1316 & n.10 (11th Cir. 2007)* (holding civil RICO claims, which are "essentially a certain breed of fraud claims, must be pled with an increased level of specificity" under *Rule 9(b)*); *see also Durham v. Business Management Associates, 847 F.2d 1505, 1511-12 (11th Cir. 1988)* (finding the *Rule 9(b)* pleading requirement applicable to RICO claims predicated on wire and/or mail fraud). The Eleventh Circuit has further held to meet this heightened standard, a plaintiff must allege: "(1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled **[*43]** the Plaintiffs; and (4) what the defendants gained by the alleged fraud." *Brooks, 116 F.3d at 1380-81* (citation omitted).

As stated, Defendants maintain Plaintiffs' allegations of wire fraud fail because they rely on extraterritorial conduct outside the scope of the statute. (*See* Mot. 35). A two-step analysis is used to determine whether the civil RICO statute applies to instances of foreign racketeering. *See* *RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101, 195 L. Ed. 2d 476 (2016)*. First, the court asks whether the statute giving rise to the predicate act in question "gives a clear, affirmative indication that it applies extraterritorially." *Id.* If it does, the inquiry is over and the conduct violating the statute may constitute a predicate act for RICO purposes. *See* *id. at 2099*. If not, the court must "determine whether the case involves a domestic application of the statute," which is also sufficient for RICO purposes. *Id. at 2101*.

Defendants insist wire fraud under *18 U.S.C. section 1343* does not apply extraterritorially because there is no language evincing an intent to reach foreign conduct. (*See* Mot. 36 (citing *European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 141 (2d Cir. 2014)*, *rev'd and remanded on other grounds by* *RJR Nabisco, Inc., 136 S. Ct. 2090, 195 L. Ed. 2d 476*)). Plaintiffs point to a circuit split and cite to contrary decisions of the First and Third Circuits, which have found the language of *section 1343* supports the extraterritorial reach **[*44]** of the statute. *See, e.g.,* *United States v. Georgiou, 777 F.3d 125, 137-38 (3d Cir. 2015)* (stating wire fraud statute applies extraterritorially, as *section 1343* "punishes frauds executed in "interstate or foreign commerce, and is surely not a statute in which Congress had only domestic concerns in mind" (internal quotation marks and citations omitted)); *see also* *United States v. Lyons, 740 F.3d 702, 718 (1st Cir. 2014)* (same).

While the Eleventh Circuit has yet to weigh in on the issue, one district court in this Circuit recently found the First and Third Circuit decisions persuasive. *See* *Drummond Co., Inc. v. Collingsworth, No. 2:15-CV-506-RDP, 2017 U.S. Dist. LEXIS 120525, 2017 WL 3268907, at *17 (N.D. Ala. Aug. 1, 2017)* ("While the Second Circuit has held that *18 U.S.C. [section] 1343* does not have extraterritorial application . . . other courts have held to the contrary[.]" (internal citations omitted; alterations added) (quoting *Absolute Activist Value Master Fund Ltd. v. Devine, 233 F. Supp. 3d 1297, 1324 (M.D. Fla. 2017)))*. Given this precedent, the Court concludes *18 U.S.C. section 1343* applies to actions taken extraterritorially.

Defendants also assert Count One is insufficient because Plaintiffs do not explain how the wire fraud injured them. (*See* Mot. 39 (quoting *United States v. Takhalov, 827 F.3d 1307, 1313 (11th Cir. 2016)))*. According to Defendants, Plaintiffs fail to meet the standard in *Takhalov*, where the Eleventh Circuit found a scheme to defraud exists where a defendant intends to do harm to a victim. *See* *Takhalov, 827 F.3d at 1312-13*, *as revised* (Oct. 3, 2016), *opinion modified on denial of reh'g*, *838 F.3d 1168 (11th Cir. 2016)*.

Plaintiffs **[*45]** sufficiently plead wire fraud for the same reasons they sufficiently plead proximate cause: they have demonstrated how the wire fraud directly harmed them. The Amended Complaint details Defendants' knowledge Plaintiffs were seeking Club Tournament television rights from Conmebol and the increasing bribe payments extracted to ensure T&T, and not Plaintiffs, received those rights. (*See* Am. Compl. ¶¶ 113-118, 122, 125). These are allegations of Defendants intending to do harm. Reading the Complaint in the light most favorable to Plaintiffs, the Court finds they meet the heightened standard for wire fraud as a RICO predicate act.

ii. New York commercial bribery

New York Penal Law Section 180.03 prohibits "confer[ring] . . . any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal," where the benefit conferred "causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars." *N.Y. Penal Law § 180.03* (alterations added). A well-pled claim for violation of the New York commercial bribery statute requires allegations "a person conferred, offered or agreed to confer a benefit of value exceeding one thousand dollars upon an employee or agent without the consent of **[*46]** his employer or principal with the intent to influence the employee's or agent's conduct in relation to his employer's or principal's affairs." *Welch Foods Inc. v. Gilchrist, No. 93-CV-0641E(F), 1996 U.S. Dist. LEXIS 15819, 1996 WL 607059, at *5 (W.D.N.Y. Oct. 18, 1996)* (citing *N.Y. Penal Law § 180.03*).

The parties agree *New York Penal Law Section 180.03* does not have extraterritorial application. (*See* Mot. 40-41; Opp'n 46). Defendants argue Plaintiffs do not allege a domestic violation of the statute because T&T, a foreign entity, made payments through foreign subsidiaries to bribe Conmebol officials overseas. (*See* Mot. 41).

In response, Plaintiffs point to trips to New York, use of New York bank accounts, and sham contracts with New York choice-of-law provisions, as constituting domestic conduct. (*See* Opp'n 45-46 (citing Am. Compl. ¶¶ 42, 74, 84)). Certainly the Amended Complaint details the transmission of bribe payments by Defendants into accounts in New York. (*See* Am. Compl. ¶¶ 185-86). The transfer of money from one New York bank account to another is hardly dissimilar to standing in New York with a bag of cash and handing it to someone as a bribe payment — an example offered by Plaintiffs at oral argument. There is sufficient domestic conduct allowing New York commercial bribery to serve as a RICO predicate act. **[*47]**

Defendants also argue there are no allegations Conmebol suffered economic harm as a result of the bribes, and as such not all elements of New York commercial bribery are satisfied. (*See* Mot. 42). Defendants challenge Plaintiffs' assertion that Conmebol suffered harm by not accepting Plaintiffs' higher bids. (*See id.*). According to Defendants, the fact the rights at issue were under contract would have left Conmebol subject to suit for breach of contract. (*See id.*). And Defendants insist Plaintiffs do not demonstrate Conmebol stood to gain more than it could have lost. (*See id.*).

While Plaintiffs submitted a proposal on October 21, 2012, covering the years 2015 to 2020, it is unclear whether the rights for 2015 to 2020 were already under contract. (*See* Am. Compl. ¶¶ 116-18). Plaintiffs also state any contracts in place with T&T at the time were the result of a bribery scheme, and thus void as a matter of law. (*See* Opp'n 46). Furthermore, the effects of Defendants' wrongdoing extended to "misleading Plaintiffs about when proposals for the rights would be considered," thus making it difficult for Plaintiffs to present offers before the rights were awarded to T&T at below-market prices. **[*48]** (Am. Compl. ¶ 139). The allegations, viewed in the light most favorable to Plaintiffs, plausibly show Conmebol suffered economic harm. As such, Plaintiffs sufficiently allege New York commercial bribery as a RICO predicate act.

Because Plaintiffs allege injury flowing from the predicate acts of wire fraud and bribery under New York state law, the Court does not address whether money laundering, monetary transactions, bribery under New York state law or violations of the Travel Act may serve as RICO predicate acts.

B. Antitrust Claims (Counts 3-8)

Plaintiffs state antitrust claims against all Defendants for conspiracy in restraint of trade under *Section 1* of the Sherman Act (Counts 3-5); and conspiracy to monopsonize the Americas Television Rights Market under *Section 2* of the Sherman Act (Count 8). (*See* Am. Compl. ¶¶ 277-92, 304-11). Plaintiffs also bring claims against T&T for monopsonization and attempted monopsonization of the Americas Television Rights Market, under *Section 2* of the Sherman Act (Counts 6-7). (*See id.* ¶¶ 293-303).

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." *15 U.S.C. § 1* (alterations **[*49]** added). To establish a *Section 1* violation of conspiracy in restraint of trade, a plaintiff does not need to allege the specific elements of conspiracy to monopolize, but instead, must show "concerted action between two or more persons — a conscious commitment to a common scheme designed to achieve an unlawful objective — in restraint of trade." *Procaps S.A. v. Patheon, Inc., 845 F.3d 1072, 1080 (11th Cir. 2016)* (internal quotation marks and citation omitted); *see also* *Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998)*. It is not enough to allege conspiracy in restraint of trade; the contract, combination or conspiracy in the restraint must rise to the level of "unreasonable and anticompetitive." *Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indem. Co., 870 F.3d 1262, 1271 (11th Cir. 2017)* (internal quotation marks omitted) (quoting *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006))*.

Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. To demonstrate a violation of *section 2* of the Sherman Act, a plaintiff must allege: (1) monopoly power, which is the power to control prices in or to exclude competition from a relevant market; and (2) the willful acquisition or maintenance of power through predatory or exclusionary acts or practices that have the effect of preventing or excluding **[*50]** competition within the same relevant market. *See* *Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293-94 (11th Cir. 2004)* (citations omitted).

In their oral arguments, Defendants generally characterized Plaintiffs' antitrust claims as trying to fit the square peg of bribery into the round hole of ***antitrust law*** — an apt description. Defendants challenge the sufficiency of the antitrust claims, stating they should be dismissed because Plaintiffs: (1) only allege harm to themselves as competitors, not harm to consumers and competition; (2) fail to plead a viable theory of causation; and (3) do not plead plausible antitrust markets. (*See* Mot. 47-62). Defendants also argue the complained-of conduct amounts to commercial bribery, which alone is neither exclusionary conduct cognizable under *Section 2* of the Sherman Act, nor an agreement in restraint of trade in violation of *Section 1* of the Act. (*See id.* 44-47). Last, Defendants argue the Foreign Trade Antitrust Improvement Act bars Plaintiffs' claims because the conduct alleged concerns commerce that is not U.S. import commerce (*see id.* 62-68), and does not have a "direct, substantial and reasonably foreseeable effect" on U.S. commerce (*id.* 63). Because the Court agrees Plaintiffs do not sufficiently allege harm to competition, this Order does not address **[*51]** Defendants' arguments as to causation, plausible antitrust markets, commercial bribery or the FTAIA.

Under *Sections 1* and *2* of the Sherman Act, an antitrust plaintiff must allege injury to competition, not merely to the plaintiff as a competitor. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*; *see also* *Am. Key Corp. v. Cole Nat'l Corp., 762 F.2d 1569, 1579 n.8 (11th Cir. 1985)* ("Harm to competition is a necessary element of all private antitrust suits under *Sections 1* and *2* of the Sherman Act[.]" (alteration added; citation omitted)). To allege actual harm to competition, Plaintiffs must "point to the specific damage done to consumers in the market[.]" *Jacobs v. Tempur-Pedic Intern., Inc., 626 F.3d 1327, 1339 (11th Cir. 2010)* (alteration added; internal quotation marks and citation omitted).

Defendants contend Plaintiffs do not allege harm to competition because each reference of harm to competition is conclusory and implausible. (*See* Mot. 49). In response, Plaintiffs argue (1) cases of monopsonization only require harm to the seller — not to consumers; but in any event, (2) they do include sufficient allegations of harm to consumers. (*See* Opp'n 54-58).

Plaintiffs cite to two out-of-circuit cases for the proposition they only need demonstrate harm to the seller, not the end consumer. (*See id.* 54 (citing *O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014)*, *aff'd in part, vacated in part on other grounds*, *802 F.3d 1049 (9th Cir. 2015)*; then citing *Telecor Commc'ns, Inc. v. Sw. Bell Tel. Co., 305 F.3d 1124 (10th Cir. 2002)*; additional citation omitted)). **[*52]** In *O'Bannon*, the district court characterized student athletes bringing a labor-related suit against the NCAA as sellers and the schools they attended as the buyers, finding the student-sellers' alleged injury harmed competition because the legal theory of the case was that of a monopsony. *See* *O'Bannon, 7 F. Supp. 3d at 991-92*. In *Telecor*, the Tenth Circuit held "[t]he Supreme Court's treatment of monopsony cases strongly suggests that suppliers . . . are protected by antitrust laws even when the anti-competitive activity does not harm end-users." *305 F.3d at 1133-34* (alterations added).

Defendants distinguish the facts in both *O'Bannon* and *Telecor* from the allegations here. (*See* Reply 29-30). Defendants argue *O'Bannon* involved labor markets for student athletes, in which the buyers are more like consumers, and thus should be treated differently. (*See id.* 29 (citing *Todd v. Exxon Corp., 275 F.3d 191, 201 (2d Cir. 2001))*. Defendants also assert the facts in *Telecor* differ significantly from the facts of this case because they involved multiple entities being prevented from entering a market.

Both decisions rely on *Mandeville Island Farms v. Am. Crystal Sugar Co.*, where the Supreme Court stated the Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or **[*53]** to sellers." *334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*. Admittedly, the court in *O'Bannon* observed "the Supreme Court has indicated that monopsonistic practices that harm suppliers may violate ***antitrust law*** even if they do not ultimately harm consumers." *7 F. Supp. 3d at 992* (citing *Mandeville Island Farms, 334 U.S. at 236*). But while *O'Bannon* reads this standard into *Mandeville Island Farms*, the Supreme Court made no such pronouncement. *See generally* *Mandeville Island Farms, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328*. The Supreme Court found injured parties bringing antitrust claims need not be customers or consumers, *see* id. at 235-36; but it did not go so far as to state there need not also be harm to consumers.

In *O'Bannon*, the district court extrapolated an additional meaning from *Mandeville Island Farms* — that antitrust laws do not require harm to consumers — by relying on Justice Jackson's dissent, which noted the price of sugar had not been impacted. *See* 7 F. Supp. 3d at 992 (citation omitted). It is unclear from the majority or the dissent in *Mandeville Island Farms* whether there was other alleged harm to consumers; and it does not appear the specific issue of whether harm to consumers is required as a secondary harm was reached. As a result, the Court interprets Mandeville Island Farms as allowing parties that are not customers or consumers to bring claims under the Sherman **[*54]** Act, but does not read beyond the holding of the case to find harm to consumers is not a required element of antitrust claims.

Defendants correctly point to binding Eleventh Circuit precedent (*see* Reply 29), which holds "[i]n order for a practice to be exclusionary, it must harm the competitive process and thereby harm consumers." Morris, 364 F.3d at 1294 (alteration added; internal quotation marks and citations omitted). More recently, the Eleventh Circuit again held plaintiffs seeking to meet the burden of alleging actual harm to competition "should point to the specific damage done to consumers in the market." Jacobs, 626 F.3d at 1339 (internal quotation marks omitted). Most importantly, neither *Jacobs* or *Morris*, nor any other Eleventh Circuit precedent, carves out exceptions to the rule federal antitrust claims require harm to the consumer.

The Court next turns to Plaintiffs' assertion the Amended Complaint sufficiently alleges harm to consumers as a result of Defendants' conduct. Two allegations involving harm to consumers appear in the pleading: (1) "[d]ecreasing the quantity, quality, and diversity of television programming catering to viewers of South American international club soccer tournaments, due in part to the Fox Defendants' **[*55]** decision not to air all games of the Club Tournaments" (Am. Compl. ¶ 178(h) (alteration added)); and (2) "[r]educing Conmebol's revenues for television rights to the Club Tournament[s], and consequently reducing the revenues passed on by Conmebol to its member soccer associations, thereby decreasing the funds available to recruit, develop and retain soccer players and to develop new facilities, organizations, and events" (*id.* ¶ 178(e) (alterations added)).

First, Defendants correctly note Plaintiffs do not explain how the Fox Defendants not airing all of the games is connected to the bribery scheme. (*See* Reply 30-31). The Amended Complaint falls short of establishing a connection between the bribery scheme and the decrease in quantity, quality, and diversity of television programming catering to South American international club soccer fans.

Second, Defendants argue the harm related to Conmebol's reduced revenues is too removed from the conduct at issue, and thus amounts to an unexplained and conclusory assertion. (*See id.* 31 (citing Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 540, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))). In *Associated General Contractors*, the harm alleged by the plaintiffs was held to be overly removed from the conduct because it required "several somewhat vaguely **[*56]** defined links," 459 U.S. at 540. Here, Plaintiffs ask the Court to take several logical steps: (1) Conmebol received less revenue (*see* Am. Compl. ¶¶ 12, 112, 121, 124); which in turn meant (2) less revenue for the soccer clubs (*see id.* ¶ 178(e)); and therefore, (3) less investment in recruiting, developing and retaining players or developing new facilities, organizations and events (*see id.*); which then finally (4) harmed viewers of soccer matches (*see id.*). The Amended Complaint is vague as to this alleged harm, as Plaintiffs do not spell out whether less revenue for Conmebol necessarily leads to less revenue for the soccer clubs; and whether less revenue for the soccer clubs necessarily leads to spending less on players, facilities, or events.[6] (*See id.*). It is too late now for Plaintiffs to connect the dots for the Court in their Opposition Memorandum by citing to evidence outside the pleading. (*See* Opp'n 57 (citing to González Aff. ¶ 24)).

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[6] The Court does not consider the information contained in the Affidavit of Fatima Lorena González Toppi [ECF No. 204], filed in response to Defendants' Motion to Dismiss for Lack of Jurisdiction and cited in Plaintiffs' Opposition Memorandum. (*See* Opp'n 43).

The Amended Complaint does not allege a direct harm to consumers. Counts Three through Eight, alleging violations of *Sections 1* and *2* of the Sherman Act, are therefore dismissed.

C. Standing

Defendants argue neither GolTV nor Global Sports has standing to bring civil RICO **[*57]** or antitrust claims. (*See* Mot. 69). According to Defendants, GolTV is not a proper plaintiff because it did not directly bid for the Club Tournament rights. (*See id.*). And while Global Sports did bid for the Club Tournament rights, Defendants argue Global Sports is barred from bringing claims because any injury it suffered occurred outside the United States. (*See id.*). Because Counts Three through Eight are dismissed on other grounds, *see supra* Part III.B., the Court considers whether Plaintiffs have standing to bring the civil RICO claims stated in Counts One and Two.

The RICO statute gives "[a]ny person injured in his business or property by reason of a violation of *section 1962* of this chapter [standing to] sue." *18 U.S.C. § 1964(c)* (alterations added). To determine whether a plaintiff has RICO standing, the Eleventh Circuit requires a plaintiff show "his injuries were proximately caused by the RICO violation." *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc., 140 F.3d 898, 906 (11th Cir. 1998)* (citing *Pelletier, 921 F.2d at 1499*). The Eleventh Circuit has also found the same motivating principles required to find proximate cause should be considered in determining whether a plaintiff's injury is sufficiently direct for a plaintiff to have RICO standing. *See Harris, 636 F. App'x at 483*.

1. GolTV

The Eleventh Circuit has interpreted the Sherman Act **[*58]** as limiting antitrust standing to "only the customer who purchased the goods or services at issue directly from the alleged antitrust violator." *Lakeland Reg'l Med. Ctr., Inc. v. Astellas US, LLC, 763 F.3d 1280, 1285 (11th Cir. 2014)* (emphasis omitted) (citing *Ill. Brick Co. v. Illinois, 431 U.S. 720, 729, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*; other citations omitted). Defendants contend this indirect-purchaser doctrine for antitrust standing must also be applied in determining whether a plaintiff has standing to bring civil RICO claims. (*See* Mot. 70 (citing *McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 855 (3d Cir. 1996)))*. Plaintiffs disagree and reference a footnote in *Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 270 n.15, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*, as evidence the Supreme Court has rejected the application of antitrust injury principles to RICO claims. (*See* Opp'n 71 (citing *Holmes, 503 U.S. 258, 270 n.15, 112 S. Ct. 1311, 117 L. Ed. 2d 532*)). Plaintiffs also cite *Sedima, 473 U.S. at 493-99*, *Anza, 547 U.S. at 457*, and *Bridge, 553 U.S. at 654-55*, in which the Supreme Court applied a proximate cause standard to determine whether plaintiffs could bring civil RICO claims. (*See* Opp'n 72).

While Defendants assert multiple circuits have applied the antitrust standing doctrine to RICO claims (*see* Reply 43), they only cite to decisions of the Third Circuit (*see* Mot. 70; Reply 43). The parties have not cited to any Eleventh Circuit case applying such a standard. Instead, the Eleventh Circuit has found the standard for RICO standing is a determination of proximate cause. *See, e.g., Bivens Gardens Office Bldg., 140 F.3d at 906*; *Pelletier, 921 F.2d at 1499*; *Harris, 636 F. App'x at 483*. Here, the pleading alleges proximate cause, and as **[*59]** such, is sufficient to establish GolTV's RICO standing. *See Viridis Corp. v. TCA Glob. Credit Master Fund, LP, 155 F. Supp. 3d 1344, 1357 (S.D. Fla. 2015)* (recognizing "the intertwined nature of the standing, proximate cause, and damages analyses under the RICO statutes" in determining the plaintiffs failed to allege proximate cause and damages in addition to RICO standing).

2. Global Sports

"A private RICO plaintiff [] must allege and prove a *domestic* injury to its business or property" in order to establish standing to bring suit under RICO. *RJR Nabisco, Inc., 136 S. Ct. at 2106* (alteration added; emphasis in original). In determining whether an injury is domestic or foreign, "[t]he application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'" *Id. at 2111* (alteration added). The parties disagree whether Global Sports alleges a domestic or foreign injury — and whether it has standing to bring RICO claims against Defendants.

Many district courts have grappled with this issue, some taking a nuanced approach, and others simply looking to the nationality or home of the plaintiff to determine where the injury was felt. *Compare* *Tatung Co., Ltd. v. Hsu, 217 F. Supp. 3d 1138 (C.D. Cal. 2016)* (holding the plaintiff suffered a domestic RICO injury because the conduct in question was directed **[*60]** at the plaintiff's business pursuits in the United States), *and* *Glock v. Glock, 247 F. Supp. 3d 1307, 2017 WL 1049448, at *7 (N.D. Ga. 2017)* (deciding the injury of an Austrian ex-wife was not suffered in the United States because there was no indication the injury arose when she was working, traveling, or doing business in the United States, or that the assets at issue were in the United States), *appeal filed*, Apr. 7, 2017; *with* *Armada (Singapore) Pte Ltd. v. Amcol Int'l Corp., No. 13 C 3455, 2017 U.S. Dist. LEXIS 70499, 2017 WL 1862836, at *1 (N.D. Ill. May 9, 2017)* (determining the injury was foreign because it was suffered at the plaintiff's principal place of business in Singapore), *and* *Cevdet Aksüt Oğullari Koll. Sti v. Cavusoglu, 245 F. Supp. 3d 650, 659 (D.N.J. 2017)* (holding injury to a business was foreign because the business was located in Turkey). Recently, in *Lan Li v. Walsh, No. 16-81871-CIV, 2017 U.S. Dist. LEXIS 114553, 2017 WL 3130388, at *10 (S.D. Fla. July 24, 2017)*, the court held Iranian and Chinese immigrant investors were injured abroad, not domestically, because they did not allege an economic impact felt in the United States, nor did they allege they were working, traveling, or doing business in the United States at the time.

Defendants argue Global Sports may not bring RICO claims because it is not based in the United States and thus any injury or economic impact felt as a result of Defendants' actions occurred where Global Sports is located — in Uruguay. (*See* Mot. 74 (citing *Absolute Activist Value Master Fund Ltd., 233 F. Supp. 3d 1297, 2017 WL 519066, at *20))*. Plaintiffs contend where **[*61]** Global Sports suffered the injury is not necessarily where the company is based. They offer alternative tests to determine whether an injury is domestic or foreign. (*See* Opp'n 75 (citing *Bascuñán v. Elsaca, 874 F.3d 806, 814 (2d Cir. 2017)*; and *Tatung, 217 F. Supp. 3d at 1138*)). In *Bascuñan*, where misappropriation of property was at issue, the Second Circuit concluded "an injury to tangible property is generally a domestic injury only if the property was physically located in the United States." *874 F.3d at 819*. In *Tatung*, the court found the defendants "thwarted" the plaintiff's business dealings in California and noted it "cannot be the case that the mere fact that a loss is economic means that foreign corporations are unable to avail themselves of the protections of civil RICO." *217 F. Supp. 3d at 1155*. Plaintiffs similarly argue Global Sports's exclusion and injury are domestic events because of its efforts to conduct business in the United States in the form of purchasing U.S. broadcasting rights to Club Tournaments. (*See* Opp'n 75).

The Court is persuaded by the nuanced approach to determining whether a RICO injury is "domestic" or "foreign." Evidence of foreign nationality or primary place of business alone is insufficient to categorize an injury as foreign under RICO. Consideration of factors such **[*62]** as where the injury to a property interest took place, *see* *Bascuñán, 874 F.3d at 819*; and whether Plaintiffs were working, traveling or doing business in the United States at the time, *see* *Lan Li, 2017 U.S. Dist. LEXIS 114553, 2017 WL 3130388, at *10*; are relevant.

Here, the injury to Global Sports's property interest was the loss of bids to purchase the U.S. and Americas broadcasting rights for Club Tournaments. (*See* Am. Compl. ¶¶ 111-12, 116-17, 122-23). Each of the bids was also an attempt by Global Sports to do business in the United States, as "GolTV and Global Sports together were denied the ability to provide telecasts of the Club Tournaments in the Florida market and throughout the United States." (*Id.* ¶ 141). As a result, the Amended Complaint alleges domestic injury to Global Sports, and Global Sports has civil RICO standing.

D. State Law Claims (Counts 9-11)

In their Amended Complaint, Plaintiffs raise claims against Defendants under the FDUTPA (Count 9) (*see id.* ¶¶ 312-17); and for civil conspiracy to commit tortious interference under Florida law (Count 11) (*see id.* ¶¶ 325-29). Plaintiffs also bring a claim against T&T, Torneos and the Fox Defendants for tortious interference with prospective economic advantage under Florida law (Count 10). (*See id.* ¶¶ 318-24). **[*63]** Defendants request the Court dismiss all of the Florida law claims. (*See* Mot. 75-81).

1. Florida Deceptive and Unfair Trade Practices Act Claim

The FDUTPA "protect[s] the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce." *Fla. Stat. § 501.202(2)* (alteration added). The "FDUTPA can be violated in two ways: (1) a per se violation premised on the violation of another law proscribing unfair or deceptive practice and (2) adopting an unfair or deceptive practice." *Felice v. Invicta Watch Co. of Am., Inc., No. 16-CV-62772, 2017 U.S. Dist. LEXIS 122895, 2017 WL 3336715, at *2 (S.D. Fla. Aug. 4, 2017)* (internal quotation marks and citation omitted). "An unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)* (internal quotation marks and citations omitted). An act is deceptive "if there is a representation, omission[,] or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Att'y Gen., 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)* (alteration added) (quoting *Sw. Sunsites, Inc. v. FTC, 785 F.2d 1431, 1434-35 (9th Cir. 1986))*.

Defendants argue the FDUTPA claim fails because it is derivative of Plaintiffs' deficient federal antitrust claims, and **[*64]** so should also be dismissed. (*See* Mot. 75). To this, Plaintiffs respond, "even if the Court were to conclude that Defendants' conduct has not violated the antitrust laws, Defendants' use of commercial bribery to deprive Plaintiffs of a fair opportunity to bid upon and obtain the tournament rights would by itself be sufficient to state a FDUTPA claim." (Opp'n 77). The Court agrees dismissal of antitrust claims does not necessarily strike a death knell for a claim under the FDUTPA.

Yet, as is the case for antitrust claims, claims under the FDUTPA require harm to consumers. Plaintiffs concede as much, asserting an unfair or deceptive practice must be "injurious to consumers." (*Id.* (quoting *Am. Airlines, Inc. v. Despegar.com USA, Inc., No. 13-2277-CIV, 2013 U.S. Dist. LEXIS 201682, 2013 WL 12064859, at *7 (S.D. Fla. Nov. 13, 2013)))*. For the same reasons articulated in *supra* Part III.B., the Amended Complaint fails to sufficiently plead harm to consumers for purposes of articulating a claim under the FDUTPA. Consequently, the Court does not address Defendants' other arguments regarding the FDUTPA claim, and dismisses Count Nine.

2. Tortious Interference and Conspiracy to Interfere Claims

To state a claim for tortious interference with prospective economic advantage or business **[*65]** relationship, a plaintiff must show: "(1) the existence of a business relationship, not necessarily evidenced by an enforceable contract; (2) knowledge of the relationship on the part of the defendant; (3) an intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship." *Tamiami Trail Tours, Inc. v. Cotton, 463 So. 2d 1126, 1127 (Fla. 1985)*; *see also* G.M. Brod & Co. Inc., v. U.S. Home Corp., 759 F.2d 1526, 1534 (11th Cir. 1985) (explaining elements of tortious interference under Florida law).

The Eleventh Circuit has held "[a] mere offer to sell . . . does not, by itself, give rise to sufficient legal rights to support a claim of intentional interference with a business relationship." *Duty Free Ams., Inc. v. Estee Lauder Cos., 797 F.3d 1248, 1279-80 (11th Cir. 2015)* (internal quotation marks and citation omitted; alterations added). Instead, "an action for tortious interference with a business relationship requires a business relationship evidenced by an actual and identifiable understanding or agreement which in all probability would have been completed if the defendant had not interfered." *Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So. 2d 812, 815 (Fla. 1994)*; *see also* *Int'l Sales & Serv., 262 F.3d at 1154*. To be clear, "[a] business relationship need not be evidenced by a contract." *Int'l Sales & Serv., Inc. v. Austral Insulated Prods., Inc., 262 F.3d 1152, 1154 (11th Cir. 2001)* (alteration added; citation omitted).

Defendants argue Plaintiffs fail to state two of the required elements for this claim in Count **[*66]** Ten: the existence of a relationship between Conmebol and Plaintiffs beyond that of offeror and offeree, and damage to Plaintiffs as a result of a breach of the relationship. (*See* Mot. 79-81). According to Defendants, no business relationship is alleged because Plaintiffs' connection to Conmebol was limited to Global Sports's offers to purchase Club Tournament television rights from Conmebol. (*See id.* 80). Defendants describe Plaintiffs' claims as even weaker than those in a typical case in which a party makes an offer because here the rights were not for sale and were under contract to T&T when the offers were made.[7] (*See id.*). For their part, Plaintiffs emphasize facts Defendants overlook supporting Plaintiffs' relationship with Conmebol, including:[8] a preexisting and ongoing relationship at the time Plaintiffs pursued the tournament rights; Conmebol's President's promise Plaintiffs' proposal would receive formal consideration by the Conmebol Executive Committee; and the fact Plaintiffs' submissions were the only other proposals for the television rights for the Club Tournaments. (*See* Opp'n 84-85 (citing Am. Compl. ¶¶ 116-17, 321)).

Other courts have addressed the standard for **[*67]** whether a business relationship arises in the context of a bidding process for a contract or exclusive rights. "[T]o establish a protected business relationship within a bidding process, a plaintiff must allege additional facts indicating that the relationship went beyond the bidding process and into negotiations which in all probability would have been completed." *Duty Free Ams., Inc. v. Estée Lauder Cos., Inc., 946 F. Supp. 2d 1321, 1339 (S.D. Fla. 2013)* (alteration added; citations omitted). In *Diversified Management Solutions, Inc. v. Control Systems Research, Inc., No. 15-81062-CIV, 2016 U.S. Dist. LEXIS 189771, 2016 WL 4256916 (S.D. Fla. May 16, 2016)*, the court held the plaintiff, a weather observation service, had a business relationship with the Federal Aviation Authority as part of a bidding process. *See id. at *7*. The defendant, a rival contractor that interfered in the bidding process, argued the plaintiff's relationship with the FAA was limited to that of offeror and offeree, but the court found plaintiff had shown two of its bids were later accepted by the FAA, indicating the plaintiff would have had significantly more than a "speculative hope" of winning the contracts had it not been for the defendant. *Id.*

In this case, there are allegations of a relationship between Conmebol and Plaintiffs go beyond the simple submission of offers. Plaintiffs **[*68]** were the only party other than T&T to bid for the Club Tournament television rights (*see* Am. Compl. ¶ 140); Plaintiffs' bids were significantly higher than T&T's (*see id.* ¶¶ 112, 117, 121-24, 126); Conmebol officials told Plaintiffs if they submitted a proposal, it would be formally considered by the Executive Committee (*see id.* ¶¶ 116-20); Conmebol shared its bids with Defendants, resulting in an increase in the amount T&T ultimately paid for the television rights (*see id.* ¶¶ 113-14, 118, 120, 125, 321); and Global Sports had previously entered into an agreement with Conmebol to purchase static advertising rights, such as billboard space for the Club Tournaments from 2010 to 2014 (*see id.* ¶ 320). Together, these are plausible allegations of a business relationship in which, had it not been for Defendants, Conmebol and Plaintiffs would have in all probability reached an agreement for Plaintiffs to purchase the Club Tournament television rights. *See* *Ethan Allen Inc., 647 So. 2d at 815*. For these reasons, as well as those previously explained, the Amended Complaint sufficiently alleges damage to Plaintiffs as a result of a breach of the relationship.

Count Ten for tortious interference under Florida law survives the Motion. **[*69]** As to Count Eleven, Defendants do not present a meaningful challenge to Plaintiffs' conspiracy claim. (*See generally* Mot.). In fact, Defendants' only reference to the conspiracy claim is in the title of the subsection on tortious interference, which states "Plaintiffs Do Not Plead Cognizable Claims for Tortious Interference or Conspiracy to Interfere." (*Id.* 79). As such, Count Eleven is not dismissed.

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[7] Arguments focused on whether the television rights were already under contract at the precise moment Plaintiffs brought each proposal to Conmebol and whether Conmebol would have revoked those contracts had it not been for the fraudulent acts of Defendants are factual disputes the Court will not address. *See supra* Part III.A.1.

[8] The Court does not consider extraneous facts referenced in Plaintiffs' Opposition stating T&T reacted to Plaintiffs' 2012 offer to Conmebol by paying an additional $200,000 per year to two Conmebol directors and that Defendants' actions were aimed at preventing Plaintiffs from being awarded the Club Tournament television rights. (*See* Opp'n 85-86).

E. Alejandro Burzaco

While Burzaco adopts and joins Defendants' Motion, he also writes separately. (*See id.* 81). First, Burzaco addresses the RICO claims, arguing Plaintiffs fail to allege their injury was proximately caused by Defendants' conduct. (*See id.*). Second, Burzaco argues Plaintiffs' claims are time-barred to the extent the claims are based on events surrounding the rejection of an offer made by Plaintiffs to Conmebol in March 2010.[9] (*See id.* 82-84). Burzaco does not make any new arguments regarding proximate cause (*see id.* 81), and so the Court only addresses his arguments as they pertain to whether the claims are time-barred.

"[A] *Rule 12(b)(6)* dismissal on statute of limitations grounds is appropriate only if it is apparent from the face of the complaint that the claim is time-barred." *La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845-46 (11th Cir. 2004)* (alteration added; **[*70]** internal quotation marks and citations omitted). The Court considers whether the RICO claims (Counts 1 & 2) and the remaining Florida state law claims (Counts 10 & 11) are time-barred.

1. RICO claims

A four-year statute of limitations applies to civil RICO claims. *See Rotella v. Wood, 528 U.S. 549, 552, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000)* (citation omitted). The date of accrual is based on the date the plaintiff knew or should have known it was injured. *See id. at 553*; *see also Pac. Harbor Capital, Inc. v. Barnett Bank, N.A., 252 F.3d 1246, 1251 (11th Cir. 2011)* (citation omitted). Defendants maintain the injury occurred when Plaintiffs' March 2010 offer to purchase the Club Tournament rights was rejected,[10] falling outside the four-year statute of limitations. (*See* Mot. 82-83). According to Plaintiffs, Defendants' fraudulent concealment in the form of sham consulting agreements and the hidden bribery scheme prevented Plaintiffs from learning of the injury. (*See* Opp'n 87; *see also* Am. Compl. ¶ 136). The Court looks to the Amended Complaint to determine the accrual date.

The Amended Complaint shows the accrual date was May 27, 2015, when Plaintiffs learned of an indictment for bribery, fraud, and other criminal wrongdoing associated with Conmebol's awarding of rights for soccer tournaments. (*See* Am. Compl. ¶ 127). Plaintiffs claim to have investigated **[*71]** why Conmebol had rejected their offers prior to May of 2015, but were unable to uncover the injuries caused by Defendants' wrongdoing and interference until the criminal indictments brought Defendants' bribery conspiracy to light. (*See id.* ¶¶ 136-37). Unlike *Pacific Harbor, 252 F.3d at 1246*, where the plaintiff suspected wrongdoing several years before beginning to investigate, there is no indication Plaintiffs should have suspected they had been injured by Defendants prior to the May 2015 indictment. Since the accrual date is May 27, 2015 and Plaintiffs filed suit on October 20, 2016 — less than four years later — the RICO claims are not time-barred.

2. State law claims

Under Florida law, the statute of limitations for malicious interference and other intentional tort claims is four years. *See Fla. Stat. § 95.11(3)(o)*. "A cause of action accrues, for statute of limitations purposes 'when the last element constituting the cause of action occurs.'" *New Lenox Indus., Inc. v. Fenton, 510 F. Supp. 2d 893, 906 (M.D. Fla. 2007)* (footnote call number omitted) (quoting *Fla. Stat. § 95.031(1)*).

Defendants argue the Florida state law claims are brought occurred outside the applicable four-year limitations period and no delayed discovery doctrine applies. (*See* Mot. 84 n.27 (citing *Yusuf Mohamad Excavation, Inc. v.*

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[9] Defendants join and adopt Burzaco's argument Plaintiffs' claims are time-barred. (*See* Mot. 84 n.27; *see also* Reply 52 n.30).

[10] The offer to Conmebol to purchase television rights for 2011 to 2014 was presented through a series of meetings, the first of which occurred on March 3, 2010. (*See* Am. Compl. ¶¶ 111-12). The Amended Complaint is not specific as to when Conmebol rejected Plaintiffs' offer, stating only that "Conmebol did not accept [Plaintiffs'] offer." (*Id.* ¶ 114 (alteration added)).

Ringhaver Equip., Co., 793 So. 2d 1127, 1127 (Fla. 5th DCA 2001))). Plaintiffs concede Defendants' point, instead arguing the doctrine **[*72]** of fraudulent concealment should be employed to toll the statute of limitations. (*See* Opp'n 88 n.26 (citing Razor Capital, LLC v. CMAX Fin. LLC, No. 17-80388, 2017 U.S. Dist. LEXIS 128362, 2017 WL 3481761, at *3 (S.D. Fla. Aug. 14, 2017))).

Generally two elements are required for fraudulent concealment to toll the statute of limitations: "'[a] plaintiff must show both successful concealment of the cause of action and fraudulent means to achieve that concealment.'" Jones v. Childers, 18 F.3d 899, 909 (11th Cir. 1994) (alteration added) (quoting Nardone v. Reynolds, 333 So. 2d 25, 37 (Fla. 1976), *holding modified on other grounds by* Tanner v. Hartog, 618 So. 2d 177 (Fla. 1993)). The Amended Complaint describes how Burzaco and his co-Defendants successfully concealed their bribery conspiracy for years through a series of sham consulting agreements that disguised bribery payments to corrupt Conmebol officials as payments for legitimate services which were never rendered. (*See* Am. Compl. ¶¶ 71-74, 136). Defendants' actions fall squarely into the standard set by the Florida Supreme Court for fraudulent concealment. As such, Counts Ten and Eleven are not dismissed.

F. Juan Angel Napout

Napout[11] argues the general allegations against Conmebol officials do not give him fair notice of the claims against him; and the specific factual allegations fall short of stating a claim against him. (*See* Mot. 84-89). Certainly, Rule 8 requires a plaintiff give "fair notice" of what its claims **[*73]** are and the "grounds upon which [they] rest[]." Twombly, 550 U.S. at 555 (alterations added; citation omitted). To satisfy the minimum standard of Rule 8, a complaint "must delineate the conduct at issue as to each Defendant, [and] allege facts showing knowledge or intent as to each Defendant[.]" Bentley v. Bank of Am., N.A., 773 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011) (alterations added). As discussed in *supra* Part III.A.3., civil RICO plaintiffs alleging wire fraud, as is the case here, must additionally satisfy the heightened pleading requirements of Rule 9(b). *See* Durham, 847 F.2d at 1511-12.

Napout accuses Plaintiffs of lumping him together with other Conmebol officials by using the term "Conmebol officials," which refers to as many as 16 individuals. (*See* Mot. 87 (citing Am. Compl. ¶ 66)). Plaintiffs use the term "Conmebol officials" to refer to (1) individuals other than Napout (*see id.* (citing Am. Compl. ¶¶ 62, 64, 66, 70, 116)); (2) an unspecified and general set of individuals (*see id.* (citing Am. Compl. ¶¶ 3, 4, 5, 11, 12, 71, 78)); and (3) Napout and Figueredo (*see id.* (citing Am. Compl. ¶¶ 129, 139, 168, 186, 189, 190, 191, 238, 258, 274)). Napout cites several cases for the unremarkable proposition a plaintiff cannot lump together defendants. (*See id.* 86 (citations omitted)).

In *Joseph v. Bernstein*, only **[*74]** one of the five defendants was specifically named as engaging in fraudulent activities, while other allegations lacked any explanation of how each defendant was liable. *See* No. 13-24355, 2014 U.S. Dist. LEXIS 114997, 2014 WL 4101392, at *6 (S.D. Fla. Aug. 19, 2014). In *Lane v. Capital Acquisitions & Mgmt. Co.*, the complaint did not differentiate among the defendants, instead alleging violations by one collective defendant despite naming five defendants. *See* No. 04-60602 CIV, 2006 U.S. Dist. LEXIS 96422, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006). Consequently, the district court found each individual defendant could not determine from the face of the complaint which acts or omissions the plaintiffs sought to hold them each liable for. *See id.* In *City of Miami v. Bank of Am. Corp.*, the plaintiff lumped together the defendants and made "undifferentiated allegations against the composite entity." 171 F. Supp. 3d 1314 (S.D. Fla. 2016).

The Amended Complaint is unlike the pleadings discussed in Joseph, Lane, and City of Miami. There are 34 paragraphs containing specific allegations against Napout. (*See* Am. Compl. ¶¶ 2, 34, 38-39, 45, 54, 69, 76, 84, 129, 132-35, 139, 168, 184, 186, 189-92, 203, 238, 245, 250, 258, 262-64, 266-67, 274, 327). The term "Conmebol officials" is defined as members of the Executive Committee of Conmebol (*see id.* ¶ 32), and Napout was a member of the Executive Committee **[*75]** from 2007 to 2014 (*see id.* ¶ 34). The Amended Complaint's specificity is thus a

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[11] Napout additionally adopts and joins Defendants' arguments for dismissal of Counts One through Five, Eight, Nine and Eleven of the Amended Complaint. (*See* Mot. 84 n.28; *see also* Reply 55 n.32).

far cry from the indiscriminate lumping together of defendants in the cases Napout cites. Furthermore, Plaintiffs point out Napout's ability to distinguish which allegations do not pertain to him is itself evidence the pleading provides Napout with fair notice of the claims against him. (*See* Opp'n 92). The Court agrees.

Napout also asserts the Amended Complaint falls short of stating an actionable claim against him. (*See* Mot. 88-89). But he merely recycles Defendants' prior arguments that Plaintiffs (1) could not have successfully bid for Club Tournament rights already under contract and (2) were unsuccessful in bidding for broadcasting rights once there was no ongoing bribery taking place. (*See id.* 89). Again, the Court declines to address what amounts to a factual dispute between the parties.

Instead, the Court looks to the Amended Complaint to determine whether the factual allegations against Napout are sufficient. Plaintiffs allege Napout committed illegal acts, including: (1) unlawfully negotiating and reaching agreements regarding the television rights (*see, e.g.*, Am. Compl. ¶¶ 132-35, 139, 168, 186, 189-92, **[*76]** 245, 250, 258); (2) soliciting and receiving six-figure bribe payments in exchange for those rights (*see, e.g., id*. ¶¶ 69, 76, 135, 168, 186, 189-92, 203, 238, 245, 250, 258); (3) misleading Plaintiffs about when the rights were available and licensing those rights in advance of expected offers from Plaintiffs (*see, e.g., id*. ¶¶ 129, 139); and (4) conspiring with co-Defendants to conceal the fraudulent activity (*see, e.g., id*. ¶¶ 84, 186). These allegations are sufficient to state a claim under RICO with wire fraud and commercial bribery as predicate offenses. *See supra* Part III.A.3.

The Court also considers whether the pleading states a claim against Napout for conspiracy to commit tortious interference. Since the alleged conduct sufficiently demonstrates tortious interference, *see* Part III.D.2., the Court limits its analysis below to whether Plaintiffs plead a claim for civil conspiracy against Napout.

In Florida, the elements of a civil conspiracy claim are: "(a) an agreement between two or more parties, (b) to do an unlawful act or to do a lawful act by unlawful means, (c) the doing of some overt act in pursuance of the conspiracy, and (d) damage to plaintiff as a result of the acts **[*77]** done under the conspiracy." *UTC Indus., Inc. v. Presidential Fin. Corp., 976 So. 2d 92, 94 (Fla. 3d DCA 2008)* (citation and internal quotation marks omitted). The "gist of a civil conspiracy is . . . the civil wrong which is done through the conspiracy which results in injury to the Plaintiff." *Czarnecki v. Roller, 726 F. Supp. 832, 840 (S.D. Fla. 1989)* (alteration added; citation and internal quotation marks omitted). The Amended Complaint makes it clear Napout agreed to participate in wire fraud and commercial bribery involving several parties (*see* Am. Compl. ¶¶ 69, 186, 189-92, 245); received bribes in exchange for ensuring T&T rather than Plaintiffs received the rights to the Club Tournaments (*see id.* ¶¶ 76, 84, 139, 250); and caused harm to Plaintiffs in the form of loss of profits (*see id.* ¶ 179, 268). Count Eleven for conspiracy to commit tortious interference amply states a claim for relief.

For the reasons stated above, the antitrust claims (Counts 3-5 & 8), and the FDUTPA claim (Count 9), against Napout are dismissed. *See supra* Part III.B. (dismissing antitrust claims for failing to allege harm to consumers); *see also supra* Part III.D.1. (dismissing the FDUTPA claim for the same reasons).

IV. CONCLUSION

In accordance with the foregoing, it is

ORDERED AND ADJUDGED that the Motion to Dismiss **[ECF No. 255]** is **GRANTED [*78] in part** and **DENIED in part**. The parties shall file a joint scheduling report, as required by *Local Rule 16.1*, by **February 8, 2018**.

DONE AND ORDERED in Miami, Florida, this 26th day of January, 2018.

/s/ Cecilia M. Altonaga

CECILIA M. ALTONAGA

UNITED STATES DISTRICT JUDGE

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Hush Hush Sound, Inc. v. H& M Hennes

United States District Court for the Central District of California

January 26, 2018, Decided; January 26, 2018, Filed

2:17-cv-07668-RGK-SS

Reporter
2018 U.S. Dist. LEXIS 221973 *

Hush Hush Sound, Inc. et al. v. H& M Hennes & Mauritz LP et al.

Core Terms

classixx, Plaintiffs', sweater, argues, trademark, musical, apparel, likelihood of confusion, artistic, misappropriation, motion to dismiss, consumer, allegations, infringing, clothing, fails, marks, trademark infringement, restitution, garments, likeness, factors, selling, courts, common law misappropriation, unfair business practice, injunctive, similarity, message, unfair

Counsel: **[*1]** Attorneys Present for Plaintiff: Not Present.

Attorneys Present for Defendant: Not Present.

Judges: R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE.

Opinion by: R. GARY KLAUSNER

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (IN CHAMBERS) Order Re: Defendant's Motion to Dismiss (DE 13)

I. INTRODUCTION

On October 19, 2017, Plaintiffs Hush Hush Sound, Inc. ("Hush"), Michael David ("David"), and Tyler Blake ("Blake") (collectively, "Plaintiffs") filed the present action against Defendant H&M Hennes & Mauritz LP ("H&M") and ten Doe Defendants. Plaintiffs raise the following claims in their Complaint: (1) trademark infringement in violation of *15 U.S.C. § 1114(1)(a)*; (2) trademark infringement in violation of *15 U.S.C. § 1125(a)*; (3) common law misappropriation of name and likeness; and (4) violation of California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof. Code § 17200*.

H&M now moves to dismiss Plaintiffs' Complaint under *Federal Rule of Civil Procedure ("Rule") 12(b)(6)*. For the following reasons, the Court **GRANTS in part** and **DENIES in part** H&M's Motion to Dismiss.

II. FACTUAL BACKGROUND

The following facts are alleged in the Complaint.

David and Blake formed a disc jockey ("DJ") group that produces and performs electronic dance music. David and Blake perform under the name "Classixx" and, together with Hush, do business under the name **[*2]** "Classixx." Hush owns a registered trademark for the unstylized word mark "Classixx" ("trademark") for (a) use in musical sound and video recordings in all media and (b) live musical performances. Plaintiffs market and sell t-shirts, apparel, and other merchandise that bears their "Classixx" trademark. Although Plaintiffs did not register their trademark until 2013, they have used the trademark to identify their brand, performances, music, and merchandise continuously since they began producing music in 2007. Plaintiffs' music is critically and commercially successful. It landed in the top 15 of the "American Billboard Independent Albums" and "Heatseekers Albums" charts, and received critical acclaim in the magazines "Chicagoist" and "LA Weekly."

H&M is a clothing retailer. H&M began selling garments, including a sweater featuring the word "classixx" in a shadow design ("the sweater" or "'classixx' sweater"), as shown below.

The sweater and H&M's other infringing garments create a likelihood of confusion, especially because H&M sometimes plays Plaintiffs' music in its stores. In fact, one consumer uploaded a photo of the sweaters on social media, with the caption "@Classixx merch in **[*3]** H&M Paris?" H&M's use of Plaintiffs' trademark has caused Plaintiffs general and special damages. In addition, H&M obtained profits they would not have realized but for their use of Plaintiffs' trademark.

III. JUDICIAL STANDARD

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Ad. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible if the plaintiff alleges enough facts to draw a reasonable inference that the defendant is liable. *Id.* A plaintiff need not provide detailed factual allegations but must provide more than mere legal conclusions. *Twombly, 550 U.S. at 555*. When ruling on a *Rule 12(b)(6)* motion, the court must accept the allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 19961)*. However, the court need not accept as true conclusory legal allegations cast in the form of factual allegations. *Ashcroft, 556 U.S. at 678*.

Apart from factual insufficiency, a complaint is also subject to dismissal under *Rule 12(b)(6)* where it lacks a cognizable legal theory, *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (1988)* or where the allegations on their face "show that relief is barred" for some legal reason, *Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007)*.

IV. DISCUSSION

A. Trademark Claims (Claims 1 and 2)

To successfully **[*4]** allege trademark infringement under the Lanham Act, a plaintiff must plead (1) that it has a protectable interest in the trademark at issue and (2) that the defendant's use of the mark creates a likelihood of confusion. *Rearden LLC v. Rearden Commerce, Inc., 683 F.3d 1190, 1203 (9th Cir. 2012)* (citing *Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011)*. H&M argues that Plaintiffs' trademark claims are barred by the *First Amendment* and that Plaintiffs otherwise fail to adequately allege a likelihood of confusion. The Court addresses each argument in turn.

1. First Amendment Protection

H&M argues that its "classixx" sweaters are protected under the *First Amendment*. The Court disagrees.

a. H&M Is Not Engaged in Expressive Conduct

H&M first argues that Plaintiffs' trademark infringement claims are barred under the *First Amendment's* expressive conduct doctrine. Conduct is expressive and entitled to *First Amendment* protection if the actor intends to convey "a particularized message" and there is a great likelihood that the message will be understood by those viewing it. *Texas v. Johnson, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)*. Courts have treated wearing particular clothing as a form of expressive conduct. *See* *Jacobs v. Clark CO.). Sch. Dist., 373 F. Supp. 2d 1162, 1172 (D. Nev. 2005)* ("[W]earing clothing bearing a printed message constitutes speech") (citing *Cohen v. Cal., 403 U.S. 15, 26, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971))*. In this case, however, the consumer's right to wear a garment bearing the word "classixx" is not impacted; rather, at issue is H&M's right to sell such a garment. **[*5]** H&M does not argue that selling its "classixx" apparel is expressive conduct. To the contrary, it argues that it exercises no creative choice in what apparel it sells. This defense fails.

b. The Sale ofH&M's Sweater Does Not Serve a Predominantly Expressive Purpose

H&M also cites to *Mastrovincenzo*, in which the Second Circuit explained that the sale of clothing is speech protected by the *First Amendment* if it has a predominantly expressive purpose. *Mastrovincenzo v. City of New York, 435 F.3d 78, 95-97 (2d Cir. 2006)*.[1] If the sale of clothing is instead "a mere commercial transaction," the *First Amendment* offers no protection. *Id. at 97*. In *Mastrovincenzo*, street vendors sold hand-painted hats and clothing of their own design, for the stated purpose of expressing "the particular idea represented on the work" and the vendors' "upbringing and style as an artist." *Id.* H&M admits that, unlike the defendants in *Mastrovincenzo*, it did not design or create the infringing garments. H&M claims it merely resells what clothing is allocated to it. Although H&M argues its consumers can express themselves by wearing their "classixx" sweater, H&M does not argue that it is expressing any message about itself by selling the infringing garments. *See id.* (noting courts should consider "whether a vendor (if different **[*6]** from the artist) purports, through the sale of goods, to be engaging in an act of self-expression rather than a mere commercial transaction"). The sale of H-M's "classixx" apparel therefore does not serve a predominantly expressive purpose. This defense also fails.

c. The Rogers Test is Inapplicable

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[1] Although H&M cites *Mastrovincenzo* in support of its arguments regarding expressive conduct and the *Rogers* test (discussed below), *Mastrovincenzo* applied neither the expressive conduct doctrine nor *Rogers. See* *Mastrovincenzo v. Caly of New York. 435 F.3d 78, 91 n.9 (2d Cir. 2006)*.

Finally, H&M argues that its "classixx" sweater is an artistic work protected under the *Rogers* test. In *Mattel, Inc. v. MCA Records, 296 F.3d 894, 902 (9th Cir. 2002)*, the Ninth Circuit adopted the *Rogers* test as the "method for balancing the trademark . . . rights protected by *§43(a)* of the Lanham Act against *First Amendment* rights in cases involving expressive works." *Brown v. Electronic Arts, Inc., 724 F.3d 1235, 1241 (9th Cir. 2013)*. Under the *Rogers* test, an artistic work's infringing use of a trademark is not actionable unless the use of the mark (1) "has no artistic relevance to the underlying work whatsoever" or (2) "[I]f it has some artistic relevance, . . . [it] explicitly misleads as to the source or the content of the work." *Mattel, Inc. v. MCA Records, Inc., 296 F.3d 894, 902 (9th Cir. 2002)* (quoting *Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989))*.

The *Rogers* test applies only to artistic or expressive works; it is not applicable to commercial works such as a traditional advertisement. *Brown, 724 F.3d at 1241*; 6 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition §31:144.50* (5th ed. 2017). In addition, courts **[*7]** in the Ninth Circuit have refused to apply the *Rogers* test unless the mark at issue was "imbue[d] . . . with a meaning beyond its source-identifying function." *Mattel, 296 F.3d at 902* (noting marks like "Band-Aid," "Rolls Royce," "Barbie," and "aspirin" have taken on expressive meaning beyond their source-identifying function); *Rebelution, LLC v. Perez, 732 F. Supp. 2d 883, 888 (N.D. Cal. 2010)* (refusing to apply the *Rogers* test when the word at issue — "rebelution" — had been imbued with no alternate meaning by the public).

H&M argues its sweaters satisfy each requirement of the *Rogers* test. Plaintiffs counter that *Rogers* is inapplicable because H&M's "classixx" sweater is not an artistic work. Indeed, H&M cites no cases in which the court applies the *Rogers* test to an item of clothing. The Court need not decide the issue here. Even assuming the sweater at issue is an expressive work, there is no evidence the word "classixx" has entered public discourse. The allegations suggest that "classixx" is understood only in association with Plaintiffs' musical group. As such, the *Rogers* test is inapplicable.

Even if the *Rogers* test applied, H&M's arguments fail to establish artistic relevance. Courts in the Ninth Circuit require the artistic relevance of the defendant's use of the **[*8]** mark "to be with reference to the meaning associated *with plaintiff's* mark " *Rebelution, LLC v. Perez, 732 F. Supp. 2d 883, 889 (N.D. Cal. 2010)* (collecting cases). If the plaintiff does not target the original product or service, but instead "merely borrow[s] another's property to get attention," the *Rogers* defense fails. *Warner Bros. Entm't v. Global Asylum, Inc., No. CV 12-9547, 2013 U.S. Dist. LEXIS 193925, 2013 WL 12114836, at *10 (C.D. Cal. Jan. 29, 2013)* (quoting *Mattel, 296 F.2d at 901*)).

H&M asserts that the word "classixx" is a restructuring of the commonly used word "classic," and that its use furthers the sweater's goal of communicating that the wearer has a timeless, yet edgy personality. That the expressive intent of the sweater bears relevance to H&M's interpretation of the word "classixx" is irrelevant. "This argument, at its logical conclusion, would allow any person to ascribe their own meaning to a mark and thereafter argue that their artistic work bears relevance to this opportunistically-defined meaning." *Rebelution, LLC, 732 F. Supp. 2d at 889*. H&M makes no showing that the musical group "Classixx" had genuine relevance to the message expressed by the sweater. It is more likely that "classixx" was chosen to capitalize on the publicity value of Plaintiffs' mark, so that fans of the musical group would buy H&M's sweater and other "classixx" apparel. *Cf. Rogers, 875 F.2d at 1001* (finding that **[*9]** the defendant satisfied the artistic relevance prong where its use of the trademark was "not arbitrarily chosen just to exploit the publicity value of [the plaintiffs' mark] but instead ha[d] genuine relevance to the film's story"). H&M's *Rogers* defense fails.

2. Likelihood of Confusion

H&M argues Plaintiffs fail to adequately allege a likelihood of confusion.[2] The likelihood of confusion requirement asks whether "a reasonably prudent consumer in the marketplace is likely to be confused as to the origin or source

[2] H&M also argues that Plaintiffs' trademark infringement claims fail because H&M's use of "classixx" is merely ornamental and has no source-identifying purpose. The cases on which H&M relies establish establish only that, if H&M's use of "classixx" is

of the goods . . . bearing one of the marks . . . at issue in the case." Rearden LLC, 683 F.3d at 1209. The likelihood of confusion must be probable, not just possible. *Id.* To determine whether a likelihood of confusion exists, courts in the Ninth Circuit consider the eight *Sleeken** factors, first articulated in AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979). Rearden LLC, 683 F.3d at 1209. The *Sleekcraft* factors are: "(1) strength of the mark; (2) proximity of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines." Id. "The *Sleek-craft* factors are intended **[*10]** to function as a proxy or substitute for consumer confusion, not a rote checklist." *Id.*

Trademarks are divided into five categories of varying strengths. Surfvivor Media, Inc. v. Survivor Prods., 406 F.3d 625, 631 (9th Cir. 2005). From strongest to weakest, those categories are: arbitrary, fanciful, suggestive, descriptive, and generic. Id. at 631-32. Arbitrary marks are "common words that have no connection with the actual product." *Id.* Fanciful marks are "'coined phrases' that also have no commonly known connection with the product at hand." Id. at 632. Suggestive marks suggest rather than describe the product's features and require some imagination to associate the mark with the product. *Id.* Descriptive marks define a particular characteristic of the product in a way that does not require imagination. *Id.* Generic marks describe the product in its entirety. *Id.* Because of its similarity to the word "classics," "Classixx" can be construed as at least somewhat evocative of Plaintiffs' style of music. Associating "Classixx" with Plaintiffs' musical group nevertheless requires some imagination. Thus. Plaintiffs' mark is best categorized as suggestive. As a suggestive mark, "Classixx" is entitled to trademark protection.

In addition to the strength of the mark, three **[*11]** other *Sleekcraft* factors point toward finding a likelihood of confusion. Both Plaintiffs and H&M sell apparel bearing the word "classixx." The similarity of the goods at issue therefore creates a greater likelihood of confusion. Plaintiffs have also demonstrated some evidence of actual confusion: a consumer posted a photo of H&M's "classixx" sweaters and asked whether H&M was selling "Classixx" merchandise. In addition, Plaintiffs allege an intent to expand their product line to include not just t-shirts but also long-sleeve shirts and sweaters.

The remaining factors are more neutral. First, the prominence of the word "classixx" — Plaintiffs' entire word mark — on H&M's sweater suggests strong similarity of the mark and supports finding a likelihood of confusion. Plaintiffs' apparel, however, generally uses a more stylized, geometric version of the "Classixx" word mark, as depicted here: . H&M's shadow design is somewhat derivative of the geometric style used by Plaintiffs, but otherwise bears no stylistic similarities to Plaintiffs' apparel. Second, while both Plaintiffs' and H&M's apparel is sold online, the parties do not sell their products on the same websites. Similarly, neither **[*12]** product is sold in the same retail locations: Plaintiffs' apparel is sold at their performances, while H&M's apparel is sold in its own retail stores. Third, Plaintiffs argue consumers are less likely to exercise a high degree of care when buying H&M's "reasonably inexpensive sweaters." While less expensive products generally lead to less purchaser care, the type of consumer likely to buy "Classixx" merchandise would already be a fan of the musical group, and therefore more likely to exercise care in purchasing an official product. Fourth, although H&M purportedly played no role in deciding to use the "classixx" mark on its sweaters, a finding of intent is not foreclosed by Plaintiffs' allegations.

Based on the Court's review of the relevant factors, the Court cannot say that the parties' products are unrelated and there is no likelihood of confusion as a matter of law. *Cf Murray v. Cable Nat. Broadcasting Co., 86 F.3d 858,*

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purely ornamental, H&M could not register "classixx" as a trademark. *See* In Re Astro-Gods Inc., 223 U.S.P.Q. 621 (T.T.A.B. Aug. 10, 19S4) (stating that an ornamental mark is protectable only if it also serves a source-indicating function, such as if "it names the secondary source of the goods or if, at the time of its first use as ornamentation, it was already a recognized trademark of applicant for services or other goods."). How H&M uses the mark has no bearing on whether Plaintiffs have a protectable interest in their own trademark. Nor does it establish as a matter of law that no likelihood of confusion could result from selling a sweater bearing only the word "classixx." The Court turns instead to the *Sleek-craft* factors to determine whether Plaintiffs adequately allege a likelihood of confusion.

861 (9th Cir. 1996) (affirming dismissal of trademark claim where the plaintiff and defendant shared no customers and their services were unrelated as a matter of law). Plaintiffs plausibly allege a likelihood of confusion.

3. Conclusion

Accordingly, H&M's Motion to Dismiss Plaintiffs' trademark claims is DENIED.

B. Misappropriation Claim [*13] (Claim 3)

In their third claim, Plaintiffs assert common law misappropriation of name or likeness. H&M argues this claim must be dismissed because Plaintiffs lack standing and Plaintiffs fail to allege that H&M used their identity as celebrities. Each argument is addressed below.

1. Standing

H&M argues that Plaintiffs' claim fails because California recognizes no right of publicity for musical groups or corporate plaintiffs. In addition, H&M argues that Plaintiffs fail to allege an injury as required to establish standing.

The cases to which H&M cites stand for the proposition that non-natural persons like corporations have no right of publicity under California common law. *See, e.g., Virag, S.R.L. v. Sony Comput. Entm't America LLC, No. 15-cv-01729, 2015 U.S. Dist. LEXIS 111211, 2015 WL 5000102, at *5 (N.D. Cal. Aug. 21, 2015)*. Groups of natural persons, including musical groups, do have a right of publicity and therefore have standing to bring a misappropriation claim. *See Id. 2015 U.S. Dist. LEXIS 111211, [WL]at *5* (noting several cases that "either determined or assumed that a group of human beings has a right of publicity as a group"); *No Doubt v. Activision Publ Inc., 702 F.Supp.2d 1139, 1140, 1146-47 (C.D. Cal. 2010)* (addressing common law right of publicity claim by a musical group). As a musical group, David and Blake have a right of publicity in their identity as "Classixx." Hush, **[*14]** however, has no right of publicity unless David and Blake transferred their rights to it. *See Virag, S.R.L., 2015 U.S. Dist. LEXIS 111211, 2015 WL 5000102, at *6* (explaining that a corporate plaintiff can sue only if "a human being or group of human beings transferred or assigned his or their right of publicity to the corporate plaintiff') (citing *No Doubt, 702 F.Supp.2d at 1140*). Plaintiffs allege no facts indicating that David or Blake assigned their rights to Hush. Therefore, only David and Blake have standing to assert their common law misappropriation claim.

H&M argues that David and Blake nevertheless lack standing because they failed to allege an injury in fact. To have standing to sue under Article III of the United States Constitution, a plaintiff must allege (1) an injury in fact (2) that is caused by the conduct complained of and (3) that is likely to be redressed by a favorable decision. *Lujan v. Deft. Of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Plaintiffs allege that H&M's misappropriation of their name caused injury including damage to marketing and publicity value and loss of goodwill. This is sufficient to allege actual injury. David and Blake have standing to assert their common law misappropriation claim.

2. *Elements of Common Law Misappropriation*

To maintain a cause of action for misappropriation of name or likeness under California common law, a plaintiff must **[*15]** allege "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." *Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342 (1983)*. H&M argues that Plaintiffs fail to allege the first element because H&M make no creative use of the "Classixx" mark, and its sweater does not implicate Plaintiffs' identities as celebrities. The Court disagrees.

California case law does not specify that a defendant must make "creative use" of plaintiff's name or likeness to be liable. The focus is instead on the defendant's exploitation of another's name or likeness for its own advantage. Here, Plaintiffs sufficiently allege that H&M used the name of their musical group "Classixx" to sell its own clothing. This is sufficient to allege H&M's use of Blake and David's identity.

3. Conclusion

H&M's Motion to Dismiss Hush's misappropriation claim is **GRANTED** for lack of standing, with leave **to amend within three days** of this Order. H&M's Motion to Dismiss David and Blake's misappropriation claim is **DENIED**.

C. UCL Claim (Claim 4)

Plaintiffs allege that H&M's use of the "Classixx" mark constitutes an unlawful and unfair business practice **[*16]** under the UCL, *Cal. Bus & Prof Code § 17200*. H&M argues that Plaintiffs' UCL claim fails because (1) Plaintiffs fail to allege standing under Article BI or the UCL; (2) Plaintiffs' requested relief is unavailable under the UCL; and (3) Plaintiffs fail to allege H&M engaged in unlawful or unfair business practices.

1. Standing

As with Plaintiffs' misappropriation claim, H&M argues that Plaintiffs lack Article III standing because they failed to allege an injury in fact. In addition, H&M argues that Plaintiffs fail to allege that they "lost money or property as a result of . . . unfair competition," as required to establish standing under UCL. *See* *Cal. Bus. & Prof Code § 17204*.

As explained above, Plaintiffs adequately alleged that H&M's misappropriation, which grounds Plaintiffs' UCL claim, caused them injury, including damage to marketing and publicity value. This is sufficient to establish injury in fact under Article III and the UCL.

2. Unlawful Business Practices

The unlawful prong "borrows violations of other laws and treats them as independently actionable." *Daugherty v. Am. Honda Motor Co., Inc., 144 Cal. App. 4th 824, 837, 51 Cal. Rptr. 3d 118 (2006)*. H&M argues that Plaintiffs' unlawful business practices claim fails because Plaintiffs insufficiently alleged the trademark infringement and misappropriation claims on which it relies. **[*17]** As explained above, Plaintiffs sufficiently allege trademark infringement and misappropriation. Accordingly, Plaintiffs adequately allege H&M engaged in unlawful business practices.

3. Unfair Business Practices

When the plaintiff in a UCL action is the defendant's competitor, a business practice is unfair if it "threatens an incipient violation of an ***antitrust law***, . . . [has] effects [that] are comparable to or the same as a violation of [an ***antitrust] law***, or otherwise significantly threatens or harms competition." *Cel Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. H&M's arguments in favor of dismissal rely on the separate test for unfairness in a UCL consumer action. *See* *Drum v. San Fernando Valley Bar Assn., 182 Cal. App. 4th 247, 253, 106 Cal. Rptr. 3d 46 (2010)* (explaining that the test for unfairness differs depending on whether the plaintiff is a competitor or a consumer). Consequently. H&M's arguments are unavailing.

4. Availability of Relief Requested

The remedies available under the UCL are limited to injunctive relief and restitution. *Cel-Tech Commc'ns, Inc., 20 Cal. 4th at 179*; *E.W. French & Sons, Inc. v. Gen. Portland, Inc., 885 F.2d 1392, 1402 (9th Cir. 1989)*. In addition, "disgorgement of money obtained through an unfair business practice is an available remedy . . . to the extent that it constitutes restitution." *Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1145, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003)*.

Here, Plaintiffs seek disgorgement of the revenues and profits that H&M allegedly received in connection with the sales of **[*18]** its infringing "classixx" apparel. Restitution, and therefore restitutionary disgorgement, is available to a plaintiff for loss of a vested interest, such as earned but unpaid wages; it is not available for a mere expectancy interest. *See* *Korea Supply Co., 29 Cal. 4th at 1149*. H&M argues Plaintiffs' request fails as a matter of law because H&M received its revenues and profits directly from its customers, not Plaintiffs. Plaintiffs make no arguments in opposition. The Court finds that Plaintiffs at most had an "expectancy" that it would have received additional profits but for H&M's allegedly unfair business practices. Plaintiffs have no claim for restitution under the UCL.

Plaintiffs also seek preliminary and permanent injunctive relief H&M argues Plaintiffs' request is moot because H&M stopped selling the allegedly infringing sweater after receiving Plaintiffs' cease and desist letter. Plaintiffs counter that H&M could recommence its sale of "classixx" apparel at any time.

H&M's argument requires consideration of its response to Plaintiffs' cease and desist letter. That response was not referenced in Plaintiffs' Complaint, and H&M does not argue it is subject to judicial notice. As such, the Court cannot consider it on **[*19]** a motion to dismiss. *See* *Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)* (per curiam) ("When reviewing a motion to dismiss we consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.").

Even if the Court were to consider H&M's responsive letter, the Court would not dismiss Plaintiffs' claim. Cessation of unlawful conduct moots a request for injunctive relief where "the reform of the defendant [is] irrefutably demonstrated and total." *Polo Fashions, Inc. v. Dick Bruhn, Inc., 793 F.2d 1132, 1135 (9th Cir. 1986)*. The Court is unconvinced at this stage that H&M has no intention of resuming its allegedly infringing sales in the future. *See* *In re Circuit Breaker Litig., 860 F. Supp. 1453, at 1456 (C .D. Cal. 1994)* (noting that "courts usually deny requests for permanent injunctions" when the "defendant infringed innocently, ceased before judgment and assured the court that it has no intention of infringing in the future"). Plaintiffs adequately assert a claim for injunctive relief under the UCL.

5. Conclusion

H&M's Motion to Dismiss Plaintiffs' UCL claim is **GRANTED in part**. To the extent Plaintiffs' seek restitution under the UCL, its claim is **dismissed with prejudice**. Otherwise, H&M's Motion to Dismiss Plaintiffs' UCL claim is **DENIED**.

V. CONCLUSION

Defendants' Motion is **DENIED** with two exceptions. First, **[*20]** to the extent Hush asserts a claim for misappropriation of Classixx's name (Claim 3), its claim is **dismissed with leave to amend** within three days of this Order. Second, to the extent Plaintiffs seek restitution under the UCL, that claim is **dismissed with prejudice**.

IT IS SO ORDERED.

Old Town Util. & Tech. Park v. Mfgr

Business and Consumer Court of Maine, Cumberland County

January 31, 2018, Decided

DOCKET NO. BCD-RE-17-11

Reporter

2018 Me. Bus. & Consumer LEXIS 6 *

OLD TOWN UTILITY & TECHNOLOGY PARK, LLC, et al., Plaintiffs, v. MFGR, LLC, et al., Defendants.

Core Terms

Advisory, promise, motion to dismiss, Deadline, antitrust, counts, promissory estoppel, alleges, induce, restraint of trade, parties, argues, assign, fiduciary duty, unjust enrichment, particularity, commerce, loyalty, buyer, breach of contract, definite statement, statute of frauds, alleged breach, purchaser, terminate, warehouse, grounds, terms, pled, team

Opinion

[*1] COMBINED ORDER ON DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on Defendants MFGR, LLC's ("MFGR") and William Firestone's ("Firestone") (collectively the "MFGR Defendants") motion to dismiss all counts against them and Defendants Old Town Holdings II, LLC's ("OTH") and Joseph Everett Deschenes's ("Deschenes") (collectively the "OTH Defendants") motion to dismiss all counts against them. Plaintiffs Old Town Utility and Technology Park, LLC ("OTU"); Relentless Capital Company, LLC ("Relentless"); and Samuel Eakin ("Eakin") oppose the motion. Oral argument was heard on January 5, 2018 at the Capital Judicial Center in Augusta, Maine. Clifford Ginn, Esq. appeared on behalf of Plaintiffs. Daniel Mitchell, Esq. appeared on behalf of the MFGR Defendants and Julia Pitney, Esq. appeared for the OTH Defendants.

FACTUAL BACKGROUND[1]

This case arises out of a disputed transaction for the sale and purchase of the former Expera Mill Facility (the "Facility") in the City of Old Town, Maine, ("Old Town," or the "City") which includes approximately 300 acres of land, roughly 400,000 square feet of warehouse building, a wastewater treatment plant, a 16MW biomass boiler, and other miscellaneous **[*2]** industrial assets. (Compl. ¶ 4.) MFGR purchased the Facility from its former owner on or about January 27, 2016. (Compl. ¶ 5.) Firestone is the principal of MFGR. (Compl. ¶ 3.)

Relentless, acting through Eakin, and James W. Sewall Company ("Sewall"), acting through its president and CEO David Edson ("Edson"), formed OTU on or about December 15, 2015, for the purpose of acquiring or leasing and redeveloping the Facility. (Compl. ¶ 6.) OTH later joined OTU through its principal, Deschenes, the former manager of fiber and logistics at the Facility. (Compl. ¶ 7.) When and to what extent OTH and Deschenes began working with

[1] The information in this section is taken in large part from Plaintiffs' First Amended Verified Complaint (the "Complaint").

or joined OTU is disputed, but by July 15, 2016, the three members executed an operating agreement for OTU giving each member equal one-third ownership of OTU and naming Edson, Eakin, and Deschenes its managers. (*Id.*)

Eakin's work on acquiring or leasing and redeveloping the Facility went three directions in 2016. One project involved securing contracts for the provision of steam and power from the Facility's power and boiler assets with the University of Maine (the "University"). (Compl. ¶¶ 14-17.) Eakin undertook this work through Relentless and partnered with another **[*3]** entity, Consolidated Edison Solutions ("ConEd"). (*Id.*) This "ConEd Team" was ultimately invited to participate in "Phase II" of the University's bidding process. (Compl. ¶¶ 19, 68.) Sometime thereafter Relentless was removed from the team. (Compl. ¶ 68.)

Meanwhile, OTU was negotiating with MFGR (the Facility's owner) and Old Town to facilitate the sale of the Facility's wastewater treatment plant and warehouses. (Compl. ¶ 9-10, 20.) In March 2016, MFGR and OTU executed an agreement whereby OTU would provide services for compensation (the "Advisory Agreement") to that end. (Compl. ¶¶ 20-21.) Pursuant to the Advisory Agreement, OTU secured[2] financing and developed a transactional framework agreeable to all parties. (Compl. ¶¶ 22-29, 32.) The terms of this proposed transaction were reduced to writing in an offer letter dated April 28, 2016 from the City to MFGR which was countersigned by Firestone. (Compl. ¶ 32.) This letter was a binding[3] letter of intent and is thus styled the "4/28/16 Agreement" by Plaintiffs, and will be so referenced in this Order. The letter proposes purchase of the Facility by the City "and/or its assigns;" Plaintiffs allege that MFGR, the City, and OTU understood **[*4]** the City's "assigns" to mean OTU. (Compl. ¶ 33.)

Through Relentless, Eakin was simultaneously developing a business model for the Facility. (Compl. ¶ 35.) As part of this process, OTU's managers met with representatives of the Carrier, Varney, and Gardner families (the "CVG families") regarding securing timber assets to fuel the facility because these three families owned substantial timberland in the State of Maine. (Compl. ¶ 37-38.) The CVG families formed CVG, Inc. ("CVG") in January 2015 to pursue their joint interests. (Compl. ¶ 38.) CVG allegedly came to view Relentless's proposal as a threat and recognized that acquiring the Facility would better serve its interests. (Compl. ¶ 43.) CVG also became part of the ConEd team, as Relentless was removed from the ConEd team and replaced with Penobscot Energy and Fiber, LLC, which was formed by CVG and its partners to redevelop the Facility. (Compl. ¶ 68.)

Meanwhile, in June through October 2016, OTU continued to work with the City and MFGR to close the sale of the Facility in accordance with the 4/28/16 Agreement. (Compl. ¶ 51.) Problems arose. Changes to the State of Maine's regulatory approach to regulation of stormwater treatment **[*5]** necessitated changes to the proposed ownership structure. (Compl. ¶¶ 52-54). On or about July 5, 2016, OTU's closing attorney circulated a draft buy-sell instrument to the parties; MFGR raised certain concerns, which OTU's closing attorney addressed. (Compl. ¶¶ 54-56.) In early August 2016, OTU and the City discovered that the Facility's tissue building warehouse roof required substantial repairs and they began working with MFGR to address the issue. (Compl. ¶ 62.) By September 1, 2016, emails had been circulated among various representatives of the three parties indicating that the City was waiting only on closing documents discussed in a prior conference call. (Compl. ¶ 70). The City's mayor had subsequently requested those documents from Firestone and the September 1 emails charged MFGR with producing these "exhibits." (*Id.*)

By early October 2016, no closing had occurred. Firestone informed OTU that a competing buyer had emerged, and on October 10, 2016, gave OTU two weeks to respond with a counteroffer. (Compl. ¶¶ 77-78.) On October 24,

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[2] The Court appreciates that whether and to what extent OTU was successful in securing financing for the sale of the Facility is a central issue in this litigation and disputed by the parties. The Court uses "secured" here because Plaintiffs allege they were able to secure adequate financing for the transaction and for purposes of a motion to dismiss, the Court must accept all well-pleaded allegations as true. *Bonney v. Stephens Mem. Hosp., 2011 ME 46, ¶ 16, 17 A.3d 123*.

[3] The MFGR Defendants challenge whether they are bound by the terms of this letter. (Def's Reply Mot. Dismiss at 1 n. 1.) *See* note 2 *supra*.

2016, Firestone raised issues with the proposed closing that OTU claims dealt with well-settled matters. (Compl. ¶¶ 84-86.) Shortly thereafter MFGR **[*6]** elected to sell the Facility to CVG. (Compl. ¶ 87.)

Plaintiffs filed their nine-count Complaint on September 5, 2017; although much has transpired since then regarding the sale of the Facility, as of that date and up until the entry of this Order, MFGR has not closed a sale of the Facility. (Compl. ¶ 95.) Supplemental briefing and letters to the Court, as well as assertions made at oral argument, suggest that in the time since the Complaint was filed: (1) The deal with CVG failed; (2) e4research.org, a non-profit corporation with a relationship with Sewall emerged as a potential new buyer; (3) that agreement expired by its terms at the end of 2017; and (4) CVG has emerged resurgent in the new year as the prospective buyer. OTU maintains that it is still willing and able to purchase the Facility from MFGR; MFGR has indicated that it is ready to move toward a closing with CVG.

OTU alone brings six counts against only MFGR in this lawsuit: Count I (Breach of Contract: 4/28/16 Agreement), Count II (Specific Performance: Sale of the Facility from MFGR to OTU), Count III (Breach of Contract: Advisory Agreement), Count IV (Promissory Estoppel: Sale of the Facility), Count V (Promissory Estoppel: **[*7]** Advisory Fees), and Count VI (Unjust Enrichment). All Plaintiffs bring two counts against OTH and Deschenes: Count VIII (Breach of Contract: OTU Operating Agreement) and Count IX (Breach of Fiduciary Duty). One Count is brought by all Plaintiffs against all Defendants: Count VII (Restraint of Trade/ Monopoly).

STANDARD OF REVIEW

In reviewing a motion to dismiss under M.R. Civ. P. 12(b)(6), courts "consider the facts in the complaint as if they were admitted." *Bonney v. Stephens Mem. Hosp., 2011 ME 46, ¶ 16, 17 A.3d 123*. The complaint is viewed "in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* (quoting *Saunders v. Tisher, 2006 ME 94, ¶ 8, 902 A.2d 830*). "Dismissal is warranted when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that he might prove in support of his claim." *Id.*

DISCUSSION

I. MFGR DEFENDANTS' MOTION TO DISMISS: COUNTS I - IV

The MFGR Defendants have moved this Court to dismiss all counts against them on the grounds that Plaintiffs have failed to state a claim upon which relief can be granted. M.R. Civ. P. 12(b)(6). Plaintiffs counter that they have adequately pled sufficient facts **[*8]** to state a cause of action as to each count. The Court considers each count in turn.

A. Count I: Breach of Contract (4/28/16 Agreement) and Count II: Specific Performance (Sale of the Facility by MFGR to OTU)

MFGR urges this Court to dismiss Counts I and II[4] on the grounds that OTU's breach of contract claim alleged in Count I is barred by Maine's statute of frauds, which states that no action can be maintained for the sale of land unless the promise, contract, or agreement is in writing and signed by the party to be charged therewith. *33 M.R.S.A. § 51(4)*. OTU responds that the 4/28/16 Agreement satisfies the statute of frauds, and that because OTU has standing to enforce that agreement, the statute of frauds is satisfied. In the alternative, OTU argues that the doctrine of part performance applies, and operates as an exception to the statute of frauds.

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[4] As the MFGR Defendants point out in their motion, specific performance is an equitable remedy, not a cause of action. (Mot. Dismiss at 3 n. 2.) The Court therefore treats Count II as a prayer for relief for MFGR's breach of the 4/28/16 Agreement plead in Count I.

The 4/28/16 Agreement is a letter of intent from Old Town to Firestone (and countersigned by same) regarding the City's proposed purchase of the Facility (or the "Old Town Mill Site," as it is referred to in the letter).[5] The 4/28/16 Agreement does not mention OTU by name. OTU alleges that where the letter refers to the "[City of Old Town] and/or its assigns," **[*9]** it is referring to OTU as the City's assignee in the proposed transaction. MFGR argues that even if the 4/28/16 Agreement is an enforceable written contract for the sale of the Facility, OTU lacks standing to enforce the agreement, because it is between MFGR and the City.

OTU claims it has standing to enforce the agreement under two theories. First, OTU claims an independent right to enforce the agreement as the City's "assign." OTU alleges that all parties to the agreement understood that OTU was the City's assign under the 4/2816 Agreement. (Compl. ¶ 33.) OTU further alleges that from the time the 4/28/16 Agreement was entered into, OTU acted on behalf of both OTU and the City, with the City and OTU determining which assets the City would purchase and lease to OTU and which assets OTU would purchase outright. (*Id.*) The Complaint alleges further facts tending to establish that the City in fact assigned its rights under the 4/28/16 Agreement to OTU. (*See* Compl. ¶¶ 51-58, 62-66)

OTU also argues that even if these facts are insufficient to establish an independent right to enforce the 4/28/16 Agreement as the referenced "assign," they at least establish a course of dealing among OTU, MFGR, **[*10]** and the City sufficient to establish that OTU is an intended thirdparty beneficiary of the 4/28/16 Agreement. In *F.O. Bailey Co. v. Ledgewood, Inc., 603 A.2d 466, 468 (Me. 1992)*, Maine adopted the *Restatement (Second) of Contracts § 302* test for whether a third party beneficiary is an intended beneficiary with a right to enforce the agreement: "A beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." The *F.O. Bailey* Court cautioned that while an intent to create an enforceable benefit in third party must be "clear and definite," it is nonetheless a factual determination and such intent may be "expressed in the circumstances surrounding" the contract's execution. *Id.*

This Court rules that OTU has alleged sufficient facts to establish its standing to enforce the 4/28/16 Agreement, whether as a party to the contract or as a third party beneficiary thereto.[6] OTU has alleged that it is the "assign" referenced in the 4/28/16 Agreement, and corroborated that allegation with further factual assertions indicating that OTU, MFGR, and the City all understood **[*11]** OTU to be the City's "assign" under the 4/28/16 Agreement. The Court therefore **denies** Defendant MFGR's motion to dismiss as to Count I and Count II.

B. <u>Count III: (Breach of Contract-Advisory Agreement)</u>

MFGR claims that OTU has inadequately pled a breach of the advisory agreement. It argues that the Advisory Agreement expired by its terms prior to OTU's performance, triggering MFGR's right to terminate the Advisory Agreement. OTU counters that it performed under the agreement prior to the contract deadlines, or, in the alternative, that any deficiency in meeting those deadlines was waived by MFGR.

The Advisory Agreement provides that MFGR will pay fees to OTU if OTU "facilitate[s] the sale" of two Facility assets (the wastewater treatment plant and the warehouse) to the City or "another buyer acceptable to MFGR but not previously known to MFGR."[7] The Advisory Agreement gives both parties the right to "terminate [the

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[5] Plaintiffs attached a copy of the 4/28/16 Agreement to the Complaint as Exhibit D, and it is central to OTU's breach of contract claim. The Court thus may consider the document without converting the MFGR Defendants' motion to one for summary judgment. *Moody v. State Liquor & Lottery Comm'n, 2004 ME 20, ¶ 10, 843 A.2d 43*.

[6] Because the Court rules that OTU has alleged sufficient facts to establish standing to enforce the signed 4/28/16 Agreement, the Court declines to consider whether the doctrine of part performance would otherwise operate to except the purported agreement to sell the Facility from the requirements of *33 M.R.S.A. § 51(4)*. The Court further expresses no opinion on whether the 4/28/16 Agreement is binding on any party, an argument that MFGR reserved but did not raise in its motion to dismiss. *See* note 3 of this Order *supra*.

agreement] with respect to any [p]roperty for which there is no executed purchase agreement by the applicable Contract Deadline or no sale as described herein prior to the applicable Closing Deadline." Firestone signed the Advisory Agreement on behalf of MFGR.

The Contract **[*12]** Deadline and Closing Deadlines for both assets are disputed by the parties. The Contract Deadline for the wastewater treatment plant is defined as "within 60 calendar days of the Effective Date;" the Closing Deadline is defined as "within 90 days of the Effective Date." The Contract Deadline for the warehouse is defined as "within 30 days of the Effective Date" and the Closing Deadline is defined as "April 30, 2016." The Effective Date of the Advisory Agreement is defined as "March __, 2016." Both Closing Deadlines are followed by the parenthetical "(or such later closing date, if any, to which MFGR and the applicable buyer have agreed)."

This parenthetical language renders the Closing Deadlines ambiguous on the face of the Advisory Agreement, and OTU has pled facts that suggest that MFGR and the applicable buyer (that is, the City and OTU) agreed to a later closing date. (Compl. ¶¶ 22-29, 32-34, 51-58, 63-64, 70.) Although MFGR points out that the Advisory Agreement includes an integration clause that states the agreement "cannot be amended, modified, or varied except by the written agreement of MFGR and [OTU]," the parenthetical language allowing for a later closing date is already **[*13]** a part of the integrated document.

The Contract Deadline, however, is a date certain, albeit fixed in relation to the undefined Effective Date. While the Effective Date is clearly ambiguous, the plain language of the contract indicates that the parties intended that date to be some day in March of 2016. Even assuming the Effective Date was March 31, 2016, OTU does not allege that it succeeded in obtaining an executed purchase agreement with the City or any other buyer within the Contract Deadline for either party.

OTU first argues that its success in "securing the City as a purchaser" within the Contract Deadline was sufficient performance under the terms of the Advisory Agreement such that MFGR did not have a right to terminate. This is inconsistent with the plain language of the applicable provision, which expressly gives either party the right to terminate the agreement in the event that no purchase agreement is executed by the Contract Deadline, and is silent about the effect of "securing" a purchser. OTU next argues that it has nonetheless stated a claim for breach of contract under the theory "that any deficiency in meeting those deadlines was waived by MFGR's conduct."

Maine has **[*14]** long recognized the principle that one who "by his own act, deprived himself of the power of fulfilment," cannot then escape his obligations under a contract. *Richards v. Allen, 17 Me. 296, 299 (1840)*. The modern doctrine of waiver maintains this principle. Waiver is the voluntary or intentional relinquishment of a known right. *Indus. Unif. Rental Svc., Inc. v. Couri Pontiac, Inc., 355 A.2d 913, 919 (Me. 1976)*. If a party entitled to a contractual right acts inconsistent with that right, the party "is estopped form asserting that right if renunciation of the waiver would prejudice the party who has relied on it." *Id.* To bar enforcement of a contractual right, the waiver "must have induced a belief in the party who is claiming reliance on that waiver that the waiving party intended voluntarily to relinquish his rights." *Id.* Waiver may be inferred from the conduct of the waiving party. *Id.*

Read in the light most favorable to OTU, OTU has plead sufficient facts to give rise to the inference that MFGR waived its right to terminate the Advisory Agreement for OTU's failure to perform by the Contract Deadline. OTU has alleged that MFGR continued to work with OTU and the City toward the execution of a purchase contract well after the Contract Deadline had run. (Compl. ¶¶ 22-29, 32-34, 51-58, 63-64, 70.) OTU's reliance **[*15]** on this purported waiver is reflected in these same allegations.

OTU has stated a claim for breach of contract for MFGR's failure to perform under the Advisory Agreement. The Court therefore **denies** the MFGR Defendants' motion to dismiss as to Count III.

C. Count IV: (Promissory Estoppel: Sale of the Facility)

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[7] Plaintiffs attached a copy of the Advisory Agreement to the Complaint as Exhibit A, and it is central to OTU's breach of contract claim. The Court thus may consider the document without converting the MFGR Defendants' motion to one for summary judgment. *Moody v. State Liquor & Lottery Comm'n, 2004 ME 20, ¶ 10, 843 A.2d 43*.

Plaintiffs plead this claim as an alternative avenue of relief if the Court determines that the purported contract between MFGR and OTU for the sale of the Facility is otherwise unenforceable. *See* Part I.A. of this Order, *supra*. "The doctrine of promissory estoppel applies to promises that are otherwise unenforceable, and is invoked to enforce such promises so as to avoid injustice." *Harvey v. Dow, 2008 ME 192, ¶ 11, 962 A.2d 322*. Maine has adopted the definition of promissory estoppel set out in *Section 90(1) of the Restatement (Second) of Contracts*:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Id. Maine allows promissory estoppel to enforce promises to convey land that lack a signed writing as required by **[*16]** the statute of frauds. *See Chapman v. Bomann, 381 A.2d 1123, 1127 (Me. 1978)*. However, our Law Court has since allowed the exception only where the "action induced" involves substantial, physical improvement to the real estate by the promisee. *See Harvey v. Dow, 2008 ME 192, ¶ 13, 962 A.2d 322* (purchaser built house on lot); *Tozier v. Tozier, 437 A.2d 645, 648-49 (Me. 1981)* (donee built house and outbuildings on lot). *See also Nappi v. Nappi Distrib., 1997 ME 54, ¶ 9, 691 A.2d 1198* ("In the context of the transfer of land, when the donee has made *substantial improvements to the land* in 'reliance upon the promise to convey the land, courts will enforce the promise to convey.'") (quoting *Tozier, 437 A.2d at 648*) (emphasis added).

OTU does not allege that it has made any physical improvements to the land. Instead, OTU argues that it expended substantial time and resources enhancing the value of the Facility in intangible ways (*i.e.* by finding tenants, developing a business plan, and securing financing), and that this induced action is sufficient to enforce the alleged promise to sell the Facility to OTU. However, based on the holdings of *Harvey* and *Tozier*, as well as the dictum from *Nappi* cited above, this Court holds that under Maine law, promissory estoppel operates as an exception to the statute of frauds only where the party seeking to enforce the promise to convey has made substantial, physical improvements **[*17]** to the land in reasonable reliance on the promise.

While the purchasers in *Chapman* did not make substantial improvements to land in reliance on a seller's promise to convey, that case is distinguishable from this one. There, one of the sellers made a specific promise to sign and return the written contract for the sale of property in direct response to an inquiry being specially made because the purchasers were about to undertake a substantial financial commitment in furtherance of the deal. *Chapman, 381 A.2d at 1127*. The *Chapman* Court was explicit that "the doctrine of promissory estoppel [applied] to raise issues of material fact concerning . . . whether [this] *separate ancillary promise* became a contract binding on [the sellers.]" *Id. at 1126* (emphasis in original). Here, OTU has not alleged that MFGR promised to sign a purchase and sale agreement for the transfer of the Facility. There is thus no separate, ancillary promise by which MFGR can be bound, and the rule since propounded in *Harvey, Tozier*, and *Nappi*—that substantial improvement to the land by the promisee is a necessary element for promissory estoppel to except a contract for the sale of land from the statute of frauds' writing requirement—applies in this **[*18]** case.

Because OTU has failed to allege that it made substantial, physical improvements to the Facility or the land on which it sits, OTU has failed to state a claim for promissory estoppel regarding the sale of the Facility by MFGR to OTU. The Court thus **grants** MFGR Defendants' motion to dismiss as to Count IV.

D. Count V: (Promissory Estoppel-Advisory Fees)

The elements of promissory estoppel are recited in Part I.C. of this Order, *supra*. In their Complaint, Plaintiffs allege that MFGR promised to pay OTU fees and costs in return for advisory services pursuant to the Advisory Agreement, that MFGR should have reasonably expected that promise to induce action on the part of OTU, Relentless, and Eakin, and that MFGR's promise in fact did induce action on the part of Plaintiffs. (Compl. ¶ 120-121.) MFGR argues that this count should be dismissed for failure to state a claim because MFGR could not have reasonably expected that OTU would perform outside the terms of the Advisory Agreement (*i.e.* by failing to perform by the contract deadline) and still expect compensation. MFGR further argues that no injustice would result if the purported promise to pay fees was not enforced because Plaintiffs **[*19]** have not performed under the Advisory Agreement, as there has not yet been a closing on the sale of the Facility.

Plaintiffs counter that MFGR should have reasonably expected its promise to induce action on their part because MFGR breached its promise of good faith and fair dealing pursuant to the Advisory Agreement. In other words, Plaintiffs argue that they were induced to continue performance under the Advisory Agreement in bad faith, and that as such expectation of payment was reasonable given the long course of dealing that is alleged in some detail in the Complaint. (*See* Compl. ¶¶ 22-29, 32-34, 51-58, 63-64, 70.)

Viewing these facts in the light most favorable to the Plaintiffs, the inference can be drawn that it was not unreasonable for Plaintiffs to continue to perform under the Advisory Agreement in hopes of future payment based on MFGR's conduct during and after the period for performance recited in the written contract. OTU has alleged that they were induced to continue performing under the Advisory Agreement by MFGR's promise to pay. That is enough to survive MFGR's motion to dismiss. The Court therefore **denies** the MFGR Defendants' motion to dismiss Count V.

E. Count VI: (Unjust **[*20]** Enrichment)

OTU pleads unjust enrichment as an alternative avenue to recovery if the Court finds the Advisory Agreement unenforceable. *See* *June Roberts Agency, Inc. v. Venture Properties, Inc., 676 A.2d 46, 49 n. 1 (Me. 1996)* (stating that the existence of a contractual agreement "precludes recovery on a theory of unjust enrichment"). "Unjust enrichment describes recovery for the value of the benefit retained when there is no contractual relationship, but when, on the grounds of fairness and justice the law compels performance of a legal and moral duty to pay. . . ." *Paffhausen v. Balano, 1998 ME 47, ¶ 6, 708 A.2d 269*. The elements that a plaintiff must prove to recover for unjust enrichment are (1) that the plaintiff conferred a benefit on the other party (2) the defendant had appreciation of the benefit and (3) the acceptance or retention of the benefit was under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value. *Forrest Assocs. v. Passamaquoddy Tribe, 2000 ME 195, ¶ 14, 760 A.2d 1041*.

MFGR moves to dismiss Count VI on the grounds that there has been no benefit conferred on them because Plaintiffs' work related to the sale and development of the Facility amounted to "an elaborate marketing proposal . . . that was ultimately rejected." *Id.* ¶ 15. Plaintiffs allege that their labor has enhanced the value of the Facility by millions **[*21]** of dollars above the auction price MFGR would have received absent the Plaintiffs' efforts, thereby conferring a significant benefit on MFGR.

MFGR claims that *Forrest Assocs*. compels dismissal of Count VI. Although this case resembles *Forrest Assocs*. in some respects, the plaintiffs in that case had an opportunity to fully develop the record at a bench trial. Plaintiffs here have alleged facts which, if true, would distinguish Plaintiffs' claim from that brought by the plaintiffs in *Forrest Assocs*. Specifically, the *Forrest Assocs*. Court held that the plaintiffs could not recover under an unjust enrichment theory because "[a]lthough [the plaintiff] created a comprehensive plan and presented it to the [defendants], there [was] no evidence that the [defendants] benefitted from either the presentation or the information contained in the plan" and the evidence demonstrated that the plan was ultimately rejected. *Id.* Under those facts, the evidence failed to establish that the plaintiff had conferred a benefit on the defendant.

In contrast, Plaintiffs here have alleged with some particularity how MFGR benefitted from Plaintiff's plans and proposals. Specifically, Plaintiffs allege that they **[*22]** "laid the foundation for financing from the City and others, recruited and negotiated terms with future tenants that increased the Facility's value and creditworthiness, and played an instrumental role in the winning ConEd [bid]." (Compl. ¶ 124.) Plaintiffs further allege that MFGR knew of and appreciated the value of that benefit, and that the circumstances render the retention of that benefit unjust without compensation paid to Plaintiffs. (Compl. ¶¶ 125-126.)

Plaintiffs have thus stated a claim for unjust enrichment. The Court therefore **denies** MFGR's motion to dismiss as to Count VI.

II. COUNT VII: RESTRAINT OF TRADE/ MONOPOLY

In Count VII, Plaintiffs allege that MFGR's plan to sell the Facility to CVG is a contract in restraint of trade or commerce in Maine and that a consummated transaction would be a combination in restraint of trade or commerce in Maine, both in violation of 10 M.R.S.A. § 1101.[8] Plaintiffs allege Defendants are all liable as co-conspirators for attempting to facilitate CVG's purchase of the Facility. *Id.*

Defendants move to dismiss on the grounds that (1) Plaintiffs have not alleged an antitrust injury and (2) Plaintiffs have not alleged that Defendants entered into a contract, combination, **[*23]** or conspiracy which restrained trade or commerce in Maine. The Court considers each argument in turn.

A. Plaintiffs Have Not Alleged An Antitrust Injury

"Maine's antitrust act provides that a plaintiff must prove injury or damage before the plaintiff can recover." McKinnon v. Honeywell Int'l, Inc., 2009 ME 69, ¶ 19, 977 A.2d 420. Maine courts may consider federal ***antitrust law*** as persuasive authority when construing Maine's antitrust statute. *Id.* In the federal context, the U.S. District Court for the District of Maine has clarified that a plaintiff "must prove an *antitrust injury*, which is to say an injury of the type the antitrust laws were intended to prevent . . . ." In re Compact Disc Min. Advertised Price Antitrust Litig., 456 F. Supp. 2d 131, 148 (D. Me. 2006) (quoting Serpa Corp. v. McWane, Inc., 199 F.3d 6, 10 (1st Cir. 1999)) (emphasis added). *See also* Int'l Ass'n of Machn's & Aerospace Workers, AFL-CIO, Local. L. No. 1821 v. Verso Paper Co., 80 F. Supp. 3d 247, 272 (D. Me. 2015) (citing Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc., 429 U.S. 477 (1977)). This Court has previously imposed the same requirement on plaintiffs bringing an antitrust action. *See Central Distribs., Inc. v. Labatt USA Opn'g Co.*, No. BCD-CV-12-33, at 10 (Bus. & Consumer Ct. Oct. 15, 2012, *Horton, J.*). The "presumptive proper" plaintiff to allege an antitrust injury "is a customer who obtains services in the threatened market or a competitor who seeks to serve that market." In re Compact Disc, 456 F. Supp. 2d at 146 (citing SAS of P.R. v. P.R. Tel. Co., 48 F.3d 39, 44 (1st Cir. 1995)).

Plaintiffs' antitrust claim stems from the allegation that CVG's acquisition of the Facility would allow it to charge elevated prices **[*24]** for its forest products and prevent the rest of Maine's forest products industry from selling forestry products to another operator of the Facility. (Compl. ¶ 129.) Plaintiffs do not allege that they are consumers of forest products or competitors in the forest products industry who would be harmed from this anticipated anticompetitive behavior. Plaintiffs' alleged damages resulting from CVG's proposed purchase of the Facility are rather "deprivation of the value of purchasing the Facility, exclusion from the team implementing the [ConEd team] bid, and expenditure of time, money, and resources in pursuing the transaction . . . ." (Compl. ¶ 139.) Significantly, these are identical to the damages attributed to the breach of contract count. (Compl. ¶ 101.) The U.S. District Court for the District of Maine—as well as this Court—have held that breach of contract damages are insufficient to establish an antitrust injury. In re Compact Disc, 456 F. Supp. 2d at 147-48 ("[Plaintiff's] injuries flow from an alleged breach of contract, unlawful transfer of proprietary information, and breach of fiduciary duty. These are not the type[s] of injury that the antitrust laws were meant to protect [against]."); *Central Distribs.*, BCD-CV-12-33, **[*25]** at 10 ("The gist of this claim is really a restatement of a breach of contract action . . . the complaint fails to state a claim for antitrust statute violations.").

This Court thus rules that Plaintiffs lack standing to bring the antitrust claim alleged in Count VII. Regardless of whether CVG's purchase of the Facility could amount to a violation of Maine's antitrust statute, as alleged, Plaintiffs have failed to allege how they have been injured by this purported anticompetitive activity.

B. Plaintiffs Have Not Alleged Necessary Action On The Part Of The Alleged Co-Conspirators

To establish a prima facie case pursuant to 10 M.R.S.A. § 1101, a plaintiff must show: "(1) that the defendants entered into a contract, combination, or conspiracy; (2) which restrained trade or commerce in Maine; and (3) that they were injured thereby for each allegation." *Pease v. Jasper Wyman & Son*, No. KNOSC-CV-00-015, at 18 (Me. Super. Ct., Knox Cty., July 31, 2002). The third element is discussed above, in Part II.B. of this Order, *supra*. Defendants in this case further argue that Plaintiffs have failed to allege facts satisfying the first two elements, and have thus failed to state a claim for antitrust violation on that **[*26]** ground.

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[8] Plaintiffs are not entitled to the injunctive relief they seek under this count. That remedy is available only to the Attorney General. State v. MaineHealth, 2011 ME 115, ¶ 8, 31 A.3d 911.

The "contract, combination, or conspiracy" alleged by Plaintiffs is the acquisition of the Facility by CVG. (Compl. ¶ 131.) All parties agree that that has not happened, although CVG has apparently resurfaced as the proposed purchaser of the Facility. (Compl. ¶ 95.) Plaintiffs nonetheless argue that MFGR's contract to sell the Facility to CVG is itself a contract in restraint of trade or commerce in Maine. (Compl. ¶ 132.) However, beyond this conclusory allegation, Plaintiffs plead no further facts to show how the purported contract for the sale of the Facility to CVG, standing alone, restrains trade in Maine. Instead, the Plaintiffs suggest that, once consummated, the transaction would "substantially lessen competition or tend to create a monopoly of lines of commerce in Maine . . ." (*Id.*)

The Court rules that Plaintiffs have failed to adequately allege the existence of a "contract, combination, or conspiracy . . . which restrained trade or commerce in Maine." *Pease*, No. KNOSC-CV-00-015, at 18. On its face, the Complaint alleges that a "consummated transaction . . . would" result in a violation *10 M.R.S.A. § 1101*—conceding that the Defendants have not yet entered into a contract that has restrained **[*27]** trade in Maine. Factual allegations that some future contract, once consummated, would eventuate an anticompetitive result does not state a claim for a violation of Maine's antitrust statute.[9]

By reason of the foregoing, the Court hereby **grants** the Defendants' motions to dismiss Count VII.[10] Plaintiffs have failed to state a claim for violation of Maine's antitrust laws, *10 M.R.S.A. §§ 1101-1108*.

III. OTH DEFENDANTS' MOTION TO DISMISS: COUNTS VIII AND IX

Although Count VIII and Count IX recite two separate causes of action—breach of contract and breach of fiduciary duty, respectively—there is factual and legal overlap between the two claims. Count VIII alleges that the OTH Defendants breached OTU's operating agreement *"as well as* their duty of loyalty, their duty not to exploit a business opportunity without first disclosing it to OTU, and their duty of confidentiality" by "facilitat[ing] CVG's opportunity to purchase the Facility from MFGR." (Compl. ¶ 143 (emphasis added).) Count IX alleges that the OTH Defendants "breached their fiduciary duty *and* duty of loyalty to OTU through self-dealing, usurpation of corporate opportunity, misrepresentation and omission of material facts, inducement, disclosure and misuse **[*28]** of confidential information, misuse of superior knowledge, failure to disclose, and rendering inappropriate advice." (Compl. ¶ 147 (emphasis added).) As in Count VIII, Plaintiffs allege this breach was committed through the OTH Defendants "facilitation" of CVG's opportunity to purchase the Facility from MFGR. (*Id.*)

It is unclear whether Plaintiffs are pleading a breach of OTU's operating agreement apart from OTH's alleged breach of its fiduciary duties in Count VIII. It is also unclear whether Plaintiffs allege that the OTH Defendants' breached only their duty of loyalty to OTU in Count IX or whether Plaintiffs are alleging a breach of fiduciary duty beyond the expressly stated breach of the fiduciary duty of loyalty. *See* *Sargent v. Buckley, 1997 ME 159, ¶ 1, 697 A.2d 1272* (defining duty of loyalty as a fiduciary duty). As grounds for the alleged breach of duty of loyalty, Count IX alleges "misrepresentation and omission of material facts," which sounds in fraud. *See* *Letellier v. Small, 400 A.2d 371, 376 (Me. 1979)*. Allegations of fraud are subject to a heightened pleading standard: "In all averments of fraud . . . the circumstances constituting the fraud . . . shall be stated with particularity . . . ." M.R. Civ. P. 9(b). The facts which could give rise to a fiduciary relationship **[*29]** must likewise be pled with particularity. *Ramsey v. Baxter Title Co., 2012 ME 113, ¶ 6, 54 A.3d 710*.

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[9] Notwithstanding the issues of standing and ripeness on which the Court decides to dismiss Count VII, Plaintiffs have not alleged how this transaction would result in an antitrust violation in any event. In essence, Plaintiffs allege that CVG's acquisition of the Facility would give CVG an advantage over its competitors by substantially lessening competition. That alone is insufficient to allege an antitrust violation. *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc., 875 F. Supp. 8, 13 (D. Me. 1994)* ("[G]aining an advantage over your competitors is not, in itself, a violation of antitrust laws.").

[10] Because the Court rules that Plaintiffs have failed to state a claim against any defendant for violating Maine's antitrust statute, the issue of whether Firestone or Deschenes could be individually liable for the alleged violation is moot. The OTH Defendants also argued grounds for dismissal that were unique to them. This argument is also moot, for the same reason.

Plaintiffs have alleged that Deschenes sought to terminate OTH's membership in OTU in August 2016, falsely promised not to act in competition with OTU, and used that false promise to procure Eakin's waiver of OTU's nondisclosure/ noncompete provisions. (Compl. ¶ 59.) This is the only affirmative fraud pled with any particularity in the Complaint. Plaintiffs allege that fiduciary duties were expressly provided for in OTU's operating agreement,[11] and cited to Maine statutory law that suggests Deschenes as manager (and, apparently, OTH as a "member active in management," *see* Pl's Opp. Mot. D. at 5) may have owed fiduciary duties to OTU as a matter of law. *See 31 M.R.S.A. §§ 1521(3)(A)*, *1559(3)*. Plaintiffs allege that Deschenes sought a report on the Facility's tissue building warehouse roof on CVG's behalf. (Compl. ¶¶ 66-67.) Plaintiffs further allege that Deschenes "facilitated" CVG's letter of intent to purchase the Facility from MFGR after Deschenes and OTH had left OTU. (Compl. ¶ 61.) Beyond this, the Complaint contains only general insinuations that the OTH Defendants were working against OTU's interest, and in CVG's interest, while OTH was still a member of OTU. (Compl. **[*30]** ¶¶ 60.)

The Court rules that Plaintiffs have not met the elevated pleading requirements for fraud or the existence of a fiduciary relationship in their Complaint against the OTH Defendants. Particularly, Plaintiffs have alleged nothing to suggest that the OTH Defendants owed Plaintiffs any duty when Deschenes allegedly facilitated the letter of intent between CVG and MFGR. Together with the lack of clarity regarding whether Count VIII alleges a breach of contract beyond the breach of fiduciary duty alleged in Count IX, the Court finds that the OTH Defendants cannot reasonably be required to frame a responsive pleading to these Counts in their current form.

Because the Court finds that the allegations supporting Counts VIII and IX lack sufficient particularity under the heightened pleading standard required by M.R. Civ. P. 9(b) and *Ramsey*, Plaintiffs ask the Court to treat the OTH Defendants' motion to dismiss as a motion for a more definite statement. M.R. Civ. P. 12(e). A motion for a more definite statement is used to remedy pleadings that are "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading" and must "point out the defects complained **[*31]** of and the details desired." *Id.*

When such a motion is granted, the pleading party must file a more definite statement within 10 days to remedy the defects highlighted in the motion. *Id.* Although the Court rules that the causes of action pled in Counts VIII and IX are too vague or ambiguous to allow the OTH Defendants a reasonable opportunity to respond, the Court agrees with Plaintiffs that allowing them an opportunity to plead these counts with the requisite level of particularity and sufficient factual support is appropriate here. Plaintiffs are thus **ordered** to file a more definite statement pursuant to M.R. Civ. P. 12(e). Plaintiffs' more definite statement should plead with sufficient particularity the factual basis for the alleged fiduciary relationship, and to the extent that Plaintiffs allege a breach of a fiduciary duty through fraud, the fraudulent acts of which they accuse the OTH Defendants. Plaintiffs should also clarify whether they are alleging a breach of contract beyond the OTH Defendant's alleged breach of the fiduciary duty of loyalty in Count VIII.

CONCLUSION

Based on the foregoing the entry will be:

1. The MFGR Defendants' motion to dismiss is GRANTED IN PART and DENIED **[*32]** IN PART as follows:
    a. The MFGR Defendants' motion to dismiss is GRANTED as to Count IV and Count VII.
    b. The MFGR Defendants' motion to dismiss is DENIED as to Count I, Count II, and Count III, Count V, and Count VI.
2. The OTH Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART as follows:
    a. The OTH Defendants' motion to dismiss is GRANTED as to Count VII.

[11] OTU's operating agreement was not attached to the Complaint and is not currently before the Court.

b. The OTH Defendants' motion to dismiss is DENIED as to Count VIII and Count IX. As to those Counts, Plaintiffs are hereby ORDERED to file within 10 days of the entry of this Order a more definite statement pursuant M.R. Civ. P. 12(e) as described in Part III, *supra*, of this Order.

January 31, 2018

DATE

SUPERIOR COURT JUSTICE

BUSINESS AND CONSUMER COURT

St. Mary's Med. Ctr., Inc. v. Steel of W. Va., Inc.

Supreme Court of Appeals of West Virginia

January 23, 2018, Submitted; January 31, 2018, Filed

Nos. 16-1101, 16-1032 and 16-1104 Consolidated

Reporter
240 W. Va. 238 *; 809 S.E.2d 708 **; 2018 W. Va. LEXIS 76 ***; 2018-1 Trade Cas. (CCH) P80,264; 2018 WL 665465

ST. MARY'S MEDICAL CENTER, INC., and PALLOTTINE HEALTH SERVICES, INC., Petitioners v. STEEL OF WEST VIRGINIA, INC., and PATRICK MORRISEY, ATTORNEY GENERAL, Respondents and PATRICK MORRISEY, ATTORNEY GENERAL, Petitioner v. STEEL OF WEST VIRGINIA, INC., Respondent

Prior History: [*1]** Appeals from the Circuit Court of Kanawha County. The Honorable Tod J. Kaufman, Judge. Civil Action No. 15-C-2214.

In re Cabell Huntington Hosp., Inc., 2015 FTC LEXIS 268 (F.T.C., Nov. 5, 2015)

Disposition: REVERSED AND REMANDED.

Core Terms

attorney general, documents, exemption, circuit court, merger, disclosure, Antitrust, Assurance, bid, Compliance, confidentiality, investigations, anti trust law, public record, orders, cooperative, unsealing, e-mails, proposed merger, certificate, bidding process, provisions, purposes, appeals, parties, moot

LexisNexis® Headnotes

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Antitrust & Trade Law > Procedural Matters

HN1[] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

W. Va. Code § 29B-1-4(a)(5) (2015) of the West Virginia Freedom of Information Act, concerning "statutory exemptions," incorporates the "investigative exemption" of the West Virginia Antitrust Act, *W. Va. Code § 47-18-7(d) (1978)*.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN2[] **Methods of Disclosure, Vaughn Indexes**

When a public body asserts that certain documents or portions of documents in its possession are exempt from disclosure under any of the exemptions contained in *W. Va. Code § 29B-1-4 (2003 Supp.)*, the public body must produce a Vaughn index. The Vaughn index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption under *W. Va. Code § 29B-1-4 (2003 Supp.)* is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. The Vaughn index need not be so detailed that it compromises the privilege claimed. The public body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt.

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Governments > Legislation > Interpretation

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN3[] **Standards of Review, Clearly Erroneous Review**

Generally, findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. However, in complex cases, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed de novo. Moreover, an interpretation of the West Virginia Freedom of Information Act is subject to de novo review.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

The antitrust exemption incorporated into the Freedom of Information Act must be viewed in the context of the Attorney General's powers and duties under the Antitrust Act. In investigating a suspected violation in the form of a monopoly, restraint of trade or illegal bidding process, the Attorney General is authorized under *W. Va. Code § 47-18-7(a) (1978)* of the Antitrust Act (Act) to administer oaths or affirmations, and may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation. The Attorney General may direct a local prosecutor to assist him or her. Remedies for violations of the Act include injunctive relief, a penalty and treble damages. Pursuant to *W. Va. Code § 47-18-16 (1978)*, the Antitrust Act shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

A necessary component of the West Virginia Antitrust Act is the investigative exemption set forth in *W. Va. Code § 47-18-7(d) (1978)* which states that the Attorney General shall not make public the name or identity of a person whose acts or conduct he or she investigates or the facts disclosed in the investigation, except disclosures in actions or enforcement proceedings. The Antitrust Act's investigative exemption is incorporated in the Freedom of Information Act through *W. Va. Code § 29B-1-4(a)(5) (2015)*, i.e., information "specifically exempted from disclosure by statute."

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > Governmental Information > Freedom of Information > Enforcement

HN6[] **Freedom of Information, Defenses & Exemptions From Public Disclosure**

A context-based analysis can be applied in determining whether public records are to be disclosed pursuant to a Freedom of Information Act request, but the determination is subject to the specific exemptions of the Freedom of Information Act listed in *W. Va. Code § 29B-1-4 (2015)*.

Administrative Law > Governmental Information > Freedom of Information > Compliance With Disclosure Requests

HN7[] **Freedom of Information, Compliance With Disclosure Requests**

The West Virginia Freedom of Information Act defines "public record" as any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Public Contracts Law > Bids & Formation > Competitive Proposals

Antitrust & Trade Law > Regulated Practices

HN8[] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

Pursuant to *W. Va. Code § 47-18-3(b)(2) (1978)*, the following activities are unlawful: A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract: (A) The price quotation of any bid is fixed or controlled, or (B) One or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid. Consequently, the bidding process and its associated documents are within the scope of the Attorney General's investigative powers and, specifically, the investigative exemption from public disclosure of the West Virginia Antitrust Act, *W. Va. Code § 47-18-7(d) (1978)*.

Administrative Law > ... > Defenses & Exemptions From Public Disclosure > Law Enforcement Records > Investigative Techniques

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

HN9[] **Law Enforcement Records, Investigative Techniques**

The West Virginia Antitrust Act's investigative exemption, incorporated in the Freedom of Information Act (FOIA) through *W. Va. Code § 29B-1-4(a)(5) (2015)*, is to be distinguished from the investigation-related FOIA exemption set forth in *W. Va. Code § 29B-1-4(a)(4) (2015)*, which exempts records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN10[] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

The West Virginia Freedom of Information Act, *W. Va. Code § 29B-1-4(a)(5) (2015)*, which excepts from public accessibility information specifically exempted from disclosure by statute, incorporates the investigative exemption from disclosure of information set forth in the West Virginia Antitrust Act, *W. Va. Code § 47-18-7(d) (1978)*. The investigative exemption is mandatory in specifying that the Attorney General "shall not" make public the name or identity of a person whose acts or conduct he or she investigates or "the facts" disclosed in the investigation. Nevertheless, the legislature has provided an exception or caveat in that the investigative exemption in *W. Va. Code § 47-18-7(d) (1978)* does not apply to disclosures in actions or enforcement proceedings. An additional caveat pertains to the Assurance of Voluntary Compliance which must be publicly filed pursuant to *W. Va. Code § 47-18-22 (1978)*.

Administrative Law > ... > Freedom of Information > Defenses & Exemptions From Public Disclosure > Statutory Exemptions

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Governments > Legislation > Interpretation

HN11[] **Defenses & Exemptions From Public Disclosure, Statutory Exemptions**

W. Va. Code § 47-18-7(d) (1978) is free from ambiguity in its admonition that the Attorney General "shall not" make public the name or identity of a person whose acts or conduct he or she investigates or "the facts" disclosed in an investigation under the West Virginia Antitrust Act. Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN12[] **Public Enforcement, State Civil Actions**

Pursuant to *W. Va. Code § 47-18-14 (1978)* of the West Virginia Antitrust Act, the Attorney General "may cooperate with officials of the federal government and the several states in the enforcement of this article."

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Vaughn Indexes

HN13[] **Methods of Disclosure, Vaughn Indexes**

The purpose of a Vaughn Index is limited to matters of litigation and serves as a resource for the benefit of a trial court.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN14[] **Public Enforcement, State Civil Actions**

When considering whether the West Virginia Health Care Authority Act exempts a hospital's acquisition from West Virginia antitrust laws, under *W. Va. Code § 16-29B-26 (2016)*, "cooperative agreement" is defined in *W. Va. Code § 16-29B-28(a)(2) (2016)* as including, inter alia, an agreement providing for the consolidation, by merger or other combination, of facilities and services traditionally offered by hospitals or other health care providers. *W. Va. Code § 16-29B-28(c) (2016)* provides that, when such an agreement might be anticompetitive within the meaning of the antitrust laws, the legislature believes it is in the state's best interest to supplant such laws with regulatory approval and oversight by the Health Care Authority (Authority). *W. Va. Code § 16-29B-28(f) (2016)* states that the Authority shall consult with the West Virginia Attorney General regarding his or her assessment of whether or not to approve the proposed cooperative agreement.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > Retrospective Operation

HN15[] **Effect & Operation, Prospective Operation**

The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the legislature intended to give the statute retroactive force and effect.

Syllabus

[*240] BY THE COURT

1. The *West Virginia Freedom of Information Act*, *W.Va. Code, 29B-1-4(a)(5)* [2015], which excepts from public accessibility "information specifically exempted from disclosure by statute," incorporates the investigative exemption from disclosure of information set forth in the *West Virginia Antitrust Act*, *W.Va. Code, 47-18-7(d)* [1978]. The investigative exemption is mandatory in specifying that the Attorney General "shall not" make public the name or identity of a person whose acts or conduct he investigates or "the facts" disclosed in the investigation.

2. "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. pt. 2, *Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970)*.

3. "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." Syl. pt. 4, *Taylor v. State Comp. Comm'n., 140 W.Va. 572, 86 S.E.2d 114 (1955)*.

Counsel: For St. Mary's Medical Center, Inc., and Pallottine Health Services, Inc., Petitioners: James W. Thomas, **[***2]** Esq., Rachel D. Ludwig, Esq., Jackson Kelly PLLC, Charleston, West Virginia.

For Steel of West Virginia, Inc., Respondent: Carte P. Goodwin, Esq., Frost Brown Todd LLC, Charleston, West Virginia.

For the State of West Virginia: Patrick Morrisey, Esq., Attorney General, Elbert Lin, Esq., Solicitor General, Edward M. Wenger, Esq., General Counsel, Katherine A. Schultz, Esq., Steven A. Travis, Esq., Office of the Attorney General, Charleston, West Virginia.

Judges: JUSTICE KETCHUM delivered the Opinion of the Court.

Opinion by: Ketchum

Opinion

[710]** **Justice Ketchum**:

West Virginia Attorney General Patrick Morrisey ("Attorney General") appeals from two orders of the Circuit Court of Kanawha County entered on October 28, 2016, unsealing an index of 349 documents and directing the Attorney General to produce 89 of those documents. The orders were entered in an action brought by Steel of West Virginia, Inc. ("Steel"), to enforce its request for production of material under this State's *Freedom of Information Act ("FOIA")*. The Attorney General received the 349 documents in connection with his investigative powers under the West Virginia Antitrust Act regarding the proposed merger of St. Mary's Medical Center, Inc. ("St. Mary's"), **[***3]** and Cabell Huntington Hospital, Inc. ("Cabell Huntington").

Steel opposed the merger before the West Virginia Health Care Authority. The Authority's approval of the merger through its award of a certificate of need was the subject of a separate appeal before this Court. The issues in that appeal, however, were settled and resolved, and Steel's appeal from the Authority's decision was dismissed as moot. A motion to dismiss the current FOIA matter in conjunction with the dismissal of Steel's appeal on the merits of the Authority's decision was refused by this Court. *See* syl. pt. 1, *State ex rel. M.C.H. v. Kinder, 173 W.Va. 387, 317 S.E.2d 150 (1984)* (A case not rendered moot if the issues "are capable of repetition and yet will evade review.").

In the current matter, limited to Steel's FOIA request, both the Attorney General and St. Mary's contend that the index of the 349 documents and the 89 documents to be produced are exempt from disclosure.[1] Thus, the Attorney General's appeal has been consolidated with two related appeals filed by St. Mary's. In one appeal, St. Mary's challenges the denial of its motion to intervene in the **[**711]** **[*241]** underlying FOIA action. In the other, St. Mary's challenges the unsealing of the index and the production of the 89 documents. **[***4]** [2]

This Court concludes that the circuit court committed error in ordering the production of the index and the 89 documents. The circuit court ordered the production of the index as a sanction against the Attorney General for

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[1] The record reveals a discrepancy in whether 89 or 87 documents were to be produced. In an October 28, 2016, order, the Attorney General was directed to produce 89 documents.

[2] Although not a party to the FOIA action brought by Steel against the Attorney General, the denial of St. Mary's motion to intervene is appealable to this Court, which enabled St. Mary's to file "protective notices of appeal." *See* *Stern v. Chemtall Inc., 217 W.Va. 329, 617 S.E.2d 876 (2005)* (granting appeal from denial of motion to intervene); Louis J. Palmer, Jr., and The Hon. Robin Jean Davis, *Litigation Handbook on West Virginia Rules of Civil Procedure*, Rule 24, § 24[2][e] (5th ed. 2017) ("An order denying intervention is final and immediately appealable."). *See also* Wright, Miller & Kane, *Federal Practice and Procedure*: *Civil 3d*, § 1923 (2007) (Denial of intervention should be regarded as an appealable final order.). Steel's motion to dismiss St. Mary's appeals was denied by this Court in April 2017.

sharing part of the index with the Federal Trade Commission. We find the sanction inappropriate. We further find that the 89 documents are not subject to production because of the statutory exemption raised by the Attorney General. That exemption is set forth in *W.Va. Code, 29B-1-4* [2015], of the *Freedom of Information Act* which incorporates, in *subsection (a)(5)*, the confidentiality provisions of the *Antitrust Act*. Finally, inasmuch as the arguments of St. Mary's largely mirror those of the Attorney General, we find the two appeals filed by St. Mary's to be moot.

The orders entered by the circuit court on October 28, 2016, are reversed, and this action is remanded to the circuit court for the entry of an order dismissing Steel's FOIA action.

I. Factual Background

St. Mary's is a general, acute care hospital in Huntington, West Virginia. Its parent corporation is Pallottine Health Services, Inc. In 2014, Pallottine decided to sell **[***5]** St. Mary's, and, following a competitive bidding process, an agreement was reached in November 2014 whereby St. Mary's would merge with Cabell Huntington, another general, acute care hospital in the Huntington area. Support for the merger in the local community was based on the likelihood that the merger would save jobs, allow more portability of health care providers and result in better patient care. Steel opposed the merger, asserting that healthcare costs will increase if the two hospitals do not remain in competition.

Various regulatory reviews and approvals were required before the merger could take place. Among the requirements was the opening in 2014 of antitrust investigations by the Federal Trade Commission and the West Virginia Attorney General. The Attorney General's investigative authority regarding the merger is found in the *West Virginia Antitrust Act, W.Va. Code, 47-18-1 [1978], et seq.*

Documents concerning the business operations and finances of the two hospitals, and the bidding process, were sent by St. Mary's and Cabell Huntington to the Federal Trade Commission and the Attorney General. The Federal Trade Commission transferred a number of the documents it received to the Attorney General. **[***6]** On November 25, 2014, a confidentiality agreement was executed by St. Mary's, Cabell Huntington and the Attorney General which stated that the documents received by the Attorney General would not be subject to disclosure and would only be used in the investigation "for any legal challenge of the Transaction [merger] under federal or state antitrust laws, or for other law enforcement purposes."

On July 31, 2015, the Attorney General filed an Assurance of Voluntary Compliance in the Office of the Clerk of Cabell County. An amended Assurance of Voluntary Compliance was filed on November 4, 2015.[3] In both **[**712]** **[*242]** documents, the Attorney General concluded that the merger was in the best interests of the State of West Virginia. However, the Assurances also secured commitments from St. Mary's and Cabell Huntington to abide by antitrust laws in future operations.

Specifically, St. Mary's and Cabell Huntington were required under the Assurances of Voluntary Compliance to observe a number of conditions for a period of years following the merger's consummation. The November 4, 2015, amended Assurance extended the period of years from seven to ten years. Both Assurances stated that neither St. Mary's nor Cabell Huntington would oppose the award of a certificate of need to any health care provider seeking to

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[3] *W.Va. Code, 47-18-22* [1978], of the Antitrust Act, states:

> In the administration of this article, the attorney general may accept an assurance of voluntary compliance with respect to any method, act or practice deemed to be a violation of this article from any person who has engaged or was about to engage in such method, act or practice. Such assurance may include a stipulation for voluntary payment **[***7]** by the alleged violator of damages sustained by any person or public body. Any such assurance shall be in writing and be filed with the circuit court in which the alleged violator resides, has his principal place of business, or is doing business. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose. *Matters thus closed may at any time be reopened by the attorney general for further proceedings in the public interest*. (emphasis added)

provide services "similar to or competitive with" the services provided by St. Mary's or Cabell Huntington in the market area. The amended Assurance clarified that "services" in that context included both outpatient and inpatient services. Moreover, under the amended **[***8]** Assurance, St. Mary's and Cabell Huntington were required to submit compliance reports to the Attorney General until the amended Assurance expired. St. Mary's and Cabell Huntington were also required to submit additional information or documentation upon request of the Attorney General "at any time." Should such a request be made, the request would be deemed "made in the investigation of a potential violation of state and/or federal antitrust laws and as such both the request and any response thereto, including documents or things produced, are subject to confidentiality provisions contained in state and/or federal law."

In September 2015, Steel sent the Attorney General a request under the *West Virginia Freedom of Information Act, W.Va. Code, 29B-1-1 [1977], et seq.*, "to inspect or obtain copies of all public records and incoming and outgoing correspondence relating to the proposed merger of Cabell Huntington Hospital and St. Mary's Medical Center."

In response, the Attorney General provided Steel with copies of documents considered subject to disclosure[4] but determined that the remaining documents were statutorily exempt under *subsection (a)(5)* of *W.Va. Code, 29B-1-4* [2015]. *Subsection (a)(5)* provides in relevant part:

> (a) There is a presumption of public **[***9]** accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under the provisions of this article:
> (5) Information specifically exempted from disclosure by statute[.]

The parties do not dispute that ***HN1***[] *subsection (a)(5)*, concerning "statutory exemptions," incorporates the "investigative exemption" of the West Virginia Antitrust Act, *W.Va. Code, 47-18-7(d)* [1978]. *W.Va. Code, 47-18-7(d)* [1978], states: "The attorney general shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this article."

II. Procedural Background

In December 2015, Steel filed a complaint in the Circuit Court of Kanawha County to enjoin the Attorney General from withholding the documents claimed to be exempt from disclosure.[5] Steel alleged that the Attorney General had no basis for the exemptions and that, in any event, the Attorney General should submit a "*Vaughn* Index" of the withheld documents and an affidavit providing a detailed explanation why each document is exempt and why disclosure of the **[***10]** document **[**713]** **[*243]** would be harmful.[6] St. Mary's, Pallottine and Cabell Huntington were not named parties in the action.

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[4] Steel described the documents the Attorney General considered subject to disclosure as largely consisting of previously available public records, news articles, and e-mails exchanging press releases and news stories.

[5] The action was styled *Steel of West Virginia, Inc., Plaintiff v. Patrick Morrisey, Attorney General, State of West Virginia, Acting in his Official Capacity, Defendant*, Civil Action No. 15-C-2214 (Kan. Co. 2015).

[6] A *Vaughn* Index was described in *Farley v. Worley, 215 W.Va. 412, 599 S.E.2d 835 (2004)*, as follows:

> ***HN2***[] When a public body asserts that certain documents or portions of documents in its possession are exempt from disclosure under any of the exemptions contained in *W.Va. Code, 29B-1-4* (2002 Repl.Vol.) (2003 Supp.), the public body must produce a *Vaughn* index named for *Vaughn v. Rosen, 484 F.2d 820, 157 U.S. App. D.C. 340 (D.C. Cir. 1973)*, *cert. denied*, *415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974)*. The *Vaughn* index must provide a relatively detailed justification as to why each document is exempt, specifically identifying the reason(s) why an exemption under *W.Va. Code, 29B-1-4* is relevant and correlating the claimed exemption with the particular part of the withheld document to which the claimed exemption applies. The *Vaughn* index need not be so detailed that it compromises the privilege claimed. The public

The Attorney General asserted in the answer that the documents sought were collected in the course of an antitrust investigation. Therefore, **[***11]** production of the documents or providing a *Vaughn* Index would be precluded by the confidentiality provisions of the *Freedom of Information Act* and the Antitrust Act.

In a parallel proceeding, Cabell Huntington filed an application with the West Virginia Health Care Authority for a certificate of need regarding the merger.[7] Steel, granted "affected person" status by the Authority, was permitted to participate in the proceeding and oppose the merger.[8] On March 16, 2016, the Health Care Authority granted certificate of need approval to Cabell Huntington to complete the merger. That decision was affirmed by the Office of Judges. In April 2017, the Office of Judges's approval of the certificate of need was affirmed by the Circuit Court of Kanawha County. Steel's petition for appeal therefrom was separately pending before this Court.[9] However, the issues therein were settled and resolved, rendering that appeal moot.

In the current FOIA action, the circuit court ordered the Attorney General to prepare a *Vaughn* Index of the withheld documents and file the Index under seal in the circuit court. On September 7, 2016, the Attorney General filed the *Vaughn* Index, listing 349 documents claimed to be exempt from disclosure. The circuit court then ordered the Attorney General to produce the *Vaughn* Index to Steel, with the Index to otherwise remain under seal. Upon analyzing the Index, Steel agreed that in excess of 200 documents were exempt from disclosure. On October 5, 2016, an order was entered directing the Attorney General to produce each of the 349 documents, in unredacted form, to the circuit court for an *in camera* review.

In an October 6, 2016, letter to the circuit court, the Federal Trade Commission stated that the documents the FTC received concerning the merger of St. Mary's and Cabell Huntington had been provided to the Attorney General upon the Attorney General's certification "that the material would be maintained in confidence and used only for official law enforcement purposes." The letter concluded:

> The current program for cooperation in federal-state law enforcement depends on private parties **[***13]** being confident that their **[**714]** **[*244]** commercially sensitive materials [are] being maintained in confidence by state regulators. If third parties cannot rely on such assurances, they will be far less likely to cooperate in merger investigations, to the detriment of both federal and state law enforcement.

Similar letters indicating that the documents in question should not be publically disclosed were sent to the circuit court by St. Mary's and Cabell Huntington. On October 11, 2016, St. Mary's and Cabell Huntington filed motions to intervene in Steel's FOIA action. St. Mary's alleged that the confidentiality of its business operations, finances and trade secrets were at stake and that it had the clearest understanding of the harm which would befall it should the documents become public records under the FOIA request. Cabell Huntington, however, later withdrew its motion to intervene on the basis that the Attorney General effectively represented its interests.

> body must also submit an affidavit, indicating why disclosure of the documents would be harmful and why such documents should be exempt.

Syllabus point 6, in part. *Accord* syllabus point 8, *Hurlbert v. Matkovich, 233 W.Va. 583, 760 S.E.2d 152 (2014)*.

[7] *See* *W.Va. Code, 16-2D-1 [2016], et seq.* (establishing a certificate of need process in relation to the offering or development of health services). The proceeding concerning the proposed merger was styled *In re: Cabell Huntington Hospital, Inc.*, CON File # 14-2-10375-A.

[8] Steel filed a petition for a writ of mandamus in this Court to compel the Health Care Authority to issue a subpoena duces tecum to St. Mary's for documents concerning the bidding process which resulted in the proposed merger. The Authority maintained that the documents were irrelevant to the certificate of need proceeding. This Court refused Steel's petition for a writ of mandamus in December 2015. *See State ex rel. Steel of West Virginia, Inc., v. West Virginia Health Care Authority and Cabell Huntington Hospital, Inc.*, Supreme Court No. 15-1163 (2015). The documents concerning the bidding process are among the documents in question in Steel's FOIA action now before us.

[9] *See* **[***12]** *Steel of West Virginia, Inc., v. West Virginia Health Care Authority and Cabell Huntington Hospital, Inc., Supreme Court No. 17-0406, 2017 W.V. Cir. LEXIS 5*.

On October 28, 2016, the circuit court entered three orders which resulted in these consolidated appeals. First, the circuit court denied St. Mary's motion to intervene. The circuit court concluded that the interests of St. Mary's, as in the **[***14]** case of Cabell Huntington, were adequately represented by the Attorney General. Second, the circuit court ordered the unsealing of the entire *Vaughn* Index of the 349 documents. The order was entered as a sanction because the Attorney General, at the request of the Federal Trade Commission, had disclosed to the FTC the portion of the Index listing the documents the FTC had sent to the Attorney General.

Third, having reviewed the 349 documents *in camera*, the circuit court ordered the production of 89 documents. The 89 documents to be disclosed were subject to the redaction of trade secrets, and, if any such redaction was made, the Attorney General was to identify the nature of the redacted information and the connection to a claimed exemption. Among the 89 documents were the original bids which had been submitted to St. Mary's by other hospital systems and other interested buyers. *See* n. 8, *supra*.

The October 28, 2016, orders have been stayed pending the outcome of these consolidated appeals.

III. Standard of Review

HN3[] Generally, findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. Syl. pt. 4, *Burgess v. Porterfield, 196 W.Va. 178, 469 S.E.2d 114 (1996)*. However, in complex cases such as the one now before us, we **[***15]** have observed that "ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed *de novo*." Syl. pt. 1, in part, *State ex rel. Cooper v. Caperton, 196 W.Va. 208, 470 S.E.2d 162 (1996)*. *Accord* syl. pt. 1, in part, *Manville Pers. Injury Settlement Trust v. Blankenship, 231 W.Va. 637, 749 S.E.2d 329 (2013)*. Moreover, in *W.Va. Reg'l Jail and Corr. Facility Auth. v. Marcum, 239 W.Va. 109, 799 S.E.2d 540, 543 (2017)*, this Court confirmed that an interpretation of this State's *Freedom of Information Act* is subject to *de novo* review.

IV. Discussion

A. The Investigative Exemption

HN4[] The antitrust exemption incorporated into the *Freedom of Information Act* relied on by the Attorney General must be viewed in the context of his powers and duties under the Antitrust Act. In investigating a suspected violation in the form of a monopoly, restraint of trade or illegal bidding process, the Attorney General is authorized under *W.Va. Code, 47-18-7(a)* [1978], of the Antitrust Act to "administer oaths or affirmations, and may subpoena witnesses, compel their attendance, adduce evidence, and require the production of any matter which is relevant to the investigation." The Attorney General may direct a local prosecutor to assist him. Remedies for violations of the Act include injunctive relief, a penalty and treble damages. Pursuant to *W.Va. Code, 47-18-16* [1978], the Antitrust Act "shall be construed liberally **[***16]** and in harmony with ruling judicial interpretations of comparable federal antitrust statutes."

HN5[] A necessary component of the Antitrust Act is the investigative exemption set forth in **[**715]** **[*245]** *W.Va. Code, 47-18-7(d)* [1978], which states: "The attorney general shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this article." As the parties agree, the Antitrust Act's investigative exemption is incorporated in the *Freedom of Information Act* through *W.Va. Code, 29B-1-4(a)(5)* [2015], *i.e.*, information "specifically exempted from disclosure by statute."[10]

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[10] The comparable federal statute to the nondisclosure provisions of *W.Va. Code, 47-18-7(d)* [1978], is *subsection (h) of 15 U.S.C. § 18a*. [2000] concerning "premerger notification." *Subsection (h)* states in part:

In the November 25, 2014, confidentiality agreement executed by St. Mary's, Cabell Huntington and the Attorney General, the **[***17]** statutory investigative exemption was expressly relied upon:

> The Transaction [merger] Information covered by this Agreement shall be treated by the Attorney General as if such Transaction Information were received pursuant to *W.Va. Code § 47-18-7*, whether received directly from [Cabell Huntington, St. Mary's and/or the FTC], before or after the execution of this Agreement, and the Attorney General agrees not to disclose such Transaction Information to any person or entity except as expressly provided in this Agreement or *W.Va. Code § 47-18-7*.[11]

In *Associated Press v. Canterbury, 224 W.Va. 708, 688 S.E.2d 317 (2009)*, this Court held that certain e-mails of a personal nature withheld by a public official from a FOIA request were not subject to disclosure. We determined that the e-mails were irrelevant to the conduct of public business and found the e-mails comparable to a note scheduling a family dinner or a private letter from a friend. We concluded, in *Canterbury*, that the e-mails were not "a public record" under the *Freedom of Information Act*.

In *Canterbury*, the status of the e-mails was determined by a "content analysis" of what the e-mails actually said, rather than a "context analysis" which could have warranted disclosure under FOIA based on the interest of the general public in the e-mails. **[***18]** However, we acknowledged in *Canterbury* that our cases permit a context-based analysis for writings that are, in fact, public records, "but which are specifically exempted from disclosure by FOIA." *224 W.Va. at 725 n. 18, 688 S.E.2d at 334 n. 18*. In other words, ***HN6***[] a context-based analysis can be applied in determining whether public records are to be disclosed pursuant to a FOIA request, but the determination is subject to the specific exemptions of the *Freedom of Information Act* listed in *W.Va. Code, 29B-1-4* [2015].[12]

At the time *Canterbury* was decided, "public record" was defined in *W.Va. Code, 29B-1-2* [1977], as "any writing containing information relating to the conduct of the public's business, prepared, owned and retained by a public body." The later 2015 and 2016 versions of the statute, however, ***HN7***[] define "public record" as "any writing containing information prepared or received by a public body, *the content or context of which, judged either* ***[**716]*** ***[*246]*** *by content or context*, relates to the conduct of the public's business." (emphasis added)

The "content" versus "context" distinction *per se* is less significant in this proceeding because the Attorney General relies on the express investigative exemption set forth in the Antitrust Act. Although that exemption is broad based, **[***19]** it has its own statutory exceptions or caveats as indicated below.

Prior to Steel's FOIA request, a description of the merger and its prospective operation were set forth in the original and amended Assurances of Voluntary Compliance. The Assurances were publically filed by the Attorney General pursuant to statute. *See* n. 3, *supra*. After the FOIA request, the Attorney General provided Steel with copies of a number of documents relating to the merger. Later, upon analyzing the *Vaughn* Index, Steel agreed that in excess

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> Any information or documentary material filed with the Assistant Attorney General or the Federal Trade Commission pursuant to this section shall be exempt from disclosure under *section 552 of Title 5* [regarding public information], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding.

With regard to the disclosure of information to the public, this Court has recognized "the close relationship between the federal and West Virginia FOIA." *Farley v. Worley, 215 W.Va. at 420, 599 S.E.2d at 843*.

[11] In syllabus point 5 of *Hechler v. Casey, 175 W.Va. 434, 333 S.E.2d 799 (1985)*, we recognized that "[a]n agreement as to confidentiality between the public body and the supplier of the information may not override the *Freedom of Information Act*, *W.Va. Code, 29B-1-1 et seq.*" However, our holding in these consolidated appeals is not based on the November 25, 2014, confidentiality agreement. Rather, our holding is based on the Attorney General's statutory investigative exemption incorporated in the *Freedom of Information Act* through *W.Va. Code, 29B-1-4(a)(5)*.

[12] *See* *Farley v. Worley, 215 W.Va. at 419-25, 599 S.E.2d at 842-48 (2004)* (decided under the 1977 version of the statute but making clear that a public body cannot simply refuse a FOIA request without specific justification.).

of 200 documents were exempt from disclosure. Thereafter, the circuit court ordered the disclosure of the *Vaughn* Index itself, as a sanction, and the 89 documents listed therein.

Among the 89 documents ordered disclosed were the original bidding documents that were submitted to St. Mary's by other hospital systems and other interested buyers. Those documents reveal the identity of the bidder, the amount of the bid and detailed bid specifications. Of the documents in question under the FOIA request, the parties' primary focus is on the bidding documents. St. Mary's asserts that the disclosure of the bidding documents would give its competitors an unfair business advantage **[***20]** whether or not the merger takes place. Steel asserts that it needed to present the bidding documents to the Health Care Authority. In December 2015, however, Steel unsuccessfully petitioned this Court for mandamus relief to obtain the bidding documents. During that proceeding, the Authority indicated that, for its purposes, the original bidding documents were irrelevant. *See* n. 8, *supra*.

The Antitrust Act, however, provides the Attorney General with an independent interest in the bidding documents. ***HN8***[] Pursuant to *W.Va. Code, 47-18-3(b)(2)* [1978], the following activities are unlawful:

> A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract:
> (A) The price quotation of any bid is fixed or controlled; or
> (B) One or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid.

Consequently, the bidding process and its associated documents are within the scope of the Attorney General's investigative powers and, specifically, the investigative exemption of the Antitrust Act, *W.Va. Code, 47-18-7(d)* [1978].[13]

Steel's **[***21]** FOIA request to obtain "all public records and incoming and outgoing correspondence relating to the proposed merger" directly implicates the Attorney General's investigative exemption. We hold that ***HN10***[] the West Virginia Freedom of Information Act, *W.Va. Code, 29B-1-4(a)(5)* [2015], which excepts from public accessibility "information specifically exempted from disclosure by statute," incorporates the investigative exemption from disclosure of information set forth in the West Virginia Antitrust Act, *W.Va. Code, 47-18-7(d)* [1978]. The investigative exemption is mandatory in specifying that the Attorney General "shall not" make public the name or identity of a person whose acts or conduct he investigates or "the facts" disclosed in the investigation. Nevertheless, the Legislature has provided an exception or caveat in that the investigative exemption in *W.Va. Code, 47-18-7(d)* [1978], "does not apply **[**717]** **[*247]** to disclosures in actions or enforcement proceedings pursuant to this article."

An additional caveat pertains to the Assurance of Voluntary Compliance which must be publically filed pursuant to *W.Va. Code, 47-18-22* [1978]. However, in the current matter, the Assurances of Voluntary Compliance concerning the merger provided that, in the event the Attorney General were to request further **[***22]** information, the request would be deemed "made in the investigation of a potential violation of state and/or federal antitrust laws and as such both the request and any response thereto, including documents or things produced, are subject to confidentiality provisions contained in state and/or federal law."

This Court finds ***HN11***[] *W.Va. Code, 47-18-7(d)* [1978], to be free from ambiguity in its admonition that the Attorney General "shall not" make public the name or identity of a person whose acts or conduct he investigates or "the facts" disclosed in the investigation. Syllabus point 2 of *Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384*

[13] To be clear, ***HN9***[] the Antitrust Act's investigative exemption, incorporated in the *Freedom of Information Act* through *W.Va. Code, 29B-1-4(a)(5)* [2015], is to be distinguished from the investigation-related FOIA exemption set forth in *W.Va. Code, 29B-1-4(a)(4)* [2015], which exempts: "Records of law-enforcement agencies that deal with the detection and investigation of crime and the internal records and notations of such law-enforcement agencies which are maintained for internal use in matters relating to law enforcement." *See, e.g., Ogden Newspapers, Inc. v. City of Williamstown, 192 W.Va. 648, 453 S.E.2d 631 (1994)* (discussing *subsection (4)* in the context of a police incident report). *Subsection (4)* is not relevant to the current matter.

(1970), makes clear: "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." *Accord* syl. pt. 5, *Leggett v. EQT Prod. Co., 239 W.Va. 264, 800 S.E.2d 850*, *cert. denied*, *138 S. Ct. 472, 199 L. Ed. 2d 358 (2017)*. *See* syl. pt. 1, *Nelson v. W.Va. Pub. Employees Ins. Bd., 171 W.Va. 445, 300 S.E.2d 86 (1982)* ("It is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation."); *accord*, syl. pt. 10, *Thomas v. McDermitt, 232 W.Va. 159, 751 S.E.2d 264 (2013)*.

A denial of the full import of the Attorney General's statutory exemption would place investigations of illegal conduct under the Antitrust Act at a disadvantage and would be contrary to the public's interest **[***23]** in the enforcement of the law. We therefore reverse the October 28, 2016, order which directed the Attorney General to produce the 89 documents.[14]

B. The Vaughn Index

This Court reverses the October 28, 2016, order which unsealed the entire *Vaughn* Index of 349 documents and allowed its production. The order was entered as a sanction against the Attorney General for sharing part of the Index with the Federal Trade Commission.

During the investigations of the proposed merger, the Federal Trade Commission transferred a number of documents it received to the Attorney General. The FTC transferred the documents on the condition that the material be kept confidential and used only for law enforcement purposes. Later, at the FTC's request, the Attorney General provided the FTC with a redacted version of the *Vaughn* Index which listed the documents the FTC had sent to the Attorney General. Finding that the Attorney General had, thus, revealed a portion of the Index without authorization, the circuit court entered the sanction.

This Court is of the opinion that the unsealing of the *Vaughn* Index, thereby permitting public access to the list of 349 documents, was inappropriate, given the relatively minor **[***24]** nature of the Attorney General's transgression. The record before us includes the affidavit of the Senior Deputy Attorney General which states that the materials provided to the FTC only referenced FTC documents.[15] No additional **[**718]** **[*248]** information contained in the *Vaughn* Index was provided.

HN12[] Pursuant to *W.Va. Code, 47-18-14* [1978], of the Antitrust Act, the Attorney General "may cooperate with officials of the federal government and the several states in the enforcement of this article." Moreover, ***HN13***[] the purpose of a *Vaughn* Index is limited to matters of litigation and serves as a resource for the benefit of the trial court. *See* *Associated Press v. Canterbury, 224 W.Va. at 713, 688 S.E.2d at 322* (The purpose of the *Vaughn* Index is to allow the circuit court to determine the validity of the government's claimed exemptions without the court having to physically examine each document.). *See also* *Farley v. Worley, 215 W.Va. at 426, 599 S.E.2d at 849*

[14] As a result of this holding, this Court need not address the additional exemption raised by the Attorney General under *W.Va. Code, 29B-1-4(a)(8)* [2015], of the *Freedom of Information Act* which provides for the nondisclosure of "internal memoranda or letters received or prepared by any public body." We note, however, that the Attorney General's conclusion that the merger was in the best interests of the State of West Virginia was not effectively made until the amended Assurance of Voluntary Compliance was filed on November 4, 2015, after the Attorney General received the documents in question.

[15] The Attorney General's transgression was providing the FTC with a portion of the sealed *Vaughn* Index without first requesting authorization or leave from the circuit court in the form of a motion or otherwise. *See, e.g.*, *W.Va. R. Civ. P. 26(c)* (providing that a deposition sealed under a protective order "be opened only by order of the court"). The affidavit of the Senior Deputy Attorney General states that the providing of the portion of the Index was in compliance with *W.Va. Code, 47-18-14* [1978], which authorizes cooperation between the Attorney General and the federal government in the enforcement of antitrust laws. According to the affidavit, there was no intent to violate the order placing the *Vaughn* Index under seal. However, the Senior Deputy Attorney General also set forth an apology in the affidavit, in the event the circuit court were to take a different view of the disclosure.

(The *Vaughn* Index "is implicated by FOIA litigation - not simply by a FOIA denial." It is specifically prepared for litigation purposes.).

Here, no contents of any documents were disclosed, and the Federal Trade Commission only received a portion of the Index listing its own material. This Court concludes that the unsealing of the *Vaughn* Index constituted an abuse of discretion. **[***25]** *See State ex rel. Richmond Am. Homes of W.Va., Inc. v. Sanders, 226 W.Va. 103, 110, 697 S.E.2d 139, 146 (2010)* (An abuse of discretion standard is applied in reviewing the imposition of sanctions.).

The October 28, 2016, order which unsealed the *Vaughn* Index is reversed. Furthermore, having reversed the orders of the circuit court which directed production of the 89 documents and the *Vaughn* Index, the petitions for appeal filed by St. Mary's are moot.

C. Exemption From Antitrust Laws

Finally, the Attorney General contends that the circuit court committed error in concluding that the *West Virginia Health Care Authority Act* "exempts the subject acquisition from the state antitrust laws enforced by the Attorney General." The statute in question, *W.Va. Code, 16-29B-26* [2016], effective March 12, 2016, provides:

> Actions of the board [of the West Virginia Health Care Authority] shall be exempt from antitrust action under state and federal antitrust laws. Any actions of hospitals and health care providers under the board's jurisdiction, when made in compliance with orders, directives, rules, approvals or regulations issued or promulgated by the board, shall likewise be exempt.
>
> It is the intention of the Legislature that this chapter shall also immunize cooperative agreements approved and subject to supervision by the **[***26]** authority and activities conducted pursuant thereto from challenge or scrutiny under both state and federal ***antitrust law***: Provided, That a cooperative agreement that is not approved and subject to supervision by the authority shall not have such immunity.

HN14[] "Cooperative agreement" is defined in *W.Va. Code, 16-29B-28(a)(2)* [2016], also effective March 12, 2016, as including, *inter alia*, an agreement providing for the consolidation, by merger or other combination, of facilities and services traditionally offered by hospitals or other health care providers. *Subsection (c)* of *W.Va. Code, 16-29B-28* [2016], provides that, when such an agreement might be anticompetitive within the meaning of the antitrust laws, "the Legislature believes it is in the state's best interest to supplant such laws with regulatory approval and oversight by the Health Care Authority as set out in this article." *Subsection (f)* of *W.Va. Code, 16-29B-28* [2016], states that the Authority "shall consult with the Attorney General of this state regarding his or her assessment of whether or not to approve the proposed cooperative agreement."[16]

Here, the bidding process concerning the proposed merger of St. Mary's and Cabell Huntington; the commencement of the **[**719]** **[*249]** federal and State antitrust investigations; the filing of the **[***27]** two Assurances of Voluntary Compliance; Steel's FOIA request; and the filing of Steel's complaint in the circuit court to enjoin the Attorney General from withholding documents all occurred prior to the March 12, 2016, enactment of *W.Va. Code, 16-29B-26* [2016] and *W.Va. Code, 16-29B-28* [2016]. Nothing suggests that those statutes have retroactive application regarding the investigative exemption asserted by the Attorney General. This Court held in syllabus point 4 of *Taylor v. State Comp. Comm'n., 140 W. Va. 572, 86 S.E.2d 114 (1955)*: ***HN15***[] "The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect." *Accord* syl. pt. 3, *Findley v. State Farm Mut. Auto. Ins. Co., 213 W.Va. 80, 576 S.E.2d 807 (2002)*, *cert. denied*, *539 U.S. 942, 123 S. Ct. 2609, 156 L. Ed. 2d 628 (2003)*.

The amended Assurance of Voluntary Compliance filed in 2015 requires St. Mary's and Cabell Huntington to observe a number of conditions for a period of ten years following the merger's consummation. The requirement to

[16] Later amendments to *W.Va. Code, 16-29B-26* [2016] and *W.Va. Code, 16-29B-28* [2016], are not applicable herein.

enter into an Assurance of Voluntary Compliance and its public filing are found in the Antitrust Act. The terms thereof in the current matter reflect the Attorney General's investigative authority and the confidentiality of the information obtained. **[***28]**

The effect of the circuit court's ruling would completely eliminate the Attorney General's investigative exemption found in *W.Va. Code, 47-18-7(d)* [1978], in relation to the proposed merger of St. Mary's and Cabell Huntington. However, the Attorney General's duties of confidentiality in securing information regarding the merger predate the 2016 statutes. The ruling of the circuit court regarding the 2016 statutes is, therefore, reversed.

V. Conclusion

The orders entered by the circuit court on October 28, 2016, are reversed, and this action is remanded to the circuit court for the entry of an order dismissing Steel's FOIA action.

Reversed and Remanded.

Seaman v. Duke Univ.

United States District Court for the Middle District of North Carolina

February 1, 2018, Decided; February 1, 2018, Filed

1:15-CV-462

Reporter

2018 U.S. Dist. LEXIS 16136 *; 2018-1 Trade Cas. (CCH) P80,273; 2018 WL 671239

DANIELLE SEAMAN, individually and on behalf of all others similarly situated, Plaintiff, v. DUKE UNIVERSITY, DUKE UNIVERSITY HEALTH SYSTEM, WILLIAM L. ROPER, and DOES 1-20, Defendants.

Prior History: Seaman v. Duke Univ., 2016 U.S. Dist. LEXIS 31337, Trade Reg. Rep. (CCH) P 79499 (M.D.N.C., Feb. 12, 2016)

Core Terms

faculty, non-faculty, damages, no-hire, antitrust, class member, predominate, suppression, lateral, common question, faculty member, class-wide, defendants', hiring, medical school, class action, seniority, increases, asserts, proposed class, calculating, structures, questions, returns, certification, regression, salary, spread, class certification, individual issues

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Judges: Catherine C. Eagles, UNITED STATES DISTRICT JUDGE.

Opinion by: Catherine C. Eagles

Opinion

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

In 2015, Dr. Danielle Seaman, a radiologist at Duke University, inquired about a posted opening in the UNC radiology department. Via email, the UNC department head told her that he had confirmed that the deans at Duke and UNC had agreed not to permit lateral moves of faculty between Duke and UNC. She has sued Duke and UNC, alleging that this agreement not to hire the other's medical school faculty violates the antitrust laws and suppressed compensation throughout the defendants' medical schools and healthcare facilities. She seeks to certify a class of faculty, physicians, nurses, and skilled medical staff that worked for the defendants.

The plaintiff has met the class certification standards in *Rule 23(a)* and *Rule 23(b)(3)* for faculty members. Inclusion of non-faculty **[*3]** in the class, however, would inject issues that cannot be resolved based on the proof offered for the faculty case, would cause significant confusion at trial, and would raise difficult manageability problems. Therefore, the Court will grant the motion, in part, to certify the proposed class to the extent it includes faculty. The Court will deny the motion for class certification as to all other proposed class members.

BACKGROUND

The plaintiff Dr. Seaman was an Assistant Professor of Radiology at Duke University School of Medicine from 2011 to 2016. Doc. 85 at ¶ 2. The defendants are Duke University, Duke University Health Systems, Dr. William Roper, the University of North Carolina at Chapel Hill, the University of North Carolina School of Medicine, the University of North Carolina Health Care System and Does 1-20.

Dr. Seaman applied for a position at UNC in 2015. In response, a UNC radiology department chief told her in an email that "lateral moves of faculty between Duke and UNC are not permitted" due to a "'guideline' which was agreed upon between the deans of UNC and Duke a few years back." Doc. 88-62 at 2.

Dr. Seaman alleges that the defendants conspired and agreed that the Duke **[*4]** defendants would not hire or attempt to hire faculty[1] employed by the UNC defendants, and vice-versa.[2] The only exception to this alleged agreement was for faculty who received a promotion when they were hired. Doc. 109 at ¶ 47. Dr. Seaman alleges that the defendants historically have had the no-hire agreement, but that the agreed-to hiring restraints were "tighten[ed] up" in 2012 following the Duke defendants attempt to recruit the UNC bone marrow transplant physician faculty. Doc. 93 at 17; *see also* Doc. 109 at ¶ 59. According to Dr. Seaman, the no-hire agreement suppressed compensation for the defendants' faculty, physicians, nurses, and other skilled medical staff.

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[1] Dr. Seaman's expert defines "faculty" to include employees who have an academic appointment at the Duke or UNC Schools of Medicine. Doc. 94 at ¶ 14. There was some question about whether physicians without an academic appointment should be included in the faculty category. The plaintiff is not sure whether the no-hire agreement was applied to physicians without an academic appointment, Doc. 187 at 83-84, and these physicians were included in Dr. Seaman's non-faculty analysis. *See id.* at 6-7. For these reasons, the Court considers physicians that do not have an academic appointment at the Duke or UNC Schools of Medicine to be non-faculty.

[2] In her complaint, Dr. Seaman alleges that the no-hire agreement extended to "skilled medical labor, including medical facility faculty," *see* Doc. 109 at ¶ 1; however, in her class certification briefing and supporting expert reports she only alleges that the no-hire agreement restricted recruitment of faculty. *See, e.g.*, Doc. 93 at 12-20. At the hearing, Dr. Seaman's counsel confirmed it had no direct evidence of an agreement as to non-faculty and admitted the only circumstantial evidence was the evidence about the agreement as to faculty. Doc. 187 at 23-24. The Court will evaluate the facts for purposes of class certification under the more limited allegations provided in Dr. Seaman's class certification briefing.

After discovery on the class certification issue was complete, Dr. Seaman and the UNC defendants settled. The Court approved the settlement.[3]

As against the Duke defendants and pursuant to *Federal Rule of Civil Procedure 23*, Dr. Seaman asks the Court to certify the following class:

> All natural persons employed by Defendants and their co-conspirators in the United States during the period from January 1, 2012 through the present (the "Class Period") as a faculty member, physician, nurse, or other skilled medical employee. Excluded from the **[*5]** Class are: members of the boards of directors and boards of trustees, boards of governors, and senior executives of Defendants and their co-conspirators who entered into the illicit agreements alleged herein; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.

Doc. 87 at 1. Dr. Seaman also asks the Court to appoint her as class representative and Lieff, Cabraser, Heimann & Bernstein, LLP, and Elliot Morgan Parsonage, P.A., as class counsel.

OVERVIEW OF QUESTION PRESENTED

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*.[4] To show that a case falls within the exception, the plaintiff "must affirmatively demonstrate his compliance" with *Federal Rule of Civil Procedure 23*. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*.

As threshold matters, the putative class representative must show that she is a member of the proposed class, *see* *Fed. R. Civ. P. 23(a)*, and must establish that the members of the proposed class are "readily identifiable" or "ascertainab[le]." *EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014)*. The plaintiff must then establish that the case satisfies all four requirements of *Rule 23(a)* and fits into at least one of the three subsections of *Rule 23(b)*. *Comcast, 569 U.S. at 33*. Here, the plaintiff relies on **[*6]** *Rule 23(b)(3)*, which requires that common issues predominate and that a class action is the superior method for resolution of the issues.

The Duke defendants do not seriously contend that the requirements of *Rule 23(a)* are not met, and the dispute centers on whether common issues predominate and the related question of manageability. "Considering whether questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)*. To establish an antitrust violation, a plaintiff must prove (1) a violation of ***antitrust law***, (2) impact to the plaintiff caused by the violation, and (3) damages sustained by the plaintiff. *Deiter v. Microsoft Corp., 436 F.3d 461, 467 (4th Cir. 2006)*.

Dr. Seaman contends that the predominance requirement is met because all three elements of the antitrust claim—violation, impact, and damages—can be proven with common evidence for all class members. The Duke defendants contend that antitrust impact and damages cannot be proven with common evidence and that individual issues on these claim elements will predominate such that class certification is not appropriate.

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[3] The Court has approved a class settlement between Dr. Seaman, class plaintiffs, and the following defendants: Dr. William Roper, the University of North Carolina at Chapel Hill, the University of North Carolina School of Medicine and the University of North Carolina Health Care System. Doc. 185. Final judgment has been entered on claims between these parties as well. Doc. 186. The settlement class has a different class definition from the proposed class at issue in the pending motion. *See* Doc. 81 at 1-2; Doc. 108 at 2-3 (defining settlement class).

[4] The Court omits internal citations and quotation marks from all cited cases in this opinion, unless otherwise noted. *See* *United States v. Marshall, 872 F.3d 213, 217 n. 6 (4th Cir. 2017)*.

ANALYSIS

I. *RULE 23(b)*

There are two requirements under *Rule 23(b)(3)*: predominance and superiority. *EQT, 764 F.3d at 357*. These requirements relate to the manageability **[*7]** of a class action, which is "a practical problem, and primarily a factual one with which a district court generally has a greater familiarity and expertise." *See* *Windham v. Am. Brands, Inc., 565 F.2d 59, 65 (4th Cir. 1977)* (en banc). For this reason, trial courts have "a wide range of discretion" in evaluating whether the requirements of *Rule 23(b)(3)* have been met. *Id.;* *Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* (noting that district courts "have broad power and discretion vested in them" as to the "certification and management of potentially cumbersome" class actions).

The predominance requirement is satisfied when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." *Gariety v. Grant Thornton, LLP, 368 F.3d 356, 362 (4th Cir. 2004)*; *see also* *Fed. R. Civ. P. 23(b)(3)*. "An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016)*. In practice, the predominance requirement asks whether a trial meant to resolve class-wide issues is manageable or whether it is likely to devolve into a series of mini-trials examining questions specific to individual plaintiffs. *See* *Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 328-29 (4th Cir. 2006)* (upholding **[*8]** district court's denial of class certification).

"The superiority requirement ensures that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Thorn, 445 F.3d at 319*; *see also* *Fed. R. Civ. P. 23(b)(3)*. This inquiry looks at whether the class action "would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated." *Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*.

Dr. Seaman must provide evidentiary proof that the requirements of *Rule 23(b)(3)* are met. *Comcast, 569 U.S. at 33*. This Court must rigorously assesses that evidence and make findings as to whether the *Rule 23* requirements have been met, *Gariety, 368 F.3d at 359*, and, where necessary, it must "resolve a genuine legal or factual dispute relevant to determining the requirements." *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 320 (3d Cir. 2008)*.[5] However, "*Rule 23* grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Brown v. Nucor Corp., 785 F.3d 895, 903 (4th Cir. 2015)* (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466, 133 S. Ct. 1184, 185 L. Ed. 2d 308 (2013)*). Rather, "the merits of a claim may be considered only when relevant to determining whether the *Rule 23* prerequisites for class certification are satisfied." *Id.* Persuasiveness of the class-wide evidence is, in general, a matter for a jury. *Tyson Foods, 136 S.Ct at 1049*.[6]

A. Antitrust Violation

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[5] The findings stated in this Order apply only to the motion for class certification. *See* *Gariety, 368 F.3d at 366* (noting that if the jury or factfinder's "finding on any fact differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment.").

[6] Of course, if no reasonable juror could believe the class-wide evidence, Dr. Seaman would lack common proof. *Tyson Foods, 136 S. Ct at 1049* (comparing class certification standards to standards for summary judgment and directed verdict). That does not appear to be the case on the current record, and any arguments that Dr. Seaman's evidence fails to prove some elements of her claim can be addressed at summary judgment or at trial. *Id. at 1047*.

Both parties will present common evidence to determine whether the defendants did, or did not, enter into a **[*9]** no-hire agreement that violated *Section 1 of the Sherman Antitrust Act*. As previously mentioned, Dr. Seaman received an e-mail from a UNC School of Medicine department chief that indicates there was an agreement with Duke not to hire each other's faculty. Doc. 88-62 at 2. In addition, Dr. Seaman will rely on testimony from the defendants' employees as well as the defendants' internal and external correspondence discussing recruitment to prove that the no-hire agreement existed and was enforced. *See* Doc. 93 at 12-20 (citing depositions of Dr. Roper, Dr. Molina, John Burness, and defendants' correspondence). Likewise, Duke has indicated that it will dispute the existence of the no-hire agreement with common evidence, such as testimony from the employees alleged to have made and enforced the agreement. *See* Doc. 187 at 78-81. There is no indication that individual questions will arise in determining whether the defendants violated the Sherman Act. The Court finds that the issue of antitrust violation is a common question that will be addressed with common proof for all proposed class members.

B. Antitrust Impact and Damages for Faculty

1. Impact

Antitrust impact is "injury [that] reflect[s] the anticompetitive **[*10]** effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Dr. Seaman asserts that common evidence can be used to demonstrate that the alleged no-hire agreement had an antitrust impact on all or nearly all of the proposed class members because the agreement suppressed the class members' compensation.

Dr. Seaman contends that the no-hire agreement had an antitrust impact on faculty compensation in two ways. First, she asserts that because of the no-hire agreement the UNC and Duke defendants did not have to provide preemptive compensation increases for faculty that otherwise would have been needed to ensure employee retention, which suppressed compensation across the faculty. *See, e.g.*, Doc. 94 at ¶¶ 44, 59, 62, 72, 83 (plaintiff's expert Dr. Leamer explaining economic theory of impact). Second, she asserts that the defendants' internal equity structures—policies and practices that are alleged to have ensured relatively constant compensation relationships between employees—spread the individual harm of decreased lateral offers and corresponding lack of retention offers to all faculty, thus suppressing compensation faculty-wide. *See, e.g.* Doc. 94 at ¶¶ **[*11]** 63, 68, 71, 81-82. Dr. Seaman has presented documentary and testimonial evidence and expert reports that include economic theory, statistical modeling, and data to support her theories, which are summarized below. Collectively, this evidence supports her theories that the alleged no-hire agreement caused preemptive faculty-wide compensation suppression and individual faculty compensation suppression that spread to all faculty through the defendants' internal equity structures.

As explained below, these antitrust impact theories and the proffered evidence in support of the theories are common to all faculty: proving either theory for a single faculty class member would prove it for all, without the need for individual inquiry. The Court therefore finds that Dr. Seaman's theories of anti-trust impact to faculty present common questions for which common proof will be proffered.

a. The relationship between lateral hiring and faculty compensation

Dr. Seaman offers evidence that the Duke and UNC defendants were unique competitors for faculty who want to remain in the Durham/Chapel Hill area and that restrictions on lateral hiring between the two would limit preemptive and retroactive compensation **[*12]** increases causing compensation suppression for all faculty.[7] *See* Doc. 93 at

[7] The UNC School of Medicine is located approximately 12 and 30 miles from the Duke University Hospital and Duke Raleigh Hospital, respectively. Doc. 94 at ¶ 16. According to the plaintiff's expert, these facilities are located within the same "commuting zone." *Id.* at ¶ 17.

11-12, 21-22. The former President of Duke University and the Dean of the Medical School at UNC acknowledge in their testimony that the Duke and UNC medical schools are each other's closest peers, and an internal Duke analysis shows the Duke medical school's next closest competitor for faculty is 300 miles away. *See* Doc. 96-5 at 6, 9 (deposition testimony of former president of Duke University); Doc. 88-8 at 99 (Dr. Roper testifying that the "amount of [competitive] sensitivity is inverse to the geographic distance"). Further, Dr. Seaman's experts, Dr. Leamer and Dr. Cappelli, reviewed the competitive nature of the relationship between the Duke and UNC medical schools and opined that their geographic proximity and similar rankings makes them each other's main competitors for physicians who want to live in the Durham-Chapel Hill area. *See, e.g.*, Doc. 95 at ¶¶ 22-25; Doc. 94 at ¶¶ 16-24; Doc. 151 at ¶¶ 12-20.

Dr. Leamer and Dr. Cappelli offer opinions about how lateral hiring affects compensation generally and how it applies to the defendants, concluding that lateral hiring competition between the defendants **[*13]** would encourage the defendants to preemptively increase compensation to retain faculty. *See* Doc. 94 at ¶ 57; Doc. 95 at ¶¶ 70-76. Dr. Seaman also provides evidence to corroborate that the general economic theory is applicable to the Duke and UNC defendants, relying on testimony from former and current Duke employees about the need to increase salaries to prevent lateral moves. *See, e.g.*, Doc. 93 at 21 (citing Doc. 96-56); Doc. 94 at ¶ 62.

This is a class-wide theory supported with class-wide proof.

b. The relationship between internal equity structures and faculty compensation.

According to Dr. Seaman, the no-hire agreement prevents one defendant's individual faculty member from receiving a lateral offer from the other defendant and consequently also prevents receipt of a corresponding retention offer from the current employer, which would increase that faculty's salary to retain the employee. She does not seek to prove impact on any particular faculty member in this situation, and instead she will rely on experts who opine that this individual faculty compensation suppression was spread to all faculty through the defendants' internal equity structures.

Dr. Leamer and Dr. Cappelli explain **[*14]** that employers reactively increase compensation in response to a competing offer or to address overall attrition rates and that this general economic theory is applicable to the defendants. *See* Doc. 94 at ¶ 57; Doc. 95 at ¶¶ 65-77. Dr. Seaman provides evidence that both defendants have historically increased salaries for faculty to retain them in the face of competing offers. *See* Doc. 93 at 22-23 (explaining examples supported by Docs. 96-28, 96-29, 96-33, 96-35, 96-46, 96-47, 96-61, 88-64); Doc. 93 at 16-17 (discussing Duke's recruitment of UNC's bone marrow transplant team supported by Docs. 96-62, 96-63, 96-88).

Dr. Seaman also provides evidence that the lack of competing offers and corresponding individual compensation suppression was spread to all faculty members through the defendants' internal equity structures. Dr. Leamer and Dr. Cappelli explain the general economic theory of how lateral hiring increases compensation for employees throughout an organization when that organization manages employee compensation to maintain parity within employment categories or to achieve compensation relationships between employee categories (e.g., Associate Professors to Assistant Professors). **[*15]** Doc. 95 at ¶¶ 43-49; Doc. 94 at ¶¶ 80-83.

Dr. Seaman provides documentary and testimonial evidence that Duke and UNC maintain internal equity structures for faculty. The evidence shows that the UNC defendants have policies that "set[] out identical salary ceilings across 18 departments by professor level" and expects departments "to work towards or maintain average salary profiles by academic rank ...; enable recruitment and retention ...; [] promote a good morale and sense of fair treatment amongst the faculty;" and consider "internal equity among groups of otherwise similarly-situated individuals in the [medical school] department." Doc. 151 at ¶¶ 33-39 (summarizing evidence). The UNC defendants also perform annual "Salary Equity Review[s]" to "identify[] instances of potential salary inequity amongst like subsets of faculty" and requires an explanation or remedial plan for any inequality that is discovered. *Id.* at ¶ 39.

While the evidence at Duke is less direct, it shows that the Dean of the School of Medicine "signs off" on all department head compensation decisions. *See, e.g.*, Doc. 151 at ¶¶ 46, 49. For both new faculty and adjustments to current faculty's compensation, there is **[*16]** documentary evidence and testimony to support the assertion that internal equity is considered in setting and adjusting compensation, particularly within each department. *See, e.g.*, Doc. 151 at ¶¶ 46-51, 54; Doc. 150 at ¶¶ 31, 33, 44-48; Doc. 94 at ¶¶ 91, 93, 97-98, 100; Doc. 95 at ¶¶ 54, 58(d), (e).

Finally, Dr. Seaman provides Dr. Leamer's "sharing" regression analyses that examine how an individual faculty member's compensation moved in relationship to other faculty compensation. *See* Doc. 94 at ¶¶ 102-08, 110-11. This analysis shows that there is a correlation between faculty compensation and provides further support for Dr. Seaman's theory that the defendants managed faculty compensation with internal equity structures.

This is a class-wide theory supported with class-wide proof.

2. Damages

Dr. Seaman proposes calculating damages attributable to the no-hire agreement in the same manner for all faculty class members and using common evidence from Dr. Leamer about reduced "returns to seniority." "Returns to seniority" are compensation increases associated with increases in experience, i.e., individual faculty members are typically paid more as they obtain more experience. *See* Doc. 94 **[*17]** at ¶¶ 54, 113, 120. Dr. Leamer's calculations provide estimates (one for UNC faculty and one for Duke faculty) of how much returns to seniority are suppressed for all faculty in the presence of the no-hire agreement. *See, e.g.*, Doc. 94 at Figure 9, ¶ 123; Doc. 150 at ¶¶ 113-116 (Dr. Leamer's explanation of how baseline returns to seniority may be calculated based on returns to seniority experienced by new recruits at previous jobs, or by comparing returns to seniority in the class period to pre-class period).

Specifically, Dr. Leamer conducts regression analyses using common data—payroll and other employment records for all faculty—to estimate the suppressed returns to seniority for faculty at UNC and Duke. Doc. 94 at ¶¶ 115-123. Dr. Leamer applies his regression results to the faculty compensation data—common data—to develop an aggregate class-wide damages estimate for faculty. Doc. 94 at ¶ 125, Figure 12. This analysis is consistent with Dr. Seaman's theory of anti-trust impact to faculty—it purports to measure faculty-wide compensation suppression that is attributable to the no-hire agreement, which is the particular antitrust impact that Dr. Seaman alleges. *See* *Comcast, 569 U.S. at 37-38*.

The Court finds **[*18]** that Dr. Seaman's proposed method for calculating faculty damages presents common questions for faculty and will be based on proof common to the faculty.

C. Antitrust Impact & Damages for Non-Faculty

1. Impact

As noted, *supra* at n. 2, Dr. Seaman does not seriously contend that the no-hire agreement applied to non-faculty. She does assert that the no-hire agreement as to faculty and the resulting suppression of faculty compensation spread to all non-faculty through the defendants' internal equity structures. This theory presents common questions for a class composed of non-faculty because proving the theory for a single non-faculty class member would prove it for all.

While the economic theory of internal equity on which Dr. Seaman relies is the same for faculty and non-faculty, *see, e.g.*, Doc. 94 at ¶¶ 45, 79, 82, 84 (Dr. Leamer explaining economic theory of impact that applies to non-faculty), the evidence is different. The documentary and testimonial evidence of internal equity for non-faculty is specific to non-faculty. *See* Doc. 151 at ¶¶ 27-32, 41-44 (summarizing evidence that both Duke and UNC use rigid step-wise pay tiers for non-faculty that provide a mechanism for spreading compensation **[*19]** affects throughout the non-faculty class). Dr. Leamer's non-faculty sharing regression analysis is similar to the faculty sharing regression, but analyzes different compensation metrics. Doc. 94 at ¶¶ 137, 139 (explaining different analyses for faculty and non-faculty). Further, an additional evidentiary step is required for non-faculty: Dr. Leamer's separate regression analysis that purports to show sharing of compensation impacts between faculty and non-faculty. Doc. 94 at ¶¶ 109, 140. This step connects the non-faculty evidence to the no-hire agreement's alleged impact on faculty compensation.

Dr. Seaman's evidence of antitrust impact for non-faculty based on this generalized compensation suppression theory is common to all non-faculty and will not require separate inquiry for individual non-faculty claims. This evidence consists of expert evidence providing economic theory and statistical analysis that is backed up, in part, by documentary and testimonial evidence. The Court finds that, for a class composed of non-faculty, the issue of antitrust impact presents common questions that can be addressed with common proof.

In addition, Dr. Seaman also contends that the no-hire agreement **[*20]** affected a subset of non-faculty more directly because they missed out on compensation increases associated with lateral moves undertaken in connection with a faculty-lead team. *See* Doc. 109 at ¶ 39; Doc. 93 at 24. She has not articulated how non-faculty compensation overall, as opposed to at an individual level, would be affected under this theory. Unlike with faculty, there is no evidence that non-faculty received retention offers or preemptory compensation increases in this context, which compensation increases would then be spread to other non-faculty through the internal equity theory discussed *supra*. At most, Dr. Seaman asserts that faculty sought compensation increases for non-faculty who undertook lateral moves with them, *see* Doc. 93 at 24,[8] but this assertion only supports individualized impact to those faculty members who would have received increased compensation in a lateral move. She has not offered any expert analysis specific to this theory that indicates class-wide impact. While the plaintiff's briefing does not fully flesh out this theory, it only appears to support finding impact to individuals and not to non-faculty as a whole or the class as a whole. The Court finds **[*21]** that this theory of impact does not present a common question or common proof for non-faculty.

2. Damages

Dr. Seaman proposes calculating damages attributable to the no-hire agreement in the same manner for all non-faculty class members and using common evidence. She relies on Dr. Leamer's analysis, which takes the faculty damages analysis and applies an additional step. He starts with the estimates of how much returns to seniority are suppressed for all faculty in the presence of the no-hire agreement. He then passes these estimates through the sharing regression that he calculated in support of finding that faculty compensation suppression spreads to non-faculty. Doc. 94 at ¶¶ 126-27. Finally he applies the results to common non-faculty compensation data to develop an aggregate class-wide damages estimate for non-faculty. Doc. 94 at Figure 13. Dr. Leamer's calculation of non-faculty damages is consistent with Dr. Seaman's internal equity theory of anti-trust impact to non-faculty. *See* *Comcast, 569 U.S. at 37-38*.

The Court finds that Dr. Seaman's proposed method for calculating damages for non-faculty class members based on an internal equity theory presents common questions for non-faculty and will be based **[*22]** on proof common to the non-faculty.

She has offered no damages evidence in support of her "lateral move with a team" theory. Moreover, it appears that such evidence would be individual, not class-wide.

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[8] The Court notes that this appears to be a bald allegation at this stage. The documentary evidence cited in support, Doc. 93 at 24 n. 58, does not provide any indication or confirmation that faculty seek compensation increases for non-faculty during lateral moves.

D. Weighing Predominance and Superiority

Finding that an antitrust violation is based on common questions and evidence is not sufficient to establish predominance. Rather, this must be considered in relation to the questions and evidence that will be presented for the antitrust impact and damages elements. *See* Windham, 565 F.2d at 66-72 (upholding district court's determination that antitrust violation issue did not predominate in the face of individual impact and damages issues). Even if common questions and proof would predominate, a court may deny certification if class adjudication is not manageable or would be unfair. *See* Fed. R. Civ. P. 23(b)(3) (requiring class action be the superior method "for fairly and efficiently adjudicating the controversy"); *see also* Reiter, 442 U.S. at 345 (recognizing the district court's discretionary authority to refuse to certify potentially cumbersome class actions with manageability issues).

1. Faculty

Dr. Seaman's theories of violation, antitrust impact, and anti-trust damages present common questions for faculty members **[*23]** and she presents common proof to support her claims. There is no indication that Dr. Seaman's proof for faculty is susceptible to individualized inquiry, that it is so unreliable no juror could believe it, or that it is not probative. The Court finds that, with respect to faculty, common questions will predominate over individualized questions. This Court finds that a class action is the superior method of adjudicating the faculty class member claims because the individual damages are insufficient to warrant individual litigation, there are no related cases pending, the forum is convenient, and a unitary adjudication will be more efficient than individual adjudications. *See* Fed. R. Civ. P. 23(b)(3); Amchem, 521 U.S. at 615; Thorn, 445 F.3d at 319.[9]

The Duke defendants identify individual issues that they contend undermine predominance, but none of these individual issues align with Dr. Seaman's theories of liability. Duke's briefing presumes that each class member is seeking damages based on the impact of enforcing the agreement against the individual class member in particular.[10] But "the choice of the injury to assert is in the plaintiff's hands," American Bar Association, *Proving Antitrust Damages: Legal and* ***[*24]*** *Economic Issues*, 8 (3d ed. 2017), and Dr. Seaman chose to assert theories of class-wide impact, not individual impact. Individual issues arising under a theory of liability that Dr. Seaman does not assert do not defeat predominance because there is no reason to think that those issues will present themselves in the adjudication.

Duke also asserts that Dr. Seaman's proposed common proof is unsupported, insufficient, or otherwise flawed and, therefore, that Dr. Seaman has not established that common issues will predominate over individual issues. *See, e.g.*, Doc. 127 at 27-40 (asserting that internal equity structures have not been established), at 23-27 (asserting that

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[9] In their briefing, neither Dr. Seaman nor Duke addressed how class-wide damages, if established, would be allocated to individual class members. The Court has considered this issue and does not anticipate that allocation to individual faculty members would create individual issues that predominate over other faculty damages issues, as it appears. That is because Dr. Seaman's theories of impact and her class-wide damages calculations would support a formulaic class-wide approach to distribution of the aggregate class-wide damages using the common employment data. *See* In re Titanium Dioxide Antitrust Litig., No. RDB-10-0318, 2013 U.S. Dist. LEXIS 62394, 2013 WL 1855980, at *16 (D. Md. May 1, 2013) (noting that at class certification "th[e] Court ... recognized [class-wide] options for determining individual damages" following an aggregate damages award); Rubenstein, Newberg on Class Actions § 12:2 (5th ed., Dec. 2017 Update).

[10] For example, Duke asserts that individualized proof will be required to show that the agreement actually restrained the movement of each particular faculty member and that each faculty member was embedded in the area such that the agreement affected them. Doc. 127 at 20-21, 26-27; *see also* Doc. 187 at 77-78. The fact that there may be some evidence about individual situations does not defeat predominance because the plaintiff's theory does not require her to prove that the movement of every faculty member was restrained or that every faculty member was embedded in the area. Evidence that this was or was not the case for individuals may well be relevant to support or rebut the assumptions underlying the plaintiff's theories. But this is in effect common evidence, and individual questions will not require resolution.

unique competitive relationship between Duke and UNC is not present), at 30-41 (asserting that Dr. Leamer's analysis is flawed but not moving to exclude it). Duke does not argue, and this Court does not find, that no reasonable juror could believe Dr. Seaman's common evidence such that her proffered evidence should be disregarded. Duke's assertions, therefore, go to the persuasiveness of Dr. Seaman's evidence and do not negate the fact that her evidence is common proof.

2. Non-Faculty

Dr. Seaman's theories and evidence **[*25]** differ between faculty and non-faculty class members. It is apparent from the briefing on this motion and on the plaintiff's motion to exclude defendants' experts that the inclusion of faculty and non-faculty in the same class is likely to cause significant confusion. Disputes already have arisen as to whether witnesses are talking only about faculty, only about non-faculty, or both. *See* Doc. 163 at 22-23. And there are extra steps required for a finding of anti-trust impact and damages as to non-faculty as compared to faculty; these are not minor steps, but include detailed and complicated expert statistical analyses and additional fact witnesses. Moreover, the evidence as to non-faculty is substantially weaker, at least on this record, since it is based on several inferences-on-inferences; this gives rise to the possibility that the strength of the faculty claim or the weakness of the non-faculty claim might tend to bleed over to the other claim in the jury's mind. Finally, the plaintiff has put forth one theory as to non-faculty that seems to be driven by individualized evidence.

Collectively these problems—different evidence, the likelihood of substantial confusion, potential for **[*26]** unfairness at trial, and the possibility of individual issues as to non-faculty—will make it very difficult to manage the class. Trial of the relatively straightforward faculty claims would be unduly complicated and there is a real potential for unfairness to both the class members and the defendant. For these reasons the Court finds that including non-faculty in the class would defeat predominance and superiority.[11] *Reiter, 442 U.S. at 345* (recognizing the district court's discretionary authority to refuse to certify potentially cumbersome class actions with manageability issues).

II. *RULE 23(a)*

Duke does not seriously dispute that Dr. Seaman has met the requirements of *Rule 23(a)*. As the discussion that follows shows, the record is clear that these requirements have been met as to the faculty class.[12]

As an initial matter, the Court finds that Dr. Seaman is a member of the proposed faculty class. She worked for the defendant Duke University from 2011 until 2016 as a Medical Instructor and Assistant Professor of Radiology. Doc. 85 at ¶ 2. The Court also finds that other members of the proposed faculty class are ascertainable. The defendants keep adequate records of their faculty and those persons are easily identifiable. *See* **[*27]** Doc. 94 at ¶ 14, Figure 1 (Dr. Leamer's report identifying other members of the class).

A. Numerosity

The plaintiff's proposed class includes approximately 5,469 faculty members. *Id.*; Doc. 93 at 27. Several thousand persons "is so numerous that joinder of all members is impracticable." *Fed. R. Civ. P. 23(a)(1)*; *see* *Cent. Wesleyan Coll. v. W.R. Grace & Co., 6 F.3d 177, 183 (4th Cir. 1993)* (noting district court's finding "that some 480 potential class members would easily satisfy the numerosity requirement"). The proposed class meets the numerosity requirements of *Rule 23(a)(1)*, and the Court so finds.

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[11] Non-faculty class members may pursue a separate class action and obtain the corresponding economies of time, effort, and expense, and uniformity of decision. *See* *Amchem, 521 U.S. at 615*.

[12] Since the Court has concluded that a non-faculty class is not manageable, the Court need not address the *Rule 23(a)* requirements as to it.

B. Commonality

To satisfy the commonality requirements, there must be "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. Commonality does not require that all, or even most questions be common and "even a single common question will do." *Dukes, 564 U.S. at 359*.

This case presents at least one question common to the faculty—whether the no-hire agreement existed. *See supra* at pp.7-8. This one common issue is sufficient to meet the *Rule 23(a)(2)* requirements, *see* *Dukes, 564 U.S. at 369*, and the Court so finds.

C. Typicality

To satisfy the typicality requirement, the claims of the named plaintiff must be typical of the claims of the class. *Fed. R. Civ. P. 23(a)(3)*. "The typicality requirement is met where the claims asserted by the named plaintiffs arise from the same course of conduct and are based **[*28]** on the same legal theories as the claims of the unnamed class members." *Tatum v. R.J. Reynolds Tobacco Co., 254 F.R.D. 59, 65 (M.D.N.C. 2008)*.

In this case, Dr. Seaman's claims and the faculty class members' claims are based on the same alleged facts and legal theory—that a no-hire agreement existed between the defendants and that the agreement injured the faculty by suppressing their compensation and causing monetary damages. Therefore, this Court finds that the typicality requirement of *Rule 23(a)(3)* is satisfied.

D. Adequacy

Rule 23(a)(4) requires that class representatives "fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)(4)*. It "serves to uncover conflicts of interest between named parties and the class they seek to represent," as well as "competency and conflicts of class counsel." *Amchem, 521 U.S. at 625 & n.20*.

Dr. Seaman has declared that she will fairly and adequately represent the interests of the class. She has provided answers to interrogatories and documents in response to discovery, which shows commitment to the case. Doc. 85 at ¶¶ 5-7.

While the parties have not identified any conflicts among the class members' interests, one concern has arisen. The defendants may attempt to assert res judicata to bar future claims that are based on a theory of individual impact and damages attributable **[*29]** to the no-hire agreement.[13] In the Court's view res judicata should not bar future claims based on theories of individual impact and damages because those individual theories are not included in this certification order and may not be brought in this case. *See* *Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 880, 104 S. Ct. 2794, 81 L. Ed. 2d 718 (1984)*. The risk of any such conflict also is small because there have not been any other antitrust claims brought against the defendants based on the no-hire agreement. The Court finds that this small risk can be managed via a disclosure in the class notice, *see* Doc. 187 at 10-11 (Dr. Seaman's counsel discussing opt-out notice), or other mechanism.

The Court also reviewed qualifications of proposed class counsel, *see* Docs. 83 and 84, and finds that they meet the requirements of *Rule 23(g)*.

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[13] For example, the agreement may have suppressed an individual's compensation under Dr. Seaman's theories of class-wide liability, but the agreement also may have impacted and damaged an individual who missed out on increased compensation associated with a lateral move or lateral move offer. The class-wide and individual theories of impact and damages are not mutually exclusive, but only the class-wide theories are being asserted in this case.

Dr. Seaman is an appropriate class representative and Lieff, Cabraser, Heimann & Bernstein, LLP, and Elliot Morgan Parsonage, P.A., are appropriate class counsel. The Court finds the requirements of *Rule 23(a)(4)* are satisfied.

CONCLUSION

Dr. Seaman has met the *Rule 23* requirements for certification of a class composed of faculty members. She has met the *Rule 23(b)(3)* requirements by demonstrating that questions and proof common to the faculty will predominate over any individual questions and **[*30]** proof and that class adjudication is the superior method of adjudication for faculty. All of her asserted theories and proposed proof are common to a class composed of faculty. Inclusion of the proposed non-faculty class members would involve differences in proof and would raise significant manageability and fairness issues so that certification of a class including non-faculty is not appropriate.

Dr. Seaman also has met the *Rule 23(a)* requirements. She established that she is a member of the faculty class and that the other faculty class members are ascertainable. She has established that a class composed of faculty members satisfies the numerosity, commonality, and adequacy of representation requirements of *Rule 23(a)(1)*, *(2)*, and *(4)*. Dr. Seaman is a member of the proposed class and therefore satisfies the typicality requirement of *Rule 23(a)(3)*.

For these reasons, the Court will certify a class of faculty members.

It is **ORDERED** that:

1. The plaintiff's motion for certification of a litigation class, Doc. 87, is **GRANTED, in part**, and the following faculty class is certified:

> All natural persons employed by Defendants and their co-conspirators in the United States during the period from January 1, 2012 through the present (the **[*31]** "Class Period") as a faculty member with an academic appointment at the Duke or UNC Schools of Medicine. Excluded from the Class are: members of the boards of directors and boards of trustees, boards of governors, and senior executives of Defendants and their co-conspirators who entered into the illicit agreements alleged herein; and any and all judges and justices, and chambers' staff, assigned to hear or adjudicate any aspect of this litigation.

2. Plaintiff Dr. Danielle Seaman is appointed class representative.
3. Lieff, Cabraser, Heimann & Bernstein, LLP, and Elliot Morgan Parsonage, P.A., are appointed class counsel.

4. The motion is otherwise **DENIED**.

This the 1st day of February, 2018.

/s/ Catherine C. Eagles

UNITED STATES DISTRICT JUDGE

[Clean Water Opportunities, Inc. v. Williamette Valley Co.]

United States District Court for the Middle District of Louisiana

February 6, 2018, Decided; February 6, 2018, Filed

CV. NO. 16-227-JWD-EWD

Reporter
2018 U.S. Dist. LEXIS 19307 *; 2018-1 Trade Cas. (CCH) P80,276; 2018 WL 736310

CLEAN WATER OPPORTUNITIES, INC. D/B/A ENGINEERED POLYURETHANE PATCHING SYSTEMS VERSUS THE WILLIAMETTE VALLEY COMPANY

Core Terms

patch, pricing, predatory, barriers, amended complaint, argues, costs, leave to amend, allegations, amend, acquisition, entrants, supplier, variable, district court, monopolist, competitor, monopoly, plywood, repair, undercut, cases, factual allegations, consumers, discovery, discount, recoup, anticompetitive conduct, manufacturer, geographic

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Judges: JOHN W. deGRAVELLES, UNITED STATES DISTRICT JUDGE.

Opinion by: JOHN W. deGRAVELLES

Opinion

RULING AND ORDER

I. INTRODUCTION

Before the Court is a Motion to Dismiss the Amended and Restated Complaint ("Amended Complaint") for Failure to State a Claim filed by Defendant The Williamette Valley Company ("Defendant"). ("Motion," Doc. 40). Plaintiff Clean Water Opportunities, Inc., d/b/a Engineered Polyurethane Patching Systems ("Plaintiff") has filed an Opposition, (Doc. 48), and Defendant has filed a Reply in further support of the Motion, (Doc. 51).

For the reasons discussed below, the Motion is granted, and this action will be dismissed.

II. [*2] PLAINTIFF'S ALLEGATIONS AND PROCEDURAL BACKGROUND

This action concerns Defendant's alleged monopolization of the market for "patch," a product used to fill imperfections in mill-produced plywood. (Doc. 34 at 2-3). Patch is applied to sheets of plywood traveling down a conveyor belt at the rate of six to twelve sheets per minute and is applied by an employee using a "patch gun," which is a handheld piece of equipment that mixes the two components of patch. (*Id.* at 3). Patch is sold to manufacturers on a per-gallon basis, but, as part of the price, the seller provides and services patch application equipment. (*Id.*).

The American Plywood Association ("APA") is an industry-based governing organization that sets standards for different grades of plywood. (*Id.*). The APA also produces a guide for synthetic repairs that includes repair using patch. (*Id.*). The APA allows two other types of "veneer repair," namely "wood plug" and "wood dough" or "wood putty" repair. (*Id.* at 4). Wood plug repair requires that imperfections be punched out and ultimately re-inserted in sheets of plywood by hand, while wood dough repair's mechanical and reliability limits "render it 'not approved' for the majority of defects commonly **[*3]** found in panel faces today." (*Id.*). Wood dough repair also requires long drying time and may leave "residual cracks." (*Id.*). Therefore, according to Plaintiff, "there are no market substitutes for patch." (*Id.*).

Patch is a "disbursed suspension" with a functional shelf life of two to four weeks. (*Id.* at 5). This shelf life shortens when the suspension is agitated, "like it would be while being transported in a semi-bulk container on a flat-bed trailer (the standard method of delivery)." (*Id.*). Between patch's limited shelf life and the requirement that a patch seller service patch application equipment (including on an emergency basis), Plaintiff contends that the relevant geographic market in this action includes patch users within a five-hundred-mile, six-hour drive radius around Baton Rouge, Louisiana. (*Id.* at 5-6). This corresponds with a "Southern Market" for patch allegedly "defined" by Defendant, which includes east Texas, Louisiana, Mississippi, Alabama, southern Arkansas, and the Florida panhandle. (*Id.* at 5).

Defendant is the sole supplier of patch in the continental United States. (*Id.* at 6). Defendant installs patch application equipment where patch is sold, but it does not allow others to purchase the equipment, **[*4]** which is not commercially sold, nor will it supply data to others on how to build it. (*Id.* at 6-7). Additionally, only two companies have the equipment to make patch "mixing tubes," and, to purchase them at a low enough price to be competitive, a supplier "would have to purchase a minimum of 10,000." (*Id.* at 7). One component of patch is a "non-standard" formula within the polyurethane industry that a new manufacturer would need to develop independently, and this component must meet numerous performance standards. (*Id.*). The other component is available "off the shelf" but there are "hundreds of varian[ts]" that a potential supplier would need to try, and the component is costly to store and ship. (*Id.* at 7-8).

To make patch, raw materials must be purchased, and these raw materials must be obtained at competitive prices to make the sale of patch economically feasible. (*Id.* at 8). "[S]ome of the better choices in raw materials" are also "essentially unavailable" because Defendant uses them. (*Id.*).

A patch supplier must also have APA approval to operate in a mill, and approval to operate industry-wide is contingent upon three tests of a supplier's patch and equipment at three different mills. (*Id.* at 8-9).

Plaintiff also alleges, "perhaps **[*5]** most importantly," that the "mere suggestion" that Defendant will no longer supply patch to a particular mill will, "in virtually all cases," be sufficient to stop a mill from using a different supplier. (*Id.* at 9).

In 1990, Plaintiff's principal owner, David Edwards, entered into the business of supplying patch to mills. (*Id.*). At that time, there were several companies in the market for providing patch; however, by 1997 or 1998, only Edwards's former company and Defendant remained. (*Id.* at 10). In 2000, Defendant bought Edwards's former company, which was then enjoying 10 to 15 percent market share, and Edwards signed a ten-year noncompete agreement. (*Id.*).

Spurred either by Defendant raising prices or by mills becoming concerned about Defendant's monopoly, a competitor entered the market nine months after Defendant first established its monopoly. (*Id.*). The competitor was "viable" for about a year before Defendant bought it out. (*Id.*).

About three years after the noncompete agreement ended, Edwards began developing and selling patch through Plaintiff, his new company. (*Id.*). Edwards reentered the market after observing that, while he had been out of the market, the cost of patch components had risen **[*6]** fifty percent but the selling price of patch had risen 250 percent. (*Id.* at 10-11). He also thought the industry would "embrace a second source" for patch and believed he could make cost-saving technological improvements to patch application equipment. (*Id.* at 11).

In July 2014, Plaintiff entered into a production contract with MARTCO, a plywood manufacturer, under which Plaintiff would provide patch and application equipment for one of two production lines at MARTCO's plant. (*Id.*). At that time, Plaintiff was selling patch for $15 per gallon and Defendant was selling patch for $17 per gallon. (*Id.*). At some point, MARTCO advised Plaintiff that Plaintiff would be permitted to take over a second production line if Defendant did not lower its prices. (*Id.* at 12). Plaintiff "encouraged" MARTCO to allow it to sell patch on both lines and offered a five-year contract at $12.90 per gallon. (*Id.*).

Defendant then offered MARTCO "substantial discount[s]" on all items Defendant sold MARTCO, including ones that did not use patch, with the contingency that MARTCO purchase all patch from Defendant and for the purpose of undercutting Plaintiff. (*Id.*). Plaintiff "reasonably believes and avers that," when these discounts are considered, **[*7]** MARTCO was buying patch at a price below Defendant's variable costs of production. (*Id.* at 14).

Plaintiff also offered MARTCO a discount but was advised that it would be unable to match Defendant's discount. (*Id.* at 13). In a meeting between representatives of MARTCO and Plaintiff, MARTCO assured Edwards that it was protected "long term." (*Id.*). MARTCO terminated its relationship with Plaintiff and required Plaintiff to remove its patch application equipment by April 23, 2015. (*Id.*). Plaintiff believes that similar discount agreements were accepted by two other manufacturers with which Plaintiff had been in discussions about supplying patch. (*Id.* at 13-15).

In June 2015, because it had been unable to enter into sales agreements with patch customers and Plaintiff was not "financially viable," Plaintiff's assets were sold to Defendant. (*Id.* at 15-16).

Plaintiff claims that, based on the prevailing price of patch when Defendant last had significant competition, the current competitive price of patch should be around $10 per gallon, not the $17 per gallon actually charged. (*See id.* at 16). This difference is passed on to plywood consumers. (*Id.* at 17).

Plaintiff claims that Defendant engaged in illegal conduct to maintain its monopoly, including predatory **[*8]** pricing, threatening termination of its relationships with mills that did business with Plaintiff, and an unlawful merger. (*Id.* at 17-18). Plaintiff alleges violations of the *Sherman Antitrust Act, 15 U.S.C. § 2*; the *Clayton Antitrust Act, 15 U.S.C. §§ 4*, *7*; and the *Louisiana Antitrust Statute, La. R.S. 51:122*, *51:123*, *51:124(A)*. (*Id.* at 18-20).

Plaintiff's original Complaint raised many of the same claims. The Court dismissed the Complaint on March 30, 2017, ruling that Plaintiff had failed to address barriers to entry to the market for patch and sufficiently define the relevant market, both in geographic terms and in terms of possible substitutes for patch. (Doc. 33 at 4-7, 9). The Court also granted leave to amend "to the extent Plaintiff finds it necessary to amend its complaint to specifically allege *how* Defendant's conduct was unlawful." (*Id.* at 9). The Court further observed that Plaintiff's "illegal acquisition" claim could not be maintained absent its other claims, as Plaintiff was required to show that Defendant's anticompetitive conduct was the but-for cause of Plaintiff's acquisition. (*Id.* at 11-12).

III. DISCUSSION

A. General Standards

In *Johnson v. City of Shelby, Miss., ___ U.S. ___, 135 S. Ct. 346, 190 L. Ed. 2d 309 (2014)*, the Supreme Court explained that "[f]ederal pleading rules call for a 'short and plain statement of the claim showing that the pleader **[*9]** is entitled to relief,' *Fed. R. Civ. P. 8(a)(2)*; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *135 S.Ct. at 346-47* (citation omitted).

Interpreting *Rule 8(a)*, the Fifth Circuit has explained:

> The complaint (1) on its face (2) must contain enough factual matter (taken as true) (3) to raise a reasonable hope or expectation (4) that discovery will reveal relevant evidence of each element of a claim. "Asking for [such] plausible grounds to infer [the element of a claim] *does not impose a probability requirement* at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal [that the elements of the claim existed]."

Lormand v. U.S. Unwired, Inc., 565 F.3d 228, 257 (5th Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

Applying the above case law, the Western District of Louisiana has stated:

> Therefore, while the court is not to give the "assumption of truth" to conclusions, factual allegations remain so entitled. Once those factual allegations are identified, drawing on the court's judicial experience and common sense, the analysis is whether those facts, which need not be detailed or specific, allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." **[*10]** [*Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*]; *Twombly, [550] U.S. at 556, 127 S. Ct. at 1965*. This analysis is not substantively different from that set forth in *Lormand, supra*, nor does this jurisprudence foreclose the option that discovery must be undertaken in order to raise relevant information to support an element of the claim. The standard, under the specific language of *Fed. R. Civ. P. 8(a)(2)*, remains that the defendant be given adequate notice of the claim and the grounds upon which it is based. The standard is met by the "reasonable inference" the court must make that, with or without discovery, the facts set forth a plausible claim for relief under a particular theory of law provided that there is a "reasonable expectation" that "discovery will reveal relevant evidence of each element of the claim." *Lormand, 565 F.3d at 257*; *Twombly, [550] U.S. at 556, 127 S. Ct. at 1965*.

*Diamond Servs. Corp. v. Oceanografia, S.A. De C.V., 2011 U.S. Dist. LEXIS 27358, 2011 WL 938785, at *3 (W.D. La. Feb. 9, 2011)* (citation omitted).

More recently, in *Thompson v. City of Waco, Tex., 764 F.3d 500 (5th Cir. 2014)*, the Fifth Circuit summarized the standard for a *Rule 12(b)(6)* motion:

> We accept all well-pleaded facts as true and view all facts in the light most favorable to the plaintiff . . . To survive dismissal, a plaintiff must plead enough facts to state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable **[*11]** for the misconduct alleged. Our task, then, is to determine whether the plaintiff state a legally cognizable claim that is plausible, not to evaluate the plaintiff's likelihood of success.

Id. at 502-03 (citations and internal quotations omitted).

B. Parties' Arguments

i. Defendant's Motion

Defendant argues that the Amended Complaint "adds new allegations" but does not save Plaintiff's "core predatory pricing claim." (Doc. 40-1 at 1). First, Defendant argues that Plaintiff's predatory pricing claims are conclusorily pled and are, in fact, undercut by the facts that Plaintiff has provided. (*Id.* at 8). Defendant observes that, according to the Amended Complaint, the current competitive price of patch should be around $10 per gallon, which includes both the variable cost associated with the gallon of patch and a share of profit, fixed costs, and overhead, including the equipment and repair costs that a patch supplier covers. (*Id.* at 8-9). To state a predatory pricing claim, Defendant argues, Plaintiff must show that Defendant priced patch below its incremental costs, represented by variable costs, *i.e.*, "substantially below" $10 per gallon. (*Id.*). Plaintiff's factual allegations concerning predatory pricing allege that **[*12]** Defendant undercut the price Plaintiff offered to MARTCO, which was $12.90 per gallon. (*Id.* at 9). Defendant believes it "utterly implausible" that, in response to Plaintiff's bid of $12.90 per gallon, Defendant not only undercut Plaintiff's price, but unnecessarily undercut Plaintiff's price to a point substantially below $10 and lost money on every gallon. (*Id.*). Defendant also observes that Plaintiff has provided no specifics about its own incremental costs of producing patch or other information that would permit the Court to draw the conclusion that Defendant may have priced below incremental cost. (*Id.* at 10).

Second, Defendant argues that Plaintiff has not shown a "dangerous probability" that Defendant will recoup any losses incurred as a result of predatory pricing. (*Id.*). According to Defendant, the Amended Complaint describes multiple instances in which a new competitor entered the market for patch, Plaintiff has not shown that any alleged barriers to entry affect Defendant more than a new entrant into the market, numerous listed "barriers to entry" are overstated or not legally relevant (*e.g.*, that a competitor must develop and manufacture a product it wishes to sell), and Defendant's presence **[*13]** in the market is not itself a barrier to entry. (*Id.* at 12-15).

Third, Defendant argues that Plaintiff has insufficiently defined the market in this case. (*Id.* at 15). With respect to the product market, Defendant attaches as exhibits APA guides which approve of the use of wood putty in certain instances and also permit the use of epoxies, which the Amended Complaint does not discuss. (*Id.* at 15-16). Defendant also argues that the qualitative differences between patch and other means of filling imperfections does not place these products in different markets. (*Id.* at 16). With respect to the geographic market, Defendant argues that the relevant question is "how far consumers will go to obtain the product or its substitute," not where the customers or sellers are located. (*Id.* at 17-18).

Finally, Defendant argues that Plaintiff's illegal acquisition claims and its "catchall" claims under federal and Louisiana law should be dismissed for the reasons discussed in the Court's prior order. (*Id.*at 18-19).

ii. Plaintiff's Opposition

In opposition, Plaintiff first observes that no discovery has occurred in this action, it does not have access to Defendant's cost and pricing information, and its plausible allegations must be accepted as true. (Doc. 48 at 5). **[*14]** Plaintiff also argues that a predatory pricing claim may be viable even absent an allegation that a monopolist priced below cost. (*Id.* at 5-8).

With respect to barriers to entry, Plaintiff maintains that, because Defendant has been in the market since 1990, it is "firmly established" and does not have to overcome the barriers discussed by Plaintiff to enter the market. (*Id.* at 8-9). Plaintiff also argues that the limited entry into the patch market since 1990 does not show limited barriers to entry and that Edwards had particular expertise that permitted his companies to enter the market. (*Id.*).

With respect to the product market, Plaintiff argues that there are no substitutes for patch "when it comes to high-volume sanded plywood production." (*Id.* at 10). Plaintiff also asks that the Court not consider the APA guides attached to the Motion, which it contends may not be considered at this stage and could only be properly understood if accompanied by testimony concerning the differences between patch and its various alleged substitutes. (*Id.* at 10-12).

With respect to the geographic market, Plaintiff reiterates the allegations in the Amended Complaint, arguing that it answered the "questions" posed in the Court's prior order **[*15]** and that the market for patch is a function of the distance between a patch supplier and its customers. (*Id.* at 12-13).

Plaintiff further argues that its Amended Complaint sets forth factual allegations showing that Defendant's "anticompetitive activities" led to the sale of Plaintiff to Defendant. (*Id.* at 13). Finally, Plaintiff argues that its remaining claims are not "catch-all" claims and should be permitted to stand alone regardless of the merits of the predatory pricing claims. (*Id.* at 13-14).

iii. Defendant's Reply

In its Reply, Defendant reiterates some arguments made in its Motion and further argues that: (1) following the Supreme Court's decision in *Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*, only below-cost prices suffice to state a predatory pricing claim; (2) the fact that an incumbent incurred entry costs years earlier does not demonstrate that costs incurred by new entrants significantly exceed the costs incurred by a monopolist; (3) the Court may consider the APA documents attached to the Motion; (4) the distance between a patch supplier and consumer is a relevant factor in defining the product market, but it is not the only factor; and (5) the Court's previous rulings warrant dismissal of the illegal acquisition claim and the alleged **[*16]** "catchall" claims. (Doc. 51 at 1-6).

C. Analysis

i. Predatory Pricing

"Predatory pricing occurs when '[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.'" *Big River Indus., Inc. v. Headwaters Resources, Inc., 971 F. Supp. 2d 609, 619 (M.D. La. 2013)* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. The United States Supreme Court has cautioned that such claims should be approached with "extreme skepticism," as "[t]he central difficulty with such actions is that the conduct alleged is difficult to distinguish from conduct that benefits consumers." *Stearns Airport Equip. Co., Inc. v. FMC Corp., 170 F.3d 518, 527 (5th Cir. 1999)* (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.

Preliminarily, the parties dispute whether a predatory pricing claim requires allegations that an alleged monopolist priced below incremental cost. According to Plaintiff, a predatory pricing claim may also rely on a "limit pricing" theory, under which a monopolist sets a price "just below that which a prospective entrant to the market would need to charge in order to sustain a successful entry." (Doc. 48 at 7 (citing *Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95, 101 (5th Cir. 1988)*; *Dimmitt Agri Industries, Inc. v. CPC Intern, Inc., 679 F.2d 516, 524 (5th Cir. 1982))*. However, *Stearns*, interpreting *Brooke Group*, forecloses this argument:

> Under *Brooke Group*, a claimant must demonstrate that the prices at issue were below an appropriate measure of its rival's costs. Stearns incorrectly **[*17]** relies on cases in this Circuit predating *Brooke Group*, in which we left open the possibility that prices above a monopolist's variable costs could be predatory under certain circumstances. The district court case from which Stearns extracts its predatory pricing standard was decided in the same month as, but before, *Brooke Group*. In the wake of *Brooke Group's* clarification of the standard, a plaintiff must show pricing below the standard this Court has long embraced as an appropriate measure of cost - average variable cost.

Stearns, 170 F.3d at 532 (citations omitted). Plaintiff argues that "[t]he cases relied on by [Defendant] do not involve 100-percent monopolists and consequently are legally and factually distinguishable," (Doc. 48 at 6), but it provides no argument or analysis that would permit the Court to depart from the clear standard set forth in *Stearns* and *Brooke Group*. Therefore, to succeed on a predatory pricing claim, a plaintiff must demonstrate: "(1) the defendant's pricing is below an appropriate measure of its costs, and (2) there is a dangerous probability that the defendant will recoup any losses sustained during the below-cost pricing period." *Big River, 971 F. Supp. 2d at 619* (citing *Brooke Group, 509 U.S. at 222-24*).

With respect to the first element, **[*18]** Plaintiff's allegations of pricing below variable cost are implausible. The only instance of "predatory pricing" alleged with specificity in the Amended Complaint is in Defendant's dealings with MARTCO. At most, these factual allegations support an inference that, when discounts are considered, Defendant offered MARTCO a price somewhere below $12.90 per gallon, the price offered by Plaintiff. (Doc. 34 at 12). According to Plaintiff's allegations, however, the competitive price for patch "should be" about $10 per gallon. (*Id.* at 16). Moreover, as Defendant observes, if a patch supplier is to remain viable, the per-gallon price must include both the variable cost of producing the unit and a contribution to fixed costs and any profit to be realized. (Doc. 40-1 at 8-10). It is unclear exactly what the variable cost of a gallon of patch is, but it is wholly speculative that Defendant reduced its price not only below Plaintiff's offered price, but unnecessarily reduced it below variable cost in order to drive Plaintiff out of the market. Absent such a plausible allegation, Plaintiff's predatory pricing claim fails.

In an abundance of caution, the Court also considers Defendant's ability to recoup **[*19]** losses that it might have incurred. To plead a plausible claim for recoupment, the pleadings must plausibly allege that: (1) the predatory pricing scheme could actually drive the competitor out of the market and (2) the surviving monopolist could then raise prices to consumers so as to recoup his costs without encouraging new entrants to the market. *Big River, 971 F. Supp. 2d at 619*. As Judge Brady explained in *Felder's Collision Parts, Inc. v. Gen. Motors Co.,*

> The second prong assesses the probability of whether Defendants could charge supracompetitive prices for a period of time long enough to recoup profit lost as a result of the challenged program. The object of this inquiry is to determine the likelihood of a predator's success in achieving the end goal of any predatory plan—net profit. Courts will not condemn behavior where it appears likely that a predator's plan will fail to be profitable, because such behavior "produces lower aggregate prices in the market, and consumer welfare is enhanced."

960 F. Supp. 2d 617, 632 (M.D. La. Apr. 17, 2013) (citing *Brooke Group, 509 U.S. at 224*). An important market factor to consider at this stage is, "[i]f barriers to entry in an industry are low, new entrants into the industry will appear when the monopolist raises its prices, and the net effect of **[*20]** the campaign will be a loss to the predator..." *Id. at 633* (citing *Stearns, 170 F.3d at 530*). In evaluating the barriers to entry, the relevant inquiry focuses on market conditions after the defendant eliminates the plaintiff from the relevant market and what will stop other competitors from entering the market once the defendant begins to raise its prices. *See* *Stearns, 170 F.3d at 530*. As the Court previously discussed, a barrier to the market must affect a new entrant significantly more than a monopolist, and contentions that Defendant's mere existence is a barrier are "unavailing." (Doc. 33 at 4-5 (citing *Stearns, 170 F.3d at 530*; *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 119 n.15, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986))*; *see also* *United States v. Syufy Enterprises, 903 F.2d 659, 668 (9th Cir. 1990)* ("The government is not claiming that Syufy monopolized the market by being too efficient, but that Syufy's effectiveness as a competitor creates a structural barrier to entry, rendering illicit Syufy's acquisition of its competitors' screens. We hasten to sever this new branch that the government has caused to sprout from the moribund *Alcoa* trunk.").

The Court agrees with Defendant that Plaintiff's alleged barriers to entry generally do not satisfy the applicable legal standards. In particular, the fact that Defendant may have surmounted these "barriers to entry" years ago does not transform them into legally significant **[*21]** barriers. *See* *HTI Health Servs., Inc. v. Quorum Health Grp., Inc., 960 F. Supp. 1104, 1133 (S.D. Miss. 1997)* ("This record contains no evidence whatsoever of new primary care physicians incurring long-term costs that *were not incurred* by already-established physicians." (emphasis added)); *E. Portland Imaging Ctr., P.C. v. Providence Health Sys.-Oregon, 280 F. App'x 584, 586 (9th Cir. 2008)* ("Plaintiffs have failed to create a factual issue regarding the barriers to entry and expansion in the diagnostic imaging market. They have not provided evidence that new entrants face long-run costs that *were not* or will not be incurred by incumbent providers." (emphasis added)); *Moecker v. Honeywell Int'l, Inc., 144 F. Supp. 2d 1291, 1308 (M.D. Fla. 2001)* ("The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier. However, the mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm." (citations omitted)); *Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1439 (9th Cir. 1995)* ("The main sources of entry barriers are: (1) legal license requirements; (2) control of an essential or superior resource; (3) entrenched buyer preferences for established brands; (4) capital market evaluations imposing higher capital costs on new entrants; and, in some situations, (5) economies of scale."); *see also* Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1202 (3d Cir. 1995) (disapproving of argument implying **[*22]** that there are legally significant barriers to entry in all markets).

While Court must accept as true that the barriers alleged by Plaintiff exist, (*see* Doc. 48 at 8-9), the Court need not accept Plaintiff's conclusions about the legal significance of these barriers. The vast majority of these barriers were satisfied by Defendant at some time in the past, and the few that were not (*e.g.*, Plaintiff's allegation that "some of the better choices in raw materials are essentially unavailable because [Defendant] uses them") are conclusory. Moreover, while the Court acknowledges Plaintiff's argument that actual entry has been fairly limited and requires some special expertise, (Doc. 48 at 8-9), it is significant that the Amended Complaint acknowledges some actual entry in a "100 percent monopoly" market in response to rising prices, one instance of which occurred only nine months after the monopoly was first established. (Doc. 34 at 10-11). Under the circumstances, the Court cannot conclude that Plaintiff has plausibly pled legally significant barriers to entry, and Plaintiff's predatory pricing claims fail for this additional reason.

ii. Illegal Acquisition Count

The Court previously ruled **[*23]** that Plaintiff's voluntary withdrawal from the market cannot give rise to an unlawful acquisition claim and that such a claim would generally "rise and fall" with Plaintiff's predatory pricing claim. (Doc. 33 at 10-12 (citing, *inter alia,* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1235 (6th Cir. 1981)). That is, Plaintiff was required to show some anticompetitive conduct by Defendant that was the but-for cause of Plaintiff's insolvency. (*Id.* at 11-12).

With respect to this claim, the Amended Complaint suffers from the same defects as the initial Complaint: although it contains legal conclusions that Defendant's actions were the sole cause of Plaintiff's sale to Defendant, the only specific facts concerning anticompetitive conduct are those that the Court analyzed *supra* in connection with Plaintiff's predatory pricing claim. (*See* Doc. 34 at 20). Because these allegations are lacking, there are no plausible allegations that anticompetitive conduct by Defendant caused the sale. Plaintiff's illegal acquisition claim therefore fails and will be dismissed.

iii. Remaining Claims

Plaintiff's first ground for relief reiterates all of the preceding paragraphs of the Amended Complaint and alleges that, "[b]y such acts, practices, and conduct," Defendant violated § 2 of the Sherman Act. **[*24]** (Doc. 34 at 18). The Court previously dismissed a virtually identical allegation claiming a "general violation" of § 2, citing favorably Defendant's argument that "where no piece of conduct is illegal, adding them together doesn't magically transform them into actionable conduct." (*See* Doc. 33 at 13); *see also* Eatoni Ergonomics, Inc. v. Research in Motion Corp., 486 F. App'x 186, 191 (2d Cir. 2012) ("Because these alleged instances of misconduct are not independently anti-competitive, we conclude that they are not cumulatively anti-competitive either."). Defendant's Motion argues that this "catchall" count should be dismissed again for the same reasons. (Doc. 40-1 at 19). Plaintiff argues that this claim is "separate and apart" from its predatory pricing and illegal acquisition claim, "as it is obvious, and has not been denied by [Defendant], that it maintains a pure monopoly over patch in the subject geographic market." (Doc. 48 at 13-14). However, as Plaintiff also observes, "the offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." **[*25]** (*Id.* at 13 (citing United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). Plaintiff again lacks plausible allegations of anticompetitive conduct (especially ones distinct from its predatory pricing claim) sufficient to satisfy the second element of this test. Therefore, Plaintiff's first claim for relief is inadequately pled and will be dismissed.

Finally, Plaintiff invokes Louisiana ***antitrust law*** on the same grounds as his federal claims. (Doc. 34 at 20; Doc. 48 at 14). The Court has previously ruled that Louisiana ***antitrust law*** mirrors federal ***antitrust law***. (Doc. 33 at 14). Because Plaintiff's federal claims are lacking, Plaintiff's claims under Louisiana ***antitrust law*** are similarly dismissed.

iv. Leave to Amend

The Court now considers whether to grant further leave to amend. In a recent antitrust case, the Fifth Circuit described the standard as follows:

> "*Rule 15(a)* requires a trial court to grant leave to amend freely, and the language of this rule evinces a bias in favor of granting leave to amend." *Jones v. Robinson Prop. Grp., LP, 427 F.3d 987, 994 (5th Cir. 2005)* (citation and internal quotation marks omitted). Leave to amend is in no way automatic, but the district court must possess a "substantial reason" to deny a party's request for leave to amend. *Id.* (citation and internal quotation marks omitted). The district **[*26]** court is entrusted with the discretion to grant or deny a motion to amend and may consider a variety of factors including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party ..., and futility of the amendment." *Id.* (citation omitted). "In light of the presumption in favor of allowing pleading amendments, courts of appeals routinely hold that a district court's failure to provide an adequate explanation to support its denial of leave to amend justifies reversal." *Mayeaux v. La. Health Serv. and Indent. Co., 376 F.3d 420, 426 (5th Cir. 2004)* (citation omitted). However, when the justification for the denial is "readily apparent," a failure to explain "is unfortunate but not fatal to affirmance if the record reflects ample and obvious grounds for denying leave to amend." *Id.* (citation and internal quotation marks omitted).
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> Denying a motion to amend is not an abuse of discretion if allowing an amendment would be futile. *Briggs v. Miss., 331 F.3d 499, 508 (5th Cir. 2003)*. An amendment is futile if it would fail to survive a *Rule 12(b)(6)* motion. *Id.* Therefore, we review the proposed amended complaint under "the same standard of legal sufficiency as applies under *Rule 12(b)(6)*." *Stripling v. Jordan Prod. Co., LLC, 234 F.3d 863, 873 (5th Cir. 2000)* (citation internal and quotation **[*27]** marks omitted).

Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 378 (5th Cir. 2014).

The Fifth Circuit has also stated:

> In view of the consequences of dismissal on the complaint alone, and the pull to decide cases on the merits rather than on the sufficiency of pleadings, district courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.

Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002). Relying on *Great Plains* and other cases from this circuit, one district court in Texas articulated the standard as follows:

> When a complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend before dismissing the action with prejudice unless it is clear that the defects in the complaint are incurable. *See* *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 329 (5th Cir. 2002)*; *see also* *United States ex rel. Adrian v. Regents of the Univ. of Cal., 363 F.3d 398, 403 (5th Cir. 2004)* ("Leave to amend should be freely given, and outright refusal to grant leave to amend without a justification . . . is considered an abuse of discretion.") (internal citation omitted). However, a court may deny leave to amend a complaint if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that **[*28]** is legally insufficient on its face." 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d ed.1990) (footnote omitted); *see also* *Martin's Herend Imports, Inc. v. Diamond & Gem Trading United States of Am. Co., 195 F.3d 765, 771 (5th Cir. 1999)* ("A district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.") (footnote omitted).

Tow v. Amegy Bank N.A., 498 B.R. 757, 765 (S.D. Tex. 2013). Finally, one leading treatise explains:

> As [] numerous case[s] . . . make clear, dismissal under *Rule 12(b)(6)* generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected. The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading. Thus, the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim. A district court's refusal to allow leave to amend is reviewed for abuse of discretion **[*29]** by the court of appeals. A wise judicial practice (and one that is commonly followed) would be to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the district court will be able to determine conclusively on the face of a defective pleading whether the plaintiff actually can state a claim for relief.

5B Charles A. Wright, Arthur R. Miller, *et al., Federal Practice and Procedure* § 1357 (3d ed. 2016).

Here, acting in accordance with "wise judicial practice," the Court previously afforded Plaintiff an opportunity to file an Amended Complaint. After reviewing the Amended Complaint and the briefing on the Motion, the Court concludes that granting further leave to amend would be futile. Significantly, the Amended Complaint confirms that Plaintiff's specific factual allegations center on its dealings with MARTCO and Defendant's alleged attempts to undercut Plaintiff's price. After two iterations, Plaintiff has been unable to provide facts plausibly suggesting that Defendant's conduct may have constituted predatory pricing; indeed, the Amended Complaint renders Plaintiff's claims *less* plausible by clarifying **[*30]** the broad range of prices that would have undercut Plaintiff's price but remained well above variable cost. As discussed above, Plaintiff's predatory pricing claims are necessary to his other claims. It appears that Plaintiff will be unable to amend to state a viable claim. The Court therefore dismisses Plaintiff's claims without further leave to amend.[1]

D. CONCLUSION

Accordingly, **IT IS ORDERED** that Defendant's Motion (Doc. 40) is **GRANTED**, and Plaintiff's claims are **DISMISSED WITH PREJUDICE**. Judgement will be entered consistent with this order.

Signed in Baton Rouge, Louisiana, on February 6, 2018.

/s/ John W. deGravelles

JUDGE JOHN W. deGRAVELLES

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

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[1] In light of this ruling, the Court need not consider the sufficiency of Plaintiff's definition of the relevant product or geographic markets.

[Roxul USA, Inc. v. Armstrong World Indus.](#)

United States District Court for the District of Delaware

February 9, 2018, Decided; February 9, 2018, Filed

CIVIL ACTION NO. 17-1258

Reporter
2018 U.S. Dist. LEXIS 21513 *; 2018-1 Trade Cas. (CCH) P80,279; 2018 WL 810143

ROXUL USA, INC. v. ARMSTRONG WORLD INDUSTRIES, INC.

Subsequent History: Motion denied by *Roxul USA, Inc. v. Armstrong World Indus., 2019 U.S. Dist. LEXIS 37925 (D. Del., Mar. 8, 2019)*

Summary judgment denied by, Partial summary judgment denied by *Roxul USA, Inc. v. Armstrong World Indus., 2019 U.S. Dist. LEXIS 37926 (D. Del., Mar. 8, 2019)*

Core Terms

distributors, ceiling tile, alleges, argues, anti-competitive, monopoly power, products, business relationship, manufacturers, foreclosure, antitrust, tortious interference, Sherman Act, consumers, commerce, monopolization, foreclose, pleads, prices, competitors, domestic commerce, market share, contractors, effects, relevant market, probability, building materials, channels, domestic, fails

Counsel: **[*1]** For Roxul USA, Inc, Plaintiff: Joseph J. Farnan, Jr., LEAD ATTORNEY, Farnan LLP, Wilmington, DE; Brian E. Farnan, Michael J. Farnan, Farnan LLP, Wilmington, DE; Christopher S. Finnerty, Jack S. Brodsky, Jeffrey S. Patterson, Michael R. Murphy, Morgan T. Nickerson, PRO HAC VICE.

For Armstrong World Industries Inc., Defendant: Kevin J. Mangan, LEAD ATTORNEY, Womble Bond Dickinson (US) LLP, Wilmington, DE; Caeli A. Higney, Cynthia Richman, Daniel G. Swanson, PRO HAC VICE.

Judges: KEARNEY, J.

Opinion by: KEARNEY

Opinion

MEMORANDUM

Competing manufacturers relying upon a limited number of companies qualified to distribute their product to consumers may seek to induce the distributors' primary allegiance in a number of ways which we do not consider unlawfully anti-competitive. One effort which can invite scrutiny is a manufacturer's exclusivity agreement with a distributor with penalties for selling other products when the manufacturer enjoys a 55% market share and the market continues to lose qualified distributors. In addressing these issues in the suspended acoustical ceiling tile industry, we today find a manufacturer with a smaller market share adequately pleads anti-competitive conduct by a manufacturer with a much **[*2]** larger market share through exclusivity agreements in the relevant market in the United States but not, as yet, in Canada and does not plead a claim for tortious interference with contractual relationships. In the accompanying Order, we grant the larger manufacturer's motion to dismiss claims against it for anti-competitive conduct in the Canadian market and for tortious interference but deny its motion to dismiss the remaining claims under the Sherman and Clayton Acts subject to further discovery.

I. Alleged facts.

Roxul USA, Inc. and Armstrong World Industries, Inc. manufacture and sell ceiling tiles and related products in the United States and Canada.[1] Roxul and Armstrong produce ceiling tiles comparable in quality and function.[2] Ceiling tiles are used in both residential and nonresidential spaces, but the non-residential market accounts for at least 90% of the demand for ceiling tiles.[3] Armstrong holds at least a 55% share of the ceiling tile market in the United States and Canada.[4] In total, three firms, including Roxul, compete against Ainistrong in the ceiling tile market in the United States and Canada.[5]

Ceiling tile manufacturers sell approximately 85% of their ceiling **[*3]** tile offerings through distributors specializing in building project matenals.[6] The vast majority of ceiling tile consumers are building contractors purchasing materials for interior construction projects. Contractors rely on distributors because they offer a wide-range of building material products in addition to ceiling tiles and provide multiple offerings for each material type.[7] Distributors also provide services such as same day delivery, logistical planning, product selection and installation expertise, storage and stocking services, and a knowledgeable sales force.[8] Contractors rely on distributors because very few contractors have the resources and network necessary to achieve the same efficiencies as specialized distributors.[9] Due to market forces, regional and national distributors have consolidated resulting in limited numbers of distributors capable of servicing Roxul and Armstrong.[10]

Roxul challenges Armstrong's actions with distributors to protect its market share in this consolidating distributor market, including through exclusivity agreements.[11] Following Roxul's entry into this market in 2013, Armstrong expanded its geographic scope of the exclusivity with some **[*4]** distributors from regional to national exclusivity or exclusivity throughout the United States and Canada.[12] Armstrong's exclusive distributors are not permitted to carry Roxul's or other competing firms' ceiling tiles.[13] Armstrong polices its exclusivity arrangements by raising prices to distributors who violate the exclusivity arrangement, enforcing liquidating damages provisions, or refusing to supply

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[1] ECF Doc. No. 1 at ¶¶ 1-2.

[2] *Id.* at ¶ 19.

[3] *Id.* at ¶ 17

[4] *Id.* at ¶ 39.

[5] *Id.* at ¶ 41.

[6] *id.* at ¶ 28.

[7] *Id.* at ¶ 31.

[8] *Id.* at ¶ 32.

[9] *Id.* at ¶ 33.

[10] *Id.* at ¶ 37.

[11] *Id.* at ¶ 48.

[12] *Id* at ¶ 54.

[13] *Id.* at ¶ 57.

its products to the distributors after the breach.[14] Armstrong also threatens to retaliate against distributors who sell or attempt to sell Roxul and other competing products in non-exclusive territories,[15] Armstrong also signed exclusivity contracts with some direct purchasers.[16] Roxul alleges these steps allow Armstrong to raise its prices and now charge more than 5% over competitive prices despite an overall decline in sales volume in the ceiling tile market since 2011.[17]

II. Analysis

Roxul alleges Armstrong's exclusivity arrangements with building material distributors violates the Sherman Act[18] and Clayton Act,[19] Roxul alleges Armstrong unlawfully obtained and maintained a monopoly under *Section 2 of the Sherman Act*. In the alternative, Roxul argues Armstrong is attempting to monopolize **[*5]** the ceiling tile market in violation of *Section 2* of the Sherman Act. Roxul also alleges Armstrong engaged in concerted action in restraint of trade in violation of *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act*. Finally, Roxul alleges Armstrong tortiously interfered with Roxul's business relations with building material distributors.

Armstrong moves to dismiss Roxul's complaint.[20] Armstrong challenges Roxul's definition of the ceiling tile market and argues we lack subject matter jurisdiction over foreign commerce in Canada. Armstrong argues Roxul failed to allege it holds monopoly power in the ceiling tile market. Armstrong argues its exclusivity arrangements with distributors are not anticompetitive because it has valid business justifications for exclusivity and it did not foreclose Roxul from a substantial portion of the ceiling tile market. Armstrong argues Roxul failed to plead antitrust injury. Finally, Armstrong argues Roxul failed to plead tortious interference with business relations because it did not

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[14] *Id.* at ¶¶ 58-59.

[15] *Id.* at ¶ 62.

[16] *Id.* at ¶ 68

[17] *Id.* at ¶ 74.

[18] *15 U.S.C. § 1, et seq.*

[19] *15 U.S.C. § 12, et seq.*

[20] In deciding a motion to dismiss under *Rule 12(b)(6)*, we accept all well-pleaded allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party, but we "are not compelled to accept unsupported conclusions and unwarranted inference, or a legal conclusion couched as a factual allegation." *Castleberry v. STI Group, 863 F.3d 259, 263 (3d Cir. 2017)* (quoting *Morrow v. Balaski, 719 F.3d 160, 165 (3d Cir. 2013))*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Edinboro Coll. Park Apartments v. Edinboro Univ. Found., 850 F.3d 567, 572 (3d Cir. 2017)* (quoting ***In re Vehicle Carrier Servs. Antitrust Litig., 846 F.3d 71, 79 n.4 (3d Cir. 2017))***. A claim satisfies the plausibility standard when the facts alleged "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Maiden Creek Assocs., L.P. v. United States DOT, 823 F.3d 184, 189 (3d Cir. 2016)* (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))*. While the plausibility standard is not "akin to a 'probability requirement,'' there nevertheless must be more than a "sheer possibility that a defendant has acted unlawfully." *Iqbal, 556 U.S. at 678* (citing *Twombly, 550 U.S. at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929*). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quoting *Twombly, 550 U.S. at 557*).

Our court of appeals requires we apply a three-step analysis under a 12(b)(6) motion: (1) "it must 'tak[e] note of the elements [the] plaintiff must plead to state a claim;" (2) "it should identify allegations that, 'because they are no more than conclusions, are not entitled to the assumption of truth;" and, (3) "[w]hen there are well-pleaded factual allegations, [the] court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief." *Connelly v. Lane Constr. Corp., 809 F.3d 780, 787 (3d Cir. 2016)* (quoting *Iqbal, 556 U.S. at 675, 679)*.

identify a contract Armstrong interfered with or identify a prospective business relationship with necessary specificity.

A. Roxul fails to state a claim of antitrust [*6] violations based on foreign trade under the Foreign Trade Antitrust Improvements Act.

Armstrong challenges Roxul's definition of the relevant market as "the sale of suspended acoustical ceiling tiles . . . sold in the United States of America and Canada."[21] Armstrong specifically challenges Roxul including ceiling tile sales in Canada. Armstrong argues the Foreign Trade Antitrust Improvements Act ("Act")[22] prohibits our exercise of jurisdiction over foreign conduct under the Sherman Act.[23] Roxul alleges it sufficiently plead the "domestic commerce exception" to the Act.

The Sherman Act "shall not apply to conduct involving trade or commerce (other than important trade or commerce) with foreign nations."[24] But there are exceptions for conduct creating a "direct, substantial and reasonably foreseeable effect" on domestic trade or commerce, import trade or import commerce with foreign nations, or export trade or commerce with foreign nations.[25] The Act requires we determine the "geographical effect" of the alleged conduct.[26] The conduct at issue must also "have an effect of a kind that ***antitrust law*** considers harmful."[27] Stated differently, conduct involving foreign trade falls within the Sherman Act **[*7]** if the conduct has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce and such effect gives rise to a claim under the Sherman Act. When the proffered anti-competitive conduct affects both customers outside the United States and within the United States but the adverse foreign effect "is independent of any adverse domestic effect," the domestic commerce exception does not apply and the Sheiman Act does not apply.[28] "The [Act] requires a plaintiff to allege that its claims were directly caused by the domestic effects of the conduct and not the foreign effects."[29] "Courts discussing the 'direct effects' requirements of the [Act] have recognized that 'direct effect' means that there must be an 'immediate consequence of the alleged anticompetitive conduct with no 'intervening developments.'"[30]

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21 ECF Doc. No. 1 at ¶ 16.

22 *15 U.S.C. § 6a*.

23 Our court of appeals instructs as the limitations contained in the Act are "substantive merits limitations" rather than a jurisdictional bar. *Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 468-69 (3d Cir. 2011)*. Our court of appeals clarified challenges under the Act must be decided under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim, as opposed to *Rule 12(b)(1)* for lack of subject matter jurisdiction. *Id. at 469*. We assess whether Roxul states a claim under the Sherman Act as to the foreign conduct at issue rather than assess whether we have subject matter jurisdiction over the foreign conduct.

24 *15 U.S.C. § 6a*.

25 *F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 161-62, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*; *Animal Sci. Prods. v. China Minmetals Corp., 654 F.3d 462, 465-66 (3d Cir. 2011)*.

26 *In re Intel Corp. Microprocessor Antitrust Litig. v. Intel Corp., 452 F Supp. 2d 555, 560 (D. Del. Sept. 26, 2006)*.

27 *F. Hoffmann-La Roche Ltd., 542 U.S. at 162*; *15 U.S.C. § 6a(2)*.

28 *F. Hoffmann-La Roche Ltd., 542 U.S. at 162*.

29 *In re Intel Corp. Microprocessor Antitrust Litig. v. Intel Corp., 452 F Supp. 2d at 561*.

30 *Id. at 560* (citation omitted).

Allegations of conduct resulting in a "ripple effect" on domestic commerce are insufficient to satisfy the domestic commerce exception.[31]

In *In re Intel Corp. Microprocessor Antitrust Litig. v. Intel Grp.*,[32] the plaintiff argued the defendant's anti-competitive conduct involving foreign commerce resulted in the plaintiff losing foreign sales and weakened the plaintiff as a domestic **[*8]** rival to the defendant.[33] The court found the plaintiff's argument insufficient to satisfy the "direct effects" standard.[34] The court described the alleged effect as speculative and found the plaintiff failed to identify how the foreign conduct resulted in a "substantial and direct domestic effect."[35] The court also discounted plaintiff's reliance on pleading it is an American company engaged in foreign commerce, as courts assess the geographical effect of foreign conduct as opposed to the location of the parties under the Act.[36]

Roxul fails to allege how foreclosure from the Canadian market because of Armstrong's exclusivity contracts directly, substantially, and foreseeably affects United States commerce. Foreclosure from the Canadian market certainly impacts Canadian commerce and consumers by limiting their choice and reducing competition in Canada, but Roxul fails to allege how reduced competition in Canada directly affects domestic commerce. Roxul argues its claim encompasses injury to competition in both the United States and Canada. We agree, as discussed below, Roxul has adequately alleged Armstrong's foreclosure of competition in the United States market impacted domestic commerce. **[*9]** But under the Act, Roxul must allege how the foreclosure from the Canadian market directly and substantially affected domestic commerce. Even if Roxul's allegations allowed for an inference the foreclosure from Canada impacted Roxul's foreign sales thereby impacting its profitability and resulting in lost opportunity to compete domestically with Armstrong, such effect would be speculative and insufficient to allege a direct effect on domestic commerce.[37] Based on the present pleading, we can only fairly conclude the effect from Armstrong foreclosing Roxul and other competing firms from the Canadian market is separate and independent from the effect Armstrong's conduct created in the United States market.

B. Roxul pleads monopolization under the Sherman Act.

Roxul alleges Armstrong unlawfully obtained and maintained monopoly power in the ceiling tile market through its exclusivity arrangements with building material distributors. Armstrong argues Roxul's allegations of Armstrong controlling at least 55 percent of the ceiling tile market is insufficient to plead monopoly power. Armstrong also argues its exclusivity arrangements are not anti-competitive and offers business justifications **[*10]** for the exclusive contracts. Armstrong argues Roxul fails to state a plausible antitrust injury because Roxul only seeks relief for injury to itself, not competition.

To plead monopolization under Section 2 of the Sherman Act, Roxul must allege "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition of maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident."[38]

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[31] Id. at 561.

[32] 452 F Supp. 2d 555, 560 (D. Del. Sept. 26, 2006).

[33] Id. at 560.

[34] Id. at 560-61.

[35] Id. at 561.

[36] *Id.*

[37] *See* id. at 560-61.

"Monopoly power is the ability to control prices and exclude competition from the given market."[39] To support an inference of monopoly power, a plaintiff typically must plead "a firm has a dominant share in a relevant market, and that significant 'entry barriers' protect that market."[40] Absent other factors, our court of appeals has found a market share of 55% is typically insufficient to demonstrate *prima facie* monopoly power.[41] Other factors to consider to determine whether a firm holds monopoly power include, "the size and strength of competing firms, freedom of entry into the field, pricing trends and practices in the industry, ability of consumers to substitute comparable goods or services from outside the market, **[*11]** and consumer demand factors."[42] Whether a firm can charge "supracompetitive prices" is also relevant to determining monopoly power.[43]

Anti-competitive conduct under the second element includes "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[44] We apply the rule of reason in assessing whether the use of exclusivity contracts is anticompetitive.[45] An exclusive dealing arrangement violates the rule of reason when the "probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals.",[46] Roxul must allege the exclusivity arrangement resulted in "substantial foreclosure" to the relevant market.[47] Foreclosure does not become substantial by pleading a particular fixed percentage and courts look to whether the exclusivity arrangement "bar[s] a substantial number of rivals or severely restricts the market's ambit."[48] "Exclusive dealing arrangements are of special concern when imposed by a monopolist."[49]

To plead antitrust injury, Roxul must allege it suffered the type of harm antitrust laws are intended **[*12]** to prevent and the injury flows "from that which makes the defendants' acts unlawful."[50]

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[38] *In re Mushroom Direct Purchaser Antitrust Litig., 514 F. Supp. 2d 683, 700 (E.D. Pa. Apr. 25, 2007)* (quoting *Crossroads Congregation Corp. v. Orange & Rockland Utils., Inc., 159 F. 3d 129, 141 (3d Cir. 1998))*.

[39] *Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 307 (3d Cir. 2007)* (citation omitted).

[40] *Id.* (quoting *Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005))*.

[41] *See* ***Fineman v. Armstrong World Indus., 980 F.2d 171, 201-02 (3d Cir. 1992)***.

[42] ***Id.*** (citation omitted).

[43] *Broadcom Corp., 501 F.3d at 307* (citing *United States v. Microsoft Corp. 253 F.3d 34, 51, 346 U.S. App. D.C. 330 (D.C. Cir. 2001))*.

[44] *Int'l Constr. Prods. LLC v. Caterpillar Inc., No. 15-108, 2016 U.S. Dist. LEXIS 6826, 2016 WL 264909, at *8 (D. Del. Jan. 21, 2016)* (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*.

[45] *See* *Eisai, Inc. V. Sanofi Aventis U.S,, LLC, 821 F.3d 394, 403-04 (3d Cir. 2016)*.

[46] *Id.* (citation omitted).

[47] *See id.*

[48] *Id.* (citation omitted).

[49] *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 271 (3d Cir. 2012)* (citing *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005))*.

[50] *In re Processed Egg Prods. Antitrust Litig., 881 F.3d 262, No. 16-3795, 2018 U.S. App. LEXIS 2698, 2018 WL 671128, at *5 (3d Cir. Jan. 22, 2018)*.

Roxul plausibly pleads monopoly power. Roxul alleges Armstrong holds a market share "in excess of 55%."[51] Although an allegation of 55% alone may not be sufficient to allege monopoly power, Roxul alleges a high barrier of entry into the market and Armstrong's history of controlling prices despite an overall decrease in sales volume in the market.[52] Only three companies compete against Armstrong in the ceiling tile market.[53] Armstrong has raised its prices since 2011, despite an overall decrease in sales volume in the ceiling tile market.[54] Armstrong now charges 5% over competitive market prices.[55] Roxul alleges only a few distributors are capable of servicing companies the size of Roxul.[56] Regional and local distributors have consolidated with national distributors expanding the reach of the Armstrong exclusivity agreements.[57] Roxul alleges Armstrong's exclusivity agreements with key distributors prevented new competitors from entering the market and remaining competitive.[58] Viewing these facts favorably to Roxul as we must do at this stage, Roxul sufficiently alleges monopoly power.

Roxul plausibly **[*13]** pleads Armstrong's willful acquisition of monopoly power through exclusivity agreements resulting in anti-competitive conduct. Armstrong argues Roxul fails to plead substantial foreclosure in the ceiling tile market. Armstrong argues Roxul's claim the exclusivity arrangements with distributors resulted in a 65% foreclosure to the ceiling tile market is unsubstantiated. Armstrong argues under the facts alleged it can only theoretically foreclose at most its total market share — 55%. Armstrong narrows its argument on the percentage alleged but ignores the supporting facts. Roxul is not required to allege a specific foreclosure percentage and we analyze all the facts in the complaint to determine whether substantial foreclosure is alleged.[59]

Specialty building products distributors are a critical channel between manufacturers, like Armstrong and Roxul, and consumers.[60] Ceiling tile manufacturers sell about 85% of their ceiling tile product through these distributors.[61] Manufacturers rely on distributors because they are able to efficiently manage the "logistical complexity of distribution services."[62] Distributors also provide a wide range of products to best meet consumer needs such as walling, **[*14]** metal framing, grid systems necessary to install ceiling tiles, necessary tools for installation, and safety accessories.[63] Distributors also provide supplemental services such as logistical planning, same day delivery, product selection and installation expertise, and networking with local contractors.[64] Consolidation of distributors heightened the importance of ceiling tile manufacturers' maintaining relationships with the limited

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[51] ECF Doc. No. 1 at ¶ 39.

[52] *Id.* at ¶¶ 42-44, 48-50.

[53] *Id.* at ¶ 41.

[54] *Id.* at ¶¶ 42-44.

[55] *Id.* at ¶ 74.

[56] *Id.* at ¶ 48.

[57] *Id.* at ¶ 37.

[58] *Id.* at ¶ 48.

[59] *See* *Eisai, Inc., 821 F.3d at 404* (identifying foreclosure does not become substantial at a "fixed percentage").

[60] ECF Doc. No. 1 at ¶ 29.

[61] *Id.* at ¶ 30.

[62] *Id.* at ¶ 30.

[63] *Id.* at ¶ 31.

[64] *Id.* at ¶ 32.

number of distributors.[65] Without access to distributors, manufacturers lack access to a viable distribution channel end-users rely upon to make ceiling tile purchases.[66]

The exclusivity agreements prohibit distributors from selling competitor ceiling tiles nationally or regionally, depending on the agreement.[67] Roxul also alleges Armstrong retaliates against distributors who violate the exclusivity provision by charging the distributors higher prices for its products, enforcing liquidated damages clauses, and choosing to stop supplying Armstrong ceiling tiles to the distributor.[68] Armstrong's exclusivity with distributors coupled with fear of retaliation for selling Roxul products forced distributors to stop carrying Roxul products.[69] Roxul sufficiently **[*15]** alleges Armstrong's exclusivity agreements and its retaliatory conduct foreclosed competition in the ceiling tile market.

Armstrong argues Roxul failed to allege substantial foreclosure because alternative channels of distribution allow Roxul to reach consumers. Armstrong cites to Roxul's allegations identifying direct buy contractors and big-box home improvement retailers as potential alternative distribution channels.[70] But Roxul alleges very few direct buy contractors exist because they lack the financial resources and expertise to establish the same value-added services specialty distributors provide.[71] Roxul alleges big-box retailers are unable to service most commercial projects because of their limited product selection and inability to provide supplemental services.[72] Roxul alleges these distribution channels are not viable options to reach ceiling tile consumers.[73] Armstrong also cites to Roxul's allegation architects "spec" or specify the brand of ceiling tile in 90% of interior construction projects.[74] Armstrong argues this allegation proves the selection of ceiling tile brand is "in the hands of the consumer." Armstrong argues Roxul could promote and sell its products to **[*16]** architects at the specification phase. But Armstrong ignores Roxul's allegation when contractors attempt to fulfill an architect's spec from exclusive distributors, the distributor attempts to change the Roxul spec to an Armstrong spec or faces the risk of retaliation from Armstrong.[75] We accept Roxul's allegations at this preliminary stage. Armstrong's factual defense regarding the availability and viability of alternative distribution channels is best reserved for summary judgment or trial.

Armstrong argues it has a valid business justification for entering into exclusivity agreements with distributors. Armstrong argues the pro-competitive effects of the exclusivity arrangements outweigh the anti-competitive effects. Armstrong argues its exclusivity arrangements encourage distributors to more aggressively market Armstrong products. Armstrong asserts exclusivity arrangements prevent "free riding on the substantial investments that manufacturers (like Armstrong) make with distributors to promote their own products."[76] Roxul alleges sufficient

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[65] *Id.* at ¶ 37.

[66] *Id.* at ¶ 50.

[67] *Id.* at ¶¶ 54-57.

[68] *Id.* at ¶¶ 58-60.

[69] *Id.* at ¶ 65.

[70] *Id.* at ¶¶ 33-34.

[71] *Id.* at ¶ 33.

[72] *Id.* at ¶ 34.

[73] *Id.* at ¶ 35.

[74] *Id.* at ¶ 88.

[75] *Id.*

[76] ECF Doc. No. 10 at p. 23.

facts outlining the anti-competitive effects the exclusivity arrangements have on the ceiling tile market.[77] Weighing pro-competitive **[*17]** and anti-competitive effects is best reserved for summary judgment or trial after the benefit of discovery.[78]

Armstrong argues Roxul fails to plead plausible antitrust injury because it does not allege Armstrong's conduct injured competition and Roxul's alleged harm is not casually connected to Armstrong's conduct. Contrary to Armstrong's argument, Roxul alleges harm to competition in the ceiling tile market. Roxul alleges the exclusivity arrangements between Armstrong and distributors foreclosed Roxul and other competitors from the ceiling tile market.[79] Armstrong's exclusivity arrangements have prevented possible competitors from entering the market and reduced consumer choice in the ceiling tile market.[80] Viewing the facts alleged favorably to Roxul, we allow for a reasonable inference the injury to competition is casually connected to Armstrong's exclusivity arrangements with building material distributors. Roxul adequately pleads antitrust injury. Roxul states a claim for monopolization under the Sherman Act.

C. Roxul pleads attempted monopolization under the Sherman Act.

Roxul alleges Armstrong's exclusivity deals are an unlawful attempt to monopolization under *Section 2 of the Sherman Act*. **[*18]** Armstrong raises the same arguments it raised to Roxul's monopolization claim: (1) Roxul has not alleged anticompetitive conduct and (2) Roxul has not alleged antitrust injury.

To state a claim for attempted monopolization under *Section 2 of the Sherman Act*, Roxul must allege "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and (3) a dangerous possibility of achieving monopoly power."[81] We consider many factors in determining whether a defendant has a dangerous probability of achieving monopoly power including the size of the defendant's market share, strength of competition, barriers to entry into the market, the nature of the alleged anticompetitive market, the elasticity of consumer demand, and the probable development of the relevant industry.[82] Determining whether there is a dangerous probability of achieving monopoly power is "a particularly fact intensive inquiry."[83] "Courts typically should not resolve this question at the pleading stage 'unless it is clear on the face of the complaint that the 'dangerous probability' standard cannot be met as a matter of law.'"[84]

As described earlier, Roxul adequately alleges anticompetitive **[*19]** conduct through exclusivity arrangements with distributors. The exclusivity arrangements foreclose competitors from accessing a significant portion of the ceiling tile market.[85] Roxul's allegations also allow for a reasonable inference Armstrong acted with the specific intent to monopolize. Armstrong pursued exclusivity arrangements with key distributors in the ceiling tile industry and have actively policed and enforced the exclusivity arrangements to the detriment of competition in the ceiling tile

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[77] ECF Doc. No. 1 at ¶¶ 71-75, 82-98.

[78] *See In re Wellbutrin XL Antitrust Litig., 868 F.3d 132, 170 n. 64 (3d Cir. 2017)* (identifying difficulty of assessing fact intensive rule of reason analysis, even at the summary judgment stage).

[79] ECF Doc. No. 1 at all ¶¶ 85-86.

[80] *Id.* at ¶¶ 82-83, 95.

[81] *Broadcom Corp., 501 F.3d at 317* (citation omitted).

[82] *Id. at 318* (citation omitted).

[83] *Id.*

[84] *Id.* (citation omitted).

[85] ECF Doc. No. 1 at ¶¶ 65-66.

market.[86] Roxul's sufficiently pleads monopoly power as discussed above, but in the alternative, Roxul also sufficiently pleads a dangerous probability of achieving monopoly power. Roxul alleges Armstrong's exclusivity arrangements prevent the entry of new competitors into the market, foreclose competitors from a significant portion of the market, and allow Armstrong to raise its prices despite an overall decrease in sales volume.[87] Only three firms compete against Armstrong in the ceiling tile market.[88] Roxul sufficiently pleads antitrust injury of foreclosure from a significant portion of the ceiling tile market. Roxul states a claim of attempted monopolization under *Section 2* of the Sherman Act.

D. Roxul pleads concerted action in restraint of trade under the Sherman Act and Clayton Act.

Roxul alleges Armstrong engaged in concerted action in restraint of trade with building material distributors in violation of *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act*. *Section 1 of the Sherman Act* prohibits every contract or conspiracy in restraint of trade or commerce.[89] To state a claim under *Section 1* of the Sherman Act, Roxul must allege (1) the defendant was a party to a contract, combination or conspiracy and (2) the contract, combination or conspiracy imposed an unreasonable restraint on trade.[90] To plead an unreasonable restraint on trade, Roxul must allege the concerted action resulted in anticompetitive effects within the market.[91] *Section 3 of the Clayton Act* prohibits a firm from entering into exclusivity arrangements where the effect of such arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[92] To determine the legality of an exclusive dealing arrangement under the Clayton Act, we determine "whether the competition foreclosed constitutes a substantial share of the relevant market."[93] Roxul relies on the same theory asserted above: Armstrong's exclusivity **[*21]** arrangements foreclosed Roxul and other competing firms from a substantial portion of the ceiling tile market.

Armstrong raises the same arguments it raised in defense to Roxul's Sherman Act claims. These arguments fail today for the same reasons. Roxul sufficiently alleges a contractual arrangement between Armstrong and distributors creating an exclusive distribution relationship.[94] Roxul also sufficiently alleges the contracts created an unreasonable restrain on trade by foreclosing competitors from entering the market and foreclosing competitors from a substantial share of the ceiling tile market.[95] Roxul states a claim under *Section 1 of the Sherman Act* and *Section 3 of the Clayton Act*.

E. Roxul fails to plead tortious interference with business relationships under Delaware law.

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[86] *Id.* at ¶¶ 54-75.

[87] ***[*20]*** *Id.* at ¶¶ 65-66, 72, 74.

[88] *Id.* at ¶ 41.

[89] *15 U.S.C. § 1*.

[90] *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011)* (citation omitted).

[91] *UniStrip Techs., LLC v. LifeScan, Inc., 153 F. Supp. 3d 728, 739-40 (E.D. Pa. Dec. 28, 2015)*.

[92] *15 U.S.C. § 14*.

[93] *UniStrip Techs., LLC, 153 F. Supp. 3d at 738* (citing *LePage's Inc. v. 3M*, *324 F.3d 141, 157 (3d Cir. 2003))*.

[94] ECF Doc. No. 1 at ¶¶ 54-56.

[95] *Id.* at ¶¶ 66, 72-73, 75, 83.

Roxul claims Armstrong tortiously interfered with its business relations by entering into exclusivity arrangements with distributors and by prohibiting non-exclusive distributors from purchasing Roxul and other competitors ceiling tiles. Roxul claims Armstrong interfered with its existing and prospective business relationships. To the extent Roxul's claim is based on existing business relationships, Armstrong **[*22]** argues Roxul failed to allege the existence of a contract between Roxul and a distributor and failed to allege a breach of the contract. To the extent Roxul's claims is based on prospective business relations, Armstrong argues Roxul did not identify a specific party with which it held a prospective business relationship.

To state a claim for tortious interference with existing contractual relations, Roxul must allege "(1) a contract, (2) about which defendant knew, *and* (3) an intentional act that is a significant factor in causing the breach of such contract, (4) without justification, (5) which causes injury."[96] To state a claim for tortious interference with prospective business relations, Roxul must allege (1) the reasonable probability of business opportunity, (2) the intentional interference by the defendant with that opportunity, (3) proximate causation, and (4) damages.[97] To satisfy the first element, Roxul "must identify a specific party who was prepared to entered [sic] into a business relationship but was dissuaded from doing so by the defendant and cannot rely on generalized allegations of harm.'"[98] "While the plaintiff does not need to identify a party by name, the plaintiff must **[*23]** do more than offer 'vague statements about unknown customers.'"[99] "A plaintiff cannot plead this element by alleging a 'nebulous, unascertainable class' of business relationships."[100]

Roxul fails to state a claim for tortious interference with existing contractual relations. Roxul does not allege a contractual relationship between it and a distributor and does not allege Armstrong's interference resulted in the distributor breaching an agreement with Roxul. Roxul also fails to state a claim for tortious interference with prospective business relationships. Roxul fails to allege a reasonable probability of business opportunity. Roxul alleges Armstrong prohibited distributors from selling Roxul ceiling tile products.[101] To the extent these distributors sold Roxul products, interference with the distributors would not be interference with prospective relations. It is unclear from Roxul's allegations if distributors sought to sell Roxul ceiling tile products and Armstrong prevented these sales. Roxul cites its allegation upon information and belief "Building Products Distributors would prefer to carry multiple Ceiling Tile brands."[102] But Roxul does not allege facts supporting an inference of **[*24]** a single distributor prepared to enter into a business relationship with Roxul. These types of macro allegations suffice for our Sherman and Clayton Act analysis, but not under the elements of tortious interference under Delaware law. We are aware of no exception to tortious interference law in the anti-competitive context. Roxul fails to state a claim for tortious interference with prospective business relations.

III. Conclusion

Roxul adequately pleads Armstrong's exclusivity arrangements in the United States' suspended acoustical ceiling tile market violate the Sherman Act and Clayton Act. Armstrong's fact defenses are best reserved for summary judgment or trial. We dismiss Roxul's claim for antitrust violations to the extent Roxul bases its claim on foreign

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[96] *Bhole, Inc. v. Shore Invs., 67 A.3d 444, 453 (Del. 2013)* (citation omitted) (emphasis in original).

[97] ***Organovo Holdings, Inc. v. Dimitrov, 162 A.3d 102, 122 (Del. Ch. Jun. 5, 2017)*** (citation omitted).

[98] *Id.* (citation omitted).

[99] *Id.* (citation omitted).

[100] ***Id. at 122-23***.

[101] ECF Doc. No. 1 at ¶¶ 56-60, 63-64.

[102] *Id.* at ¶ 67.

trade in Canada and its claim for tortious interference with business relationships without prejudice should Roxul be able to plead facts consistent with this Memorandum under *Fed. R. Civ. P. 11*.

ORDER

AND NOW, this 9th day of February 2018, upon considering Defendant's Motion to dismiss (ECF Doc. No. 9), Plaintiff's Response (ECF Doc. No. 11), Defendant's Reply (ECF Doc. No. 12) and for reasons in the accompanying Memorandum, it is **ORDERED** Defendant's **[*25]** Motion (ECF Doc. No. 9) is **GRANTED in part and DENIED in part**:

1 Defendant's Motion is **GRANTED** as to Plaintiff's attempts to define the relevant market as including Canada and for its tortious interference claims under Delaware law **without prejudice;** and,

2. Defendant's Motion is **DENIED** in all other respects.

/s/ Kearney

KEARNEY, J.

Steves & Sons, Inc. v. Jeld-Wen, Inc.

United States District Court for the Eastern District of Virginia, Richmond Division

February 9, 2018, Decided; February 9, 2018, Filed

Civil Action No. 3:16-cv-545

Reporter
292 F. Supp. 3d 656 *; 2018 U.S. Dist. LEXIS 21983 **; 2018-1 Trade Cas. (CCH) P80,278; 2018 WL 815579

STEVES AND SONS, INC., Plaintiff, v. JELD-WEN, INC., Defendant.

Prior History: *Steves & Sons, Inc. v. Jeld-Wen, Inc., 252 F. Supp. 3d 537, 2017 U.S. Dist. LEXIS 75308 (E.D. Va., May 17, 2017)*

Core Terms

doorskins, Acquisition, antitrust, prices, summary judgment, damages, parties, manufacturers, lost profits, termination, anticompetitive, ripeness, plant, merger, molded, interior, door, claim for damages, laches, anti trust law, quotations, suppliers, asserts, effects, divestiture, speculative, conspiracy, injuries, notice, future damage

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Judges: Robert E. Payne, Senior United States District Judge.

Opinion by: Robert E. Payne

Opinion

[*660] MEMORANDUM OPINION

This matter is before the Court on DEFENDANT JELD-WEN, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I AND IV OF PLAINTIFF STEVES AND SONS, INC.'S COMPLAINT (ECF No. 375). For **[*661]** the reasons set forth below, the motion was denied, except on the issue of future lost profits damages under Count One, as to which the Court ordered further briefing. See ECF No. 578. The Court has considered that briefing in the context of JELD-WEN, Inc.'s ("JELD-WEN") motion for judgment as a matter of law on the future lost profits damages claim at trial, after Steves and Sons, Inc. ("Steves") had put on its fact witnesses. Accordingly, only the ripeness of that **[**3]** claim, and not its validity, is addressed in this opinion.

BACKGROUND

A. Factual Background

1. Pre-2012 Interior Molded Doorskin Market

Steves and JELD-WEN are both participants in the interior molded doorskin market in the United States. That type of doorskin is used to make interior molded doors, which are built to resemble solid wood doors at a much lower cost. Interior molded doorskin manufacturers create and ship doorskins to assembly plants, where molded door manufacturers use the doorskins to build door slabs that are then sold to retailers or distributors. Steves is an independent door manufacturer that is currently unable to produce its own doorskins, and has never done so. As a result, it must purchase doorskins from doorskin manufacturers. JELD-WEN, however, is a vertically integrated door manufacturer, meaning that it both produces doorskins and uses those doorskins internally to manufacture and sell finished doors.

Before 2012, Steves and other independent door manufacturers purchased interior molded doorskins from three main suppliers: JELD-WEN, CraftMaster Manufacturing, Inc. ("CMI"),[1] and Masonite.[2] Like JELD-WEN, CMI and Masonite were both vertically integrated manufacturers **[**4]** of interior molded doorskins and doors.

2. Execution of Supply Agreement

On May 1, 2012, Steves and JELD-WEN entered into a long-term supply agreement ("the Supply Agreement"), pursuant to which Steves would purchase, inter alia, interior molded doorskins from JELD-WEN. EOF No. 379-2 (Under Seal) § 1; JELD-WEN's Statement of Undisputed Material Facts (ECF No. 379) (Under Seal) ("Def. SUMF") ¶ 1. The Supply Agreement would be in effect through December 31, 2019, but would automatically renew for a successive seven-year term at that time unless either party terminated the contract. Supply Agreement § 2. The Agreement further provided that Steves could terminate it for any reason upon two-year written notice to JELD-

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[1] CMI came into existence following the merger of Masonite and Premdor in 2002. After the Department of Justice ("DOJ") filed suit to block the merger, the parties entered into a consent decree allowing the merger on the condition that Masonite divest its Towanda plant, which CMI subsequently purchased.

[2] JELD-WEN argues that the Court should not consider this fact and others referenced in this section because Steves presented them in narrative format, in violation of *Local Rule 56(B)*. See *Integrated Direct Mktg., LLC v. May, 129 F. Supp. 3d 336, 344-46 (E.D. Va. 2015)* (refusing to consider new facts presented in narrative format in oppositions to motions for summary judgment because oppositions did not specifically state which undisputed material facts in motions were disputed). But Steves' opposition, besides stating narrative facts, specifically disputes or agrees to all of JELD-WEN's purportedly undisputed material facts. Moreover, JELD-WEN included an appendix to its reply disputing the narrative facts in Steves' opposition. Therefore, unlike in *Integrated Direct Marketing,* it is fairly easy to discern which facts are disputed and which are not.

WEN, and that JELD-WEN could likewise terminate it without cause upon seven-year **[*662]** written notice to Steves. Id. § 3(a)(2)(b); Def. SUMF ¶ 2; Steves' Statement of Additional Material Facts (ECF No. 452) (Under Seal) ("Pl. SAMF") ¶ 4.

Under the Supply Agreement, Steves had to purchase at least 80% of its interior molded doorskin requirements from JELD-WEN. Pl. SAMF ¶ 2. Steves could, however, purchase any quantity of doorskins from another supplier that offered a price **[**5]** at least 3% lower than JELD-WEN's purchase price, after JELD-WEN had the chance to match that lower price. Id. ¶ 3; Supply Agreement § 4. The prices that JELD-WEN would charge Steves for doorskins were variable and were calculated using a formula based on JELD-WEN's key input costs. Supply Agreement § 6(c). In addition, the contract obligated JELD-WEN to provide Steves with doorskin products of satisfactory quality. Id. § 8. Finally, if any disputes arose under the Agreement, the parties were required to participate in an alternative dispute resolution process before initiating litigation. That process began with an internal conference between the parties' senior executives, and then mediation if the conference was unsuccessful. Id. § 10.

3. JELD-WEN's Acquisition of CMI

On June 15, 2012, JELD-WEN and CMI announced that JELD-WEN was acquiring CMI and merging CMI's operations and assets into JELD-WEN ("the CMI Acquisition"), pending due diligence and the signing of a definitive agreement. Def. SUMF ¶ 14. Although Steves knew before it executed the Supply Agreement that JELD-WEN was planning to purchase CMI, Steves and JELD-WEN did not condition the effectiveness of that contract on the occurrence or **[**6]** non-occurrence of the merger. Steves was aware at that time that the Acquisition would reduce the U.S.-based doorskin manufacturers to only JELD-WEN and Masonite. Id. ¶¶ 16-18.

On July 17, 2012, the DOJ's Antitrust Division notified JELD-WEN that it had opened a preliminary investigation into the proposed CMI Acquisition. Steves indicated to the DOJ that it did not oppose the merger. The Antitrust Division closed its investigation on September 28, 2012 without having taken any action to prevent the CMI Acquisition. Id. ¶¶ 19-21. The Acquisition was then completed on October 24, 2012. Id. ¶ 15.

Following the merger, JELD-WEN closed the head office of CMI in Chicago, as well as two of CMI's four door manufacturing plants, and transitioned CMI's sales staff into JELD-WEN's organizational structure. JELD-WEN also shut down its own doorskin manufacturing plants in Iowa and North Carolina. In addition to those broader changes, JELD-WEN consolidated the JELD-WEN and CMI doorskin dies into one portfolio, retired more than one hundred obsolete dies, and reduced the number of doorskin designs from 31 to 19. Id. ¶¶ 33-41.

JELD-WEN also acquired CMI's Towanda plant. JELD-WEN subsequently constructed **[**7]** a $1.6 million paint plant inside that building, and JELD-WEN's MiraTec and Extira products are now manufactured at the Towanda plant. Id. ¶¶ 42-43. The effect of this consolidation of operations at the Towanda plant is disputed. JELD-WEN contends that it cannot physically separate the manufacturing lines for the MiraTec and Extira products from the doorskin manufacturing lines that are also at the Towanda plant, id. ¶ 44, but Steves points to evidence that JELD-WEN has not conducted an extensive analysis of the effects of a divestiture order with respect to the plant, Pl. SAMF ¶¶ 37, 39.

4. Post-Merger Interactions Between Steves and JELD-WEN

After the merger, JELD-WEN's key input costs declined, and have continued to **[*663]** do so in most years since then. The parties disagree about whether these declining costs are the result of JELD-WEN having acquired the low-cost Towanda plant, or whether the input costs for JELD-WEN's "legacy" plants would have declined notwithstanding the CMI Acquisition. Id. ¶ 5. Despite these declining costs, however, Steves claims that JELD-WEN has increased the prices it charges Steves to purchase doorskins under the Supply Agreement. Id. ¶ 7. Steves also highlights **[**8]** documents indicating that JELD-WEN might have imposed price increases for certain doorskins that JELD-WEN believed were outside the scope of the Supply Agreement.

Some JELD-WEN employees also acknowledged quality problems with the company's doorskins after the CMI Acquisition, and Steves complained to JELD-WEN about the declining quality of the doorskins. Id. ¶¶ 10-11. Moreover, Steves cites evidence that JELD-WEN made it more difficult after the merger for external customers, such as Steves, to return defective products. It is unclear, however, whether these problems were caused by the CMI Acquisition. Indeed, JELD-WEN began internal testing of thinner doorskins in early 2012, and informed Steves before the Acquisition was consummated that it had reduced the target thickness of its doorskins. Def. SUMF ¶¶ 10-11.

The acrimony between Steves and JELD-WEN peaked in July 2014 when, according to Steves, JELD-WEN demanded that Steves agree to a new pricing structure for the Supply Agreement, including a "capital charge"—an 11% increase in the price of doorskins. JELD-WEN asserts that it never made this demand, noting that Steves has never paid any capital charge under the Agreement. Id. ¶ **[**9]** 8. In any event, shortly thereafter, on September 10, 2014, JELD-WEN provided Steves with notice of termination of the Supply Agreement. Consequently, the Agreement will terminate on September 10, 2021. Id. ¶¶ 3-4.

The parties present conflicting evidence about JELD-WEN's interest in continuing to sell doorskins to Steves after that date. Steves claims that JELD-WEN has refused to provide Steves with any proposal for terms of a new long-term supply agreement, but JELD-WEN insists that it has told Steves it is interested in negotiating future doorskin sales after 2021. Notwithstanding this dispute, the parties agree that JELD-WEN has supplied doorskins to Steves since giving notice of termination. Id. ¶ 5.

5. Steves' Efforts to Obtain Alternative Doorskin Supply

After JELD-WEN notified Steves that it would terminate the Supply Agreement, Steves began to explore ways to produce or acquire interior molded doorskins without relying on JELD-WEN. Id. ¶ 32. One other supplier that Steves considered was Masonite. However, in July 2014, Masonite announced that it would no longer sell doorskins to third parties. Whether Masonite is, or ever was, amenable to selling doorskins to Steves at reasonable **[**10]** prices is highly disputed. Steves points to documents indicating that, after the merger, Masonite has not entered into long-term supply agreements with any third-party customers; will not negotiate the price of its doorskins; limits external sales of doorskins to customers or products with which Masonite does not compete; cannot sell Steves enough doorskins to meet Steves' needs; and has only offered Steves doorskins at prices much higher than prices Masonite offered in 2012, or prices JELD-WEN charged under the Supply Agreement in 2015. Pl. SAMF ¶¶ 16-22. JELD-WEN, however, claims that some evidence indicates that Masonite would sell **[*664]** doorskins to Steves at standard prices; that Masonite has sold doorskins to external customers from 2010 to 2016; and that Steves has not determined whether the 2015 prices that Masonite quoted to Steves would be unprofitable for Steves. Def. SUMF ¶¶ 27-31.

Steves has also pursued relationships with foreign doorskin suppliers like Teverpan, Kastamonu, and Yildiz, although it is unclear whether those suppliers can provide Steves with the quantity and range of doorskins that Steves requires. Negotiations with those suppliers are at various stages. Pl. SAMF **[**11]** ¶¶ 24-27. Some evidence indicates that Steves could obtain doorskins from Teverpan at prices more than 3% lower than those JELD-WEN charges under the Supply Agreement, but other evidence suggests that the quality of doorskins from foreign suppliers is inadequate to satisfy Steves.

Finally, Steves has considered becoming vertically integrated by building its own doorskin manufacturing plant. The parties disagree about how long this process might take. JELD-WEN highlights evidence indicating that the timeline is closer to two years, and Steves has presented evidence showing that three to four years is a more realistic estimate. In any event, Steves has not yet identified a partner to help it build any manufacturing facility. Id. ¶ 29.

6. Initiation of Alternative Dispute Resolution Process

In January 2015, consistent with the Supply Agreement, Steves requested an affidavit from JELD-WEN supporting its announced price increases. Id. ¶ 33. Then, in March 2015, Steves demanded an internal conference to resolve its dispute with JELD-WEN over doorskin pricing and quality issues. When no resolution was reached, the parties participated in mediation, and then entered into a standstill agreement **[**12]** regarding Steves' claims under the Supply Agreement and "the antitrust laws." Even after mediation, the parties continued settlement discussions, and agreed to four extensions of the standstill agreement between September 2015 and April 2016. Id. ¶¶ 34-36.[3] However, that agreement did not at any point explicitly prevent Steves from filing an antitrust claim. Def. SUMF ¶ 26.

B. Procedural Background

Following the failure of the parties' required dispute resolution process, Steves initiated this action on June 29, 2016, asserting antitrust and contract claims against JELD-WEN related to the CMI Acquisition and JELD-WEN's alleged breach of the Supply Agreement. Complaint (ECF No. 5) (Under Seal). The Complaint contained the following claims: COUNT ONE, a claim under the Clayton Act, *Section 7*, *15 U.S.C. § 18*; COUNT TWO, Breach of Contract; COUNT THREE, Breach of Warranty; COUNT FOUR, Declaratory Judgment, concerning certain rights under the Supply Agreement and the putative termination of that contract; COUNT FIVE, Specific Performance, regarding the Supply Agreement; **[*665]** and COUNT SIX, Trespass to Chattels.[4] Id. ¶¶ 175-206. Count One sought two forms of relief. It primarily requested injunctive relief pursuant **[**13]** to *Section 16* of the Clayton Act, *15 U.S.C. § 26*, to force JELD-WEN to divest assets sufficient to: (1) create a doorskin manufacturer with the same market significance that CMI had before the Acquisition; or (2) restore the interior molded doorskin market to its competitive state before the CMI Acquisition. Alternatively, Steves sought treble damages pursuant to *Section 4* of the Clayton Act, *15 U.S.C. § 15*, for injuries suffered by Steves as a result of the anticompetitive effects of the CMI Acquisition, including JELD-WEN's refusal to sell doorskins to Steves at prices consistent with the Supply Agreement and JELD-WEN's termination of the contract. Id. ¶¶ 177-78.

On August 5, 2016, JELD-WEN moved to dismiss Count One for failure to state a claim. ECF No. 20. The Court denied that motion on October 21, 2016, concluding that the Complaint plausibly alleged that the CMI Acquisition violated Section 7 by causing higher doorskin prices, lower doorskin quality, reduced doorskin output, and increased coordination between JELD-WEN and Masonite, and that these anticompetitive effects impacted both Steves and the broader doorskin market. ECF No. 64. At a pretrial conference on October 19, 2016, the matter was set for trial to begin on June 12, 2017, **[**14]** and a detailed schedule for the conduct of pretrial proceedings was thereafter implemented. ECF No. 65. Pursuant to that schedule, the parties engaged in extensive discovery.

On March 27, 2017, JELD-WEN sought leave to amend its Answer and to add counterclaims against Steves based on JELD-WEN's recent detection, from documents produced by Steves during discovery, of "Steves' theft of JELD-WEN trade secrets and confidential information." ECF No. 101 at 1-2. In relevant part, the counterclaims alleged that Steves and two former JELD-WEN employees, John Pierce and John Ambruz ("Ambruz"), had engaged in a conspiracy to steal trade secrets from JELD-WEN concerning how to build and operate a doorskin plant that could produce the type of doorskins that Steves was buying from JELD-WEN under the Supply Agreement. Although the Court granted JELD-WEN leave to assert the counterclaims, the Court also ordered that they be tried separately from the antitrust and contract claims. ECF Nos. 239-240. Trial for the counterclaims is set to begin on April 9,

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[3] JELD-WEN disputes these facts solely on the basis that they are inadmissible at trial because they reflect confidential settlement communications. See *Fed. R. Evid. 408(a)(2)*. But even if this evidence concerns a "disputed claim" within the scope of *Rule 408*, Steves may offer this evidence at trial for purposes other than "prov[ing] or disprov[ing] the validity or amount" of that claim, or impeaching one of JELD-WEN's witnesses. Id. *408(a)*. The Court already recognized as much in denying JELD-WEN's related motion in limine. ECF No. 779. Thus, it is not true that this evidence "cannot be presented in a form that would be admissible in evidence," *Fed. R. Civ. P. 56(c) (2)*, so the Court can consider those facts here.

[4] On October 2, 2017, the Court dismissed Count Six as moot after Steves notified the Court that it would not persist with that claim. ECF No. 409. All other claims remain here.

2018, and the parties are proceeding on a separate pretrial schedule for that case. ECF No. 374. Those counterclaims are not relevant to the Court's **[**15]** decision on summary judgment here.

After completing discovery, Steves and JELD-WEN both moved for summary judgment on September 22, 2017. Steves sought a ruling from the Court that it had established its prima facie case under Count One that the CMI Acquisition is likely to have anticompetitive effects in the interior molded doorskin market. ECF No. 381. The Court denied Steves' motion on November 21, 2017, based on the Court's finding at oral argument that there were genuine disputes of material fact as to whether Steves had satisfied the elements of its prima facie case. ECF No. 575.

JELD-WEN sought summary judgment on Count One, as to both the divestiture claim and the claim for future lost profits damages caused by the CMI Acquisition, **[*666]** and Count Four. On November 27, 2017, the Court denied JELD-WEN's motion to the extent it sought summary judgment on Count One's divestiture claim and Count Four, for reasons to be explained in a forthcoming memorandum opinion. ECF No. 578. However, the Court ordered the parties to submit supplemental briefs on the question of whether JELD-WEN was entitled to summary judgment on Steves' future lost profits damages claim under Count One. ECF Nos. 574, **[**16]** 578.

Shortly thereafter, on December 1, 2017, JELD-WEN notified the Court that Steves had recently produced to JELD-WEN more than two hundred pages of handwritten notes of Gregory Wysock ("Wysock"), a Steves employee whose testimony is relevant to certain aspects of Steves' claims. ECF No. 603. After allowing JELD-WEN to conduct a supplemental deposition of Wysock, the Court granted JELD-WEN's request to conduct limited additional discovery of Wysock, Sam Steves II, and Ambruz based on information obtained during that deposition. The Court also amended the briefing schedule for the supplemental briefs as to Steves' future lost profits damages claim under Section 7, to allow the parties to include evidence from Wysock's deposition and recently-produced notes. ECF No. 732. As a result, JELD-WEN's motion for summary judgment did not become ripe for decision on all issues contained therein until January 9, 2018.

The Court then heard further argument on the future lost profits damages claim at the Final Pretrial Conference on January 22 and 26, 2018. It did not, however, decide whether summary judgment should be granted on that claim before trial commenced. Instead, the Court allowed Steves to present **[**17]** evidence at trial to attempt to establish a factual predicate upon which the jury could determine the fact and amount of the future lost profits damages with reasonable certainty. On February 6, 2018, after Steves had introduced that evidence but before its damages expert presented his future lost profits damages estimates, JELD-WEN moved for a judgment under *Federal Rule of Civil Procedure 50(a)* on the future lost profits claim—effectively converting its motion for summary judgment on that issue to a motion for judgment as a matter of law. The Court denied that motion, but its reasons for doing so are irrelevant here. In any event, having entertained Steves' trial evidence about future lost profits damages, the Court will not consider in this opinion whether summary judgment on that claim would have been appropriate.

DISCUSSION

I. Legal Standard

Under *Fed. R. Civ. P. 56*, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. *Rule 56* requires the entry of summary judgment "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential **[**18]** to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. For a court to enter summary judgment, "there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Id. at 323* (internal quotations omitted).

When reviewing a motion for summary judgment, a court must interpret the facts and any inferences drawn therefrom in the light most favorable to the nonmoving party. **[*667]** See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Lee v. Town of Seaboard, 863 F.3d 323, 327 (4th Cir. 2017)*. To successfully oppose a motion for summary judgment, the nonmoving party must demonstrate to the court that there are specific facts that would create a genuine issue for trial. See *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. However, "'[c]onclusory or speculative allegations do not suffice' to oppose a properly supported motion for summary judgment, 'nor does a mere scintilla of evidence.'" *Matherly v. Andrews, 859 F.3d 264, 280 (4th Cir. 2017)* (quoting *Thompson v. Potomac Elec. Power Co., 312 F. 3d 645, 649 (4th Cir. 2002))*. "Where . . . the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." *United States v. Lee, 943 F.2d 366, 368 (4th Cir. 1991)*.

II. Count One

JELD-WEN seeks summary judgment on Count One on three grounds. First, it contends that Steves has not suffered any antitrust injury from **[**19]** the CMI Acquisition that is separate from the contract injury caused by JELD-WEN's alleged breach of the Supply Agreement. Moreover, JELD-WEN says, even if its breach of contract could have caused cognizable antitrust harm, Steves has not shown that any anticompetitive effects of the Acquisition impacted Steves by forcing it to pay higher prices or receive lower quality doorskins. Second, JELD-WEN asserts that Steves' claim for future lost profits damages is not ripe because those damages are based on speculation about future antitrust injury. Alternatively, those future damages depend on the occurrence of certain future events and are thus entirely speculative. Third, Steves' divestiture claim is barred by the doctrine of laches and because Steves cannot show a significant threat of antitrust injury.

A. Antitrust Injury and Impact

"[A]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" can assert a private damages claim under *Section 4* of the Clayton Act. *15 U.S.C. § 15(a)*. To prevail on that claim, the plaintiff must demonstrate three elements: (1) violation of the ***antitrust law***, (2) direct injury to the plaintiff from such violation, and (3) damages sustained **[**20]** by the plaintiff. *Windham v. Am. Brands, Inc., 565 F. 2d 59, 65 (4th Cir. 1977)*. The "gravamen" of a *Section 4* claim is not the antitrust violation itself, but rather the subsequent "individual injury." Id. Furthermore, the injury proven must be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. In other words, "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Id.*

1. Existence of Antitrust Injury

JELD-WEN's first argument is that Steves' injuries do not satisfy the Brunswick definition of antitrust injury because those harms arose under the Supply Agreement, not because of any reduced competition from the CMI Acquisition. JELD-WEN compares this case to others in which courts rejected *Section 4* claims based on injuries that were linked to defendant's breach of an existing contract between the parties. See, e.g., *Orion Pictures Distribution Corp. v. Syufy Enters., 829 F.2d 946, 949 (9th Cir. 1987)* (movie theater owner's repudiation of guarantees owed to film distributor by contract, after owner acquired competitor, was not antitrust **[*668]** injury because "[owner]'s duties to [distributor] were fixed by its contractual commitment to pay guarantees," so "competition was no longer a factor in determining **[**21]** [owner]'s obligation to [distributor]"). Noting that the parties entered into the Supply Agreement five months before the CMI Acquisition closed, JELD-WEN argues that, as in those cases, Steves' injuries (JELD-WEN's price increases under the Supply Agreement and its refusal to reimburse Steves for claims of defective doorskins) stem from the contract rather than as a consequence of the lessening of competition as a result of the CMI Acquisition.

This argument mischaracterizes Steves' *Section 4* claim and ignores key differences between this case and those cited by JELD-WEN. As JELD-WEN acknowledges, contractual harm can still constitute antitrust injury even if the parties' actions are bound by a contract. The relevant question is not whether the contract itself predated the anticompetitive effects at issue, but instead whether "the only competition alleged to be injured predated" the anticompetitive activity. *Z Channel Ltd. P'ship v. Home Box Office, Inc., 931 F.2d 1338, 1342 (9th Cir. 1991)* (emphasis in original). In Orion Pictures, there was no antitrust injury because "the injury to competition in that case (allegedly acquiring monopoly power) had ended before the . . . injury (loss of revenue from the broken contract) occurred." *Id. at 1345 n.10*. Here, by contrast, competition was not **[**22]** eliminated by the time that the doorskin pricing and quality injuries occurred. To the contrary, Steves asserts that the Supply Agreement contained provisions intended to preserve competition: for instance, the requirement that Steves purchase only 80% of its doorskins from JELD-WEN, or the allowance of purchases from other suppliers if JELD-WEN could not match their low prices. Consequently, breaches of the Supply Agreement can also be considered antitrust injuries to the extent that they resulted from the reduced competition under that contract that was facilitated by the CMI Acquisition.

Steves has produced sufficient evidence to create a genuine dispute of fact on this issue. It has shown at least that the Acquisition may have allowed JELD-WEN to raise prices under the Supply Agreement or provide lower quality doorskins because the merger undercut Steves' ability to seek favorable prices or higher-quality doorskins from other suppliers. JELD-WEN claims that there is no evidence to support these theories, but the post-merger availability of alternate supply—from either Teverpan or Masonite, both of which JELD-WEN focuses on—is a subject of intense dispute. In addition, Steves has **[**23]** presented evidence indicating that the merger permitted JELD-WEN to raise prices on Madison and Monroe doorskins, to coordinate with Masonite to limit doorskin supply to the market, and to terminate the Supply Agreement in September 2014 because of JELD-WEN's enhanced market power. A jury could conclude that these steps were "anticompetitive acts made possible by the [CMI Acquisition]." See *Brunswick, 429 U.S. at 489*. As a result, even if is not extensive, this evidence raises a genuine dispute about whether Steves has suffered an antitrust injury.

2. Impact from Anticompetitive Effects

JELD-WEN further contends that, even if JELD-WEN's breaches of the Supply Agreement could establish antitrust injury, Steves has not shown that those injuries are causally linked to the CMI Acquisition. In the antitrust context, the injury element "is often referred to as impact or fact of damage. It is the causal link between the antitrust violation and **[*669]** the damages sought by plaintiffs[,] [and] thus requires both injury-in-fact and a showing that the injury is the result of the antitrust activity." *In re New Motor Vehicles Canadian Exp. Antitrust Litig., 522 F.3d 6, 19 (1st Cir. 2008)* (internal citations and quotations omitted). To show "fact of damage" or impact, "[i]t is enough that the illegality is shown to **[**24]** be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)* ("Zenith Radio I"). Thus, for example, proof of impact in a *Section 4* case can be shown by proof of what price the plaintiff would have paid had the merger never occurred. See *Robinson v. Tex. Auto. Dealers Ass'n, 387 F.3d 416, 422 (5th Cir. 2004)* ("[I]mpact may be shown simply by proof of purchase at a price higher than the competitive rate." (internal quotations omitted)); *In re Graphics Processing Units Antitrust Litig., 253 F.R.D. 478, 507 (N.D. Cal. 2008)* ("GPU") ("[I]n order to satisfy *Section 4* of the Clayton Act, plaintiffs must demonstrate that they paid a higher price for their graphics card or computer than they otherwise would have paid in the absence of a conspiracy.").[5] JELD-WEN argues that Steves has not met its burden because it has not shown what doorskin prices or quality would have been without the CMI Acquisition.

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[5] As Steves notes, both Robinson and GPU discussed impact at the class certification stage, so evidence of a higher price that every class member would have had to pay would be the only way to satisfy the commonality and predominance requirements under *Rule 23*. See *Robinson, 387 F.3d at 422*; *GPU, 253 F.R.D. at 507*. Therefore, these cases do not necessarily indicate that an individual plaintiff must demonstrate a precise competitive benchmark to show impact, as causation could be shown through other individualized proof of harm.

Here too, however, JELD-WEN fails to account for certain evidence that supports Steves' theory of antitrust injury. Steves asserts that its liability expert, Carl Shapiro ("Shapiro"), did not conduct an empirical analysis of the prices that JELD-WEN would have charged absent the Acquisition because he did not need to: the Supply Agreement **[**25]** set the competitive benchmark of prevailing doorskin prices before the merger. JELD-WEN certainly disagrees that the Agreement is an accurate benchmark, but the weight of Shapiro's analysis is a question for the jury, not the Court. Moreover, evidence indicates that JELD-WEN increased doorskin prices from pre-merger levels even as key input costs at JELD-WEN's legacy plants declined.[6] Similarly, there is genuine evidence that the decrease in JELD-WEN's doorskin quality was exacerbated by the CMI Acquisition—even if JELD-WEN had begun to thin its doorskins before the merger—and that customers other than Steves suffered from quality issues. This circumstantial evidence is sufficient to create a dispute about whether the Acquisition caused anticompetitive effects that impacted Steves. See *Zenith Radio I, 395 U.S. at 114* (circumstantial evidence was sufficient to "sustain the inference" of impact). Consequently, summary judgment on Count One cannot be granted on this basis.

B. Future Lost Profits Damages Claim

JELD-WEN makes two separate arguments as to Steves' *Section 4* claim for **[*670]** future lost profits damages.[7] First, it asserts that the claim is not ripe, as Steves' future damages relate to an antitrust injury that Steves may never **[**26]** suffer. Second, JELD-WEN contends that even if those damages are based on an existing antitrust injury, Steves cannot recover them because they are unreasonably speculative. As noted, the Court reserved its decision on the second argument until Steves had presented evidence at trial, so the validity of Steves' future lost profits damages claim is not discussed in this opinion. However, because the ripeness contention calls into question the Court's jurisdiction over that claim at trial, the Court will address it here.

Article III of the Constitution limits federal courts to deciding actual "cases" and "controversies." *Doe v. Obama, 631 F.3d 157, 160 (4th Cir. 2011)*. JELD-WEN's motion pertains to two intertwined aspects of the justiciability requirement, standing and ripeness.[8] See *Miller v. Brown, 462 F.3d 312, 319 (4th Cir. 2006)* ("Analyzing ripeness is similar to determining whether a party has standing."). Although a plaintiff must satisfy three requirements to establish standing to seek particular relief, the only one relevant here is that the plaintiff must have suffered an injury in fact—"an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)* (internal citations and quotations omitted). However, "the standing doctrine **[**27]** only answers the question of who may sue, not the question of when a party may sue, which properly is addressed by the doctrine of ripeness." *Hispanic Leadership Fund, Inc. v. FEC, 897 F. Supp. 2d 407, 424 (E.D. Va. 2012)* (emphasis added) (citing *Miller, 462 F.3d at 319*).

The ripeness doctrine "prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" *Miller, 462 F.3d at 318-19* (quoting *Rescue Army v. Mun. Ct. of L.A., 331 U.S. 549, 584, 67 S. Ct. 1409, 91 L. Ed. 1666 (1947))*. Under that inquiry, a court must "balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Id. at 319* (internal quotations omitted). "A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." Id. In other words, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scoggins v. Lee's Crossing Homeowners Ass'n, 718 F.3d 262, 270 (4th Cir. 2013)* (alteration in original) (quoting *Texas v. United*

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[6] This evidence can therefore show antitrust impact even without considering the cost reductions allowed by JELD-WEN's acquisition of CMI's Towanda plant because JELD-WEN still would have owned the legacy plants in the absence of the merger.

[7] Steves seeks these damages only under Count One because it concedes that JELD-WEN's September 2014 notice of termination of the Supply Agreement did not breach the contract.

[8] JELD-WEN does not assert that Steves lacks standing to seek future lost profits damages. However, the elements of Article III standing provide helpful context for JELD-WEN's ripeness argument; indeed, JELD-WEN referenced those elements when introducing the ripeness challenge in its supplemental brief.

States, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998)). "The hardship prong," on the other hand, "is measured by the immediacy of the threat and the burden imposed on the [plaintiff]," including "the cost to the parties of delaying judicial review." *Miller, 462 F.3d at 319* (internal quotations omitted). The plaintiff bears the burden of proving ripeness. Id.

The parties' arguments focus almost entirely on **[**28]** the first element—the fitness of **[*671]** Steves' future damages claim for judicial review. The disagreement on this issue concerns whether to characterize the injury causing the future damages as a present injury or a future injury. Steves contends that those damages stem from JELD-WEN's 2014 termination of the Supply Agreement. That injury, says Steves, is a consequence of the CMI Acquisition, which enhanced JELD-WEN's power in the interior molded doorskin market and allowed it to make long-term decisions that would limit the ability of competing door manufacturers to obtain a stable doorskin supply. As a result, whatever damages Steves incurs when the Supply Agreement terminates in September 2021 will relate to a previous anticompetitive act that impacted Steves long before 2021.

JELD-WEN, on the other hand, concedes that claims for some injuries from the CMI Acquisition may be ripe—such as, presumably, increased door prices. Nonetheless, it insists that Steves will only incur lost profits damages if it suffers another antitrust injury in 2021, when JELD-WEN stops providing Steves with doorskins and Steves cannot obtain an alternate doorskin supply. JELD-WEN asserts that even if that harm **[**29]** could be linked to the CMI Acquisition, its occurrence necessarily requires speculation about whether certain intervening events will come to pass. Specifically, the parties must fail to enter into another long-term doorskin supply agreement, JELD-WEN must refuse to supply doorskins to Steves on commercially viable terms, Steves must be unable to find any other source of doorskin supply, and Steves must go out of business or suffer a substantial loss.

This framing of the injury relies on the Supreme Court's discussion of antitrust injury and damages in *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* ("Zenith Radio II"). In that case, the court noted that, for purposes of the statute of limitations for *Section 4* damages claims, the general rule is that "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Id. at 338*; see also *15 U.S.C. § 15*. In the specific context of "a continuing conspiracy to violate the antitrust laws . . . this [rule] has usually been understood to mean" that each injury suffered gives rise to a separate cause of action that is subject to its own limitations period. *Zenith Radio II, 401 U.S. at 338*; see also *Klehr v. A.O. Smith Corp., 521 U.S. 179, 189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)* ("***Antitrust law*** provides that, in the case of a continuing violation, say, a price-fixing conspiracy **[**30]** that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again . . ." (internal quotations omitted)).

In those circumstances, damages must be connected to the discrete injuries that caused them:

> [E]ach separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial. Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date.

Zenith Radio II, 401 U.S. at 338-39 (emphasis added) (internal citations omitted). By extension, then, "refus[ing] **[*672]** to award future profits as too speculative is equivalent to holding that no cause of action has yet accrued for any but those damages already suffered. In these instances, the cause of action **[**31]** for future damages, if they ever occur, will accrue only on the date they are suffered." *Id. at 339*. Applying this rationale here, the "particular invasion" that Steves' future lost profits damages relate to is, in JELD-WEN's view, the eventual expiration of the Supply Agreement in 2021. To the extent that such damages are linked to an antitrust injury that has already occurred, they are too speculative because so many intervening acts could change Steves' doorskin supply by that future date. Consequently, if Steves can obtain those damages at all, it can only do so when it actually loses JELD-WEN's doorskin supply and goes out of business in 2021.[9]

JELD-WEN's reading of *Zenith Radio II* misunderstands the scope of that case. Other courts have held that the "continuing violations doctrine" described in Zenith Radio II and Klehr can only be applied in "conspiracy and monopolization cases not involving mergers or acquisitions." *Z Techs. Corp. v. Lubrizol Corp., 753 F.3d 594, 599 (6th Cir. 2014)* (citing, inter alia, *Klehr, 521 U.S. at 189* (emphasizing that the case involved "a price fixing conspiracy"); *Zenith Radio II, 401 U.S. at 338-39* (discussion confined to "the context of a continuing conspiracy to violate the antitrust laws")); see also *Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1052 (8th Cir. 2000)* ("Continuing violations have not been found outside the RICO or Sherman Act **[**32]** conspiracy context . . . because acts that simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations." (internal quotations omitted)).

This action is predicated on a "single act," the CMI Acquisition, that—based on the disputed evidence—caused injury to Steves by allowing JELD-WEN to raise doorskin prices, decrease the quality of its doorskins with no risk of losing customers, and give notice of termination for the Supply Agreement without concern that Steves could obtain a steady doorskin supply elsewhere.[10] Those injuries appear to be the very "unabated inertial consequences (of a single act)" that do not implicate the continuing violations doctrine underlying JELD-WEN's argument. *Concord Boat, 207 F.3d at 1052*. JELD-WEN does not explain why that doctrine applies in this situation, such that Steves' future damages are necessarily separate from the injury suffered when JELD-WEN gave notice of termination for the Supply Agreement in 2014.[11] Therefore, JELD-WEN's **[*673]** claim that the Court must assess ripeness injury-by-injury is irrelevant here.[12] Steves has shown that whether it suffered antitrust injury when JELD-WEN **[**33]** provided that notice is a triable factual issue, and it is clear that a claim based on an existing injury is ripe. See *Miller, 462 F.3d at 319*.

Moreover, the only other relevant case cited by JELD-WEN, *SureShot Golf Ventures, Inc. v. Topgolf Int'l, Inc., No. CV H-17-127, 2017 U.S. Dist. LEXIS 135796, 2017 WL 3658948 (S.D. Tex. Aug. 24, 2017)*, is inapposite. There, plaintiff alleged that it suffered an antitrust injury following defendant's acquisition of a third party because defendant refused to give plaintiff assurances that it would exercise its option to renew the parties' contract for plaintiff's license to proprietary technology developed by the third party when that contract expired in five years. *2017 U.S. Dist. LEXIS 135796, [WL] at *3-4*. The court dismissed plaintiff's *Section 4* damages claim as unripe because defendant's "perceived threats of monopolistic behavior [we]re speculative and d[id] not confer standing." *2017 U.S. Dist. LEXIS 135796, [WL] at *4*. But, in reaching that conclusion, the court specifically noted that plaintiff had not pled that defendant had "denied it access to the [proprietary technology]." Id. In addition, "none of the

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[9] To preserve the viability of this potential claim, JELD-WEN reiterates its earlier representation to the Court that—should Steves actually go out of business in 2021—JELD-WEN will not seek dismissal of a *Section 4* damages claim on the basis that the claim accrued earlier and is barred by the statute of limitations. Nor, says JELD-WEN, will it assert any time-related defense.

[10] JELD-WEN's counsel claimed at the Final Pretrial Conference that its notice of termination could not be considered an antitrust injury because the parties had so stipulated. However, JELD-WEN provided no evidence of that stipulation, and Steves' counsel indicated that the stipulation likely reflected that JELD-WEN's notice could not give rise to contractual liability—which Steves has agreed is not the case.

[11] It may well be true that Steves could suffer some other future antitrust injury from the CMI Acquisition that the parties have not identified, and that the act causing that injury could be of the type that implicates the continuing violations doctrine. However, the Court cannot resolve that hypothetical issue here.

[12] The only cases that JELD-WEN cites as purportedly establishing this principle involved challenges to rules or standards that were either completed and being enforced, and thus ripe for review, or were in "early stages of development," and thereby unripe. See *Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 64-65 (2d Cir. 1988)*; *Plant Oil Powered Diesel Fuel Sys., Inc. v. ExxonMobil Corp., 801 F. Supp. 2d 1163, 1183-84 (D.N.M. 2011)*. The harms that Steves suffered because of the CMI Acquisition are not as easily separable in a temporal or causal sense. As a result, it is uncertain whether the rationale of those cases would hold for Steves' injuries.

antitrust actions which [plaintiff] allege[d] ha[d] actually occurred (i.e. controlling prices, foreclosing competitors from access to technology, sending less qualified personnel for installation and **[**34]** service requests, licensing the technology only to companies outside of golf entertainment centers)." Id.

In contrast, this case has advanced well past the pleading stage, and the record demonstrates that JELD-WEN's conduct after the CMI Acquisition amounts to considerably more than just "threats of monopolistic behavior." Indeed, Steves has presented evidence creating a genuine dispute of fact as to whether it suffered antitrust injury when JELD-WEN gave notice of termination of the Supply Agreement. Accordingly, Steves might have suffered the present antitrust injury that the *SureShot Golf* plaintiff could not even plead. Steves has therefore met its burden in proving that its future damages claim is ripe for presentation to the jury.

C. Divestiture Claim

Section 16 of the Clayton Act allows private parties to obtain injunctive relief "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. "[I]n order to seek injunctive relief under *[Section] 16*, a private plaintiff must allege threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (quoting *Brunswick, 429 U.S. at 489*). The injunctive relief authorized by this statute **[**35]** may include an order requiring the acquiring company to divest the assets of the acquired firm, even when the plaintiff is a private party. See *California v. Am. Stores Co., 495 U.S. 271, 295-96, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)*. However, "equitable defenses such as laches . . . may protect consummated transactions from belated attacks by private parties." **[*674]** *Id. at 296*. JELD-WEN argues that Steves' divestiture claim under Count One must be dismissed because laches applies here, and because Steves has failed to show any threatened antitrust injury from the CMI Acquisition.

1. Laches

"Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" *White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990)* (quoting *Costello v. United States, 365 U.S. 265, 282, 81 S. Ct. 534, 5 L. Ed. 2d 551 (1961))*. The defense "generally applies to preclude relief for a plaintiff who has unreasonably 'slept' on his rights," barring "claims where a defendant is prejudiced by a plaintiff's unreasonable delay in bringing suit after the plaintiff knew of the defendant's violation." *PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 121 (4th Cir. 2011)*; see also *Kloth v. Microsoft Corp., 444 F.3d 312, 325 (4th Cir. 2006)* (noting that laches involves an "equitable balancing of a plaintiff's delay with prejudice to a defendant" (internal quotations omitted)). JELD-WEN contends that the undisputed evidence establishes that Steves unreasonably **[**36]** delayed suit after it became aware that the CMI Acquisition might violate *Section 7*, and that the delay harmed JELD-WEN because it completely integrated CMI's operations into its own business following the merger.

As the Court has previously recognized, "the equitable defense of laches has been used to bar antitrust claims in other circuits." *Steves & Sons, Inc. v. JELD-WEN, Inc., 252 F. Supp. 3d 537, 545 & n.7 (E.D. Va. 2017)* (citing *Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1235 (8th Cir. 2010)*; *Midwestern Mach. Co., Inc. v. Nw. Airlines, Inc., 392 F.3d 265, 277 (8th Cir. 2004)*; *Taleff v. Sw. Airlines Co., 828 F. Supp. 2d 1118, 1122-25 (N.D. Cal. 2011)*; *Garabet v. Autonomous Techs. Corp., 116 F. Supp. 2d 1159, 1172-73 (C.D. Cal. 2000))*. JELD-WEN relies on several of those cases here. But the fact that divestiture is an extreme remedy, as JELD-WEN points out, is not pertinent here. Rather, the relevant question is whether JELD-WEN has shown that there is no genuine dispute about the reasonableness of Steves' delay or the prejudice to JELD-WEN.

The evidence in the record shows that JELD-WEN has not met that burden. The application of laches is generally a fact-intensive analysis. See *White, 909 F.2d at 102* ("[W]hether laches bars an action depends upon the particular circumstances of the case."). And here, unresolved factual questions remain as to both prongs of the laches inquiry.

First, with respect to Steves' delay, it is unclear when Steves believed that the CMI Acquisition would have anticompetitive effects, given the possibility that doorskin prices and quality might have been protected **[**37]** by the Supply Agreement.[13] See *PBM Prods., 639 F.3d at 121*. Moreover, evidence suggests that Steves acted promptly once it learned of JELD-WEN's anticompetitive conduct, initiating the requisite dispute resolution procedure under that Agreement. Second, even assuming JELD-WEN's burden is **[*675]** lower in light of the length of Steves' delay, see *White, 909 F.2d at 102*, the degree of prejudice is uncertain, as the parties dispute the costliness of integrating JELD-WEN's and CMI's operations.[14] Given that these issues are unresolved, summary judgment on the basis of laches is inappropriate.

2. Threat of Antitrust Injury

Of course, to prevail on its divestiture claim, Steves still must be able to demonstrate "a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Zenith Radio I, 395 U.S. at 130*; see also *Garabet, 116 F. Supp. 2d at 1170* ("*Section 16* requires a threatened loss or injury cognizable in equity . . . proximately resulting from an antitrust violation." (internal quotations omitted)). JELD-WEN asserts that Steves cannot do so because its speculative claims of future injury are belied by evidence that Steves can obtain alternative doorskin supply once its contractual relationship with JELD-WEN ends.

This argument fails **[**38]** for the same reasons as JELD-WEN's assertions regarding Steves' damages claim. JELD-WEN's contention that potential future injury could be prevented by Steves' efforts to find another doorskin supplier or manufacture doorskins itself is mistaken, because the evidence of Steves' ability to do either is disputed. Moreover, there is a genuine disagreement—supported by evidence on both sides—about whether the CMI Acquisition has already caused anticompetitive effects that are likely to continue or recur. See supra Section II.A. Just as with Steves' *Section 4* damages claim, these factual disputes preclude summary judgment on Steves' *Section 16* divestiture claim.

III. Count Four

JELD-WEN also moves for summary judgment on Count Four, arguing that it does not present a case or controversy required by Article III because the termination date of the Supply Agreement is not in dispute. A declaratory judgment under the Declaratory Judgment Act, *28 U.S.C. § 2201*, is only proper if the facts show "'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Ross v. Reed, 719 F.2d 689, 694 (4th Cir. 1983)* (quoting *Golden v. Zwickler, 394 U.S. 103, 108, 89 S. Ct. 956, 22 L. Ed. 2d 113 (1969))*. JELD-WEN contends that there is no controversy about the termination **[**39]** date of the Agreement because, notwithstanding its previous position, it now agrees that the termination date is September 10, 2021, and that it will supply Steves with doorskins until that date.

However, disputes about the credibility of JELD-WEN's current stance prevent summary judgment on Count Four. As recently as March 2015, JELD-WEN asserted that the proper termination date under the Supply Agreement was ambiguous, and reserved the right to argue that the Agreement terminated on the original December 31, 2019 date, rather than seven years after JELD-WEN gave notice of termination—that is, September 10, 2021. ECF No. 452-64

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[13] Steves argues that its filing suit within the Clayton Act's four-year statute of limitations for damages actions is relevant to this factor. It cites a recent Supreme Court case, *Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962, 188 L. Ed. 2d 979 (2014)*, as holding that laches cannot be applied when a plaintiff has filed suit within the limitations period imposed by a statute. *Id. at 1977*. Even if that holding applies to Clayton Act claims, the four-year statute of limitations applies to *Section 4* damages claims, not *Section 16* divestiture claims. See *15 U.S.C. § 15(b)*.

[14] Although JELD-WEN may be right that the consummation of the merger is sufficient prejudice to implicate laches, the cost of any divestiture order is still relevant to the Court's balancing of the equities. See *Ginsburg, 623 F.3d at 1235-36*.

(Under Seal) ¶ 13. JELD-WEN now claims that its position has changed and it believes that the later date is correct. But where a defendant seeks to moot a claim through its **[*676]** voluntary conduct, it bears the "'heavy burden'" of "'ma[king] it absolutely clear [to the court] that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (quoting *United States v. Concentrated Phosphate Export Ass'n, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968))*. JELD-WEN has done nothing to convince the Court that its apparent change of heart is genuine beyond listing the termination date as an uncontroverted fact in its motion. This minimal step is insufficient **[**40]** to satisfy JELD-WEN's substantial burden. Accordingly, JELD-WEN's motion will be denied to the extent that it seeks summary judgment on Count Four.

CONCLUSION

For the foregoing reasons, DEFENDANT JELD-WEN, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I AND IV OF PLAINTIFF STEVES AND SONS, INC.'S COMPLAINT (ECF No. 375) was denied, except as to Steves' future lost profits damages claim under Count One, the validity of which the Court decided at trial in the context of JELD-WEN's motion for judgment as a matter of law.

It is so ORDERED.

/s/ Robert E. Payne

Robert E. Payne

Senior United States District Judge

Richmond, Virginia

Date: February 9, 2018

St. Lawrence Communs. LLC v. Motorola Mobility LLC

United States District Court for the Eastern District of Texas, Marshall Division

February 15, 2018, Decided; February 15, 2018, Filed

CASE NO. 2:15-CV-351-JRG

Reporter

2018 U.S. Dist. LEXIS 25229 *; 2018 WL 915125

SAINT LAWRENCE COMMUNICATIONS LLC, Plaintiff, v. MOTOROLA MOBILITY LLC, Defendants.

Prior History: *St. Lawrence Communs. LLC v. ZTE Corp., 2016 U.S. Dist. LEXIS 178965 (E.D. Tex., July 15, 2016)*

Core Terms

patent, license, patent misuse, licensees, pool, infringement, misuse, anticompetitive, equitable defense, rule of reason, damages, effects, obligations, briefing, Parties, royalty, negotiations, tying arrangement, injunctions, worldwide, Wideband, district court, convincing, principles, broadened, package, terms, procompetitive, equitable, inventors

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN1[] **Conveyances, Licenses**

An obligation to license a patent on fair, reasonable, and non-discriminatory terms is commonly abbreviated as a "FRAND" obligation.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Evidence > Burdens of Proof > Clear & Convincing Proof

HN2[] **Defenses, Misuse**

Patent misuse is an equitable defense to a claim for patent infringement. A holding of misuse renders the patent unenforceable until the misuse is purged; it does not, of itself, invalidate the patent. The key inquiry under the patent misuse doctrine is whether, by imposing the condition in question, the patentee has impermissibly broadened the physical or temporal scope of the patent grant and has done so in a manner that has anticompetitive effects. While patent misuse must be established by the defendant, courts are divided on whether a defendant must establish patent misuse by a preponderance or by clear and convincing evidence. Patent misuse arises from the equitable doctrine of unclean hands. As such, patent misuse should be established by clear and convincing evidence, the same standard that is necessary to establish unclean hands.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN3[] **Defenses, Misuse**

The Federal Circuit has cautioned against a broad application of the patent misuse doctrine. The defense of patent misuse is not available to a presumptive infringer simply because a patentee engages in some kind of wrongful commercial conduct, even conduct that may have anticompetitive effects. Although the law should not condone wrongful commercial activity, the body of misuse law and precedent need not be enlarged into an open-ended pitfall for patent-supported commerce.

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN4[] **Defenses, Misuse**

The only time Congress has spoken on the judicially-created doctrine of patent misuse, it circumscribed the doctrine. *35 U.S.C.S. § 271(d)*.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN5[] **Conveyances, Licenses**

The standard for patent misuse articulated in Princo focuses on whether the patent holder's conduct broadens the physical or temporal scope of the patent grant and in a manner that has anticompetitive effects. While a breach of an obligation to license a patent on fair, reasonable, and non-discriminatory terms (FRAND) may be relevant to this inquiry, a breach of FRAND is not determinative of patent misuse.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN6[] **Inequitable Conduct, Anticompetitive Conduct**

The analysis of tying arrangements in the context of patent misuse is closely related to the analysis of tying arrangements in ***antitrust law***. However, Congress has declared certain practices not to be patent misuse even though those practices might otherwise be subject to scrutiny under ***antitrust law*** principles. *35 U.S.C.S. § 271(d)*. These practices include conditioning the license of any rights to the patent on the acquisition of a license to rights in another patent, unless the patent owner has market power for the patent on which the license or sale is conditioned. *35 U.S.C.S. § 271(d)(5)*. Therefore, patent misuse with respect to tying is a two-step inquiry. First, the defendant must demonstrate that the patent holder has market power in a clearly defined market. Second, the defendant must establish that the conduct at issue is either per se misuse, or misuse under the rule of reason.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN7[] **Inequitable Conduct, Anticompetitive Conduct**

With respect to the second step of the two-step inquiry required to show patent misuse through a tying arrangement, the Federal Circuit has expressed skepticism that a patent-to-patent tying arrangement should be treated as per se misuse. The legislative history of *35 U.S.C.S. § 271(d)* indicates congressional skepticism about treating tying arrangements in the context of patent licensing as per se patent misuse, rather than analyzing such arrangements under the rule of reason. While grouping patents together in package licenses has anticompetitive potential, it also has potential to create substantial procompetitive efficiencies such as clearing possible blocking patents, integrating complementary technology, and avoiding litigation.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN8[] **Inequitable Conduct, Anticompetitive Conduct**

To apply the rule of reason analysis in showing patent misuse through a tying arrangement, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN9[] **Inequitable Conduct, Anticompetitive Conduct**

A party with both an essential patent and a nonessential patent is allowed to package the two together and only offer the package for a single price.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Patent Law > ... > Defenses > Inequitable Conduct > Fact & Law Issues

HN10[] **Conveyances, Licenses**

Whether a patent holder violated its obligation to license a patent on fair, reasonable, and non-discriminatory terms (FRAND) is a question of fact.

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Judges: RODNEY GILSTRAP, UNITED STATES DISTRICT JUDGE.

Opinion by: RODNEY GILSTRAP

Opinion

REDATED FINDINGS OF FACT AND CONCLUSIONS [*2] OF LAW

This is a patent infringement case brought by Plaintiff Saint Lawrence Communications LLC ("SLC") against Defendant Motorola Mobility LLC ("Motorola"). The Court seated a jury on March 3, 2017, and a trial before that jury commenced on March 20, 2017. The jury then returned a unanimous verdict finding willful infringement and no invalidity. (Dkt. No. 34.)

After the close of evidence, and while the jury was deliberating, the Court provided the Parties an opportunity to present evidence and argument in support of and in opposition to, as appropriate, any equitable defenses urged by Motorola. At that time, the Parties agreed not to present any evidence or argument orally to the Court, electing instead to submit the issues to the Court on the papers. (Dkt. No. 58, 3/24 Trial Tr. at 3:22-4:14.) Thereafter, the Court issued an Order setting forth the post-trial briefing schedule on all outstanding issues, including Motorola's equitable defenses. (Dkt. No. 72.) The Court also granted the Parties' request for additional briefing on said equitable defenses. (Dkt. No. 85.) Accordingly, Motorola's equitable defenses of patent misuse and limitation of damages based on FRAND principles are **[*3]** now fully before the Court. Pursuant to *Rule 52 of the Federal Rules of Civil Procedure*, the Court issues these Findings of Fact ("FF") and Conclusions of Law ("CL").

I. Findings of Fact

A. The Parties

[FF1] Motorola is a corporation organized under the laws of the State of Delaware and headquartered in Chicago, Illinois. (Dkt. No. 1 at ¶ 2; Case No. 2:15-cv-349, Dkt. No. 46 at ¶ 2.) It is in the business of developing, among other things, cell phones and related technology. (Dkt. No. 46, 3/20 AM Trial Tr. at 52:12-15.)

[FF2] SLC is a Texas limited liability company with its principal place of business in Plano, Texas. (Dkt. No. 1 at ¶ 1.) SLC is in the business of licensing and monetizing its patent portfolio. (Dkt. No. 46, 3/20 AM Trial Tr. at 40:13-16.)

B. Procedural History

[FF3] On March 10, 2015, SLC filed its original complaint in this case. (Dkt. No. 1.) In that complaint, SLC alleged that certain Motorola products infringed U.S. Patent Nos. 6,795,805 ("the '805 Patent"), 6,807,524 ("the '524 Patent"), 7,151,802 ("the '802 Patent"), 7,260,521 ("the '521 Patent"), and 7,191,123 ("the '123 Patent") (collectively "Patents-in-Suit" or "Asserted Patents"). (*Id.*)

[FF4] On June 25, 2015, this case was consolidated with a related case involving Saint Lawrence and ZTE Corporation et al. (Dkt. No. 7.)

[FF5] On September 1, 2015, Motorola filed its original answer in this case. (Case No. 2:15-cv-349, **[*4]** Dkt. No. 46.) In its answer, Motorola denied SLC's allegations of infringement of the Patents-in-Suit and raised a defense of patent misuse. (*Id.*) Motorola additionally pled that "SLC's claim for damages may also be limited by FRAND principles." (*Id.* at ¶ 37.)

[FF6] During discovery, Motorola identified documents and other materials supporting its patent misuse defense and its limitations on damages defense, including SLC's inconsistent royalty rates for its licensees to the Patents-in-Suit. (Dkt. No. 74-2 (Ex. A to SLC's Opp'n) at 8-12.)

[FF7] SLC did not move to dismiss Motorola's patent misuse defense, nor did SLC move for summary judgment or bring any other pretrial motion on this defense.

[FF8] In the Parties' Joint Pretrial Order, Motorola contended that any claim by SLC for damages was limited by SLC's obligation to license the patents pursuant to FRAND principles. (Case No. 2:15-cv-349, Dkt. No. 413 at 5, 7.) Motorola also contended that SLC's claims were barred in whole or in part under the doctrine of patent misuse, and it identified patent misuse as a defense that it intended to assert at trial. (*Id.* at 7, 12, 13.)

[FF9] During the pretrial conference, SLC conceded that Motorola had raised, as an affirmative defense, an **[*5]** "equitable patent misuse defense" and stated that "both parties agree the question of patent misuse is an equitable defense" that the Court should decide. (Case No. 2:15-cv-349, Dkt. No. 449, 2/21 Pretrial Conference Tr. at 54:9-55:15.) The Parties then stipulated to a procedure for how they would present the evidence relating to Motorola's misuse defense. (*Id.* at 64:20-65:11.)

[FF10] A jury trial on the non-equitable issues in this case was held from March 20-March 24, 2017. (Dkt. No. 45-58.) On March 24, 2017, the jury returned a verdict finding willful infringement of claim 2 of the '805 Patent, claim 4 of the '524 Patent, claim 1 of the '802 Patent, claim 1 of the '521 Patent, and claim 102 of the '123 Patent. (Dkt. No. 34 at 2, 5.) The jury also did not find any claim invalid, and it further awarded damages in the amount of $9,177,483. (*Id.* at 3-4.)

[FF11] At the conclusion of trial, SLC and Motorola agreed that a separate bench trial was not needed to address the remaining equitable issues. Instead, the Parties agreed that, to the extent Motorola wished to raise one or more of its equitable defenses, it would do so in post-trial briefing. (Dkt. No. 58, 3/24 Trial Tr. at 3:22-4:14.)

[FF12] The Court issued an order on April 14, 2017 setting a **[*6]** timeline for post-trial briefing, including Motorola's briefing in support of its equitable defenses. (Dkt. No. 72.)

[FF13] Pursuant to that order, on April 27, 2017, Motorola filed its opening brief on its equitable defenses of patent misuse and the FRAND limitations on damages. (Dkt. No. 73.) SLC filed its response on May 11, 2017. (Dkt. No. 74.) Motorola then filed an unopposed motion for leave to file limited additional briefing on the equitable issues (Dkt. No. 83), which the Court granted (Dkt. No. 85). Motorola filed its limited additional briefing in the form of a reply on May 19, 2017. (Dkt. No. 84.) SLC filed a sur-reply on May 30, 2017, thereby concluding the parties' briefing on the equitable defenses of patent misuse and the limitation of damages due to FRAND principles. (Dkt. No. 91.)

C. The Patents-in-Suit

[FF14] The '805 Patent is entitled "Periodicity Enhancement in Decoding Wideband Signals." (PX-1.) The application for the '805 Patent was filed on October 27, 1999, and issued on September 21, 2004. (*Id.*) The inventors listed on the face of the '805 Patent are Bruno Bessette, Redwan Salami, and Roch Lefebvre. (*Id.*) At trial, SLC accused Motorola of infringing claim 2 of the '805 Patent. (Dkt. No. 34.)

[FF15] The **[*7]** '524 Patent is entitled "Perceptual Weighting Device and Method for Efficient Coding of Wideband Signals." (PX-2.) The application for the '524 Patent was filed on October 27, 1999, and issued on October 19, 2004. (*Id.*) The inventors listed on the face of the '524 Patent are Bruno Bessette, Redwan Salami, and Roch Lefebvre. (*Id.*) At trial, SLC accused Motorola of infringing claim 4 of the '524 Patent. (Dkt. No. 34.)

[FF16] The '802 Patent is entitled "High Frequency Content Recovering Method and Device for Over-Sampled Synthesized Wideband Signal." (PX-3.) The application for the '802 Patent was filed on October 27, 1999, and issued on December 19, 2006. (*Id.*) The inventors listed on the face of the '802 Patent are Bruno Bessette, Redwan Salami, and Roch Lefebvre. (*Id.*) At trial, SLC accused Motorola of infringing claim 1 of the '802 Patent. (Dkt. No. 34.)

[FF17] The '521 Patent is entitled "Method and Device for Adaptive Bandwidth Pitch Search in Coding Wideband Signals." (PX-4.) The application for the '521 Patent was filed on October 27, 1999, and issued on August 21, 2007. (*Id.*) The inventors listed on the face of the '521 Patent are Bruno Bessette, Redwan Salami, and Roch Lefebvre. (*Id.*) At trial, SLC accused Motorola of infringing claim 1 of the '521 Patent. (Dkt. No. 34.)

[FF18] The '123 Patent is entitled "Gain-Smoothing **[*8]** in Wideband Speech and Audio Signal Decoder." (PX-5.) The application for the '123 Patent was filed on November 17, 2000, and issued on March 13, 2007. (*Id.*) The inventors listed on the face of the '123 Patent are Bruno Bessette, Redwan Salami, and Roch Lefebvre. (*Id.*) At trial, SLC accused Motorola of infringing claim 102 of the '123 Patent. (Dkt. No. 34.)

D. <u>The Patents-In-Suit as Standard Essential Patents</u>

[FF19] The original owner of the Patents-in-Suit was a company called VoiceAge. (PX-1-5.)

[FF20] In 2000, VoiceAge, through a partnership with Nokia, entered a competition supervised by the European Telecommunications Standard Institute ("ETSI") and the Third Generation Partnership Project ("3GPP") for the development of a speech audio coding standard. (Dkt. No. 46, 3/20 AM Trial Tr. at 109:20-112:9.) Nine competitors entered the preselection phase of the competition. (*Id.* at 113:10-17.) Together, VoiceAge and Nokia submitted a codec, referred to either as the "Nokia candidate" or the "Nokia/VoiceAge candidate." (*Id.* at 111:14-18.) The Nokia/VoiceAge candidate codec allowed for wideband speech coding capabilities and transmission components over cellular networks and channels. (*Id.* at 110:25-111:5.)

[FF21] Five candidates **[*9]** made it to the selection phase of the competition: Nokia/VoiceAge, Motorola, Texas Instrument, Ericsson, and a consortium of four other companies. (*Id.* at 113:18-114:6.)

[FF22] The Nokia/VoiceAge codec won, and it was then incorporated into the Adaptive Multi-Rate Wideband ("AMR-WB") standard by the standard setting organizations ETSI and 3GPP. (Dkt. No. 46, 3/20 AM Tr. at 115:10-22, 117:2-16; *see also* Dkt. No. 49, 3/21 AM Tr. at 13:24-14:1.)

[FF23] As part of this process, VoiceAge agreed, under ETSI's Intellectual Rights Policy, "to grant irrevocable licenses on fair, reasonable and non-discriminatory terms and conditions." (PX-133; DX-731; DX-1112.)

[FF24] ***HN1***[] An obligation to license on fair, reasonable and non-discriminatory terms is commonly abbreviated as a "FRAND" obligation. (Dkt. No. 51, 3/21 PM Sealed Trial Tr. at 19:7-15.)

[FF25] It is undisputed that SLC assumed VoiceAge's FRAND obligations when it acquired the Patents-in-Suit. (Dkt. No. 49, 3/21 AM Trial Tr. at 78:8-11; Dkt. No. 59, 3/21 PM Trial Tr. at 57:2-10.)

[FF26] As a result of the standardization process, AMR-WB became mandatory for a smartphone to make Voice over LTE ("VoLTE") calls over an LTE network, and certain carriers **[*10]** made the standard mandatory for other types of networks, too. (Dkt. No. 52, 3/22/2017 PM Trial Tr. at 29:11-30:2 (explaining AMR-WB is necessary for VoLTE calls on Verizon and AT&T as well as international calls on Sprint); Dkt. No. 56, 3/23 Sealed Trial Tr. at 13:22-25 ([TEXT REDACTED BY THE COURT]).)

E. <u>VoiceAge's Licensing of the Patents-In-Suit and the W-CDMA Patent Pool</u>

[FF27] The W-CDMA patent pool included patents related to W-CDMA or 3G cellular communication standards, including AMR-WB. (Dkt. No. 56, 3/23 Sealed Tr. at 3:16-23; Dkt. No. 49, 3/21 AM Tr. at 31:15-21.) Licensees received a license to all the patents in the pool. (*Id.*) Sipro Lab Telecom, a company with the same corporate principals as VoiceAge, managed the WCDMA patent pool. (Dkt. No. 49, 3/21 AM Tr. at 31:22-32:5.)

[FF28] In 2012, [TEXT REDACTED BY THE COURT]. (Dkt. No. 56, 3/23 Sealed Tr. at 3:16-23.)

[FF29] Licensees to the W-CDMA patent pool at that time paid a royalty of approximately $1 per phone. (Dkt. No. 49, 3/21 AM Trial Tr. at 74:18-20.) VoiceAge received only a portion of this royalty, calculated through the pool's patent weighting system. (*Id.* at 74:21-23.) VoiceAge believed the rate the W-CDMA patent **[*11]** pool was charging in 2012 was a FRAND rate for the pool. (*Id.* at 38:21-23.)

[FF30] In 2013, VoiceAge withdrew the Asserted Patents from the W-CDMA patent pool and sold them to SLC's parent company. (*Id.* at 39:18-25; 59:6-8.)

F. <u>SLC's Licensing of the Patents-in-Suit</u>

[FF31] Motorola was offered an opportunity to take a license to the W-CDMA Patent Pool. (Dkt. No. 49, 3/21 AM Trial Tr. at 31:22-24; 41:13-20.)

[FF32] Motorola did not take a license to the W-CDMA patent pool while VoiceAge was a member of the pool, stating that it favored having bilateral negotiations with each one of the patent owners. (*Id.* at 41:21-42:11.)

[FF33] To date, Motorola still has not licensed the Patents-in-Suit. (*Id.* at 28:17-20.)

[FF34] Other mobile device manufacturers, including [TEXT REDACTED BY THE COURT] have taken licenses to the Asserted Patents. (Dkt. No. 51, 3/21 PM Sealed Trial Tr. at 21:2-15.) [TEXT REDACTED BY THE COURT]. (*Id.*)

1. [TEXT REDACTED BY THE COURT]

[FF35] [TEXT REDACTED BY THE COURT] This estimate is sometimes called [TEXT REDACTED BY THE COURT]

[FF36] The [TEXT REDACTED BY THE COURT]

[FF37] There are various factors that might explain why [TEXT REDACTED BY THE COURT] At this point, SLC would **[*12]** have had

[FF38] Even so, at the time [TEXT REDACTED BY THE COURT]

[FF39] There is also no evidence that [TEXT REDACTED BY THE COURT]

[FF40] By the time SLC [TEXT REDACTED BY THE COURT] Thus, it would have been reasonable for SLC to [TEXT REDACTED BY THE COURT].

2. [TEXT REDACTED BY THE COURT]

[FF41] [TEXT REDACTED BY THE COURT]

[FF42] During its negotiations with [TEXT REDACTED BY THE COURT]

[FF43] [TEXT REDACTED BY THE COURT]

[FF44] The ultimate agreement between the SLC [TEXT REDACTED BY THE COURT]

[FF45] [TEXT REDACTED BY THE COURT]

3. Disclosure of W-CDMA Patent Pool

[FF46] When negotiating with potential smartphone manufacturer licensees, SLC listed all current licensees in its presentation materials. (DX-556; Dkt. No. 53, 3/22 PM Trial Tr. at 131:25-133:10.)

[FF47] However, these presentation materials did not distinguish between licensees who had agreed to rates as part of the W-CDMA patent pool and licensees who had separately licensed the Asserted Patents. (*Id.*)

[FF48] Additionally, SLC did not disclose information about the W-CDMA patent pool, including how much VoiceAge had received under the W-CDMA patent pool, to potential licensees either because SLC's representative in these negotiations, **[*13]** Ms. Wagner, was not aware of such information, including how much VoiceAge had received through the W-CDMA patent pool, or because Ms. Wagner thought the W-CDMA rates generally were irrelevant to negotiations relating to only the Asserted Patents. (Dkt. No. 50, 3/21/2017 PM Trial Tr. at 56:16-57:1.)

4. The Threat of Injunction

[FF49] [TEXT REDACTED BY THE COURT]

[FF50] However, Motorola did not establish that prospective licensees who were under the threat of an injunction actually paid substantially more than companies who were not. (Dkt. No. 74 at 11-12, 17-18.)

[FF51] Motorola also did not establish that the threat of an injunction actually caused licensees to be coerced into taking a license. (*Id.* at 17-18.) hi fact. Motorola was enjoined by a court in Germany based on patents related to the Asserted Patents, yet it persisted in not taking a license to the Asserted Patents. (*Id.*)

5. Representations to Potential Licensees

[FF52] [TEXT REDACTED BY THE COURT]

[FF53] Motorola did not demonstrate that this confirmation, horn SLC to Huawei, was a deliberate misrepresentation. (*See, e.g.*, Dkt. No. 55, 3/23/2017 AM Trial Tr. at 40:22-41:2 (testimony by Defendant's expert agreeing that the royalty rate communicated **[*14]** by SLC about the Samsung License could be discerned by "look[ing] at the agreement").)

6. Effects of SLC's Licensing Conduct

[FF54] Motorola did not establish that SLC's licensing conduct, including its practice of seeking worldwide licenses, actually harmed competition.

II. CONCLUSIONS OF LAW

A. Legal Standard

[CL1]*HN2*[] Patent misuse is an equitable defense to a claim for patent infringement. *U.S. Philips Corp. v. Int'l Trade Comm'n, 424 F.3d 1179, 1184 (Fed. Cir. 2005)*; *C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1372 (Fed. Cir. 1998)* ("[A] holding of misuse renders the patent unenforceable until the misuse is purged; it does not, of itself, invalidate the patent.").

[CL2] "[T]he key inquiry under the patent misuse doctrine is whether, by imposing the condition in question, the patentee has impermissibly broadened the physical or temporal scope of the patent grant and has done so in a manner that has anticompetitive effects." *Princo Corp. v. Int'l Trade Com'n, 616 F.3d 1318, 1328 (Fed. Cir. 2010)* (en banc).

[CL3] While patent misuse must be established by the defendant, *id. at 1338*, courts are divided on whether a defendant must establish patent misuse by a preponderance or by clear and convincing evidence. *Compare* *Universal Elecs., Inc. v. Universal Remote Control, Inc., No. SACV1200329AGJPRX, 2014 U.S. Dist. LEXIS 200348, 2014 WL 12587050, at *8 (C.D. Cal. Dec. 16, 2014)* (requiring "clear and convincing evidence that Plaintiff is barred from enforcing the '426 Patent against **[*15]** Defendant for patent misuse"), *with* *Ocean Tomo, LLC v. Barney, 133 F. Supp. 3d 1107, 1118 (N.D. Ill. 2015)* (applying preponderance of the evidence standard).

[CL4] Having reviewed the relevant authorities, the Court is persuaded that applying a clear and convincing standard is the better view. "[P]atent misuse arises from the equitable doctrine of unclean hands." *C.R. Bard, 157 F.3d at 1372 (Fed. Cir. 1998)*. As such, patent misuse should be established by clear and convincing evidence, the same standard that is necessary to establish unclean hands. *See* *In re Omeprazole Patent Litig., 483 F.3d 1364, 1374 (Fed. Cir. 2007)* (applying clear and convincing standard with respect to unclean hands); *see also* *Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1287-90 (Fed. Cir. 2011)* (concluding that inequitable conduct should be established by clear and convincing evidence because it "emerged from unclean hands"). Regardless, Motorola's patent misuse defense fails under either standard of proof.

B. Analysis

1. Patent Misuse in SLC's Alleged Breach of FRAND

[CL5] Motorola's first argument is that SLC engaged in patent misuse by violating or exceeding its FRAND obligations as to the Asserted Patents. (Dkt. No. 73 at 2.) In advancing this argument, Motorola primarily relies on three district court opinions: *Multimedia Patent Trust v. Apple Inc., No. 10-CV-2618-H, 2012 U.S. Dist. LEXIS 167479, 2012 WL 6863471, at *23 (S.D. Cal. Nov. 9, 2012)*; *Apple Inc. v. Motorola Mobility, Inc., No. 11-cv-178-bbc, 2011 U.S. Dist. LEXIS 72745, 2011 WL 7324582, at *14 (W.D. Wis. June 7, 2011)*; and *UTStarcom, Inc. v. Starent Networks, Corp., No. 07 CV 2582, 2008 U.S. Dist. LEXIS 98498, 2008 WL 5142194, at *2 (N.D. Ill. Dec. 5, 2008)*.

[CL6] In *Multimedia*, the **[*16]** district court observed, without extensive analysis, that "several courts have held that a patentee's violation of its [F]RAND obligations may *in certain circumstances* constitute patent misuse." *2012 U.S. Dist. LEXIS 167479, 2012 WL 6863471, at *23* (emphasis added). In support of this proposition, the court cited *UTStarcom* and *Apple. Id*.

[CL7] In *UTStarcom*, the district court found, without citation, that an allegation that the plaintiff "fail[ed] to offer a license to the[] patents to [defendant] on reasonable, nondiscriminatory terms" after deliberately withholding information about the patents from the relevant standards organization was sufficient to state a counterclaim for patent misuse. UTStarcom, 2008 U.S. Dist. LEXIS 98498, 2008 WL 5142194, at *2.

[CL8] In *Apple*, the district court similarly addressed the issue on a motion to dismiss, concluding that Apple's allegations sufficiently "state[d] a claim for patent misuse" based on the allegation that Motorola had refused to license its patents on FRAND terms and also "ma[d]e *false commitments* that led to the establishment of worldwide standards incorporating its own patents and eliminating competing alternative techniques . . . ." Apple, 2011 U.S. Dist. LEXIS 72745, 2011 WL 7324582, at *13-14 (emphasis added).

[CL9] Motorola also relies on Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007), as did the district court in *Apple*. (Dkt. No. 73 at 2-3) In ***[*17]*** *Broadcom*, the Third Circuit held that "a patent holder's *intentionally false promise* to license essential proprietary technology on [fair, reasonable and non-discriminatory terms], . . . [followed by] the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct." 501 F.3d at 314 (emphasis added).

[CL10] None of these cases stand for the proposition that a breach of FRAND obligations constitutes patent misuse and Motorola has identified no case holding as such. *See* In re Innovatio IP Ventures, LLC Patent Litig., 921 F. Supp. 2d 903, 916 (N.D. Ill. 2013) ("The parties have not cited, however, and the court has not found, any cases suggesting that the existence of a [F]RAND commitment provides a *complete* defense against an infringement lawsuit. Instead, most cases merely limit a patent holder's remedy to collecting a [F]RAND royalty . . . ."); *see also* Michael G. Cowie & Joseph P. Lavelle, *Patents Covering Industry Standards: The Risks to Enforceability Due to Conduct Before Standard-Setting Organizations*, 30 AIPLA Q.J. 95, 115-116, 148 (2002) (questioning whether a breach of FRAND obligations broadens the scope of a patent grant and noting that there are "no published misuse decisions" reaching this result).

[CL11] Indeed, ***HN3***[] the Federal Circuit has cautioned against a broad application of the patent **[*18]** misuse doctrine. *See, e.g.,* Princo, 616 F.3d at 1329 ("Recognizing the narrow scope of [patent misuse], we have emphasized that the defense of patent misuse is not available to a presumptive infringer simply because a patentee engages in some kind of wrongful commercial conduct, even conduct that may have anticompetitive effects."); C.R. Bard, 157 F.3d at 1373 ("Although the law should not condone wrongful commercial activity, the body of misuse law and precedent need not be enlarged into an open-ended pitfall for patent-supported commerce.").

[CL12] Additionally, ***HN4***[] the only time Congress has spoken on the judicially created doctrine of misuse, it circumscribed the doctrine. Id. at 1329-1330 (discussing legislative history of 35 U.S.C. § 271(d)); Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 42, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006) (same).

[CL13] Accordingly, this Court applies ***HN5***[] the standard articulated in Princo[1] focusing on whether SLC's conduct "broaden[s] the physical or temporal scope of the patent grant and . . . in a manner that has anticompetitive effects." 616 F.3d at 1328. While a breach of FRAND obligations may be relevant to this inquiry, a breach of FRAND is not determinative of patent misuse. *Cf.* id. at 1329 ("While proof of an antitrust violation shows that the patentee has committed wrongful conduct having anticompetitive effects, that does not establish misuse of the **[*19]** patent in suit unless the conduct in question . . . ha[s] been held to be outside the otherwise broad scope of the patent grant.").

[CL14] Applying Princo, the Court is persuaded that SLC's conduct, in light of the facts of this case, does not constitute patent misuse.

[CL15] First, the Court is not persuaded that SLC's efforts to seek injunctions in Germany "impermissibly broadened the physical or temporal scope of the patent grant." Princo, 616 F.3d at 1328; Finjan, Inc. v. ESET, LLC, No. 17-CV-00183-CAB-BGS, 2017 U.S. Dist. LEXIS 116359, 2017 WL 3149642, at *4 (S.D. Cal. July 24, 2017)

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[1] Motorola did not argue that SLC's alleged breach of its FRAND obligations constituted patent misuse *per se. Compare* (Dkt. No. 73 at 6), *with* (Dkt. No. 73 at 16). Therefore, the Court does not apply the *per se* standard here.

(Bencivengo, J.) ("Whatever legal action Finjan is taking in Germany, none of ESET's allegations support a conclusion Finjan is 'physically' or 'temporally' broadening the scope of the patents in suit."); *see also* [FF50-FF51, FF55].

[CL16] Motorola cites no evidence or authority that supports a contrary result. At most, Motorola argues that seeking injunctions in Germany constituted a breach of SLC's FRAND obligations because SLC was required to license its patents on FRAND terms. (Dkt. No. 73 at 13 ("Such actions violated SLC's contractual obligations to Motorola and other potential licensees, third party beneficiaries to SLC's obligation to license these SEPs under FRAND terms and conditions.").) **[*20]** However, as explained above, this supposed breach of FRAND, *but see* *Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1331 (Fed. Cir. 2014)* ("To the extent that the district court applied a *per se* rule that injunctions are unavailable for SEPs, it erred."), *overruled on other grounds by* *Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2015)*, is not determinate of patent misuse and here it is not indicative of SLC broadening the scope of its patent rights. [FF49-FF51].

[CL17] Additionally, because Motorola did not establish that SLC's efforts to seek injunctions in Germany harmed competition, [FF54], Motorola necessarily fails to show that SLC's conduct constitutes misuse. *Princo, 616 F.3d at 1334* ("Princo urges us to overrule the line of authority in this court holding that patent misuse requires a showing that the patentee's conduct had anticompetitive effects. We decline to do so."); *see also* *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* (noting that ***antitrust law*** protects "competition[,] not competitors").

[CL18] Similarly, the Court is not persuaded that SLC engaged in patent misuse by negotiating different rates and terms for different licensees when presented with different circumstances. [FF35-FF45, FF54]. To hold as such would tell patent owners that their first license for a FRAND encumbered patent must also be their last, tying the hands of patent owners and future **[*21]** licensees who may not be similarly situated. *But see* *Brulotte, 379 U.S. at 33* (distinguishing between a patent owner who "exact[s] royalties as high as he can negotiate" from one who "project[s] those royalty payments beyond the life of the patent" and thus engages in patent misuse).

[CL19] Finally, Motorola argues that SLC made various misrepresentations and omissions in its negotiations with potential licensees that amount to patent misuse, such as its failure to alert potential licensees to the effective royalty rate for the Asserted Patents as part of the W-CDMA pool. (Dkt. No. 73 at 13-14.) While the Court does not agree that SLC deliberately misrepresented or omitted material information to potential licensees, [FF46-FF48, FF52-54], even if it had, this sort of conduct, while potentially wrongful, would not rise to the level of patent misuse because Motorola did not demonstrate that this conduct harmed competition. [FF54].

[CL20] Even taken together, Motorola's evidence is insufficient to demonstrate that SLC's conduct constituted misuse. Motorola's defense here must therefore fail.[2]

2. Patent Misuse by Tying

[CL21] Motorola's second argument for patent misuse is that SLC used its alleged market power to **[*22]** engage in impermissible tying by requiring some licensees to obtain a single license for SLC's U.S. and German patents. (Dkt. No. 73 at 17.)

[CL22] ***HN6***[] "[T]he analysis of tying arrangements in the context of patent misuse is closely related to the analysis of tying arrangements in ***antitrust law***." *U.S. Philips, 424 F.3d at 1185*.

[2] To the extent Motorola's arguments as to the alleged FRAND violations also depend on a showing of market power in a clearly defined market, the Court declines to address this question because Motorola failed to establish that SLC's conduct harmed competition. [FF54].

[CL23] However, "Congress has declared certain practices not to be patent misuse even though those practices might otherwise be subject to scrutiny under ***antitrust law*** principles." *Id. at 1185-86* (discussing *35 U.S.C. § 271(d)*). These practices include "condition[ing] the license of any rights to the patent . . . on the acquisition of a license to rights in another patent," *unless* the patent owner "has market power for the patent . . . on which the license or sale is conditioned." *35 U.S.C. § 271(d)(5)*.

[CL24] Therefore, patent misuse with respect to tying is a two-step inquiry. First, the defendant must demonstrate that the patent holder has market power in a clearly defined market. *U.S. Philips, 424 F.3d at 1185*. Second, the defendant must establish that the conduct at issue is either *per se* misuse, or misuse under the rule of reason. *Id.* ("[D]epending on the circumstances, tying arrangements can be viewed as *per se* patent misuse or can be analyzed under the rule of reason."). **[*23]**

[CL25] ***HN7***[] With respect to the second step of this inquiry, the Federal Circuit has expressed skepticism that a patent-to-patent tying arrangement should be treated as *per se* misuse. *See* *U.S. Philips, 424 F.3d at 1186 n.1* ("[W]e note that the legislative history [of *35 U.S.C. § 271(d)*]. . . indicates congressional skepticism about treating tying arrangements in the context of patent licensing as *per se* patent misuse, rather than analyzing such arrangements under the rule of reason."); *see also* *Illinois Tool Works, 547 U.S. at 36* ("The assumption that tying arrangements serve hardly any purpose beyond the suppression of competition, rejected in [*United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*], has not been endorsed in any opinion since." (internal quotation marks and brackets omitted)).

[CL26] In particular, the Federal Circuit has explained that "while grouping patents together in package licenses has anticompetitive potential, it also has potential to create substantial procompetitive efficiencies such as clearing possible blocking patents, integrating complementary technology, and avoiding litigation." *Princo, 616 F.3d at 1325* (internal quotation marks omitted); *see also* *U.S. Philips, 424 F.3d at 1192-1193* ("In short, package licensing has the procompetitive effect of reducing the degree of uncertainty associated with investment decisions."); *Koninklijke Philips N.V. v. Cinram Int'l, Inc., No. CIV.A. 08-0515, 2013 U.S. Dist. LEXIS 76163, 2013 WL 2301955, at *5 (S.D.N.Y. May 24, 2013)* ("Defendants cannot entirely discount **[*24]** the benefit of the pooled arrangement in savings on 'transaction costs associated with making individual patent-by-patent royalty determinations and monitoring possible infringement of patents that particular licensees chose not to license.'" (quoting *U.S. Philips, 424 F.3d at 1198*)); *Texas Instruments, Inc. v. Hyundai Elecs. Indus., Co., 49 F. Supp. 2d 893, 901 (E.D. Tex. 1999)* ("The portfolio license is widely used . . . because it is almost impossible on a patent-by-patent, country-by-country, product-by-product basis to determine whether someone is using a company's patents in a given country . . . ."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21-23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* (discussing the "unique" benefits of package copyright licenses).

[CL27] Without declaring that patent-to-patent tying is never *per se* misuse, the Court concludes that SLC's conduct here is not *per se* patent misuse. Indeed, SLC's pursuit of worldwide licenses achieves many of the procompetitive efficiencies that the Federal Circuit identified in *U.S. Philips* and emphasized again in *Princo*.[3] For example, seeking a worldwide license helps both parties avoid the extraordinary transaction costs of litigating or licensing a global patent portfolio on a country-by-country or patent-by-patent basis. *See* *Texas Instruments, 49 F. Supp. 2d at 901* (noting the difficult of country-by-country policing of patent rights).

[CL28] Accordingly, **[*25]** ***HN8***[] the Court applies the rule of reason analysis, *i.e.* "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and effect." *U.S. Philips, 424 F.3d at 1197* (citing *Virginia Panel Corp. v. MAC Panel Co., 133 F.3d 860, 869 (Fed. Cir. 1997)*).

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[3] Although *U.S. Philips* and *Princo* did not involve identical facts, the act of seeking worldwide licenses is sufficiently analogous to seeking a package license like the one at issue in *U.S. Philips*. *424 F.3d at 1182* ("Potential licensees who sought to license patents to the technology for manufacturing CD-Rs or CD-RWs were not allowed to license those patents individually . . . .").

[CL29] With reference to the rule of reason, Motorola identifies three anticompetitive effects that supposedly flow from SLC's practice of seeking worldwide licenses for the Asserted Patents: "extracting more money from licensees than they would have paid for just licenses to the U.S. or German patents," "foreclosing development of workarounds of SLC's foreign patents," "harm[ing] other licensees' ability to compete with [TEXT REDACTED BY THE COURT]" (Dkt. No. 73 at 17-18.)

[CL30] However, Motorola did not carry its burden to show that SLC's conduct violated the rule of reason.

[CL31] First, as the Court found *supra* [FF54], Motorola did not demonstrate that SLC's practice of seeking a worldwide license for its patent portfolio had anticompetitive effects.

[CL32] Moreover, Motorola did not show that the potentially **[*26]** anticompetitive harms it identified outweighed the potential benefits of SLC's licensing practices. *U.S. Philips, 424 F.3d at 1198* (noting that the proper analysis with respect to the rule of reason and package licensing balances the anticompetitive and procompetitive aspects of the conduct at issue); *see also* *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1392 (5th Cir. 1983)* ("Proof that the [plaintiff's] activities, on balance, adversely affected competition in the appropriate product and geographic markets is essential to recovery under the rule of reason."); *Columbia Broad. Sys., Inc. v. Am. Soc. of Composers, Authors & Publishers, 620 F.2d 930, 934 (2d Cir. 1980)* ("A rule of reason analysis requires a determination of whether an agreement is on balance an unreasonable restraint of trade, that is, whether its anti-competitive effects outweigh its pro-competitive effects."). In fact, Motorola engaged in no discussion of this issue in its single page treatment of the rule of reason. (Dkt. No. 73 at 17-18.)

[CL33] Ultimately, the Court is not persuaded that SLC's decision to license its portfolio covering the AMR-WB standard on a worldwide basis constituted patent misuse *per se* or under the rule of reason.[4] *See* *U.S. Philips, 424 F.3d at 1192 n.5* (***HN9***[] criticizing "[t]he implication . . . that a party with both an essential patent and a nonessential patent is not allowed to package the two together and only offer the package **[*27]** for a single price").

C. Limitation of Damages Based on FRAND Principles

[CL34] Motorola also argues that "[i]n violation of its FRAND obligations, SLC's damages request at trial disregarded the rates paid in the W-CDMA patent pool, and instead relied on SLC's 'tinkered' with [TEXT REDACTED BY THE COURT] license and SLC's injunction-induced licenses." (Dkt. No. 73 at 19.) In doing so, Motorola essentially seeks to attack the jury's award of damages through the present briefing, which the Court limited to equitable issues.

[CL35] ***HN10***[] Whether SLC violated its FRAND obligations is a question of fact. *Apple Inc. v. Samsung Elecs. Co., 920 F. Supp. 2d 1116, 1141 (N.D. Cal. 2013)*.

[CL36] During the trial, the jury heard extensive evidence from both parties relating to whether the license SLC sought (and ultimately received) from Motorola in this particular case complied with FRAND.

[CL37] Rather than permit Motorola to attack the jury's award of damages through the guise of an equitable defense, the Court will address the jury's verdict through the traditional channels: motions pursuant to *Rules 50(b)* and *59 of the Federal Rules of Civil Procedure*.

III. CONCLUSION

[4] Because SLC's conduct is not patent misuse *per se* or under the rule of reason, the Court finds it unnecessary to address whether Motorola appropriately defined a relevant market or established that SLC has market power in such a market.

For the reasons set forth above, the Court concludes that: (1) Motorola has failed to establish that SLC committed patent misuse, either through its licensing **[*28]** practices or through its tying arrangements; and (2) Motorola can urge any arguments that the jury's verdict is not supported by the evidence through motions pursuant to *Rules 50(b)* and *59 of the Federal Rules of Civil Procedure.*

So ORDERED and SIGNED this 15th day of February, 2018.

/s/ Rodney Gilstrap

RODNEY GILSTRAP

UNITED STATES DISTRICT JUDGE

Fenner v. GM, LLC (In re Duramax Diesel Litig.)

United States District Court for the Eastern District of Michigan, Northern Division

February 20, 2018, Decided; February 20, 2018, Filed

Case No. 17-cv-11661

Reporter

298 F. Supp. 3d 1037 *; 2018 U.S. Dist. LEXIS 26543 **; 85 ERC (BNA) 2661; 2018 WL 949856

IN RE DURAMAX DIESEL LITIGATION, ANDREI FENNER, et al, Plaintiffs, v. GENERAL MOTORS, LLC, ROBERT BOSCH GMBH, and ROBERT BOSCH LLC, Defendants.

Subsequent History: Dismissed by, in part, Dismissed without prejudice by, in part *Fenner v. Gen. Motors, LLC (In re Duramax Diesel Litig.), 2018 U.S. Dist. LEXIS 128777, 2018 WL 3647047 (E.D. Mich., Aug. 1, 2018)*

Related proceeding at *Bulaon v. GM LLC, 2019 U.S. Dist. LEXIS 187603, 2019 WL 5565961 (C.D. Cal., Oct. 29, 2019)*

Related proceeding at *Pantel v. GM LLC, 2019 U.S. Dist. LEXIS 187604, 2019 WL 5565962 (C.D. Cal., Oct. 29, 2019)*

Later proceeding at *In re Duramax Diesel Litig., 2020 U.S. Dist. LEXIS 265971 (E.D. Mich., Jan. 15, 2020)*

Later proceeding at *In re Duramax Diesel Litig. Fenner v. GM, LLC, 2020 U.S. Dist. LEXIS 265970, 2020 WL 13490741 (E.D. Mich., Jan. 15, 2020)*

Motion granted by, in part, Motion denied by, in part, Request denied by, Without prejudice, Request granted *Fenner v. GM, LLC (In re Duramax Diesel Litig.), 2020 U.S. Dist. LEXIS 56880 (E.D. Mich., Apr. 1, 2020)*

Objection overruled by, Decision reached on appeal by *In re Duramax Diesel Litig., 2020 U.S. Dist. LEXIS 60728, 2020 WL 1685462 (E.D. Mich., Apr. 7, 2020)*

Motion granted by *In re Duramax Diesel Litig., 2020 U.S. Dist. LEXIS 171059 (E.D. Mich., Sept. 18, 2020)*

Motion granted by *In re Duramax Diesel Litig., 2020 U.S. Dist. LEXIS 252064, 2020 WL 8881743 (E.D. Mich., Nov. 10, 2020)*

Motion granted by *In re Duramax Diesel Litig., 2020 U.S. Dist. LEXIS 225663, 2020 WL 7056028 (E.D. Mich., Dec. 2, 2020)*

Dismissed by, Without prejudice *In re Duramax Diesel Litig., 2021 U.S. Dist. LEXIS 86468, 2021 WL 1812688 (E.D. Mich., May 6, 2021)*

Dismissed by, in part, Motion denied by, in part *In re Duramax Diesel Litig., 2021 U.S. Dist. LEXIS 86461, 2021 WL 1821030 (E.D. Mich., May 6, 2021)*

Summary judgment granted by, Dismissed by, Motion denied by, As moot, Class certification denied by, As moot, Judgment entered by *In re Duramax Diesel Litig., 2023 U.S. Dist. LEXIS 119799 (E.D. Mich., July 12, 2023)*

Prior History: *Counts v. GM, LLC, 237 F. Supp. 3d 572, 2017 U.S. Dist. LEXIS 20277, 2017 WL 588457 (E.D. Mich., Feb. 14, 2017)*

Core Terms

emissions, Plaintiffs', consumers, engine, enterprise, allegations, regulations, fraudulent, diesel, defeat, damages, Polluting, omissions, argues, Defendants', preempted, clean, advertisements, consolidated, words, amended complaint, misrepresentations, premised, overpayment, courts, cases, mail, customers, wire, technology

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 8(a)(2) mandates that pleadings, including complaints, must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 9(b)* requires a party allege fraud or mistake to state with particularity the circumstances constituting fraud or mistake. *Rule 9(b)* also provides, however, that malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Evidence > Burdens of Proof > Allocation

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

HN2[] **Judges, Discretionary Powers**

Fed. R. Civ. P. 12(b)(1) provides the means by which a party may assert lack of subject-matter jurisdiction as a defense. A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. However, a factual attack challenges the factual existence of subject matter jurisdiction. In that case, the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction exists. Regardless, the plaintiff bears the burden of proving that jurisdiction exists.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN3[] Motions to Dismiss, Failure to State Claim

A pleading fails to state a claim under *Fed. R. Civ. P. 12(b)(6)* if it does not contain allegations that support recovery under any recognizable legal theory. In considering a *Rule 12(b)(6)* motion, the court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. The pleader need not provide detailed factual allegations to survive dismissal, but the obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. In essence, the pleading must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face and the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

Constitutional Law > ... > Case or Controversy > Standing > Elements

Civil Procedure > Preliminary Considerations > Jurisdiction > Subject Matter Jurisdiction

Constitutional Law > The Judiciary > Jurisdiction > Subject Matter Jurisdiction

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN4[] Standing, Injury in Fact

Federal courts have a duty to confirm subject matter jurisdiction in every case pending before them. *U.S. Const. art. III, § 2*, limits federal court jurisdiction to "Cases" and "Controversies." The doctrine derived from *art. III, § 2* imposes the requirement of standing: federal jurisdiction exists only if the dispute is one which is appropriately resolved through the judicial process. For standing to exist, three elements must be satisfied: injury in fact, causation, and redressability. Injury in fact exists when the plaintiff has suffered an invasion of a legally protected interest that is both concrete and particularized and actual or imminent, not conjectural or hypothetical. Causation exists if the injury is one that fairly can be traced to the challenged action of the defendant. The redressability requirement is satisfied if the plaintiff's injury is likely to be redressed by a favorable decision. Standing can exist even if the alleged injury may be difficult to prove or measure.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN5[] Standing, Injury in Fact

Claims of overpayment, wherein a plaintiff paid a premium but did not receive the anticipated consideration, are cognizable injuries in fact.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN6[] Standing, Elements

Proximate causation is not a requirement of Article III standing. Indeed, the causation requirement in standing is not focused on whether the defendant caused the plaintiff's injury in the liability sense; the plaintiff need only allege injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN7[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a)(2) mandates that pleadings, including complaints, must contain a short and plain statement of the claim showing that the pleader is entitled to relief. However, federal pleading rules do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] Complaints, Requirements for Complaint

The undergirding purpose of Fed. R. Civ. P. 8(a) is to ensure that the complaint provides notice. If the length and unnecessary complexity of the complaint obscures the true nature of the allegations and claims, dismissal may be appropriate.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN9[] Heightened Pleading Requirements, Fraud Claims

The specificity required for allegations of affirmative misrepresentations is necessarily different than the specificity required for allegations of fraudulent omissions. The purpose of Fed. R. Civ. P. 9(b) is to put defendants on notice of the nature of the claim. When it comes to claims of fraud by omission or fraudulent concealment, the plaintiff faces a slightly more relaxed pleading burden; the claim can succeed without the same level of specificity required by a normal fraud claim. The reasons for the disparate burden are straightforward. Fraudulent acts occur at a specific time, fraudulent omissions occur over a period of time. Fraudulent acts can be specifically described, but omissions are, by very definition, more amorphous.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN10[] Heightened Pleading Requirements, Fraud Claims

Plaintiffs must allege their theory of fraudulent omissions with enough specificity to provide defendants with fair notice of the claims. At the same time, in reviewing the complaint, the difficulty of obtaining proprietary information or pinpointing the point in time when a fraudulent omission occurred will be taken into account.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN11[] Heightened Pleading Requirements, Fraud Claims

When asserting claims of fraud, plaintiffs are not permitted to generally assert all claims against all defendants. But, at the same time, the Federal Rules of Civil Procedure are premised on the idea that pleadings should be simple and focused on providing notice.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Governments > Courts > Rule Application & Interpretation

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Mistake

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN12[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) is not to be read in isolation, but is to be interpreted in conjunction with *Fed. R. Civ. P. 8*. In a complex case, involving multiple actors and spanning a significant period of time, where there has been no opportunity for discovery, the specificity requirements of *Fed. R. Civ. P. 9(b)* should be applied less stringently. It is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. In other words, the *Rule 9(b)* requirements are not meant to be an insurmountable barrier.

Antitrust & Trade Law > Consumer Protection

Constitutional Law > Supremacy Clause > Federal Preemption

Environmental Law > Federal Versus State Law > Federal Preemption

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN13[] Antitrust & Trade Law, Consumer Protection

Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. In all preemption cases, and especially where Congress has legislated in a field in which the States have traditionally occupied, courts start with the assumption that the historic police powers of the States were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress. Environmental regulation is a field that the states have traditionally occupied. The same is true of consumer protection and advertising regulations. Where the statute does not expressly preempt state law, preemption may be implied. The U.S. Supreme Court has recognized two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Business & Corporate Compliance > ... > Air Quality > Emission Standards > Mobile Emissions Sources

Environmental Law > Federal Versus State Law > Federal Preemption

Environmental Law > Federal Versus State Law

HN14[] Emission Standards, Mobile Emissions Sources

Section 209 of the Clean Air Act, codified at *42 U.S.C.S. § 7543*, reads as follows: No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment. *42 U.S.C.S. § 7543* also specifies, however, that nothing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles. *§ 7543(d)*.

Civil Procedure > Pleading & Practice > Pleadings > Complaints

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN15[] **Pleadings, Complaints**

When considering well-pleaded factual allegations, the court must assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. In considering a motion to dismiss, the court must construe the complaint in a light most favorable to the plaintiff.

Civil Procedure > Pleading & Practice > Pleadings > Complaints

HN16[] **Pleadings, Complaints**

Plaintiffs, not defendants, are the masters of their complaint.

Constitutional Law > Supremacy Clause > Federal Preemption

HN17[] **Supremacy Clause, Federal Preemption**

The second kind of implied preemption—conflict preemption—comes in two varieties. First, conflict preemption exists when compliance with both federal and state requirements is physically impossible. Second, conflict preemption exists when state law would operate as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Administrative Law > Separation of Powers > Primary Jurisdiction

HN18[] **Separation of Powers, Primary Jurisdiction**

The doctrine of primary jurisdiction arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency. When the doctrine is invoked, the court proceedings are stayed so that the parties may refer the matter to the administrative agency. However, the doctrine is not subject to a ready formula for application. Relevant factors include the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions and the expert and specialized knowledge of the agencies involved.

Administrative Law > Separation of Powers > Primary Jurisdiction

HN19[] **Separation of Powers, Primary Jurisdiction**

The primary jurisdiction doctrine should not be invoked if no administrative forum is available.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN20[] **Racketeer Influenced & Corrupt Organizations, Claims**

The *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, establishes bases for both criminal and civil suits. A RICO civil suit may be brought by any person injured in his business or property by reason of a violation of *section 1962* of this chapter. *18 U.S.C.S. § 1964(c)*. *Section 1962* provides that: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. *18 U.S.C.S. § 1962(c)*. In other words, a party advancing a civil RICO claim must establish their right to sue and then further allege the following elements: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN21[] **Racketeer Influenced & Corrupt Organizations, Claims**

Plaintiffs may assert a claim under the *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, only if they can identify an injury to their business or property by reason of a violation of *18 U.S.C.S. § 1962*. *18 U.S.C.S. § 1964(c)*. In so limiting the scope of RICO standing, Congress exhibited an intention to exclude personal injury—that is, an injury to a person, such as a broken bone, a cut, or a bruise or a bodily injury. Similarly, a RICO injury must be concrete, not intangible or speculative.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN22[] **Racketeer Influenced & Corrupt Organizations, Claims**

The In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig. Court provides a guiding principle for determining if a cognizable injury under the *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, has been asserted: an injury arises as a result of a purchase only where the diminished value of the plaintiff's property has actually been realized or when the alleged infirmity in the purchased property has otherwise tangibly manifested itself.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN23[] Racketeer Influenced & Corrupt Organizations, Claims

Courts have generally held that damages theories premised on the expectation of future value or profits are too speculative and contingent to establish injury for purposes of the *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.* However, courts have recognized expectation damages under RICO where an agreement between the parties provided for a certain performance guarantee that the defendant had no intention of keeping. And courts have similarly found that, when the financial injury occurred at the time of payment, a cognizable out of pocket loss has been sustained.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN24[] Racketeer Influenced & Corrupt Organizations, Claims

The *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, proximate causation analysis is closely related to (even subsumed in) the statutory standing analysis. The U.S. Supreme Court has held that a plaintiff's right to sue required a showing that the defendant's violation not only was a "but for" cause of his injury, but was the proximate cause as well. The plaintiff must show some direct relation between the injury asserted and the injurious conduct alleged. Importantly, the causation inquiry must focus on the alleged link between the "predicate acts" and the asserted injury. A purported link that is too remote, purely contingent, or indirect is insufficient to confer standing. According to the U.S. Supreme Court, the general tendency of the law, in regard to damages at least, is not to go beyond the first step. An attenuated causation theory creates difficulties in apportioning damages between plaintiffs and attributing damages to defendants. A challenge to a RICO suit based on asserted lack of proximate causation, however, is often best resolved at summary judgment, not at the pleading stage.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Torts > ... > Multiple Defendants > Concerted Action > Civil Conspiracy

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN25[] Racketeer Influenced & Corrupt Organizations, Claims

When a conspiracy is alleged, it is inevitable that not all of the RICO defendants will be directly involved in every action which injures the plaintiff. The mere fact that it may be possible to differentiate between the RICO defendants in terms of culpability does not necessarily prevent a finding that all defendants proximately caused the alleged injury.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN26[] Racketeer Influenced & Corrupt Organizations, Claims

Although civil RICO plaintiffs must establish proximate causation, they need not necessarily show that they relied on any misrepresentations. Rather, plaintiffs need only show that the defendants' wrongful conduct was a substantial and foreseeable cause of the injury and the relationship between the wrongful conduct and the injury is logical and not speculative.

Torts > ... > Elements > Causation > Proximate Cause

HN27[] **Causation, Proximate Cause**

Proximate cause is not the same thing as a sole cause. A plaintiff can adequately allege proximate causation by plausibly asserting that the defendant's actions increased the likelihood of injury.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN28[] **Racketeer Influenced & Corrupt Organizations, Claims**

The elements of a prima facie claim under the *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

HN29[] **Racketeer Influenced & Corrupt Organizations, Claims**

In order to state a claim under the *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, plaintiffs must plausibly allege the existence of an enterprise engaged in a pattern of racketeering activity. *18 U.S.C.S. § 1962(c)*. But the definition of "enterprise" for RICO purposes is exceedingly broad. The statute defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *18 U.S.C.S. § 1961(4)*. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones. A RICO association-in-fact must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN30[] **Claims, Fraud**

Simply conspiring to commit a fraud is not enough to trigger the *Racketeer Influenced and Corrupt Organizations Act*, *18 U.S.C.S. § 1961 et seq.*, if the parties are not organized in a fashion that would enable them to function as a racketeering organization for other purposes. The most probative question in determining whether a RICO enterprise exists is whether the enterprise has the ability to exist apart from the pattern of wrongdoing. To state it differently, the enterprise is not the pattern of racketeering activity; it is an entity separate and apart from the pattern of activity in which it engages. The Sixth Circuit has identified two important principles for determining whether an association with a corporation constitutes a RICO enterprise: 1) individual defendants are always distinct from corporate enterprises because they are legally distinct entities, even when those individuals own the corporations or act only on their behalf; and 2) corporate defendants are distinct from RICO enterprises when they are functionally separate, as when they perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN31[] **Claims, Fraud**

A RICO enterprise does not exist where one company unknowingly aided another company in a fraudulent endeavor. But when both companies are aware of and contribute to the fraud, they cannot argue that they have a routine commercial relationship.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN32[] **Racketeer Influenced & Corrupt Organizations, Claims**

Pursuant to *18 U.S.C.S. § 1961(5)*, a pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN33[] **Claims, Fraud**

To state a RICO claim based on mail or wire fraud, plaintiffs must allege the following three elements: (1) devising or intending to devise a scheme to defraud (or to perform specified fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing the scheme or attempting to do so. The plaintiffs must allege that defendants possessed the specific intent to deceive or defraud. The scheme to defraud must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. The plaintiffs need not show actual reliance, but the plaintiffs must demonstrate that the misrepresentations or omissions were "material." Specific intent to defraud or deceive exists if the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > Criminal Offenses > Fraud > Wire Fraud

HN34[] **Mail Fraud, Elements**

Importantly, a defendant may commit mail fraud even if he personally has not used the mails. A mail fraud conviction requires only a showing that the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or that a reasonable person would have foreseen use of the mails. In other words, there is no requirement that the defendant have actually intended that the mails (or wire) be used. And, further, the mailings may be innocent or even legally necessary. The use of the mails need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN35[] **Claims, Fraud**

When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of *Fed. R. Civ. P. 9(b)*, a plaintiff must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Criminal Law & Procedure > Criminal Offenses > Fraud

HN36[] **Claims, Fraud**

Because, to the district court's knowledge, the United States Court of Appeals for the Sixth Circuit has never articulated a duty to disclose requirement, the court declines to manufacture that requirement. In the context of RICO, the more recent and better reasoned cases from other circuits do not require a duty to disclose in order for fraudulent omissions to constitute a scheme to defraud. And, importantly, a false or fraudulent representation, within the meaning of *18 U.S.C.S. § 2314*, may be made by statements of half truths or the concealment of material facts, as well as by affirmative statements or acts.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Claims

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN37[] **Racketeer Influenced & Corrupt Organizations, Claims**

In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. Liability under *18 U.S.C.S. § 1962(c)* depends on showing that the defendants conducted or participated in the conduct of the "enterprise's affairs," not just their own affairs. Although Reves v. Ernst & Young does not explain what it means to have some part in directing the enterprise's affairs, subsequent decisions have persuasively explained that it can be accomplished either by making decisions on behalf of the enterprise or by knowingly carrying them out.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > The Judiciary > Case or Controversy > Standing

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN38[] **Class Actions, Certification of Classes**

Threshold individual standing is a prerequisite for all actions, including class actions. A potential class representative must demonstrate individual standing vis-as-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action. The growing consensus, however, is that class certification issues are logically antecedent to Article III concerns, at least when the named plaintiffs possess Article III standing. In other words, where class certification is the source of the potential standing problems, class certification should precede the standing inquiry.

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Judges: Honorable THOMAS L. LUDINGTON, United States District Judge.

Opinion by: THOMAS L. LUDINGTON

Opinion

[*1045] ORDER DENYING MOTIONS TO DISMISS AND DENYING MOTIONS FOR LEAVE TO FILE [3] SURREPLIES AS MOOT**

On May 25, 2017, the original Plaintiffs (including the first-named Plaintiff Andrei Fenner) filed a complaint against Defendant General Motors LLC ("GM"), Robert Bosch GmbH, and Robert Bosch LLC ("Bosch" and, collectively, the "Defendants"). ECF No. 1. The suit was assigned to United States District Judge George Caram Steeh. On July 25, 2017, Judge Steeh issued a stipulated proposed order which consolidated the *Fenner* class action with another class action (*Carrie Mizell* et al. v. *General Motors LLC*, et al., Case No. 17-11984) also pending before him at the time. ECF No. 16. Pursuant to that stipulated proposed order, the "caption for the Consolidated Action" was designated as **[*1046]** "IN RE DURAMAX DIESEL LITIGATION." *Id.* at 3. Also pursuant to that stipulated order, the Plaintiffs filed a consolidated amended complaint on August 4, 2017. ECF No. 18. On August 30, 2017, the consolidated case was reassigned because it is a companion case to *Counts* et al. *v. General Motors*, Case No. 1-16-cv-12541, which is currently in discovery. ECF No. 33.

At the deadline for responsive pleadings, Defendants filed two motions to dismiss the consolidated amended complaint. ECF Nos. 44, 45.[1] Defendants **[**4]** advance many arguments, including that the Plaintiffs lack standing to sue, that Plaintiffs have failed to state a claim for affirmative misrepresentation, that any fraudulent concealment or omission claims should be dismissed or stayed, and that Plaintiffs have failed to state a *Racketeering Influenced and Corrupt Organizations Act* (RICO) claim, *18 U.S.C. § 1961 et seq.* For the following reasons, the motions to dismiss will be denied.

I.

All well-pleaded factual allegations are assumed to be true at the pleading stage. The consolidated amended complaint names thirteen Plaintiffs residing in ten states.[2] Each Plaintiff bought a Silverado or Sierra 2500 or 3500 diesel vehicle with a model year between 2011 and 2016. Con. Am. Compl. at 1, ECF No. 18. Some Plaintiffs bought new vehicles and others bought used vehicles, but each purchased their vehicle from an authorized GM dealer. *See, e.g., id.* at 14. The vehicles which Plaintiffs identify all contain a "Duramax" diesel engine. *Id.* at 1. Plaintiffs' allegations center on the emissions reduction technology associated with that engine.

A.

According to Plaintiffs, GM represented the Duramax engine as providing both low emissions and high performance. *Id.*[3] Plaintiffs (in unsourced quotations) **[**5]** contend that GM boasted that the Duramax engine constituted a "'remarkable reduction of diesel emissions'" compared to the engine previously used in its Silverado and Sierra vehicles. *Id.* Those representations were false. Plaintiffs allege that

> scientifically valid emissions testing has revealed that the Silverado and Sierra 2500 and 3500 models emit levels of NOx many times higher than (i) their gasoline counterparts, (ii) what a reasonable consumer would expect, (iii) what GM had advertised, (iv) the Environmental Protection Agency's maximum standards, and (v) the levels set for the vehicles to obtain a certificate of compliance that allows them to be sold in the United States.

Id.[4]

In other words, the Duramax engine does not actually combine high power and low **[*1047]** emissions as GM suggested: "[T]he vehicles' promised power, fuel economy, and efficiency is obtained only by turning off or turning

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[1] Prior to filing, GM and Bosch requested leave to submit briefs of 80 (and 60, respectively) pages in support of their motions to dismiss. ECF Nos. 35, 39. In response, the Court directed the Defendants to submit an outline of their anticipated briefs and suggested that judicial efficiency might be served by waiting to advance state-specific challenges to Plaintiffs' claims in a motion filed pursuant to *Federal Rule of Civil Procedure 12(c)*. ECF No. 36. Defendants were amenable to the latter suggestion and, accordingly, the Court granted the parties leave to submit briefs of 50 pages (and reply briefs of 15 pages). ECF No. 42.

[2] Those states are Arizona, Arkansas, California, Louisiana, Michigan, Nevada, New Jersey, New Mexico, Oregon, and Texas.

[3] This purported achievement would be particularly noteworthy because diesel engines "have an inherent trade-off between power, fuel efficiency, and emissions: the greater the power and fuel efficiency, the dirtier and more harmful the emissions." *Id.* at 46.

[4] In the consolidated amended complaint, Plaintiffs summarize, in detail, the testing they conducted on a 2013 Silverado 2500. *Id.* at 70-92.

down emissions controls when the software in these vehicles senses they are not in an emissions testing environment." *Id.* at 1-2.

The Duramax engine allegedly achieves this feat by employing "defeat devices." *Id.* at 2. As Plaintiffs define that term, "[a] defeat device means an auxiliary emissions control device that **[**6]** reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use." *Id.* The Duramax engine allegedly contains three such devices. Defeat Device No. 1 "reduces or derates the emissions system when temperatures are above the emissions certification test range (86°F)." *Id.* at 3. Similarly, Defeat Device No. 2 "operates to reduce emissions control when temperatures are below the emissions certification low temperature range (68°F)." *Id.* The impact of these alleged devices is significant:

> Testing reveals that at temperatures below 68°F (the lower limit of the certification test temperature), stop and go emissions are 2.1 times the emissions standard at 428 mg/mile (the standard is 200 mg/mile). At temperatures above 86°F, stop and go emissions are an average of 2.4 times the standard with some emissions as high as 5.8 times the standard.

Id.

The third defeat device "reduces the level of emissions controls after 200-500 seconds of steady speed operation in all temperature windows, causing emissions to increase on average of a factor of 4.5." *Id.* Plaintiffs estimate that "due to just the temperature-triggered **[**7]** defeat devices, the vehicles operate at 65-70% of their miles driven with emissions that are 2.1 to 5.8 times the standard." *Id.*[5]

Plaintiffs provide a technical explanation for how GM was able to leverage these devices to "obtain and market higher power and fuel efficiency from its engines while still passing the cold-start emissions certification tests." *Id.* at 4. Essentially, GM placed the "Selective Analytic Reduction (SCR) in front of the Diesel Particulate Filter (DPF)."[6] *Id.* In doing so, GM increased the engine's power production and fuel efficiency. However, placing the SCR in front of the DPF also dramatically increased potential emissions, thus requiring the engine to "employ Active Regeneration (burning off collected soot at a high temperature) and other power- and efficiency-sapping exhaust **[*1048]** treatment measures." *Id.* Thus, the power and fuel-efficiency gains were lost because of the increased need for emissions reduction technology. GM's solution, according to the Plaintiffs, was the three defeat devices identified above.

B.

1.

Plaintiffs allege that, in developing this solution, "GM did not act alone." *Id.* at 10. Rather, Robert Bosch GmbH and Robert Bosch LLC "were active and **[**8]** knowing participants in the scheme to evade U.S. emissions requirements" and to develop, manufacture, and test the "electronic diesel control (EDC) that allowed GM to implement the defeat device." *Id.* The EDC in question, Bosch's EDC17, "is a good enabler for manufacturers to

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5 Plaintiffs analogize these alleged devices to those which Volkswagen has recently pleaded guilty to including in their diesel vehicles and which other vehicle manufacturers have been accused of utilizing. *See id.* at 2.

6 The SCR converts oxides of nitrogen (a harmful pollutant produced by diesel engines) into nitrogen gas and water "by means of a reduction reaction." *Id.* at 50. The DPF traps and stores particulate matter (soot). *Id.* at 51. The DPF is "cleaned through a process known as regeneration." *Id.* "Passive regeneration" is a "continuously occurring process" which occurs whenever "the exhaust gas temperature is high enough to burn the particulate matter trapped by the filter." *Id.* "Active regeneration occurs only when the engine senses that the DPF needs to be cleaned as the DPF is approaching maximum capacity and generating too much exhaust backpressure." *Id.* In that scenario, "fuel is injected into the exhaust stream via the HCI to increase the exhaust gas temperature so that the particulate matter can be burned off at carbon's non-catalytic oxidation temperature." *Id.* Because fuel is being used for a purpose other than propulsion, "[a]ctive regeneration dramatically reduces fuel economy." *Id.*

employ 'defeat devices' as it enables the software to detect conditions when emissions controls can be derated—*i.e.*, conditions outside of the emissions test cycle." *Id.* Importantly, "[a]lmost all of the vehicles found or alleged to have been manipulating emissions in the United States (Mercedes, FCA, Volkswagen, Audi, Porsche, Chevy Cruze) use a Bosch EDC17 device." *Id.*

According to a Bosch press release quoted by Plaintiffs, the EDC17 device controls "'the precise timing and quantity of injection, exhaust gas recirculation, and manifold pressure regulation.'" *Id.* at 93. The device also "'offers a large number of options such as the control of particulate filters or systems for reducing nitrogen oxides.'" *Id.* EDC17 is "run on complex, highly proprietary engine management software over which Bosch exerts near-total control." *Id.* at 94. Because the software "is typically locked to prevent customers, like GM, from making significant **[**9]** changes on their own," vehicle manufacturers must work closely with Bosch to implement EDC17 in a vehicle. *Id.*

According to Plaintiffs, "Bosch participated not just in the development of the defeat device, but also in the scheme to prevent U.S. regulators from uncovering the device's true functionality." *Id.* at 39. Additionally, "Bosch GmbH and Bosch LLC marketed 'clean diesel' in the United States and lobbied U.S. regulators to approve 'clean diesel,' another highly unusual activity for a mere supplier." *Id.* In short, Plaintiffs believe that "Bosch was a knowing and active participant in a massive, decade-long conspiracy with Volkswagen, Audi, Mercedes, GM, and others to defraud U.S. consumers, regulators, and diesel car purchasers or lessees." *Id.* at 40.

2.

In their complaint, Plaintiffs repeatedly reference allegedly similar conduct by other automobile manufacturers. Plaintiffs explain that, in recent years, "almost all of the major automobile manufacturers rushed to develop 'clean diesel' and promoted new diesel vehicles as environmentally friendly and clean." *Id.* at 5. Due in part to that marketing, a significant market for "clean diesel" vehicles developed: "[O]ver a million diesel vehicles were purchased **[**10]** between 2007 and 2016 in the United States and over ten million in Europe." *Id.* at 6. A number of those diesel vehicle manufacturers, however, have now been accused of installing "defeat devices" in their diesel vehicles. *Id.* For example, Volkswagen has pleaded guilty to criminal charges (and has settled civil class action claims) arising out of allegations that it purposefully evaded emission standards. *Id.* Fiat Chrysler Automobiles has also been accused of similar conduct. On January 12, 2017, the EPA "issued a Notice of Violation to FCA because it had cheated on its emissions certificates with respect to its Dodge Ram and Jeep Grand Cherokee vehicles, and on May 23, 2017, the United States filed a civil suit in the Eastern **[*1049]** District of Michigan alleging violations of the *Clean Air Act*." *Id.* at 6-7.

C.

Unlike gasoline engines, diesel engines "compress a mist of liquid fuel and air to very high temperatures and pressures, which causes the diesel to spontaneously combust." *Id.* at 46. When compared to gasoline engines, diesel engines produce greater amounts of "oxides of nitrogen (NOx), which includes a variety of nitrogen and oxygen chemical compounds that only form at high temperatures." *Id. See also id.* at 47. According **[**11]** to Plaintiffs,

> NOx pollution contributes to nitrogen dioxide, particulate matter in the air, and reacts with sunlight in the atmosphere to form ozone. Exposure to these pollutants has been linked with serious health dangers, including asthma attacks and other respiratory illnesses serious enough to send people to the hospital. Ozone and particulate matter exposure have been associated with premature death due to respiratory-related or cardiovascular-related effects. Children, the elderly, and people with pre-existing respiratory illness are at acute risk of health effects from these pollutants. As a ground level pollutant, NO2, a common byproduct of NOx reduction systems using an oxidation catalyst, is highly toxic in comparison to nitric oxide (NO). If overall NOx levels are not sufficiently controlled, then concentrations of NO2 levels at ground level can be quite high, where they have adverse acute health effects.

Id.

Plaintiffs further allege that the EPA believes that NOx contributes to increases in the amount of acid rain, water quality deterioration, toxic chemicals, smog, nitric acid vapor, and global warming. *Id.* at 113-114.

D.

In the consolidated amended complaint, Plaintiffs repeatedly reference **[**12]** the pollution standards promulgated by the EPA and other entities. They allege that GM and Bosch conspired to conceal the defeat devices in the Duramax engine from the EPA and allege that, because of the defeat devices, the vehicles in question do not comply with emission pollution standards, despite being certified as conforming to those requirements. *See, e.g., id.* at 97-99. But Plaintiffs also allege that "[t]his case is not based on these laws but on deception aimed at consumers." *Id.* at 5. Plaintiffs contend that "a vehicle's pollution footprint is a factor in a reasonable consumer's decision to purchase a vehicle" and that GM's actions demonstrate their understanding of that fact. As Plaintiffs explain, GM crafted a marketing campaign, "intended to reach the eyes of consumers, [which] promoted the Duramax engine as delivering 'low emissions' or having 'reduced NOx emissions.' GM was acutely aware of this due to the public perception that diesels are 'dirty.'" *Id.* at 60.

In the consolidated amended complaint, Plaintiffs quote, summarize, or reproduce approximately ten pages of GM advertising, press releases, and publications related to the emissions production and fuel economy of its diesel engines. *See id.* at 61-70. **[**13]** These advertisements and publications repeatedly emphasize that the Duramax engine "'run[s] clean,'" delivers "'low emissions,'" and is "'friendlier to the environment.'" Notably, not one of the advertisements or publications which Plaintiffs reproduce in this section of the consolidated amended complaint references EPA standards or represents that the vehicle in question has been certified by the EPA.

Plaintiffs allege that the disparity between the way the Duramax engine was characterized as operating and the way in which its emissions reductions systems **[*1050]** were actually configured has resulted in financial harm to them and other consumers. *See id.* at 116 ("As a result of GM's unfair, deceptive, and/or fraudulent business practices, and its failure to disclose that under normal operating conditions the Polluting Vehicles are not "clean" diesels, emit more pollutants than do gasoline-powered vehicles, and emit more pollutants than permitted under federal and state laws, owners and/or lessees of the Polluting Vehicles have suffered losses.").

First, Plaintiffs allege that they "paid a premium of nearly $9,000 [because] GM charged more for its Duramax engine than a comparable gas car." *Id.* at 115. Because the **[**14]** Duramax engine did not reduce emissions to the level a reasonable consumer would have expected, Plaintiffs allege that they overpaid for the vehicle at the time of purchase. *Id.* at 117. Plaintiffs also identify other damages they have suffered:

> Had Plaintiffs and Class members known of the higher emissions at the time they purchased or leased their Polluting Vehicles, they would not have purchased or leased those vehicles, or would have paid substantially less for the vehicles than they did. Moreover, when and if GM recalls the Polluting Vehicles and degrades the GM Clean Diesel engine performance and fuel efficiency in order to make the Polluting Vehicles compliant with EPA standards, Plaintiffs and Class members will be required to spend additional sums on fuel and will not obtain the performance characteristics of their vehicles when purchased. Moreover, Polluting Vehicles will necessarily be worth less in the marketplace because of their decrease in performance and efficiency and increased wear on their cars' engines.

Id. at 117.

E.

The consolidated amended complaint includes fifty-four counts. The first count alleges that the Defendants violated the RICO statute. The remaining fifty-three counts are **[**15]** state law claims predicated on the fraudulent concealment and consumer protection laws of forty-three different states. Thirty-three of the state law claims originate from states where no named Plaintiff resides.

II.

Defendants have moved for dismissal pursuant to *Federal Rules of Civil Procedure 8(a)*, *9(b)*, *12(b)(1)* and *12(b)(6)*. ***HN1***[] *Rule 8(a)(2)* mandates that pleadings, including complaints, must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* *Rule 9(b)* requires a party allege fraud or mistake to "state with particularity the circumstances constituting fraud or mistake." *Id.* *Rule 9(b)* also provides, however, that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.*

HN2[] *Rule 12(b)(1)* provides the means by which a party may assert lack of subject-matter jurisdiction as a defense. "A *Rule 12(b)(1)* motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack)." *Cartwright v. Garner, 751 F.3d 752, 759 (6th Cir. 2014)* (citing *United States v. Ritchie, 15 F.3d 592, 598 (6th Cir.1994))*. "A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of *Rule 12(b)(1)* analysis." *Id.* However, **[**16]** a "factual attack challenges the factual existence of subject matter jurisdiction." *Id.* In that case, "the district court has broad discretion over what evidence to consider and may look outside the pleadings to determine whether subject-matter jurisdiction **[*1051]** exists." *Adkisson v. Jacobs Eng'g Grp., Inc., 790 F.3d 641, 647 (6th Cir. 2015)*. Regardless, "the plaintiff bears the burden of proving that jurisdiction exists." *DLX, Inc. v. Kentucky, 381 F.3d 511, 516 (6th Cir. 2004)*.

HN3[] A pleading fails to state a claim under *Rule 12(b)(6)* if it does not contain allegations that support recovery under any recognizable legal theory. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. In considering a *Rule 12(b)(6)* motion, the Court construes the pleading in the non-movant's favor and accepts the allegations of facts therein as true. *See* *Lambert v. Hartman, 517 F.3d 433, 439 (6th Cir. 2008)*. The pleader need not provide "detailed factual allegations" to survive dismissal, but the "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. In essence, the pleading "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face" and "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal, 556 U.S. at 678-79* (quotations **[**17]** and citation omitted).

III.

In the present motions to dismiss, Defendants argue that Plaintiffs lack standing to bring suit, that the consolidated amended complaint is impermissibly vague, that all of Plaintiffs' claims are preempted, that any surviving claims should be stayed, and that Plaintiffs have failed to state a cognizable RICO claim. Those arguments will be addressed in roughly that order. Before proceeding further, the Court must confirm its jurisdiction. After analyzing jurisdictional issues, the next question is whether the complaint is sufficiently clear and specific to comply with federal pleading requirements. The cognizability of Plaintiffs' claims involving the alleged misrepresentation, concealment, or omission of material facts is inextricably intertwined with the question of whether those claims are preempted and the related question of whether this suit should be stayed in favor of an EPA investigation. Accordingly, those questions will be considered together. Next, Defendants' arguments for dismissal of the RICO claim will be considered. Finally, the dispute over whether Plaintiffs lack standing to assert claims premised on the laws of states where no named Plaintiff **[**18]** resides will be addressed.

Both GM and Bosch have filed separate motions to dismiss. While the two motions travel similar ground (and refer to and rely upon each other), they also contain distinct arguments. An effort will be made to specifically identify which Defendant's arguments are being addressed and the impact of each conclusion on each Defendant.

However, one of the disputes is whether the complaint is adequately specific in its allegations about which Defendant took what action. For that reason, some generalization will be inevitable.

A.

HN4[] Federal courts have a duty to confirm subject matter jurisdiction in every case pending before them. *Valinski v. Detroit Edison, 197 F. App'x 403, 405 (6th Cir. 2006)*. *Article III, § 2 of the U.S. Constitution* limits federal court jurisdiction to "Cases" and "Controversies." The doctrine derived from *Art. III, § 2* imposes the requirement of standing: federal jurisdiction exists only if the dispute is one "which [is] appropriately resolved through the judicial process." *Whitmore v. Arkansas, 495 U.S. 149, 155, 110 S. Ct. 1717, 109* ***[*1052]*** *L. Ed. 2d 135 (1990)*. For standing to exist, three elements must be satisfied: injury in fact, causation, and redressability. *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351(1992)*. Injury in fact exists when the plaintiff has suffered "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent," not "conjectural or **[**19]** hypothetical." *Id. at 560* (citations omitted). Causation exists if the injury is one "that fairly can be traced to the challenged action of the defendant." *Simon v. E. Kentucky Welfare Rights Org., 426 U.S. 26, 41, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*. The redressability requirement is satisfied if the plaintiff's injury is "likely to be redressed by a favorable decision." *Id. at 38*. Standing can exist even if the alleged injury "may be difficult to prove or measure." *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016)*.

Bosch argues that the Plaintiffs lack Article III standing because they have not identified an injury in fact which is traceable to the actions of Bosch. GM has not briefed the question of Article III standing, but has incorporated by reference Bosch's brief on the issue. *See* GM Mot. Dismiss at 16-17 n.18, ECF No. 45.[7] Bosch identifies "two types of injuries (1) alleged overpayment for their vehicles . . . and (2) potential future injuries arising from potential diminished performance." Bosh Mot. Dismiss at 11. As regards the overpayment theory, Bosch argues that the injury cannot be fairly traced to Bosch's actions because Bosch did not advertise the vehicles to consumers, did not establish the price for the vehicles, and was not a party to any vehicle-purchase contracts. As regards the potential for diminished future performance, **[**20]** Bosch argues that this theory is unduly hypothetical and speculative.

1.

Plaintiffs' overpayment theory suffices to provide standing to sue GM, which manufactured the vehicles and authorized their sale. Accepting Plaintiffs' allegations as true, they paid a premium for a "clean diesel" vehicle which actually polluted at levels dramatically higher than a reasonable consumer would expect. In other words, they paid for a product which did not operate in the way they believed it did. ***HN5***[] Claims of overpayment, wherein a plaintiff paid a premium but did not receive the anticipated consideration, are cognizable injuries in fact. *See* *Wuliger v. Manufacturers Life Ins. Co., 567 F.3d 787, 794 (6th Cir. 2009)*. *See also* *Danvers Motor Co. v. Ford Motor Co., 432 F.3d 286, 293 (3d Cir. 2005)* ("Monetary harm is a classic form of injury-infact."). That injury is traceable to GM's actions: GM developed the Duramax engine (including the alleged defeat devices), marketed its diesel vehicles as environmentally friendly, and set the MSRP for its diesel vehicles. There is, accordingly, a "'traceable connection between the plaintiff's injury and the complained-of conduct of the defendant.'" *Id. at 796* **[*1053]** (quoting *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998))*. And financial damages are, of course, fully redressable by a favorable decision. Plaintiffs have standing to sue GM.

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[7] This decision is puzzling because Bosch appears to admit in their briefing that Plaintiffs' "overpayment" theory is sufficient to establish standing to sue GM. Bosch focuses its argument on the assertion that any such overpayment is not attributable to Bosch's actions. *See* Bosch. Mot. Dismiss at 12, ECF No. 44 ("But Plaintiffs do not have standing to sue Bosch LLC - rather than GM - unless their injury "fairly can be traced" to the actions of Bosch LLC. . . . Any overpayment based on artificially inflated market price cannot fairly be traced to the actions of Bosch LLC, which is not alleged to have advertised directly to consumers or have had any control over the price of the Subject Vehicles."). Nevertheless, because the Court has an independent obligation to confirm its own jurisdiction, Plaintiffs' standing to sue GM will be briefly addressed.

Bosch's connection to the alleged **[**21]** overpayment, however, is more attenuated. Bosch did not manufacture the Duramax engine, advertise vehicles containing that engine, or establish the MSRP. Accordingly, Bosch argues that any overpayment by Plaintiffs is attributable solely to GM's actions. That assertion mischaracterizes the allegations in the consolidated amended complaint. Plaintiffs allege that

> Bosch participated not just in the development of the defeat device, but also in the scheme to prevent U.S. regulators from uncovering the device's true functionality. Moreover, Bosch's participation was not limited to engineering the defeat device (in a collaboration described as unusually close). Rather, Bosch GmbH and Bosch LLC marketed "clean diesel" in the United States and lobbied U.S. regulators to approve "clean diesel," another highly unusual activity for a mere supplier.

Con. Am. Compl. at 39.

In other words, "Bosch GmbH and Bosch LLC have enabled over 1.3 million vehicles to be on the road in the United States polluting at levels that exceed emissions standards and which use software that manipulate emissions controls in a manner not expected by a reasonable consumer." *Id.* at 40.

Bosch admits that it supplied components to the **[**22]** diesel vehicles in question, but argues that it did not market those vehicles or enter into any contractual relationships with any of the Plaintiffs. As stated, however, that is not entirely true. Plaintiffs allege that Bosch "marketed 'clean diesel' in the United States." *Id.* at 39. While the exact nature of that marketing is unclear, it is plausible that Bosch's efforts contributed to the market demand for "clean diesel" vehicles, generally, in the United States. *See id.* at 5-6. The premiums which Plaintiffs paid for vehicles with Duramax engines were a natural consequence of that market demand. Similarly, Plaintiffs allege that Bosch enabled GM to deceive consumers and thus contributed to the overpayment. Plaintiffs emphasize the close relationship between GM and Bosch, including the joint efforts to calibrate EDC17 for the Duramax engine. The allegations in the consolidated amended complaint, if true, clearly establish that Bosch developed the vehicle component which has caused Plaintiffs' injury, that Bosch was aware of the deception that component would inevitably contribute to, and that Bosch was aware that consumers would pay a premium for vehicle capabilities that the component would not deliver. **[**23]** In other words, Plaintiffs overpaid for their vehicles *because* Bosch worked closely with GM to install working defeat devices in the Duramax vehicles.

There can be no dispute that, compared to GM, Bosch has a more indirect relationship with United States consumers. But ***HN6***[] "[p]roximate causation is not a requirement of Article III standing." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 1391 n.6, 188 L. Ed. 2d 392 (2014)*. Indeed, "the causation requirement in standing is not focused on whether the defendant 'caused' the plaintiff's injury in the liability sense; the plaintiff need only allege 'injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.'" *Wuliger, 567 F.3d at 796* (quoting *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976))*. Bosch may ultimately **[*1054]** prevail in its argument that it should not be held liable for Plaintiffs' overpayment, but Plaintiffs' allegation that Bosch was intimately involved in the creation of the component which caused the overpayment suffices to establish Article III standing.

None of the (noncontrolling) cases which Bosch cites in support of its argument compel a different result because each is legally or factually distinguishable. Bosch cites *In re Schering Plough Corp. Intron/Temodar Consumer **[**24]** Class Action* for the proposition that overpayment damages provide standing only if traceable to the actions of the defendant. *678 F.3d 235, 245 (3d Cir. 2012)*. In holding that the plaintiffs had not identified a causal relationship between the alleged misconduct (unlawful marketing practices) and the alleged injury (payment for ineffective drugs), the Third Circuit noted that the plaintiffs did not actually allege that they "ever paid for a Temodar or Intron-A prescription." *Id. at 247*. The plaintiffs did allege that they paid for Rebetol, but the Third Circuit explained that "[i]t is pure conjecture to conclude that because Schering's misconduct caused other doctors to write prescriptions for ineffective off-label uses for other products, Local 331 ended up paying for two prescriptions for Rebetol due to the same kind of misconduct." *Id. at 248*. Here, the causal connection is much clearer: Bosch worked with GM to develop the vehicle component which was the source of the overpayment by Plaintiffs. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig.* is similarly inapplicable. *826 F. Supp. 2d 1180, 1191 (C.D. Cal. 2011)* (dismissing claims against North American divisions of Toyota Motor

Corporation because the complaint did not allege **[**25]** that the American advertisements were aired in other countries and thus did not identify a link between the defendants responsible for U.S. marketing and "the buying decisions of Toyota customers worldwide"). Bosch's involvement in the creation of a vehicle component which has caused financial harm to Plaintiffs has been clearly alleged.[8] Between that involvement and Bosch's alleged marketing for "clean diesel," Plaintiffs have adequately alleged that their overpayment can be fairly traced to Bosch.

2.

Plaintiffs' allegations of overpayment are sufficient to enable them to advance their state law consumer protection and fraudulent concealment claims. Plaintiffs' other alleged damages (essentially that, if the existence of a defeat device is proven, the value of their vehicles will decrease) need not be considered for standing purposes. Defendants separately challenge Plaintiffs' standing to bring a RICO claim. That argument is based upon a statutory standing requirement, not Article III standards, and thus will be considered below.

B.

Defendants next challenge the form of the consolidated amended complaint. GM argues, first, that the entire complaint should be dismissed because it does **[**26]** not contain a "short and plain statement of the claim showing that the pleader is entitled to relief," as required by *Federal Rule of Civil Procedure 8(a)*. **[*1055]** Second, GM (joined by Bosch) argues that all of Plaintiffs' state law claims which sound in fraud do not meet *Federal Rule of Civil Procedure 9(b)* specificity standards. Third, Bosch argues that Plaintiffs have engaged in impermissible group pleading. Each argument will be addressed in turn.

1.

HN7[] *Rule 8(a)(2)* mandates that pleadings, including complaints, must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* However, federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss., 135 S. Ct. 346, 346, 190 L. Ed. 2d 309 (2014)*. The consolidated amended complaint spans 229 pages and contains 900 pages of exhibits. Defendants are correct that this complaint is lengthy, but this is not one of the extraordinarily rare scenarios where a complaint should be dismissed because of its length. Defendants fault the consolidated amended complaint for including "scores of paragraphs [related] to alleged misconduct involving Volkswagen, Audi, Porsche, Mercedes, and Fiat Chrysler." GM Mot. Dismiss at 12. These allegations are of limited relevance, **[**27]** but do provide context for Plaintiffs' remaining allegations. ***HN8***[] The undergirding purpose of *Rule 8(a)* is to ensure that the complaint provides notice. If the length and unnecessary complexity of the complaint obscures the true nature of the allegations and claims, dismissal may be appropriate. This is not such a case.

2.

Defendants also argue that Plaintiffs have failed to meet the heightened pleading standards of *Rule 9(b)* with respect to their allegations of fraud. The adequacy of Plaintiffs' fraud allegations are best resolved in conjunction with the analysis of whether Plaintiffs have stated a claim. However, one general point will be taken up separately.

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[8] Bosch also argues that Plaintiffs' overpayment theory should be interpreted as essentially a "benefit-of-the-bargain" argument and suggests that such a theory is insufficient to establish standing because Bosch was not a party to any vehicle-purchase contracts with consumers. But a consumer can establish a concrete injury by alleging that he or she "received a product that failed to work for its intended purpose or was worth objectively less than what one could reasonably expect," regardless of whether the purchase was made pursuant to a contract. *Koronthaly v. L'Oreal USA, Inc., 374 F. App'x 257, 259 (3d Cir. 2010)*.

HN9[] The specificity required for allegations of affirmative misrepresentations is necessarily different than the specificity required for allegations of fraudulent omissions.[9] The purpose of *Rule 9(b)* is to put defendants on notice of the nature of the claim. *See* *Williams v. Duke Energy Int'l, Inc., 681 F.3d 788, 803 (6th Cir. 2012)* ("[I]t is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim through evidence unturned in discovery. *Rule 9(b)* does not require omniscience; rather the Rule requires that the circumstances of the fraud be pled with enough specificity to put defendants on notice as to **[**28]** the nature of the claim." (internal citations omitted)). "When it comes to claims of fraud by omission or fraudulent concealment, the plaintiff faces a slightly more relaxed pleading burden; the claim 'can succeed without the same level of specificity required by a normal fraud claim.'" *Beck v. FCA US LLC, 273 F. Supp. 3d 735, 2017 WL 3448016, at *9 (E.D. Mich. 2017)* (quoting *Baggett v. Hewlett-Packard Co., 582 F.Supp.2d 1261, 1267 (C.D. Cal. 2007))*. The reasons for the disparate burden are straightforward. Fraudulent acts occur at a specific time, fraudulent omissions occur over a period of time. Fraudulent acts can be specifically described, but omissions are, by very definition, more amorphous.

As this Court explained in *Counts*, the Sixth Circuit has rejected the argument that it has the authority to "relax" the **[*1056]** *Rule 9(b)* particularity requirement. *See* *Counts v. General Motors, LLC, 237 F. Supp. 3d 572 (E.D. Mich. 2017)* (citing *United States v. Walgreen Co., 846 F.3d 879, 880-81 (6th Cir. 2017))*. That said, the Sixth Circuit has recognized that "'particular' allegations of fraud may demand different things in different contexts." *Walgreen, 846 F.3d at 881*. *HN10*[] Plaintiffs must allege their theory of fraudulent omissions with enough specificity to provide Defendants with fair notice of the claims. At the same time, in reviewing the consolidated amended complaint, "the difficulty of obtaining proprietary . . . information or pinpointing the point **[**29]** in time when a fraudulent omission occurred will be taken into account." *Counts, 237 F. Supp. 3d at 595*.

3.

Bosch further argues that the Plaintiffs have engaged in impermissible group pleading. This argument is primarily focused on Plaintiffs' RICO claim. As discussed below, Plaintiffs have adequately alleged the prima facie elements of a RICO claim with sufficient specificity to put Defendants on notice of their alleged involvement in the enterprise. Bosch further objects to Plaintiffs' decision to define "Bosch" as including both Bosch LLC and Bosch Gmbh. Bosch contends that Plaintiffs' failure to distinguish between these two entities precludes Bosch from understanding exactly what its constituent entities are accused of.

HN11[] When asserting claims of fraud, plaintiffs are not permitted to "generally assert all claims against all defendants." *State Farm Mut. Auto. Ins. Co. v. Universal Health Grp., Inc., No. 14-CV- 10266, 2014 U.S. Dist. LEXIS 151213, 2014 WL 5427170, at *3 (E.D. Mich. Oct. 24, 2014)* (citing *Hoover v. Langston Equipment Assoc., Inc., 958 F.2d 742, 745 (6th Cir. 1992))*. But, at the same time, the Federal Rules of Civil Procedure are premised on the idea that pleadings should be simple and focused on providing notice. *See* *Llewellyn-Jones v. Metro Prop. Grp., LLC, 22 F. Supp. 3d 760, 780 (E.D. Mich. 2014)*. As discussed above, allegations of fraudulent concealment will inevitably be less specific than allegations of affirmative misrepresentation. **[**30]**

Plaintiffs allege that "[b]oth Bosch GmbH and Bosch LLC . . . operate under the umbrella of the Bosch Group." Con. Am. Compl. at 41. Members of both Bosch GmbH and Bosch LLC were involved in the alleged conspiracy here. Plaintiffs indicate that the "acts of individuals described in this Complaint have been associated with Bosch GmbH and Bosch LLC whenever possible." *Id.* But Plaintiffs further contend that those employees "often hold themselves out as working for 'Bosch.'" *Id.* at 42. In other words, identifying "which Bosch defendant" was involved in which particular actions cannot always be "ascertained with certainty." *Id.* Plaintiffs believe that discovery will alleviate this confusion. *Id.*

Given Plaintiffs' allegation that Bosch employees and constituent entities often blur the legal boundaries between Bosch subsidiaries, the allegations against the Bosch Defendants are sufficiently specific. Plaintiffs are proceeding

[9] Plaintiffs have expressly disclaimed any claims premised on affirmative misrepresentation (discussed below).

primarily on a theory of fraudulent omissions, and Bosch's alleged role within that fraudulent scheme is clear. ***HN12***[] "*Rule 9(b)* is not to be read in isolation, but is to be interpreted in conjunction with *Federal Rule of Civil Procedure 8*." *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc., 501 F.3d 493, 503 (6th Cir. 2007)*. "In a complex case, involving multiple actors and spanning a significant period of **[**31]** time, where there has been no opportunity for discovery, 'the specificity requirements of *Rule 9(b)* [should] be applied less stringently. . . . It is a principle of basic fairness that a plaintiff should have an opportunity to flesh out her claim **[*1057]** through evidence unturned in discovery.'" *State Farm Mut. Auto. Ins. Co. v. Pointe Physical Therapy, LLC, 107 F. Supp. 3d 772, 788 (E.D. Mich. 2015)* (quoting *JAC Holding Enterprises, Inc. v. Atrium Capital Partners, LLC, 997 F.Supp.2d 710, 727 (E.D. Mich. 2014))*. This is one such case.

In other words, the *Rule 9(b)* requirements are not meant to be an insurmountable barrier. Although the precise identity of the subsidiary and/or employee which may have taken certain actions is unclear, that level of detail is unnecessary to put the Bosch Defendants on notice of the claims made against them. The consolidated amended complaint will not be dismissed without prejudice for engaging in group pleading.

IV.

Defendants seek dismissal of the state law claims. First, they argue that Plaintiffs have failed to state claims for affirmative misrepresentation. Second, Defendants argue that Plaintiffs' fraudulent omission claims should be dismissed or stayed. Specifically, Defendants assert that Plaintiffs' concealment or omission claims are preempted, have not been plausibly pled, and should be stayed under the primary jurisdiction doctrine. In response, Plaintiffs deny that they are **[**32]** advancing any fraud claims premised on affirmative misrepresentations. *See* Pl. Resp. GM Mot. Dismiss at 9-10 ("But Plaintiffs do not sue for common law fraud under state law for affirmative misrepresentations."). Rather, "Plaintiffs sue for omissions of material fact, fraudulent concealment, violation of state law consumer protection statutes, and violation of RICO." *Id.* at 10. Plaintiffs further challenge the assertion that the state consumer protection laws on which it relies incorporate only claims of "common law fraud": "The consumer protection statutes bar not only fraud but also deceptive, unfair, and unlawful conduct." *Id.* For similar reasons, Plaintiffs contend that GM's argument that Plaintiffs have failed to plead reliance on affirmative misrepresentations is irrelevant.

Plaintiffs acknowledge that the consolidated amended complaint includes an extended discussion of various advertisements and press releases which GM issued regarding vehicles equipped with the Duramax engine. Those allegations, Plaintiffs explain, are not meant to buttress affirmative misrepresentation claims. They are meant "to show that Defendants' omissions were material for purposes of claims under consumer protection **[**33]** statutes and RICO." *Id.* at 11. To repeat: "The relevance of those promises is GM's acknowledgement that low emissions are material . . . to a reasonable consumer." *Id.* at 12.

Given Plaintiffs' decision to disavow any affirmative misrepresentation claims, the remaining issues are whether Plaintiffs' state law claims are preempted by the *Clean Air Act* (CAA), whether Plaintiffs have plausibly pleaded fraudulent omission claims, and whether any plausibly pleaded fraudulent omission claims should be stayed pursuant to the primary jurisdiction doctrine. Each question will be addressed in turn.

A.

HN13[] "Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)* (quoting *Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977))*. In all preemption cases, and especially where "Congress has 'legislated . . . in a field in which the States have traditionally occupied,' . . . [courts] 'start with the assumption that the historic police powers of the **[*1058]** States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr, 518 U.S. 470, 485, 116 S. Ct.*

2240, 135 L. Ed. 2d 700 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)). "Environmental regulation is a field that the states have traditionally **[**34]** occupied." Merrick v. Diageo Americas Supply, Inc., 805 F.3d 685, 694 (6th Cir. 2015). The same is true of consumer protection and advertising regulations. *See* In re Ford Fusion & C-Max Fuel Econ. Litig., No. 13-MD-2450 KMK, 2015 U.S. Dist. LEXIS 155383, 2015 WL 7018369, at *28 (S.D.N.Y. Nov. 12, 2015); Gilles v. Ford Motor Co., 24 F. Supp. 3d 1039, 1047 (D. Colo. 2014). Where the statute does not expressly preempt state law, preemption may be implied. The Supreme Court has recognized

> two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Gade, 112 S.Ct. at 2383 (internal citations omitted).

Defendants' preemption arguments arise out of Section 209 of the CAA. **HN14**[] That section, codified at 42 U.S.C. § 7543, reads as follows:

> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition **[**35]** precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

Id. at § 7543(a).

Section 7543 also specifies, however, that "[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles." *Id.* at § 7543(d).

1.

The initial question is whether Plaintiffs' suit (and the state law claims it is premised upon) represents an attempt to establish a "standard" relating to the control of emissions or involves "certification, inspection, or any other approval relating to the control of emissions." The Supreme Court has interpreted "standard" in § 7543(a) to mean "requirements such as numerical emission levels with which vehicles or engines must comply . . . or emission-control technology with which they must be equipped." Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 253, 124 S. Ct. 1756, 158 L. Ed. 2d 529 (2004). Plaintiffs are, of course, private citizens suing on their own behalf, not state governmental entities. But there is some authority to support the proposition that § 7543(a)'s language can reach even private causes of action for damages. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 521, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992) (finding that the federal cigarette statute, which forbade states **[**36]** from imposing additional "requirements" or "prohibitions" governing cigarette advertising, had broad preemptive effect and applied to both "positive enactments and common law" actions for damages) (internal citations omitted). *See also* Jackson v. Gen. Motors Corp., 770 F. Supp. 2d 570, 575 **[*1059]** (S.D.N.Y. 2011) ("The operative phrase in § 209(a) is 'adopt or attempt to enforce.' As a result, if state common law tort actions are examples of 'enforcement,' then such actions (assuming that they are 'related to' the control of emissions) are clearly preempted by § 209(a)."). Indeed, as the *Cipollone* Court recognized, "common-law damages actions . . . are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose 'requirements or prohibitions.'" 505 U.S. at 522.

Accordingly, if Plaintiffs' state law claims represent veiled attempts to establish a "standard relating to the control of emissions," they are expressly preempted. But Plaintiffs' suit is not a disguised attempt to impose a standard on GM by mandating maximum "numerical emission levels" for its diesel vehicles or requiring certain emission-control technology. Rather than imposing requirements regarding the type of emissions technology which GM must include in its vehicles, Plaintiffs' suit seeks **[**37]** compensation for GM's fraudulent *concealment* of the actual operation of the emissions technology in its diesel vehicles from consumers.

GM further argues that Plaintiffs' suit represents an attempt to require "disclosure" of "information regarding AECDs—a technology for the 'control of emissions'—before a car can be sold." GM Mot. Dismiss at 25. According to GM, the suit is thus preempted because this disclosure requirement constitutes a "straightforward effort to 'require certification, inspection, or any other approval relating to the control of emissions . . . as a condition precedent to the initial retail sale' of a new motor vehicle." *Id.* (quoting *§ 7543(a)*). Defendants have provided no authority for the proposition that private claims alleging violations of consumer protection laws are equivalent to a "certification, inspection, or . . . other approval" requirement. Such an interpretation would be incompatible with the plain meaning of the section. The ability to certify, inspect, or approve presupposes that the acting party has some authority to prevent the sale of a car if the vehicle fails to pass the certification test. Consumers cannot prevent a manufacturer from selling a particular **[**38]** vehicle, and so it appears impossible that consumers could impose *any* "condition precedent to the initial retail sale" of a vehicle.[10] *§ 7543(a)*.

2.

GM nevertheless argues that the suit is preempted because Plaintiffs' claims "relate **[*1060]** to" the enforcement of EPA emission standards. GM's rationale can be summarized as follows. First, "Plaintiffs' non-disclosure claims rest exclusively on the presence of an 'illegal' 'defeat device.'" GM Mot. Dismiss at 19. Second, the alleged purpose of that "defeat device" is "to defeat EPA certification testing and evade federal emissions standards." *Id.* at 20. Third, "[a]ll of Plaintiffs' claims thus depend on and are based 'solely on' a showing that GM employed a 'defeat device' as defined by the EPA." *Id.* For that reason, all of Plaintiffs' claims are expressly preempted. *Id.*

This line of reasoning can be sustained only by selectively characterizing Plaintiffs' allegations and claims. But notwithstanding Defendants' understandable desire to reframe Plaintiffs' allegations in a light favorable to their preferred defenses, the Court cannot do the same. ***HN15***[] When considering "well-pleaded factual allegations," the Court must "assume their veracity and then determine **[**39]** whether they plausibly give rise to an entitlement to relief." *Iqbal, 556 U.S. at 679*. In considering a motion to dismiss, the Court must "construe the complaint in a light most favorable" to the plaintiff. *Lambert, 517 F.3d at 439*.

GM customers could conceivably attempt to bring suit against GM and Bosch for noncompliance with EPA emission standards. And there can be no doubt that such a suit would be preempted. *See Engine Mfrs. Ass'n, 541 U.S. at*

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[10] In further support of the contention that GM has publically disclosed the existence of AECDs which are present in the subject vehicles, GM points to a publically available document which purports to show that GM provided "AECD Descriptions" to the EPA. *See* GM Reply Br. at 5 & Ex. 5, ECF No. 57. Information from outside the pleadings cannot be considered at the pleading stage, with several limited exceptions. *Tackett v. M & G Polymers, USA, L.L.C., 561 F.3d 478, 487 (6th Cir. 2009)*. To the extent the identified document is a public record, courts may typically only take judicial notice of such records to recognize "the fact of the documents' existence, and not for the truth of the matters asserted therein." *Passa v. City of Columbus, 123 F. App'x 694, 697 (6th Cir. 2005)*. And even if this exhibit was considered now, it would not change the Court's analysis. The document suggests that AECD descriptions were provided to the EPA, but does not include those descriptions. In other words, the document does not appear to provide any evidence that the AECDs were themselves publically disclosed. Plaintiffs' claims are focused on allegedly inadequate disclosures to the *public*; confidential disclosures to the EPA are irrelevant.

The relevance of the document purportedly submitted to the EPA is the primary subject of the parties' motions for leave to file surreplies. *See* ECF No. 58, 60. Because the document cannot be considered for the purpose it was submitted and would not change the Court's analysis even if reviewed, those motions will be denied as moot.

255.[11] But construing *this* complaint in a light most favorable to Plaintiffs, Plaintiffs claims can be interpreted differently. A careful parsing of Defendants' syllogism reveals several mistaken premises.

i.

First, Defendants emphasize that Plaintiffs' claims "rest exclusively on the presence of an 'illegal' 'defeat device.'" GM Mot. Dismiss at 19. By that assertion, Defendants mean that the complaint "alleges only one type of defeat device, *i.e.* one whose purpose is to defeat EPA certification testing and evade federal emissions standards." *Id.* at 20. Thus, Defendants believe Plaintiffs' claims will require proof that the Duramax engine includes a "'defeat device' *as defined by the EPA*." *Id.* (emphasis added). That is not the definition given by Plaintiffs in the consolidated amended complaint. According **[**40]** to Plaintiffs, "[a] defeat device means an auxiliary emissions control device that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use." Con. Am. Compl. at 2.[12]

It is undoubtedly true that the consolidated amended complaint includes references to EPA standards, emissions testing, and Plaintiffs' belief that the vehicles at issue violate EPA regulations. *See, e.g., id.* at 2, 3, 6. But Plaintiffs can prevail on **[*1061]** their claims without proving the existence of a "defeat device" as that term is defined by the EPA. Plaintiffs' fraudulent concealment and consumer protection claims are premised on the following assertions:

> A reasonable consumer would not expect their Silverado or Sierra vehicle to spew unmitigated NOx in this fashion while driving in the city or on the highway, nor would a reasonable consumer expect that fuel economy was achieved in part by turning off or derating the emission systems, nor would a reasonable consumer expect that if the emissions were as promised the advertised fuel economy and performance could not be achieved. . . . GM never disclosed to consumers that the Polluting Vehicles **[**41]** may be "clean" diesels in very limited circumstances but are "dirty" diesels under most driving conditions. GM never disclosed to consumers that it programs its emissions systems to work only under certain conditions. GM never disclosed that it prioritizes engine power and profits over the environment. GM never disclosed that the Polluting Vehicles' emissions materially exceed the emissions from gasoline-powered vehicles, that the emissions exceed what a reasonable consumer would expect from a "low emissions" vehicle, and that the emissions materially exceed applicable emissions limits in real-world driving conditions.

Id. at 8, 9-10.

None of these allegations, with the exception of the very last phrase,[13] will require proof that the Duramax engine contains a "defeat device" which violates EPA standards. To the contrary, Plaintiffs' fraudulent concealment and

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[11] There are a number of potential theories which Plaintiffs could have conceivably advanced and which would have been squarely preempted. For example, if Plaintiffs were seeking damages based solely on Defendants' alleged violations of the CAA, their suit would be preempted. Likewise, if Plaintiffs' claims were "predicated on deceit against the EPA during new-vehicle certification," their claims would be preempted. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 264 F. Supp. 3d 1040, 1054 (N.D. Cal. 2017)*.

[12] The consolidated amended complaint also discusses the EPA's definition of a defeat device, but that definition is alleged in connection with allegations regarding the EPA's conclusion that Volkswagen's diesel vehicles violated the CAA. *Id.* at 6. In their briefing, Defendants repeatedly contend that allegations regarding the conduct of other diesel vehicle manufacturers is irrelevant, and so Defendants cannot reasonably point to these allegations when arguing that Plaintiffs' claims should be preempted.

[13] And even this allegation is focused on consumer expectations about compliance, not the compliance itself. *See In re Volkswagen "Clean Diesel" Litigation, 94 Va. Cir. 189, 2016 WL 5347198 at *6 (Va.Cir.Ct. 2016)* ("[A]lthough emissions compliance or lack thereof may be further proof of deceit, it is the deceit about compliance, rather than the need to enforce compliance, that is the gravamen of Plaintiffs' claims."). Admittedly, proving this allegation appears to require proof that EPA

consumer protection claims are focused on whether Defendants fraudulently concealed information regarding the operation of the Duramax engine's emissions technology which would have been material to a reasonable consumer. Thus, Plaintiffs will be required to prove that the Duramax engine contains a component which "derates" emissions reduction **[**42]** technology and thus increases emissions to a level that a reasonable consumer would not anticipate and would consider material to his or her purchase decision. But Plaintiffs will not be required to prove that the engine component which is the source of the harm meets the EPA's definition of an illegal defeat device.[14]

ii.

Second, Defendants assert that Plaintiffs are asking the Court to "declare the EPA's existing compliance determination invalid—and *any* such effort is an affront to the EPA's exclusive jurisdiction." GM Mot. Dismiss at 22 (emphasis in **[*1062]** original). Just like Plaintiffs can prevail without demonstrating the existence of a "defeat device" that is illegal under EPA regulations, Plaintiffs can prevail without showing that the subject vehicles violate EPA regulations. The gravamen of their state law claims is that they purchased a vehicle which polluted at levels far greater than a reasonable consumer would expect. In other words, the vehicle operated differently than they expected. And, importantly, Plaintiffs allege that this disparity results from a nondisclosed vehicle component which is inherently deceptive: its alleged purpose is to surreptitiously **[**43]** permit dramatically higher emissions under certain conditions.

On their face, these allegations do not require proof of noncompliance with EPA regulations. In fact, it is conceivably possible that Defendants could simultaneously comply with EPA regulations while still concealing material information from consumers. Defendants' arguments to the contrary are premised on the assumption that consumers only care about compliance with emission standards, not the total level of emissions by a certain vehicle or the different levels of pollution emitted by competing vehicles. But that assumption cannot be true: the significant market for environmentally friendly vehicles—which are designed to emit pollution far below the regulatory maximums—directly contradicts that assertion. As noted above, the advertisements and press releases which GM issued regarding the Duramax engine and subject vehicles repeatedly emphasized the engine's low emissions, but never expressly referenced EPA regulations. In other words, GM's own conduct reveals an understanding that consumers believe emission levels are material to their purchasing decisions separate and apart from the regulatory maximum emission standards. **[**44]** Thus, the allegation that the subject vehicles do not comply with EPA regulations is consistent with Plaintiffs' theory of harm, but proof of noncompliance is not required.[15]

If Plaintiffs' claims were predicated on proving noncompliance with EPA regulations or with demonstrating that Defendants had defrauded the EPA, they would be preempted. *See* *Jackson, 770 F. Supp. 2d at 572* (finding state tort claims advanced by government employees to be preempted because the plaintiffs had abandoned all claims except those expressly based on proving violation of the CAA). Plaintiffs expressly deny that they assert those claims. *See* Con. Am. Compl. at 5; Pl. Resp. GM Mot. Dismiss at 17. ***HN16***[] Plaintiffs, not Defendants, are the masters of their complaint. *See* *Caterpillar Inc. v. Williams, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)*.

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regulations have been violated. To the extent that it is true, a claim premised on solely that allegation would likely be preempted. But Plaintiffs advance numerous other theories of consumer harm which are not preempted.

14 Notwithstanding this fact, Plaintiffs (and the Court) frequently use the term "defeat device" as a short hand for the manner in which EDC17 allegedly uses several features to bypass or derate emissions reduction technologies in certain circumstances. That term has entered the common parlance, and so the fact that the EPA has also provided a legal definition for the term "defeat device" does not mean that every use of the term "defeat device" necessarily involves a reference to that regulatory definition.

15 In other words, proof that Defendants concealed material information from the EPA will almost certainly provide the factual predicate to sustain Plaintiffs' state law claims, but the inverse is not necessarily true.

iii.

Defendants rely upon a number of cases to support their express preemption argument, but each are distinguishable. For example, Defendants cite a several cases where state governmental entities brought claims against vehicle manufacturers alleging unlawful levels of emissions. *See* *In re Office of Attorney Gen. of State of New York, 269 A.D.2d 1, 11, 709 N.Y.S.2d 1 (2000)* (finding the New York attorney general's suit to be preempted by the CAA because "the Attorney General [was] attempting to enforce [federal emission] standards"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 264 F. Supp. 3d 1040, 1052 (N.D. Cal. 2017)* **[**45]** (finding Wyoming's suit to be preempted because Wyoming was attempting to enforce a state regulation which **[*1063]** prohibited "installing a defeat device in a vehicle prior to registration"). Such suits involved transparent attempts by state governmental entities to establish supplementary emission regulations or enforce existing regulations. Here, Plaintiffs are suing for consumer fraud premised on the allegation that Defendants did not disclose certain aspects of how the subject vehicles operated. The allegations involve the level of emissions, but do not require proof that federal emission regulations were violated.

Defendants also cite *Jackson v. General Motors Corp., 770 F. Supp. 2d 570*. *Jackson* involved government employees bringing suit alleging common law tort claims. Thus, *Jackson* did not involve an attempt by a state to create and enforce emission standards. But the *Jackson* plaintiffs were alleging "direct violations of EPA standards as a predicate for claims of personal injuries" *Felix v. Volkswagen Grp. of Am., Inc., No. A-0585-16T3, 2017 N.J. Super. Unpub. LEXIS 1776, 2017 WL 3013080, at *5 (N.J. Super. Ct. App. Div. July 17, 2017)* (distinguishing *Jackson*). *See also* *Jackson, 770 F. Supp. 2d at 577* ("Plaintiffs' negligence claims regarding Defendants' compliance with CAA emissions standards" are "squarely" preempted).

In other words, Defendants rely upon cases **[**46]** where the claims depended upon direct proof of noncompliance with federal emission regulations. Plaintiffs, on the other hand, are bringing consumer protection and fraudulent concealment claims which do not require direct proof of noncompliance. None of the courts which have considered such claims have concluded that they are preempted. *See* *Felix v. Volkswagen Grp. of Am., Inc., No. A-0585-16T3, 2017 N.J. Super. Unpub. LEXIS 1776, 2017 WL 3013080, at *6 (N.J. Super. Ct. App. Div. July 17, 2017)* ("[T]he gravamen of plaintiffs' complaint centers on VW's alleged deceitful, fraudulent practices, and its alleged breach of a duty not to mislead consumers."); *Counts v. Gen. Motors, LLC, 237 F. Supp. 3d 572, 592 (E.D. Mich. 2017)* (holding that "a suit by private consumers who allege that a vehicle manufacturer misrepresented the functionality and effectiveness of certain technology" is not preempted by the CAA); *In re Volkswagen "Clean Diesel" Litigation, 94 Va. Cir. 189, 2016 WL 5347198 at *6 (Va.Cir.Ct. 2016)* ("Because Plaintiffs' fraud and VCPA claims are based on alleged misrepresentations that do not rely on or seek to enforce any emissions standards, and because they will not interfere with any significant CAA regulatory objective," they are not preempted.). *See also* *In re Caterpillar, Inc., C13 & C15 Engine Prod. Liab. Litig., No. 1:14-CV-3722 JBS-JS, 2015 U.S. Dist. LEXIS 98784, 2015 WL 4591236, at *11 (D.N.J. July 29, 2015)* ("Plaintiffs' claims which seek enforcement of express and implied warranties **[**47]** for defects in the Engines' emissions systems, as well as those based on consumer fraud and negligent design, are hardly comparable to efforts by state and local governments to adopt or enforce emissions standards or to require additional certifications or inspections prior to sale.").

3.

Because Plaintiffs' claims are not expressly preempted, the next question is whether they are implicitly preempted. As explained above, there are two types of implied preemption. The first, field preemption, occurs where federal regulations are so expansive that Congress has left no room for supplemental state regulation. Defendants do not advance a field preemption argument. And because the CAA includes a "savings clause" wherein Congress expressly confirms that states retain the ability to regulate "the use, operation, or movement" of motor vehicles, that decision was reasonable. *§ 7543(d)*. *See also* *Geier v. Am. Honda Motor Co., 529 U.S. 861, 868, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)*.

HN17[] **[*1064]** The second kind of implied preemption—conflict preemption—comes in two varieties. First, conflict preemption exists when compliance with both federal and state requirements is physically impossible. *Gade, 505 U.S. at 98*. GM does not advance that argument. Second, conflict preemption exists when state law would operate as an obstacle **[**48]** to "the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (internal citations omitted). GM argues that Plaintiffs' claims represent an obstacle to Congress's purpose and objectives in enacting the CAA.

Specifically, GM argues that "[t]o the extent that Plaintiffs' claims are based on GM's failure to publically disclose (or only partially disclose) specific aspects of its AECDs, these claims are preempted" because "the EPA has already decided what should and should not be disclosed to the public with respect to emissions controls" and thus "the EPA has decided that [this information] may remain confidential." GM Mot. Dismiss at 24-27.

The question raised by GM's argument is whether Congress intended the CAA (or EPA) to regulate the scope of vehicle manufacturer's disclosure obligations to consumers. GM has provided no legal authority to support the proposition that the CAA and/or the EPA is responsible for determining the extent to which vehicle manufacturers must disclose information about the emissions produced by their cars to consumers. The EPA is tasked with *environmental* protection, not *consumer* protection. Defendants have not provided "any basis **[**49]** to conclude, that a significant federal regulatory goal of the CAA is consumer protection from false advertising claims regarding emissions compliance, vehicle efficiency, or implementation of new emissions technology." *In re Volkswagen "Clean Diesel" Litigation, 94 Va. Cir. 189, 2016 WL 5347198 at *6*. *See also* *In re Caterpillar, Inc., C13 & C15 Engine Prod. Liab. Litig., No. 1:14-CV-3722 JBS-JS, 2015 U.S. Dist. LEXIS 98784, 2015 WL 4591236, at *11, *14 (D.N.J. July 29, 2015)* (finding that consumer fraud and negligent design claims were not implicitly preempted by the CAA because the claims were not premised on proof that the engines were noncompliant with EPA standards).

It is undoubtedly true, as Defendants argue, that the EPA requires vehicle manufacturers to provide extensive disclosures *to the EPA* so that it may determine emissions compliance. And the EPA has further concluded that some of those disclosures will not be made public record by the agency. *See, e.g.*, EPA Class Determination 1-13, ECF No. 45, Ex. 2. Defendants reference a document produced by the EPA which explains that the EPA will not produce information under the *Freedom of Information Act* if the requested information involves confidential trade secrets. *Id.* at 2. GM appears to argue that because the EPA does not have a legal duty to disclose certain information **[**50]** to the public, GM does not have a duty to disclose that information to the public. Simply put, the EPA's duty to disclose information to the public is entirely untethered from GM's duty to disclose information to the public. The idea that the EPA's interpretation of its obligations under the *Freedom of Information Act* has any bearing on Defendants' obligations to disclose material information to consumers simply has no merit.[16] There is no risk that Plaintiffs' claims will interfere or undermine the purposes and objectives of Congress in passing **[*1065]** the CAA, and so Plaintiffs' claims are not implicitly preempted.

B.

Defendants argue that, even if Plaintiffs' claims are not preempted, "Plaintiffs have not plausibly pled that there is *any* kind of 'defeat device' other than the kind used to defeat EPA regulations that would be material to a reasonable consumers." GM Mot. Dismiss at 28 (emphasis in original). In other words, "[w]hile it might plausibly be material to a reasonable consumer that [the level of emissions allegedly revealed by Plaintiffs' testing] does not comply with EPA regulations, it is *not* plausible that a reasonable consumer would care about those numbers outside the context **[**51]** of EPA regulations." *Id.*

This is an argument for a jury. In essence, GM is arguing that consumers care only about compliance with EPA regulations, as opposed to the true level of emissions. That assertion might be true for some consumers, but it

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[16] GM's argument regarding implied preemption might have merit if "Plaintiffs' claims could be construed as alleging that AEDC disclosures to the government should have been made public," but as explained above Plaintiffs' claims are premised on Defendants' nondisclosures to consumers, not the EPA. GM. Mot. Dismiss at 27.

cannot possibly be generally accepted as true as a matter of law. Plaintiffs allege that there is a significant consumer demand for environmentally friendly vehicles. *See* Con. Am. Compl. at 5. And that fact is common knowledge. Many of these vehicles, like the Toyota Prius, emit pollution far below the regulatory maximums. If consumers only cared about regulatory compliance and not the quantitative level of emissions, then vehicle manufacturers would focus their advertising on regulatory compliance, not environmental friendliness. But as already noted twice, Plaintiffs have summarized or reproduced over ten pages of GM advertisements and press releases where the company repeatedly touts the low emissions and environmentally friendly nature of the Duramax engine, but never expressly states that the engine complies with emission regulations. That fact goes without saying: all consumers naturally expect their vehicles to be compliant. Consumers **[**52]** who purposefully buy a "green" vehicle, then, must be (at least partially) basing their purchase decision on the technology in the vehicle which reduces emissions far *below* that maximum level. Plaintiffs allege that the subject vehicles operate with significant portions of its emissions reduction technology inactive for 65 to 70% of the miles driven. *Id.* at 3. It is very plausible that a consumer who bought a vehicle because it purportedly contained advanced emissions reduction technology would consider that fact to be material. *Id.* at 3.[17]

C.

Finally, Defendants argue that this case should be stayed pursuant to the primary jurisdiction doctrine in favor of an EPA investigation. ***HN18***[] "The doctrine of primary jurisdiction arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency." *United States v. Haun, 124 F.3d 745, 749 (6th Cir. 1997)*. When the doctrine is invoked, the court proceedings are stayed so that the parties may refer the matter to the administrative agency. *Id.* However, the doctrine is not subject to a "ready formula" for application. *Id.* Relevant factors include **[*1066]** "'the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative **[**53]** questions'" and "'the expert and specialized knowledge of the agencies involved.'" *In re Long Distance Telecommunications Litig., 831 F.2d 627, 630 (6th Cir. 1987)* (quoting *United States v. Western Pacific Railroad Co., 352 U.S. 59, 63-65, 77 S.Ct. 161, 164, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 (1956))*.

Neither factor supports a stay here. The Court has already explained why Plaintiffs' claims are not premised on proof that the Duramax engine involves an "illegal" defeat device or is noncompliant with EPA regulations. Accordingly, the factual questions raised by Plaintiffs' suit are only tangentially within the EPA's specialty. *See In re Ford Fusion & C-Max Fuel Econ. Litig., No. 13-MD-2450 KMK, 2015 U.S. Dist. LEXIS 155383, 2015 WL 7018369, at *30 (S.D.N.Y. Nov. 12, 2015)* ("While Defendant is correct that Plaintiffs' claims relate to the accuracy of EPA-estimated fuel economy (and perhaps suggest deficiencies in the current estimation formula), the question of whether the advertisements related to such information were misleading is a question conventionally left to the courts to answer."). Because the EPA has no regulatory responsibility regarding Defendants' disclosures to consumers, there is no risk of regulatory inconsistency. The EPA undoubtedly possesses specialized expertise regarding emissions testing and the operation of defeat devices. But, as this Court explained in *Counts*, "federal courts must frequently adjudicate disputes involving complicated technical claims, **[**54]** particularly in the field of products liability. Simply put, mere technical complexity is not a 'compelling and legitimate' reason for a federal court to decline jurisdiction." *237 F. Supp. 3d at 593* (internal citations omitted).

Additionally, ***HN19***[] the primary jurisdiction doctrine should not be invoked if "no administrative forum is available." *Haun, 124 F.3d at 750*. The EPA has no authority to redress consumer grievances regarding the operation of emissions technology in vehicles it certifies, and thus Plaintiffs have no administrative forum for their

[17] Bosch also argues that the state law claims brought against it should be dismissed because they are preempted. In so arguing, Bosch also attempts to argue that all of Plaintiffs' claims against them are expressly premised on Bosch's alleged efforts to evade United States emission requirements. But Plaintiffs are not advancing state law claims of that nature. To the extent Bosch argues that Plaintiffs have not stated any state law claims against them because they have not plausibly pleaded a connection between Bosch's conduct and the fraudulent concealment, that argument is best left for the (presumptive) motions by Defendants for judgment on the pleadings.

claims. Similarly, the EPA has no authority to remedy Plaintiffs' alleged financial damages. *See id.* (noting that the "exclusive means" by which the government could "collect a monetary penalty" against the defendants was through a civil action in the district court). *See also* *Counts, 237 F. Supp. 3d at 593*. The primary jurisdiction doctrine is inapplicable here.

V.

Defendants also seek dismissal of Plaintiffs' RICO claim, which is contained in the first count in the consolidated amended complaint. In Plaintiffs' words,

> For many years now, the RICO Defendants have aggressively sought to increase the sales of Polluting Vehicles in an effort to bolster revenue, augment profits, and increase GM's share of the diesel **[**55]** truck market. Finding it impossible to achieve their goals lawfully, however, the RICO Defendants resorted instead to orchestrating a fraudulent scheme and conspiracy. In particular, the RICO Defendants, along with other entities and individuals, created and/or participated in the affairs of an illegal enterprise ("Clean Diesel Fraud Enterprise") whose direct purpose was to deceive the regulators and the public into believing the Polluting Vehicles were "clean" and "environmentally friendly."

Con. Am. Compl. at 128-29.

HN20[] The *Racketeer Influenced and Corrupt Organizations Act* establishes bases for both criminal and civil suits. A RICO civil suit may be brought by "[a]ny person injured in his business or property by reason of a violation of *section 1962* of this chapter." *18 U.S.C. § 1964(c)*. *Section 1962* **[*1067]** provides that: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Id.* at *§ 1962(c)*. In other words, a party advancing a civil RICO claim must establish their right **[**56]** to sue and then further allege the following elements: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 404 (6th Cir. 2012)* (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*.

Defendants argue both that Plaintiffs have not established their standing to bring a civil RICO suit and also that Plaintiffs have not adequately alleged the prima facie elements of a RICO claim. GM additionally argues that the RICO claim is an improper attempt to enforce the provisions of the *Clean Air Act* ("CAA"), violations of which may be prosecuted exclusively pursuant the CAA.

A.

HN21[] Plaintiffs may assert a RICO claim only if they can identify an injury to their "business or property by reason of a violation of *section 1962*." *18 U.S.C. § 1964(c)*. In so limiting the scope of RICO standing, Congress exhibited an intention to exclude "personal injury—that is, an injury 'to a person, such as a broken bone, a cut, or a bruise' or a 'bodily injury.'" *Jackson v. Sedgwick Claims Mgmt. Servs., Inc., 731 F.3d 556, 564 (6th Cir. 2013)* (quoting *Black's Law Dictionary* 857 (9th ed. 2009)). Similarly, a RICO injury must be concrete, not intangible or speculative. *See* *Saro v. Brown, 11 F. App'x 387, 389 (6th Cir. 2001)*. *See also Fleischhauer v. Feltner, 879 F.2d 1290, 1299 (6th Cir. 1989)* (explaining that RICO plaintiffs must identify a "reasonable and principled basis of recovery" which is "not based upon mere speculation and surmise"); *Short v. Janssen Pharm., Inc., No. 1:14-CV-1025, 2015 U.S. Dist. LEXIS 61123, 2015 WL 2201713, at *3 (W.D. Mich. May 11, 2015)* **[**57]** ("Short must, at a minimum, show some direct, pecuniary injury to his own pocket that is unrelated to the claimed personal injury.").

In *Reiter v. Sonotone Corp.*, the Supreme Court interpreted *§ 4 of the Clayton Act*, which authorizes "[a]ny person who shall be injured in his business or property" by reason of an ***antitrust law*** violation to bring suit. *442 U.S. 330, 337, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*. The Supreme Court held that "where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct, she has alleged an injury in her 'property' under *§ 4*." *Id. at 342*. That holding did not involve the RICO statute, but the Sixth Circuit has held that "*Reiter*'s common-sense observation about *§4* applies with equal logical force to *§ 1964(c)*." *Jackson, 731 F.3d at 564*.[18]

1.

Plaintiffs' alleged injury appears to be analogous: the price of the vehicles they bought was "artificially inflated by reason of [Defendants' fraudulent scheme]." *Reiter,* ***[*1068]*** *442 U.S. at 342*. Defendants argue, however, that "this supposed 'injury' is purely speculative" and that other Courts have refused to recognize RICO injuries involving similar "overpayment" theories. GM Mot. Dismiss at 35.

Defendants argue that *In* ***[**58]*** *re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.* supports their interpretation of the RICO injury requirement. *155 F. Supp. 2d 1069, 1089 (S.D. Ind.)*, *rev'd on other grounds* *In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002)*. In *Bridgestone*, the plaintiffs asserted a RICO claim against Bridgestone/Firestone Inc. arising out of an alleged defect in a particular brand of radial tires that caused "the Tires to have 'an unreasonably dangerous propensity to suffer complete or substantial tread separation.'" *Id. at 1077* (quoting Complaint, ¶ 4). The plaintiffs alleged they sustained RICO injuries because they would be forced to "bear the financial loss associated with the cost of the replacing the Tires," their vehicles were less valuable because the safety risks of the tires was now known, and because consumers would have paid less for the Tires if the safety risks were known. *Id. at 1089* (internal citations omitted). Importantly, the alleged injury was *not* that the plaintiffs had been forced to replace their tires, nor that the Plaintiffs had experienced actual tire failure, nor even that any plaintiff had "incurred an actual monetary loss as a result of . . . selling or attempting to sell" the tires. *Id. at 1090*.

The district court concluded that these alleged injuries were speculative and contingent **[**59]** on future events:

> Plaintiffs' assertion of financial loss is grounded in the possibility of future events that may cause them to suffer the loss associated with the products they claim are defective or diminished in value: the tires that they have unilaterally replaced or may replace in the future may suffer tread separation; they may receive on trade-in or resale of their Explorers (or other vehicles equipped with the Tires) less than they would have received absent the alleged defects.

Id. at 1091.

In other words, "[t]he actual failure of the Tires . . . is a contingency upon which Plaintiffs' economic damages are dependent." *Id. at 1092*. ***HN22***[] The *Bridgestone* Court provided a guiding principle for determining if a cognizable RICO injury has been asserted: an injury arises "as a result of a purchase only where the diminished value of the plaintiff's property has *actually been realized* or when the alleged infirmity in the purchased property has otherwise tangibly manifested itself." *Id. at 1094* (emphasis added).

In re: Gen. Motors LLC Ignition Switch Litig. is also instructive. *No. 14-MC-2543 (JMF), 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at *16 (S.D.N.Y. July 15, 2016)*. That multidistrict litigation involved allegations that GM had manufactured vehicles with a defective ignition switch. *2016 U.S. Dist. LEXIS 92499, [WL] at *1*. The plaintiffs advanced **[**60]** a RICO claim. The district court described their theory of injury as a "benefitof- the-bargain" defect theory and summarized it as follows: "Plaintiffs who purchased defective cars were injured when they purchased for x dollars a New GM car that contained a latent defect; had they known about the defect, they would have paid fewer than x dollars for the car (or not bought the car at all), because a car with a safety defect is worth less than a car without a safety defect." *2016 U.S. Dist. LEXIS 92499, [WL] at *7*. The district court held that such a theory was

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[18] The *Clayton Act* included a civil-action provision which permitted private parties to sue for injuries arising out of ***antitrust law*** violations. The Supreme Court has "repeatedly observed . . . that Congress modeled *§ 1964(c)* on the civil-action provision of the federal ***antitrust law***." *Holmes v. Sec. Inv'r Prot. Corp., 503 U.S. 258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*.

insufficient to create RICO standing: "'loss of value' or 'benefit of the bargain' damages 'are generally unavailable in RICO suits' and 'plainly' unavailable where (similar to the case here) a RICO claim 'sound[s] in fraud in the inducement.'" *2016 U.S. Dist. LEXIS 92499, [WL] at *16* **[*1069]** (quoting *McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 228-29 (2d Cir. 2008))*.

McLaughlin addresses the distinction between out-of-pocket-losses (which are cognizable RICO injuries) and benefit-of-the-bargain and price impact damages theories, which are not (because both are expectation-based). That class action case centered on the allegation that the defendant tobacco companies had fraudulently marketed "light cigarettes" as healthier than "full-flavored" cigarettes. *522 F.3d at 220*. The Second Circuit explained **[**61]** that, to "establish the requisite injury under civil RICO," the plaintiffs must show that they "paid more for light cigarettes than they would have but for defendants' misrepresentations." *Id. at 227*. The plaintiffs attempted to meet that burden by providing a "loss of value" model which purported "to measure the difference between the price plaintiffs paid for light cigarettes as represented by defendants and the (presumably lower) price they would have paid (but for defendants' misrepresentation) had they known the truth." *Id. at 228*.

The Second Circuit held that this expectation-based theory was essentially based on a "benefit-of-the-bargain" rationale and that such damages are generally unavailable in RICO suits. *Id.* The court emphasized that "Defendants' misrepresentation could in no way have reduced the value of the cigarettes that plaintiffs actually purchased; they simply could have induced plaintiffs to buy Lights instead of full-flavored cigarettes." *Id. at 229*. Additionally, there was "no reasonable means of calculating" such damages. *Id.* Doing so would require the court to "conceptualize the impossible—a healthy cigarette—and then to imagine what a consumer might have paid for such a thing." *Id.* The **[**62]** plaintiffs alternatively advanced a "price impact" theory based on a "multiple regression analysis" which plaintiffs suggested showed "the amount by which defendants would have had to reduce their prices to account for the concomitant reduced demand." *Id.* The Second Circuit likewise rejected that theory, explaining that "plaintiffs have not come forward with any meaningful means of estimating how the market has changed or might change in the future in response to fluctuations in the demand for light cigarettes." *Id.* The Second Circuit did acknowledge that some plaintiffs likely suffered "out-of-pocket" damages arising out of the misrepresentations, but held that "out-of-pocket losses cannot be shown by common evidence because they constitute an inherently individual inquiry: individual smokers would have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentation." *Id. at 228*.

Several Sixth Circuit cases also provide guidance. In *Hofstetter v. Fletcher*, the RICO defendants "sold millions of dollars worth of insurance policies to scores of individual clients throughout the country by means of a fraudulent promotion whereby the defendants falsely **[**63]** represented that the potential investors could completely avoid payment of any future federal income taxes." *860 F.2d 1079 (6th Cir. 1988)*. That alleged injury—the payment for the insurance policy premised on representations that were demonstrably false at time of payment—was sufficient to establish RICO standing.

In contrast, the plaintiffs in *Fleischhauer v. Feltner* brought a RICO claim arising out of the defendants' sale of "non-theatrical rights to distribution of 23 full length feature motion pictures." *879 F.2d 1290, 1292 (6th Cir. 1989)*. The defendants allegedly knew that the films in question "were not marketable either because they were unauthorized copies or because unauthorized copies were readily available." *Id. at 1294*. The defendants marketed the movie rights as providing "both income **[*1070]** and tax advantage[s]," but also "advised interested parties that there was a significant chance that the purchaser would be audited by the Internal Revenue Service." *Id. at 1293*. The defendants argued that the plaintiffs' damages should be "confined to the amount appellees paid in down payments," but the jury awarded significantly more than that amount. On appeal, the Sixth Circuit held that "plaintiffs' damages should be limited to the amounts actually invested," and not **[**64]** "expectancy or 'benefit of the bargain' damages" based on purported lost profits or expenses arising out of IRS audits. *Id. at 1300*. The Sixth Circuit reasoned that "[t]here was ample warning about risks involved, particularly tax hazards, therefore expectancy damages are not recoverable under these circumstances." *Id. See also id.* (Although in some cases expectancy damages might be appropriate, clearly they are not in this case.").

2.

To summarize, ***HN23***[] courts have generally held that damages theories premised on the expectation of future value or profits are too speculative and contingent to establish injury for purposes of RICO. However, "courts have recognized expectation damages under RICO . . . where an agreement between the parties provided for a certain performance guarantee that the defendant had no intention of keeping." *Ignition Switch Litigation, 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353 at 17* (collecting several cases). And courts have similarly found that, when the financial injury occurred *at the time of payment*, a cognizable out of pocket loss has been sustained. *See Bridgestone*, *155 F. Supp. 2d at 1094*. For example, in *Bailey v. Atl. Auto. Corp.*, the RICO plaintiff advanced a cognizable injury because the defendants sold "former short term rental vehicles to consumers without disclosing **[**65]** the vehicles' history," resulting in the plaintiff being overcharged. *992 F. Supp. 2d 560, 579 (D. Md. 2014)*. The district court distinguished cases, like *Bridgestone*, where the alleged overpayment damages were premised on the manifestation of some defect in the future: "Bailey contends that she suffered the claimed loss *at the moment of purchase* in reliance upon the false representation that she was not buying a former short-term rental vehicle." *Id. at 581* (emphasis added).

There are a number of analogous cases. *See In re Merrill Lynch Ltd. Partnerships Litig., 154 F.3d 56, 59 (2d Cir. 1998)* ("[I]nvestors allege that the partnerships were fraudulent at the outset because they could never achieve the promised objectives. . . . [T]he investors sustained recoverable out-of-pocket losses when they invested; namely, the difference between the value of the security they were promised and the one they received which could not meet those objectives."); *Ellis v. J.P. Morgan Chase & Co., 950 F. Supp. 2d 1062, 1086 (N.D. Cal. 2013)* ("Plaintiffs allege they have paid marked-up fees and thus satisfy RICO standing. A consumer who has been overcharged can claim injury to property under RICO based on a wrongful deprivation of money, which is a form of property."); *Stitt v. Citibank, N.A., 942 F. Supp. 2d 944, 954 (N.D. Cal. 2013)* (identifying a cognizable RICO injury when the plaintiffs were "overcharged" markedup fees related to mortgage loan servicing even **[**66]** if the "total fees assessed fell within market range" because the plaintiffs alleged that they "would not have paid the fees but for Defendants' deception").

In other words, a distinction must be made between damages theories where the (ascertainable and reasonably quantifiable) overpayment occurred at the time of injury and speculative damages theories which are contingent on some future event, lost profit, or unanticipated future expense. Thus, a RICO plaintiff may recover **[*1071]** for money invested on the basis of misrepresentations, but not for loss of the profits which the plaintiffs expected to receive from that investment. *See Fleischhauer, 879 F.2d at 1300*. Likewise, a RICO plaintiff may recover for overpayment when they buy a used car after being told it was new, *see Bailey, 992 F. Supp. 2d at 579*, but may not recover for overpayment simply because the tires they purchased *may* be defective, *see Bridgestone, 155 F. Supp. 2d at 1095*. A RICO plaintiff may recover money paid pursuant to insurance policies that plaintiffs chose because "the defendants falsely represented that the potential investors could completely avoid payment of any future federal income taxes," *see Hofstetter*, 860 F.2d at *14, but cannot recover for loans granted to debtors based upon misrepresentations by the debtors because the plaintiffs **[**67]** would suffer damages only if the debtors defaulted (and because the amount of damages was speculative until the creditor's bargained for remedies were exhausted), *see First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994)*.

Plaintiffs allege both speculative and nonspeculative damages here. Some of Plaintiffs' alleged damages are clearly speculative. For example, they allege that "when and if GM recalls the Polluting Vehicles and degrades the GM Clean Diesel engine performance and fuel efficiency in order to make the Polluting Vehicles compliant with EPA standards, Plaintiffs and Class members will be required to spend additional sums on fuel and will not obtain the performance characteristics of their vehicles when purchased." Con. Am. Compl. at 117. Likewise, Plaintiffs allege that "Polluting Vehicles will necessarily be worth less in the marketplace because of their decrease in performance and efficiency and increased wear on their cars' engines." *Id.* Those damages are contingent on future, uncertain developments. Because those injuries may never occur and are thus currently unmeasurable, they cannot give rise to RICO standing. *See Gelt Funding Corp., 27 F.3d at 768* ("[A]s a general rule, a cause of action does not accrue under RICO until the amount of damages becomes **[**68]** clear and definite.").

Plaintiffs additionally allege that "[h]ad Plaintiffs and Class members known of the higher emissions at the time they purchased or leased their Polluting Vehicles, they would not have purchased or leased those vehicles, or would have paid substantially less for the vehicles than they did." Con. Am. Compl. at 117. This alleged injury straddles the line between speculative and concrete. Consumers weigh many factors in choosing a vehicle. While emissions are undoubtedly one such factor, the assertion that the unexpectedly high emissions would have been a material factor for all the Plaintiffs is questionable. Accepting all well-pleaded allegations as true, Plaintiffs have alleged that they would not have purchased the vehicles in question had they known of the true emissions level. Fair enough. But the contention that they "would have paid substantially less" appears to be premised on some approximation of what the new market value for the vehicles would have been. Determining what that decrease in value would have been seems hopelessly speculative. *See* McLaughlin, 522 F.3d at 229 ("We are asked to conceptualize the impossible—a healthy cigarette—and then to imagine what a consumer might **[**69]** have paid for such a thing.").

However, Plaintiffs' first alleged injury clearly suffices to create RICO standing. Plaintiffs contend that they "paid a premium of nearly $9,000, as GM charged more for its Duramax engine than a comparable gas car." Con. Am. Compl. at 115. Plaintiffs thus identify a specific payment attributable directly to the vehicle component at issue which they opted to purchase **[*1072]** on the basis of fraudulent conduct. This is cognizable out-of-pocket injury: "[T]he price of the [Duramax engine-equipped vehicle which Plaintiffs] bought was artificially inflated by reason of [Defendants' fraudulent] conduct." Reiter, 442 U.S. at 342. *See also* Jackson, 731 F.3d at 564; Canyon Cty. v. Syngenta Seeds, Inc., 519 F.3d 969, 976 (9th Cir. 2008). Accepting Plaintiffs' allegations as true, the fraud (and thus overcharge) occurred *at the time the purchase was made. See* Bailey, 992 F. Supp. 2d at 579. Unlike in *Bridgestone* (where only some tires exhibited the defect), the alleged injury occurred every time a Duramax vehicle was purchased. The amount by which Plaintiffs overpaid is not contingent on a future occurrence or on the vagaries of the free market. It occurred and became determinable at the moment the Plaintiffs paid a premium for a vehicle component which did not work as had been represented. Plaintiffs experienced **[**70]** a financial property loss at that moment, which distinguishes the present case from others where the overpayment or diminution in value had not yet occurred. *Compare* Bridgestone, 155 F. Supp. 2d at 1093 & n.26; Gelt, 27 F.3d at 769, *with* Bailey, 992 F. Supp. 2d at 580-81. This is a cognizable RICO injury.

Admittedly, several cases appear to support the opposite conclusion. The *Ignition Switch Litigation* opinion does suggest that a plaintiff who purchases a defective car for more than they would have paid if they were aware of a defect does not state a RICO injury. 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353 at *7. But the district court also recognized that "courts have recognized expectation damages under RICO . . . where an agreement between the parties provided for a certain performance guarantee that the defendant had no intention of keeping." 2016 U.S. Dist. LEXIS 92499, [WL] at *17. The district court distinguished the present claim because plaintiffs had "at best" alleged an implied promise that GM-brand vehicles would have "continuing resale value." *Id.* Resale value and brand devaluation theories are clearly speculative. But, here, GM allegedly sold Duramax vehicles, for a premium, which did not perform as a reasonable consumer would expect. In other words, Defendants had no intention of delivering the emissions performance which consumers expected. **[**71]**

More importantly, the Ignition Switch Litigation opinion relies heavily upon the Second Circuit's opinion in *McLaughlin*, but appears to overlook a crucial aspect of that opinion. In *McLaughlin*, the Second Circuit was reviewing a district court decision to certify a class action advancing a RICO claim. The court explained that "[o]nly by showing that plaintiffs paid more for light cigarettes than they would have but for defendants' misrepresentation can plaintiffs establish the requisite injury under civil RICO." McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 227 (2d Cir. 2008). The Second Circuit concluded that such out of pocket losses existed, but that they "cannot be shown by common evidence because they constitute an inherently individual inquiry: individual smokers would have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentation." Id. at 228.[19] The plaintiffs' alternative damages theories (which the Second Circuit rejected, providing the basis for the decision in the *Ignition Switch Litigation*) were premised on market demand theories that, because of the confluence of factors involved, were too speculative to support a RICO claim. *See* id. at 226-28. Tri-State Express, Inc. v.

[19] Thus, even though the alleged RICO injury is sufficient to create standing, the nature of the alleged injury might prevent class certification.

Cummins Engine Co., 2000 U.S. Dist. LEXIS 23564, despite its factual similarities to the present case, is **[*1073]** distinguishable **[**72]** for the same reason: those plaintiffs relied upon "only the potential for harm," while the present case involves Plaintiffs who paid a premium for a vehicle component which did not provide the benefits paid for. *Id. at *18*.

To the extent the rationale in *Ignition Switch Litigation* and *Tri-State Express* cannot be squared with the conclusion that Plaintiffs have alleged a RICO injury, the Court declines to follow their reasoning. Indeed, such a reading of those two cases appears to be incompatible with the Supreme Court's conclusions in *Reiter* and the Sixth Circuit's decision in *Hofstetter*.

B.

Bosch argues that, even if Plaintiffs' alleged injury is sufficient to confer standing to bring a RICO claim against GM, they have not alleged that their injuries were proximately caused by Bosch's conduct. ***HN24***[] The RICO proximate causation analysis is closely related to (even subsumed in) the statutory standing analysis. The Supreme Court has "held that a plaintiff's right to sue . . . required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes, 503 U.S. at 268*. The plaintiff must show "some direct relation between the injury asserted and the injurious conduct **[**73]** alleged." *Id.* Importantly, the causation inquiry must focus on the alleged link between the "predicate acts" and the asserted injury. *Heinrich v. Waiting Angels Adoption Servs., Inc., 668 F.3d 393, 405 (6th Cir. 2012)*. A purported link that is "too remote," "purely contingent," or "indirect" is insufficient to confer standing. *Holmes, 503 U.S. at 271, 274*. According to the Supreme Court, "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Id.* (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. An attenuated causation theory creates difficulties in apportioning damages between plaintiffs and attributing damages to defendants. *See id. at 273*. A challenge to a RICO suit based on asserted lack of proximate causation, however, is often best resolved at summary judgment, not at the pleading stage. *See Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 615 (6th Cir. 2004)*.

In *Holmes*, a "Securities Investor Protection Corporation" (SIPC) brought suit against defendants who allegedly "conspired in a stock-manipulation scheme." *Id. at 261*. After the scheme was detected, stock prices plummeted and a number of broker-dealers were unable to meet their financial obligations to customers. The SIPC, accordingly, was required to advance nearly $13 million to cover the customer claims. The SIPC then brought a RICO claim against the defendants to recoup its losses. That relationship, according **[**74]** to the Supreme Court, was too attenuated to create standing: "the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims." *Id. at 271*. In other words, "[t]he broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors." *Id.*

In *Hemi Grp., LLC v. City of New York, N.Y.*, the Supreme Court rejected another RICO claim because the plaintiff's causal theory was even more attenuated than in *Holmes.* The City of New York advanced the following causal theory:

> Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports **[*1074]** from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, the City could not determine which customers had failed to pay the tax. The City thus could **[**75]** not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected.

559 U.S. 1, 9, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010).

The Supreme Court held that this relationship was too attenuated. The Court explained: "The City's theory thus requires that we extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City)." *Id. at 11*.[20] In holding that this proximate causation theory was insufficient, the Supreme Court relied in part upon the fact that "[t]he State certainly is better situated than the City to seek recovery from Hemi." *Id. at 12*. In other words, when there are other, "better situated plaintiffs [which] have an incentive to sue," the "RICO 'direct relationship' requirement" may not be met. *Id. at 11-12*.

Plaintiffs allege that the direct relationship between Bosch's predicate acts and their injury is "plain—Bosch developed the defeat devices that are at the core of this litigation while knowing that GM would sell Affected Vehicles without revealing the existence of those devices to consumers or anyone else and that consumers would buy them." Pl. Res. Bosch Mot. Dismiss **[**76]** at 25. Bosch argues that this theory is insufficient for several reasons.

1.

First, Bosch contends that "Plaintiffs' alleged harms here are premised upon the 'premium' GM charged for the Subject Vehicles, which GM determined alone." Bosch Mot. Dismiss at 26. Because Bosch was not involved in the pricing decisions, Plaintiffs' injury stems from "separate actions carried out by separate parties." *Hemi, 559 U.S. at 11* (emphasis omitted). All of the cases Bosch relies upon in support of this argument involve RICO claims where the injuries to Plaintiffs were at least partially attributable to the decisions of third-party entities who were *not* parties to the suit. *See* *Longmont United Hosp. v. Saint Barnabas Corp., 305 F. App'x 892, 895 (3d Cir. 2009)* (plaintiff hospital suing defendant hospital consortium for increased medicare expenses which were partially traceable to a non-party government agency's decisions regarding reimbursement amounts); *Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 930 (9th Cir. 1994)* (sub-leasing tenant suing owners of the building with whom it had no contract for their fraudulent scheme to increase the rent paid by the non-party sublessee). Here, the separate party which Bosch identifies is Bosch's alleged coconspirator. Bosch has provided no authority for the proposition that a RICO defendant may avoid liability simply by identifying **[**77]** a separate action by its codefendant which partially contributed to the plaintiff's injury (especially when, as here, the Plaintiffs allege that the RICO Defendants worked together to cause the **[*1075]** injury). Such an assertion is facially absurd.

Bosch does argue, correctly, that the proximate causation analysis must be conducted for each defendant in a RICO case. But, ***HN25***[] when a conspiracy is alleged, it is inevitable that not all of the RICO defendants will be directly involved in every action which injures the plaintiff.[21] The mere fact that it may be possible to differentiate between the RICO defendants in terms of culpability does not necessarily prevent a finding that all defendants proximately caused the alleged injury. *See* *Trollinger, 370 F.3d at 620* ("[P]laintiffs need not show that Tyson's conduct was the sole cause of their injury in order to establish proximate cause; they need show only that the conduct was a substantial cause.") (citing *Schwartz v. Sun Co., 276 F.3d 900, 904 (6th Cir.2002))*. This suit does not involve "derivative or passed-on harm": all entities which conceivably contributed to Plaintiffs' injuries have been joined as parties. *Id.* (citing *Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002))*.

2.

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[20] And Chief Justice Robert's opinion (joined by three justices) took care to reject the argument advanced by three dissenting justices that "RICO's proximate cause requirement [should] turn on foreseeability, rather than on the existence of a sufficiently 'direct relationship' between the fraud and the harm." *Id. at 12*.

[21] This is not the say, however, that Plaintiffs may advance a *§ 1962(c)* RICO claim against Bosch without identifying specific predicate acts committed by Bosch. *See* *Kerrigan v. ViSalus, Inc., 112 F. Supp. 3d 580, 605 (E.D. Mich. 2015)* (collecting cases and distinguishing between *§ 1962(d)* conspiracy claims and *§ 1962(c)* substantive claims). That subtly different analysis will be conducted below, while determining whether Plaintiffs have alleged a prima facie RICO claim. As explained in that section, Plaintiffs have adequately alleged that Bosch committed predicate acts of mail and wire fraud even though Plaintiffs have not specifically alleged that Bosch personally used the mail or wire to further the fraudulent scheme.

Bosch next argues that its alleged conduct was not a substantial factor in causing Plaintiffs' injuries. **[**78]** Specifically, Bosch contends that "Plaintiffs' alleged injury was the result of a host of factors including GM's advertising campaign; . . . the 'premiums' GM charged based on consumer demand for certain features; . . . reputation of local dealers; market forces such as competition; and promotional discounts." Bosch Mot. Dismiss at 27. Bosch further argues that Plaintiffs' injuries might be "dependent on GM's ability to provide a fix, if necessary, for the Subject Vehicles." *Id.* And, finally, Bosch opines that "to the extent Plaintiffs claim that their injury resulted from their reliance on purportedly false ads by GM, that itself breaks any causal link to the Bosch Defendants." *Id.* at 28.

That final argument is clearly inconsistent with Sixth Circuit (and Supreme Court) precedent. As the Sixth Circuit has recently held, ***HN26***[] "[a]lthough civil RICO plaintiffs must establish proximate causation, they need not necessarily show that they relied on any misrepresentations." *In re ClassicStar Mare Lease Litig., 727 F.3d 473, 487 (6th Cir. 2013)*. Rather, "Plaintiffs need only show that the defendants' wrongful conduct was 'a substantial and foreseeable cause' of the injury and the relationship between the wrongful conduct and the injury is 'logical and not speculative.'" **[**79]** *Id.* (quoting *Trollinger, 370 F.3d at 615*). *See also* *Wallace, 714 F.3d at 420* ("[T]he appropriate inquiry in this case is not whether Wallace actually relied on the allegedly inflated appraisal, but whether the fraudulent scheme furthered by that appraisal proximately caused his financial injuries.").

In *Bridge v. Phoenix Bond & Indem. Co.*, the Supreme Court addressed, in detail, the question of whether reliance is an element of a RICO cause of action. *553 U.S. 639, 647-659, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*. The Court explained: "Nothing on the face of the relevant statutory **[*1076]** provisions imposes such a requirement." *Id. at 649*. Likewise, the Court dismissed the argument that "a plaintiff who brings [a RICO claim predicated on mail fraud] must show that it relied on the defendant's misrepresentations in order to establish the requisite element of causation." *Id. at 653*. In *Bridge*, the Supreme Court repeatedly distinguished between common law fraud requirements and RICO-based mail fraud claims. The Supreme Court further explained that, even under general common law fraud principles, the law "does not say that only those who rely on the misrepresentation can suffer a legally cognizable injury." *Id. at 656*. Rather, the common law "provides only that the plaintiff's loss must be a foreseeable result of *someone's* reliance on **[**80]** the misrepresentation." *Id.* (emphasis in original). In other words, a RICO plaintiff will typically be required to show that "*someone* relied on the defendant's misrepresentations," but does not need to prove first-party reliance. *Id. at 658-59* (emphasis in original).

In *Bridge*, the RICO defendants conspired to "fraudulently obtain[] a disproportionate share of [tax] liens by violating the Single, Simultaneous Bidder Rule at" Cook County tax lien auctions. *Id. at 643*. The RICO plaintiffs alleged that this scheme "deprived them and other bidders of their fair share of liens and the attendant financial benefits." *Id. at 644*. The defendants argued that "the alleged representations," their "attestations of compliance with the Single, Simultaneous Bidder Rule," were made to the county and not the plaintiffs. *Id. at 648*. The Supreme Court held that the plaintiffs had identified a "sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury" because "[i]t was a foreseeable and natural consequence of petitioner's scheme to obtain more liens for themselves that no other bidders would obtain fewer liens." *Id.*

For similar reasons, Plaintiffs have plausibly alleged that Bosch's joint activities with **[**81]** GM were a substantial factor contributing to their injury. EDC17 is the means by which Plaintiffs were injured. According to Plaintiffs, Bosch "exerts near-total control" over the customization of EDC17, eliminating the possibility that GM programmed the functionality which enables use of defeat devices without Bosch's knowledge. *See* Con. Am. Compl. at 94-95. Plaintiffs thus plausibly allege that Bosch developed the vehicle component which has caused Plaintiffs' injury, that Bosch was aware of the deception that component would inevitably contribute to, and that Bosch was aware that consumers would pay a premium for vehicle capabilities that the component would not deliver.[22]

[22] Bosch's arguments conflate the distinction between (1) the requirement that Plaintiffs allege a causal link between their injury and the predicate acts and (2) the elements of mail and wire fraud. As discussed below, a party can be guilty of mail fraud even if they did not personally use the mail. The fact that GM, not Bosch, is the party who used the mail and wire to make representations to regulators and consumers is thus not determinative. *See* ***United States v. Stapleton, 293 F.3d 1111, 1117***

To repeat, Plaintiffs were financially injured when they paid a premium for a vehicle component which did not work as a reasonable consumer would have expected. GM and Bosch worked closely together to develop that component, and any injury which resulted was a "foreseeable and natural consequence" of their efforts. *Bridge, 553 U.S. at 648*. While **[*1077]** GM's pricing decisions and market forces might have contributed to the *level* of damages which Plaintiffs sustained, they were not the *source* of the injury. Put another way, if the Duramax engine **[**82]** did not include the Bosch-developed EDC17, Plaintiffs would have suffered no injury, even though all the other independent factors Bosch identifies would still exist. Thus, Bosch's development of EDC17 was the but for cause of Plaintiffs' injuries.

It was also the proximate cause. ***HN27***[] "[P]roximate cause is not . . . the same thing as a sole cause." *Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1399 (11th Cir.)*. A plaintiff can adequately allege proximate causation by plausibly asserting that the defendant's actions "increased the likelihood of injury." *Wallace, 724 F.3d at 422*. The causation analysis in this matter is complicated due to the confluence of potentially contributing factors to Plaintiffs' injury, but there can be no reasonable dispute that the development of EDC17 is a "fundamental part of the [injury] calculus." *Id.* The alleged connection between Bosch's development of that component and Plaintiffs' alleged overpayment is sufficiently direct, foreseeable, and logical to satisfy proximate causation requirements at the pleading stage. *See id.*

3.

Third, Bosch argues that "the difficulty of apportioning damages between Bosch LLC and GM creates the risk of double recovery." Bosch Mot. Dismiss at 28. It is true that the Supreme Court has identified the difficulties **[**83]** of apportioning treble damages among multiple dissimilarly situated plaintiffs as a factor to consider in conducting the proximate causation analysis. *See* *Holmes, 503 U.S. at 273*. This concern was focused on the disparate damages suffered by different classes of plaintiffs (some with claims that are indirectly related to and derivative of the other class's claims). In other words, the Supreme Court's expressed concern was *not* with the difficulty of allocating the relative culpability of various RICO defendants, but with determining the proportion of the recovery which should be recoverable by directly injured plaintiffs as compared to indirectly injured plaintiffs. *See also* *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., No. MDL 2672 CRB (JSC), 2017 U.S. Dist. LEXIS 179652 , 2017 WL 4890594, at *9 (N.D. Cal. Oct. 30, 2017)* ("Difficulty apportioning damages between defendants, however, is not a factor that is considered in the proximate cause analysis."); *Koch v. Royal Wine Merchants, Ltd., 907 F. Supp. 2d 1332, 1343 (S.D. Fla. 2012)*. The proximate causation requirement operates as means to avoid that difficult determination. The Plaintiffs in this suit are all similarly situated. Accordingly, there is no difficult apportionment question and, relatedly, there is no risk of Defendants being subjected to multiple claims or multiple recoveries. Plaintiffs **[**84]** have plausibly alleged that Bosch's conduct proximately caused their injury.

C.

Defendants alternatively argue that, even if Plaintiffs have standing to bring a RICO claim, they have not alleged the prima facie elements of a RICO claim. ***HN28***[] The elements of a prima facie RICO claim are: "'(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Heinrich, 668 F.3d at 404* (quoting *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*.

1.

Defendants argue that Plaintiffs have not adequately alleged either the existence of an enterprise or the required pattern of predicate acts. Bosch additionally argues that Plaintiffs have not plausibly alleged that Bosch participated

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(9th Cir. 2002) ("Because an essential element of these offenses is a fraudulent scheme, mail and wire fraud are treated like conspiracy in several respects.") (internal citations omitted).

in the "conduct" of **[*1078]** the alleged enterprise. The initial question is whether the Plaintiffs have adequately alleged the existence of an enterprise.

i.

HN29[] In order to state a RICO claim, the Plaintiffs must plausibly allege the existence of an enterprise engaged in a pattern of racketeering activity. *18 U.S.C. § 1962(c)*. But the definition of "enterprise" for RICO purposes is exceedingly "broad." *Boyle v. United States, 556 U.S. 938, 944, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)*. The statute defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *18 U.S.C. § 1961(4)*. "On **[**85]** its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones." *United States v. Turkette, 452 U.S. 576, 580-81, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981)*. A RICO association-infact "must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle, 556 U.S. at 946*.[23]

Bosch first argues that Plaintiffs have not plausibly alleged that Bosch and GM shared a "common purpose." *Turkette, 452 U.S. at 583*. In the consolidated amended complaint, Plaintiffs allege that the Defendants "created and/or participated in the affairs of an illegal enterprise ('Clean Diesel Fraud Enterprise') whose direct purpose was to deceive the regulators and the public into believing the Polluting Vehicles were 'clean' and 'environmentally friendly.'" Con. Am. Compl. at 129. Later in the consolidated amended complaint, Plaintiffs provide further specificity:

> GM, the Bosch defendants, and other entities and individuals associated for the common purpose of designing, manufacturing, distributing, testing, and selling the Polluting Vehicles through fraudulent COCs [certificates of compliance] and EOs **[**86]** [Executive Orders], false emissions tests, deceptive and misleading marketing and materials, and deriving profits and revenues from those activities. Each member of the Clean Diesel Fraud Enterprise shared in the bounty generated by the enterprise—i.e., by sharing the benefit derived from increased sales revenue generated by the scheme to defraud consumers and franchise dealers alike nationwide.

Id. at 132-133.

Bosch contends that these allegations do not specify a common purpose. First, Bosch notes that "Plaintiffs make no allegations that Bosch LLC played any role in obtaining the COCs and EOs for GM and the Subject Vehicles." Bosch Mot. Dismiss at 30. Bosch further characterizes the complaint as framing "generalized allegations concerning unspecified communications with regulators that fail to specify the who, what, when, and where of the alleged communications or any reason to believe they were truthful." *Id.* In fact, Bosch attempts to explain away all of Bosch's alleged involvement as being related only to the Volkswagen emissions scandal.

These arguments miss the point. Plaintiffs' essential theory is that Bosch and GM[24] worked together to create an engine **[*1079]** component which accommodated the use of **[**87]** defeat devices. That component and the related defeat devices caused the Duramax engine to produce emissions at a level much higher than a reasonable

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[23] The Defendants do not attempt to argue that the relationship which Plaintiffs allege existed between them was too short to give rise to a RICO association-in-fact. And Defendants decline to make that argument for good reason: Plaintiffs allege that Defendants' enterprise spanned years.

[24] Plaintiffs allege that Bosch and GM conspired together. The additional allegation that Bosch also conspired in similar manner with Volkswagen is largely irrelevant. It is, at the very least, consistent with Plaintiffs' theory. Bosch's apparent belief that the alleged existence of a similar but separate agreement affirmatively establishes that no such agreement existed between Bosch and GM is unexplained. The Plaintiffs' well-pleaded allegations must be construed in their favor and accepted as true at this stage.

consumer would expect. That identified common purpose—the Defendants agreed to create a component together which would not operate as consumers would expect—is sufficient. Bosch has not proffered, and the Court cannot conceive of, a reason why Plaintiffs must identify specific communications with regulators in order to allege a common purpose. Such communications may have been made and, indeed, may have furthered the Defendants' common purpose, but they are a secondary aspect of the alleged common purpose.

ii.

Second, Defendants argue that any alleged relationship between them is simply a routine business relationship which is insufficient to create RICO liability. ***HN30***[] "[S]imply conspiring to commit a fraud is not enough to trigger the Act if the parties are not organized in a fashion that would enable them to function as a racketeering organization for other purposes." *VanDenBroeck v. CommonPoint Mortg. Co., 210 F.3d 696, 699 (6th Cir. 2000)*, *abrogated on other grounds in* *Bridge, 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*. The most probative question in determining whether a RICO enterprise exists is whether the enterprise has the "ability to exist apart from **[**88]** the pattern of wrongdoing." *Id.* (internal citations omitted). To state it differently, "[t]he 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Turkette, 452 U.S. at 583*. The Sixth Circuit has identified two important principles for determining whether an association with a corporation constitutes a RICO enterprise:

> 1) individual defendants are always distinct from corporate enterprises because they are legally distinct entities, even when those individuals own the corporations or act only on their behalf; and 2) corporate defendants are distinct from RICO enterprises when they are functionally separate, as when they perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity.

In re ClassicStar Mare Lease Litig., 727 F.3d at 492.

Here, GM and Bosch are clearly different corporate entities and performed different roles within the enterprise. Their association thus satisfies the fundamental requirements of a RICO enterprise.

Defendants correctly argue that courts have overwhelming held that a "routine commercial relationship" is insufficient to form the basis for a RICO enterprise. The district court in *Gomez* ***[**89]*** *v. Guthy-Renker, LLC* has provided both an exhaustive exposition of the law and an example of the typical fact pattern which plaintiffs allege. *No. EDCV1401425JGBKKX, 2015 U.S. Dist. LEXIS 90725, 2015 WL 4270042, at *5 (C.D. Cal. July 13, 2015)*. The *Gomez* Court summarized the typical theory:

> Some provider of services ("Provider") has a business client ("Business"). Completely unbeknownst to Provider, Business is conducting its affairs fraudulently. Someone ("Injured Party") is injured by Business's fraudulent practices and **[*1080]** wishes to seek compensation from Business.

Id.

"Despite the widespread consensus among courts that such routine business relationships are insufficient to impose RICO liability, there has been very little agreement among courts as to which particular RICO requirement fails under such circumstances." *2015 U.S. Dist. LEXIS 90725, [WL] at *9*. Some courts, like the Second Circuit, require that "the common purpose of an association be fraudulent in order for it to constitute a RICO enterprise." *Id.* (citing *First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 174 (2d Cir. 2004))*. Other courts have rejected RICO claims premised on routine services contracts "because the entities are actually pursuing their individual economic interests, rather than any shared purpose." *Id.* And still other courts have "noted the lack of organization and structure underlying a **[**90]** routine contractual relationship for the provision of services." *2015 U.S. Dist. LEXIS 90725, [WL] at *10*.

The *Gomez* court discusses other rationales that various courts have promulgated when confronted with this issue, but all can be summarized as demonstrating "a remarkable uniformity [among federal courts] that RICO liability must be predicated on a relationship more substantial than a routine contract between a service provider and its client." *2015 U.S. Dist. LEXIS 90725, [WL] at *11*. The alleged business relationship which the Defendants entered into here, however, is far from "routine." Defendants' assertion that Bosch has supplied a number of legitimate vehicle components to GM is, simply, irrelevant. Those contractual relationships are not part of the illegal enterprise which Plaintiffs allege existed.

Plaintiffs allege that Defendants participated in an enterprise with the purpose of defrauding consumers. They "associated for the common purpose of designing, manufacturing, distributing, testing, and selling the Polluting Vehicles through fraudulent COCs and EOs, false emissions tests, and deceptive and misleading marketing and materials, and deriving profits and revenues from those activities." Con. Am. Compl. at 132. The alleged course of conduct is inherently **[**91]** deceptive: Bosch and GM collaborated to create an engine which performed one way when being tested for emissions and another way when in normal use. *See also* *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 2017 U.S. Dist. LEXIS 179652, 2017 WL 4890594, at *15* ("Bosch's intent to defraud reasonably can be inferred from the scheme itself. . . . No one to date in this multidistrict litigation has sought to justify, or explain a lawful purpose for, software that effectively turns a vehicle's emission systems on or off depending on whether the vehicle is undergoing emissions testing or being operated under normal driving conditions.").

In other words, Plaintiffs have plausibly alleged that both Bosch and GM were engaged in an enterprise with the manifest purpose of defrauding both regulators and consumers.[25] The Defendants may have engaged in other, "routine" business transactions, but that is irrelevant. The Defendants may even have considered the alleged enterprise whereby they collaborated to configure the EDC17 for the Duramax engine to be a similar business relationship. But when the essential purpose of a particular business relationship is fraud, the related conduct is "not ordinary or normal business activities." *Levine v. **[*1081]** First Am. Title Ins. Co., 682 F. Supp. 2d 442, 461 (E.D. Pa. 2010)*. That fraudulent purpose is the distinction **[**92]** between the EDC17 collaboration and Bosch's previous transactions with GM, as well as the reason that the cases which Defendants cite are inapplicable. *See* *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig., 2017 U.S. Dist. LEXIS 179652, 2017 WL 4890594, at *15* (finding that a RICO enterprise existed and involving indistinguishable facts); *Mitchell Tracey v. First Am. Title Ins. Co., 935 F. Supp. 2d 826, 844 (D. Md. 2013)* ("[U]nlawful acts are not conducted in the ordinary course of business."); *Robins v. Glob. Fitness Holdings, LLC, 838 F. Supp. 2d 631, 652 (N.D. Ohio 2012)* ("The RICO claims of all Plaintiffs fail because they have failed to allege an enterprise for the common purpose of committing bank and wire fraud."). ***HN31***[] A RICO enterprise does not exist where one company unknowingly aided another company in a fraudulent endeavor. But when both companies are aware of and contribute to the fraud, they cannot argue that they have a routine commercial relationship.[26]

Bosch alternatively argues that no RICO enterprise exists because Plaintiffs do not allege that Bosch "had any financial interest in the success of the purported enterprise other than its own compensation for performing the tasks for which it was hired." Bosch Mot. Dismiss at 32. Bosch cites *Guaranteed Rate, Inc. v. Barr* for that proposition. *912 F. Supp. 2d 671, 687 (N.D. Ill. 2012)*. In *Guaranteed Rate*, the district court found that no RICO enterprise **[**93]** existed for several reasons, including because there was not "a single factual claim asserting the RICO Defendants had any interest in the outcome of the alleged scheme beyond their individual interests." *Id.* The

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[25] The nature of the common purpose distinguishes this case from others, like *Shaw v. Nissan N. Am., Inc.*, where the alleged purpose was to continue selling vehicles that (might have) contained defects. *220 F. Supp. 3d 1046, 1054 (C.D. Cal. 2016)*. The common purpose here was to create, market, and sell a component and consequently an engine which was inherently deceptive.

[26] The fact that two distinct companies (Bosch and GM) associated together for a common purpose is important. That fact distinguishes the present case from several which Defendants cite. *See* *Ignition Switch Litig., 2016 U.S. Dist. LEXIS 92499, 2016 WL 3920353, at *12* (no enterprise because the only alleged members were GM and its agents)*;* *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prod. Liab. Litig., 826 F. Supp. 2d 1180, 1185 (C.D. Cal. 2011)* (no RICO enterprise because all defendants were subsidiaries of Toyota). It is axiomatic that a company cannot form a RICO enterprise with itself. But, of course, several companies can easily form a RICO enterprise. *See* *United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979)*. *See also* *In re ClassicStar Mare Lease Litig., 727 F.3d at 493*.

court went on: "[T]here is no indication in the Amended Complaint that the RICO Defendants shared in the profits of the alleged enterprise as opposed to merely taking their own respective profits from their respective actions related to the scheme." *Id.* In *Menzies v. Seyfarth Shaw LLP*, however, the district court rejected the argument that *Guaranteed Rate* stood for the proposition that "RICO requires the enterprise members to share the profits of their illegal scheme." *197 F. Supp. 3d 1076, 1095 (N.D. Ill. 2016)*. "There is no such requirement." *Id.*

The Court agrees. And, more importantly, Bosch's argument is factually suspect. Although GM's profits from sales of Duramax-equipped vehicles might be distinct from Bosch's profits for development and implementation of EDC17 in those vehicles, all Defendants clearly profited from the alleged scheme. EDC17 enabled GM to produce diesel vehicles with an apparent blend of high power, high fuel efficiency, and low emission levels. Because that combination was attractive to consumers, **[**94]** the scheme resulted in higher demand for GM's diesel vehicles, which in turn increased GM's demand for EDC17 devices. The scheme thus plausibly resulted both in higher sales of diesel vehicles for GM and higher sales of EDC17 for Bosch.

[*1082] 2.

The next question is whether Plaintiffs have alleged that the Defendants both engaged in a pattern of racketeering activity. ***HN32***[] Pursuant to *§ 1961(5)*, a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." Defendants argue, correctly, that Plaintiffs must allege that *each* Defendant engaged in two predicate acts of racketeering activity. *See Kerrigan v. ViSalus, Inc., 112 F. Supp. 3d 580, 605 (E.D. Mich. 2015)*. *See also Crest Constr. II, Inc. v. Doe, 660 F.3d 346, 358 (8th Cir. 2011)*; *Guaranteed Rate, Inc. v. Barr, 912 F. Supp. 2d 671, 684 (N.D. Ill. 2012)*.

Here, Plaintiffs allege that Defendants engaged in multiple predicate acts of mail and wire fraud. ***HN33***[] To state a claim based on mail or wire fraud, the Plaintiffs must allege the following three elements: "(1) devising or intending to devise a scheme to defraud (or to perform specified fraudulent acts); (2) involving a use of the mails; and (3) for the purpose of executing **[**95]** the scheme or attempting to do so. *United States v. Kennedy, 714 F.3d 951, 958 (6th Cir. 2013)* (quoting *United States v. Frost, 125 F.3d 346, 354 (6th Cir.1997))*.[27] The Plaintiffs must allege that Defendants possessed the "specific intent to deceive or defraud." *Frost, 125 F.3d at 354*. The "scheme to defraud must involve 'misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.'" *Bender v. Southland Corp., 749 F.2d 1205, 1216 (6th Cir. 1984)* (quoting *United States v. Van Dyke, 605 F.2d 220, 225* (6ht Cir. 1979)). The Plaintiffs need not show "actual reliance," but the Plaintiffs must demonstrate that the misrepresentations or omissions were "material." *United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003)*. Specific intent to defraud or deceive exists if "the defendant by material misrepresentations intends the victim to accept a substantial risk that otherwise would not have been taken." *Id. at 488*.

HN34[] Importantly, "[a] defendant may commit mail fraud even if he personally has not used the mails." *Frost, 125 F.3d at 354* (citing *United States v. Griffith, 17 F.3d 865, 874 (6th Cir.1994))*. "A mail fraud conviction requires only a showing that the defendant acted with knowledge that use of the mails would follow in the ordinary course of business, or that a reasonable person would have foreseen use of the mails." *Id.* In other words, there is no requirement that the defendant have actually intended that the mails (or wire) be used. *Id.* And, further, "'[t]he mailings may be innocent or even legally necessary.'" *Id.* (quoting **[**96]** *United States v. Oldfield, 859 F.2d 392, 400 (6th Cir. 1988))*. The use of the mails "'need only be closely related to the scheme and reasonably foreseeable as a result of the defendant's actions.'" *Id.* (quoting *Oldfield, 859 F.2d at 400*).

[27] The Sixth Circuit has "interpreted the mail-fraud and wire-fraud statutes as having essentially the same elements, except for the use of the mails versus the wires." *Kennedy, 714 F.3d at 958*.

HN35[] "When pleading predicate acts of mail or wire fraud, in order to satisfy the heightened pleading requirements of Rule 9(b), a plaintiff must '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" Heinrich, 668 F.3d at 404 (quoting Frank v. Dana Corp., 547 F.3d 564, 570 (6th Cir. 2008)).

[*1083] i.

GM argues, first, that Plaintiffs' allegations regarding GM's advertising campaign are insufficient to establish affirmative misrepresentations because all claims made in that campaign are nonactionable puffery. Plaintiffs contend that their "RICO claim does not require any proof of affirmative misrepresentations because the omission of material facts suffices to prove the predicate acts of mail or wire fraud." Pl. Resp. GM Mot. Dismiss at 10. That is correct. *See* Bender, 749 F.2d at 1216.

The more pertinent question, then, is whether Plaintiffs have adequately alleged fraudulent omissions. Defendants contend that Plaintiffs do not allege any fraudulent omissions "with the factual specificity mandated by Rule 9(b)." GM Mot. **[**97]** Dismiss at 40. But, as discussed earlier, allegations of omissions—as opposed to affirmative misrepresentations—will inevitably be less specific. Misrepresentations occur at a definite point in time, but omissions occur over periods of time. And, because misrepresentations involve action while omissions involve inaction, plaintiffs are less likely to uncover discrete evidence of omissions. *See* Beck, 273 F. Supp. 3d 735, 2017 WL 3448016, at *9 (collecting cases). It must be remembered that the essential purpose of Rule 9(b) is to provide the defendants with adequate notice of the allegations so that they can defend against the claims.

When considered from that perspective, Plaintiffs' allegations of fraudulent conduct are clearly sufficient to apprise Defendants of the alleged fraudulent scheme. Defendants argue that Plaintiffs have not plausibly alleged that both GM and Bosch had specific intent to defraud consumers. But, as explained above, that intent can be inferred from the nature of the alleged conduct. The way in which EDC17 interacted with the Duramax engine is inherently deceptive. The alleged purpose of the device is to provide the perception of reduced emissions while avoiding the reality of reduced emissions. Defendants cannot reasonably **[**98]** argue that the deceptive nature of EDC17 was unanticipated or unintended, and even if they do, that argument could be resolved only by a jury. Plaintiffs have plausibly alleged that the purpose of EDC17 was deception, and so Defendants' protestations that it has an innocent and lawful purpose are noncognizable at the pleading stage.

Defendants also appear to argue that Plaintiffs have not plausibly alleged or specifically identified specific uses of the mail or wire which were fraudulent. But the Sixth Circuit has clearly held that a RICO claim can exist even if the mailings were "innocent" or "legally necessary." Frost, 125 F.3d at 354 (internal citations omitted). Additionally, the Supreme Court has held that "[m]ailings occurring after receipt of the goods obtained by fraud are within the statute if they 'were designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no mailings had taken place.'" United States v. Lane, 474 U.S. 438, 451-52, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986) (quoting United States v. Maze, 414 U.S. 395, 403, 94 S. Ct. 645, 38 L. Ed. 2d 603 (1974)). *See also* United States v. Daniel, 329 F.3d 480, 489 (6th Cir. 2003). In other words, Plaintiffs do not bear the burden of pleading uses of the mail or wire that were fraudulent. They need only identify uses of the mail or wire **[**99]** which furthered the fraudulent scheme. Allegations that mailings by the Defendants aided in the concealment of the fraud are sufficient.

In making the argument that Plaintiffs must specifically allege fraudulent uses of the mail and wires, Defendants conflate several legal requirements. As described above, Plaintiffs bear the burden of alleging **[*1084]** that each Defendant committed two predicate acts of racketeering activity. Plaintiffs allege that Defendants engaged in wire and mail fraud. Wire and mail fraud require a scheme to defraud through fraudulent representation or omission *and* a use of the mail or wire to further that scheme. But a defendant can commit wire or mail fraud without actually having used the wire or mail to defraud. Rather, and as explained above, a defendant can be found culpable simply by entering into the scheme to defraud if a co-defendant's use of the mail or wire was reasonably foreseeable and closely related to the scheme. Thus, Bosch's repeated argument that Plaintiffs must specifically allege that *Bosch* used the mail or wire to defraud is, simply, wrong.

Plaintiffs have adequately alleged a number of uses of the mail and wire which furthered the fraudulent scheme. **[**100]** GM submitted applications to government regulators which affirmed that the vehicles complied with emission standards. Without those mailings and electronic communications, GM would have been unable to sell the vehicles. The applications and resulting certificates also increased the likelihood that consumers would perceive the Duramax vehicles as emitting pollution at a low level. And although Bosch may not have directly used the mail or wire to further the fraudulent scheme, GM's uses of the mail and wire were inevitable and thus reasonably foreseeable. Plaintiffs have not specifically alleged the date of the applications or the specific identity of the employee who prepared them, but Plaintiffs have alleged enough detail to put Defendants on notice of the alleged predicate acts.

Additionally, Plaintiffs have identified a number of advertisements made by GM which characterized the Duramax vehicles as having low emissions and as being friendly to the environment. *See* Con. Am. Compl. at 61-70. If Plaintiffs were relying on these advertisements as the basis for its claim of fraud, then Defendants' arguments regarding puffery and duty to disclose would become relevant. However, these representations **[**101]** do not constitute the fraudulent scheme; they merely further it. The level of emissions produced by a diesel engine was a material consideration for consumers purchasing a vehicle. GM's extensive advertising which emphasized the low emissions and environmentally-friendly nature of its "clean diesel" engine underscores its understanding of that fact. Thus, regardless of whether these advertisements would be actionable on their own, they were material to the scheme. The advertisements urged consumers to buy Duramax vehicles *because* they were environmentally friendly even though the Defendants had purposefully worked together to obfuscate the true level of emissions.

Plaintiffs have specifically identified a number of communications that were "reasonably calculated to deceive persons of ordinary prudence and comprehension." *Bender, 749 F.2d at 1216*. The communications themselves may not have been demonstrably fraudulent, but they were intended to increase the likelihood that consumers would purchase Duramax vehicles because they produced emissions at a low level, when in fact the true level of emissions was much higher. The nondisclosure of the true operation of the Duramax engine was material precisely because **[**102]** GM worked so hard to convince consumers that it was a "clean diesel" engine. The fact that the uses of the mail and wire which Plaintiffs identify may have been innocent or legally required is irrelevant. *See Frost, 125 F.3d at 354*. *See also Schmuck, 489 U.S. at 712* ("[A]lthough the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary **[*1085]** to the passage of title, which in turn was essential to the perpetuation of Schmuck's scheme."). Plaintiffs have identified a number of predicate acts of mail or wire fraud with sufficient specificity to avoid dismissal.[28]

ii.

Bosch alternatively argues that Plaintiffs cannot rely on alleged omissions unless they can demonstrate that Bosch had an independent duty to disclose. Some noncontrolling cases do appear to support this proposition. *See United States v. Skeddle, 940 F. Supp. 1146, 1149 (N.D. Ohio 1996)* ("Because the "scheme to defraud of property or money" counts are based on what was not said (i.e., omissions), the defendants are culpable under this branch of the mail fraud statute only if the government proves the defendants had a duty to disclose their interest in the transactions."); *Gould, Inc. v. Mitsui Min. & Smelting Co., 750 F. Supp. 838, 843 (N.D. Ohio 1990)* ("[T]here has been no attempt to delineate what facts were omitted or what **[**103]** duty defendants had to disclose information to Gould, which is necessary when one alleges a material omission."). *See also United States v. Benny, 786 F.2d 1410, 1418 (9th Cir. 1986)* ("[A] non-disclosure can only serve as a basis for a fraudulent scheme when there exists

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[28] As the *Kerrigan* Court explained, when the RICO claim is premised on a concealment theory of fraud, the plaintiffs do not need to meet the *Rule 9(b)* heightened pleading standard when identifying the mailings. Rather, Plaintiffs need only "provide a detailed description of the fraudulent scheme and a clear explanation of each Defendant's alleged role in it." *112 F. Supp. 3d at 607*. Plaintiffs have done so here.

an independent duty that has been breached by the person so charged."); *United States v. Rabbitt, 583 F.2d 1014, 1026 (8th Cir. 1978)*.

But other courts have squarely rejected this rationale. *United States v. Colton, 231 F.3d 890, 901 (4th Cir. 2000)* ("Concealment often is accompanied by an affirmative misrepresentation or a violation of an independent statutory or fiduciary disclosure duty, but neither is "essential" for actionable fraud."); *United States v. Keplinger, 776 F.2d 678, 697 (7th Cir. 1985)* ("It requires no extended discussion of authority to demonstrate that omissions or concealment of material information can constitute . . . fraud cognizable under the mail fraud statute, without proof of a duty to disclose the information pursuant to a specific statute or regulation."); *United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977)* (same).

Neither Plaintiffs nor Defendants have identified Sixth Circuit authority which expressly addresses this question. The Sixth Circuit has, however, repeatedly confirmed that concealment of material facts can constitute a fraudulent scheme sufficient to establish RICO liability. *See, e.g., Daniel, 329 F.3d at 487*; *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882, 885 (6th Cir. 1990)*; *Am. Eagle Credit Corp. v. Gaskins, 920 F.2d 352, 354 (6th Cir. 1990)*; *Bender, 749 F.2d at 1216*. *See also United States v. Chew, 497 F. App'x 555, 563 (6th Cir. 2012)* ("[I]n relation both to mail fraud and wire fraud, there **[**104]** is no technical or precise definition of an unlawful 'scheme to defraud.' The standard is a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.") (internal citations omitted); *In re ClassicStar Mare Lease Litig., 823 F. Supp. 2d 599, 627 (E.D. Ky. 2011)* ("A fraudulent scheme may be demonstrated by proof that it was reasonably calculated to deceive persons of ordinary prudence and comprehension, and communications of half-truths and concealment of material facts are both actionable."). ***HN36***[] Because, to the Court's knowledge, the Sixth Circuit has never articulated a duty to disclose **[*1086]** requirement, the Court declines to manufacture that requirement. The more recent and better reasoned cases from other circuits do not require a duty to disclose in order for fraudulent omissions to constitute a scheme to defraud.

And, importantly, "[a] false or fraudulent representation, within the meaning of *18 U.S.C. § 2314*, may be made by statements of half truths or the concealment of material facts, as well as by affirmative statements or acts." *United States v. O'Boyle, 680 F.2d 34, 36 (6th Cir. 1982)*. *See also United States v. Kurlemann, 736 F.3d 439, 446 (6th Cir. 2013)*; *United States v. Allen, 554 F.2d 398, 410 (10th Cir. 1977)*. Even if the representations made during the advertising campaign are nonactionable puffery, those representations also seem fundamentally inconsistent **[**105]** with Plaintiffs' allegation that the Duramax vehicles polluted at levels several multiples more than the legal limit. Con. Am. Compl. at 3. In other words, to the extent Defendants may have had no duty to disclose the operation of the Duramax engine's emissions technology in the abstract, a duty arose when they created the appearance that it was a "clean diesel" engine. *See e.g., Muncy v. InterCloud Sys., Inc., 92 F. Supp. 3d 621, 642 (E.D. Ky. 2015)* (summarizing situations where a duty to disclose arises in the tort context).

3.

Finally, Bosch argues that Plaintiffs have not plausibly alleged that Bosch participated in the conduct of the RICO enterprise by directing the enterprise's affairs. Bosch similarly argues that Plaintiffs cannot join Bosch as a RICO Defendant by alleging that Bosch aided and abetted GM in violating the wire and mail fraud statutes. Finally, Bosch and GM both argue that Plaintiffs cannot maintain a RICO conspiracy claim if they do not allege a cognizable substantive RICO claim.

i.

In *Reves v. Ernst & Young*, the Supreme Court addressed the requirement that a RICO defendant "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." *507 U.S. 170, 179, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993)* (quoting*§ 1962(c)*). The Court explained:

> Once we understand the word "conduct" **[**106]** to require some degree of direction and the word "participate" to require some part in that direction, the meaning of *§ 1962(c)* comes into focus. ***HN37***[] In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required.

Id.

"[L]iability [under *§ 1962(c)*] depends on showing that the defendants conducted or participated in the conduct of the "*enterprise's* affairs," not just their *own* affairs." *Id. at 185*. "Although *Reves* does not explain what it means to have some part in directing the enterprise's affairs, subsequent decisions from our sister circuits have persuasively explained that it can be accomplished either by making decisions on behalf of the enterprise or by knowingly carrying them out." *United States v. Fowler, 535 F.3d 408, 418 (6th Cir. 2008)*.

Bosch argues that Plaintiffs' allegations establish simply that Bosch "worked together with GM to **[**107]** design and implement software and that Bosch LLC participated in promoting clean diesel technology generally." Bosch Mot. Dismiss at 35. According **[*1087]** to Bosch, that is insufficient because "a RICO violation requires more than that a defendant had a business relationship with a putative RICO enterprise or . . . performed services for that enterprise." *Id.* (quoting *Kerrigan, 112 F. Supp 3d at 603* (internal citations omitted)).

This argument is simply a repackaging of Bosch's previous argument that no RICO enterprise has been alleged because the relationship between the Defendants was merely a routine business relationship. That argument was rejected above and carries no additional persuasive weight here. Plaintiffs allege that Bosch was an integral part of the operation of the enterprise because Bosch "locked out" EDC17 so that its customers could not make significant changes to the component. Rather, Bosch worked closely with its customers to customize EDC17. Plaintiffs' allegations characterize EDC17 as performing an inherently deceptive function. Thus, the operation of EDC17 is the apparent heart of the fraudulent enterprise and, because Bosch bears primary responsibility for programming EDC17, it "knowingly carried **[**108]** . . . out" core aspects of the alleged enterprise. *Fowler, 535 F.3d at 418*. *See also* *Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 793 (6th Cir. 2012)* ("*Fowler* makes clear that knowingly carrying out the orders of the enterprise satisfies the "operation or management" test."). *See also id.* ("We recognize that although this analysis applies to all Defendants, the various Defendants acted in different capacities and those differences may ultimately impact the determination of whether a particular Defendant only participated in his own affairs. But that is a matter to be fleshed out in discovery and to be resolved through motion practice or by the jury.").[29]

ii.

Thus, Plaintiffs have adequately alleged the elements of a *§ 1962(c)* substantive RICO claim against both GM and Bosch. Both Defendants argue that, to the extent Plaintiffs have not alleged a cognizable substantive RICO claim, they cannot maintain a *§ 1962(d)* RICO conspiracy claim against the Defendants. The premise of that argument has been rejected, and so the RICO conspiracy claim will not be dismissed.

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[29] Bosch also argues that Plaintiffs cannot satisfy the predicate act requirement by alleging that Bosch "aided and abetted" GM in violating the mail and wire fraud statutes. As explained above, this argument conflates several legal requirements. Plaintiffs must allege that Bosch engaged in two predicate acts under the RICO statute. The alleged predicate acts, mail and wire fraud, can be committed without actually using the mail or wire. A charge of mail or wire fraud, then, bears a certain resemblance to conspiracy law. As explained above, Plaintiffs have plausibly alleged that Bosch committed predicate acts of mail and wire fraud. Thus, Plaintiffs' RICO theory does not rely upon "aiding or abetting" liability.

D.

Finally, GM argues that Plaintiffs' RICO claim must be dismissed because it is essentially an attempt to enforce the *Clean Air Act* via a civil suit. In support of that argument, GM cites three cases (none involving suits to enforce the CAA) **[**109]** where courts concluded that extensive regulatory schemes provided the exclusive remedies for violations of regulatory statutes and preventing the plaintiffs from invoking RICO to obtain treble damages. *See Ayres v. Gen. Motors Corp., 234 F.3d 514, 525 (11th Cir. 2000)* (dismissing a RICO claim premised on non-compliance with the notification requirement of *Section 210 of the Energy Reorganization Act* because the regulatory statute provided the exclusive remedy for violations); *Norman v. Niagara Mohawk Power Corp., 873 F.2d 634, 637 (2d Cir. 1989)* (also dismissing a RICO **[*1088]** claim premised on violation of *Section 210 of the Energy Reorganization Act* because that section provides an exclusive remedy for violations and because the RICO claim did not involve "a collateral matter that is only peripherally related to the safety concerns implicit in *section 210*"); *Gifford v. Meda, No. 09-CV-13486, 2010 U.S. Dist. LEXIS 45322, 2010 WL 1875096, at *12 (E.D. Mich. May 10, 2010)* (dismissing a RICO claim premised on "the misclassification of Plaintiffs as independent contractors for purposes of federal income and employment tax reporting" because that conduct was "unlawful only by virtue of the federal income tax laws").

This argument is largely coterminous with Defendants' argument, rejected above, that Plaintiffs' state law claims are preempted by the CAA. Plaintiffs' allegations are not dependent upon proof of violation of federal emission regulations. That said, Plaintiffs' **[**110]** allegations are confusing because they repeatedly allege that Defendants purposefully deceived government regulators about the true emission levels of the Duramax engine. Plaintiffs allege, however, that their suit is "not based on these laws but on deception aimed at consumers." Con. Am. Compl. at 5.

For largely the same reasons articulated while rejecting Defendants' argument that Plaintiffs' state law claims are preempted, Plaintiffs' RICO claim is not primarily premised on proof of violation of EPA regulations and thus is cognizable. The alleged common purpose at the heart of the RICO scheme is the deception of consumers. The alleged injury is overpayment by consumers. The identified predicate acts of mail and wire fraud involve communications to consumers. Admittedly, Plaintiffs also allege that the RICO Defendants intended to deceive regulators and made fraudulent mail and wire communications to regulators. But neither of those allegations are essential to Plaintiffs' RICO claim. Accordingly, they are best construed as "collateral matter[s]" that are "only peripherally related to the" regulatory concerns advanced by EPA regulations. *Norman, 873 F.2d at 637*. Plaintiffs' RICO claim is not an attempt to **[**111]** obtain a remedy which is exclusively within the purview of the EPA.

VI.

The final question is whether Plaintiffs should be permitted to proceed to discovery on state law claims advanced on behalf of unnamed, putative class members. Defendants argue that these claims should be dismissed because Plaintiffs do not have standing to advance claims on behalf of unnamed Plaintiffs prior to class certification. Plaintiffs argue that this analysis is best reserved until class certification because that determination will resolve the standing issue.

HN38[] "Threshold individual standing is a prerequisite for all actions, including class actions." *Fallick v. Nationwide Mut. Ins. Co., 162 F.3d 410, 423 (6th Cir. 1998)*. "A potential class representative must demonstrate individual standing vis-as-vis the defendant; he cannot acquire such standing merely by virtue of bringing a class action." *Id.* The growing consensus, however, is that "class certification issues are . . . 'logically antecedent' to Article III concerns," at least when the named plaintiffs possess Article III standing. *See Ortiz v. Fibreboard Corp., 527 U.S. 815, 831, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*; *Kaatz v. Hyland's Inc., No. 16 CV 237 (VB), 2016 U.S. Dist. LEXIS 87348, 2016 WL 3676697, at *4 (S.D.N.Y. July 6, 2016)*; *Storey v. Attends Healthcare Prod., Inc., No. 15-CV-13577, 2016 U.S. Dist. LEXIS 72505, 2016 WL 3125210, at *3 (E.D. Mich. June 3, 2016)*; *In re Auto. Parts Antitrust Litig., 29 F. Supp. 3d 982, 1000 (E.D. Mich. 2014)*. In other words, "where 'class certification is the source of the potential standing problems,' class certification should precede the standing inquiry." **[*1089]** *In re*

Digital Music Antitrust Litig., 812 F. Supp. 2d 390, 406 (S.D.N.Y. 2011) (quoting *In re Grand Theft Auto Video Game Litig., No. 06 MD 1739, 2006 U.S. Dist. LEXIS 78064, 2006 WL 3039993, at *2 (S.D.N.Y. Oct. 25, 2006))*. **[**112]**

GM attempts to argue that the standing question would exist regardless of whether Plaintiffs filed their claims alone or as part of a putative class action. But GM does not explain why that is the case, and the Court cannot conceive of a reason. The named Plaintiffs have Article III standing and, if the class is certified, then those Plaintiffs will be able to advance state law claims on behalf of unnamed Plaintiffs. The question of whether the state law claims may be advanced on behalf of unnamed Plaintiffs, then, is indistinguishable from the *Federal Rule of Civil Procedure 23* analysis. *See* *Kaatz, 2016 U.S. Dist. LEXIS 87348, 2016 WL 3676697, at *4* ("That standing inquiry is more appropriately addressed at the class certification stage when courts consider the commonality and typicality prerequisites of class actions."). The claims predicated on the law of states where no named Plaintiff lives will not be dismissed for lack of standing.

VII.

Accordingly, it is **ORDERED** that Defendants' motions to dismiss, ECF No. 44, 45, are **DENIED**.

It is further **ORDERED** that Plaintiffs' motion for leave to file a surreply, ECF No. 58, is **DENIED as moot**.

It is further **ORDERED** that Defendant GM's motion to file a surresponse, ECF No. 60, is **DENIED as moot [**113]** .

Dated: February 20, 2018

/s/ Thomas L. Ludington

THOMAS L. LUDINGTON

United States District Judge

N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.

United States Court of Appeals for the Second Circuit

December 15, 2017, Argued; February 23, 2018, Decided

Docket No. 17-3585

Reporter

883 F.3d 32 *; 2018 U.S. App. LEXIS 4343 **; 2018-1 Trade Cas. (CCH) P80,285; 2018 WL 1021223

NORTH AMERICAN SOCCER LEAGUE, LLC, Plaintiff-Appellant, v. UNITED STATES SOCCER FEDERATION, INC., Defendant-Appellee.

Prior History: [1]** Appeal from a November 4, 2017 order of the United States District Court for the Eastern District of New York (Brodie, J.).

North American Soccer League, LLC ("NASL") appeals from the denial of its motion for a preliminary injunction seeking a Division II designation pending the resolution of its antitrust case against the United States Soccer Foundation, Inc. ("USSF"). We evaluate NASL's motion under the heightened standard applicable to mandatory preliminary injunctions. NASL has not demonstrated a clear likelihood of success on the merits of its antitrust claim against USSF under *15 U.S.C. § 1*. Accordingly, we AFFIRM the order of the District Court denying NASL's motion for a preliminary injunction, and we REMAND the matter for further proceedings on the merits of NASL's claims.

N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc., 296 F. Supp. 3d 442, 2017 U.S. Dist. LEXIS 183202 (E.D.N.Y., Nov. 4, 2017)

Core Terms

league, conspiracy, district court, soccer, procompetitive, designation, preliminary injunction, anticompetitive, concerted action, direct evidence, antitrust, quotation, courts, merits, season, status quo, promulgation, stability, argues, adverse effect, divisional, benefits, top-tier, annual, marks, circumstantial evidence, restrictive alternative, likelihood of success, mandatory injunction, heightened standard

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Standards of Review, Abuse of Discretion**

An appellate court reviews a district court's legal rulings de novo and its ultimate denial of a preliminary injunction for abuse of discretion. A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Balance of Hardships

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Mandatory Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

HN2[] **Grounds for Injunctions, Balance of Hardships**

Courts refer to preliminary injunctions as prohibitory or mandatory. Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it. A party seeking a preliminary injunction must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing a clear or substantial likelihood of success on the merits.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN3[] **Sherman Act, Claims**

Section 1 of the Sherman Act prohibits every contract, combination or conspiracy in restraint of trade or commerce. *15 U.S.C.S. § 1*. Thus, to establish a clear likelihood of success under its *§ 1* claim to obtain an injunction, a movant must show there is a contract, combination or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace of actual or potential competition.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] **Sherman Act, Claims**

For an arrangement to be a conspiracy under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, it must embody concerted action. Concerted action exists where there is an agreement between separate economic actors pursuing separate economic interests. The fact that the co-conspirators are capable, due to their separateness, of acting in concert is not sufficient. Proof of a conspiracy is required.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] **Sherman Act, Claims**

A plaintiff alleging a conspiracy under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, must offer direct or circumstantial evidence that reasonably tends to prove a conscious commitment to a common scheme designed to achieve an unlawful objective. Rarely do co-conspirators plainly state their purpose. As a result, courts often must evaluate circumstantial evidence of a conspiracy by weighing plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy. Courts should look for evidence that tends to exclude the possibility that the defendant was acting independently. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] **Sherman Act, Claims**

Courts use the Monsanto-Matsushita framework for assessing conspiracies, under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, including those conspiracies provable by direct evidence. A plaintiff who can proffer direct evidence of a conspiracy should have no qualms with the Monsanto-Matsushita framework because direct evidence by definition shows the requisite concerted action. Direct' evidence must evince with clarity a concert of illegal action.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Sherman Act, Claims**

Organizational decisions do not inherently constitute *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, concerted action. Not every action by a trade association is concerted action by the association's members. Indeed, even though a trade association by its nature involves collective action by competitors, a trade association is not by its nature a walking conspiracy. Rather, it is when a *§ 1* plaintiff establishes the existence of an illegal contract or combination that the plaintiff can proceed to demonstrate that the agreement constituted an unreasonable restraint of trade. Evidence should tend to show that association members, in their individual capacities, consciously committed themselves to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] **Scope, Monopolization Offenses**

Direct evidence of an illegal contract, combination, or conspiracy satisfies *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*, concerted-action requirement.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN9[] **Scope, Monopolization Offenses**

Only unreasonable restraints on competition violate *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*. Courts use one of two tests here. A restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be per se unreasonable, or because it violates what has come to be known as the 'Rule of Reason. Regulation of league sports is a textbook example of when the rule of reason applies. An abbreviated, "quick look" version of the rule of reason applies when no elaborate industry analysis is required to demonstrate the anticompetitive character of the challenged agreement.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN10[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

There is a three-step rule-of-reason framework under *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*. First, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market. Second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate the pro-competitive effects of the challenged restraint. Third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these legitimate competitive benefits could have been achieved through less restrictive means. Ultimately, the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN11[] **Exemptions & Immunities, Exempt Cartels & Joint Ventures**

Under the first step of the rule of reason, a plaintiff must demonstrate that the alleged restraint has an adverse effect on competition. The plaintiff can do this directly, by showing an actual adverse effect on competition as a whole in the relevant market. Or the plaintiff can make her case indirectly, by showing that the defendant has sufficient market power to cause an adverse effect on competition. Plaintiffs seeking to show adverse effect indirectly must demonstrate both the defendant's market power and other grounds for believing the challenged restraint harms competition. These other grounds might include price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN12[] **Scope, Monopolization Offenses**

Although fraught with anticompetitive potential, standards promulgated by standard-setting organizations can be flush with significant procompetitive advantages. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN13[] **Scope, Monopolization Offenses**

It is permissible for courts to consider free riding and stability as two potential pro-competitive justifications in the standard-setting context. Eliminating free riders can be a pro-competitive advantage of alleged restraints on competition like vertical price agreements. The same holds true in the standard-setting context.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN14[] **Scope, Monopolization Offenses**

Courts can consider whether evidence of a defendant's stabilizing behavior constitutes a pro-competitive benefit of standard-setting.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN15[] **Scope, Monopolization Offenses**

A defendant cannot, of course, justify anticompetitive arrangements by saying an industry's "special characteristics" warrant them.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN16[] **Conspiracy to Monopolize, Sherman Act**

Unilateral action does not violate *§ 1 of the Sherman Act*, *15 U.S.C.S. § 1*.

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Judges: Before: PARKER, WESLEY, and CHIN, Circuit Judges. **[**2]**

Opinion by: WESLEY

Opinion

[*34] WESLEY, *Circuit Judge*:

After the denial of its requested Division II designation for the 2018 season of men's professional soccer, the North American Soccer League, LLC ("NASL") filed an antitrust suit against the United States Soccer Federation, Inc. ("USSF"). NASL also moved for a preliminary injunction, seeking designation as a Division II league pending resolution of the suit. This opinion addresses that motion. We conclude NASL has not demonstrated a clear likelihood of **[*35]** success on the merits of its antitrust claim under the heightened standard applicable to mandatory preliminary injunctions. Accordingly, we affirm the judgment of the United States District Court for the Eastern District of New York, *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc. ("NASL"), No. 17-CV-05495, 296 F. Supp. 3d 442, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771 (E.D.N.Y. Nov. 4, 2017)* (Brodie, *J.*), denying NASL's motion for a preliminary injunction.

I

As the regional governing body for soccer in the United States and Canada, USSF designates leagues as Division I, II, or III according to USSF's Professional League Standards (the "Standards"). The Standards establish requirements that a league must meet to gain a divisional designation—also called a sanction—for a season of play. The more competitive **[**3]** the division, the higher the bar. For example, the 2008 Standards required that a Division I league have a minimum of ten teams distributed in at least three time zones; a Division II league have a minimum of eight teams in at least two time zones; and a Division III league have a minimum of eight teams, with no time-zone requirement.

Soccer leagues apply to USSF to receive annual designations for the upcoming season of play by submitting reports demonstrating their compliance, or plans for compliance, with the Standards. Leagues may submit requests for waivers from compliance with the Standards' requirements. The USSF Board votes on divisional designations after reviewing the recommendations of USSF's Professional League Task Force ("Task Force"). The Board is composed of fifteen directors, two of whom are chosen by the professional leagues.

The same process applies for revising the Standards; the USSF Board works in conjunction with a Professional League Standards Task Force ("Standards Task Force").[1] Unchanged from 1996 to 2008, the Standards for all divisions were revised in 2008 and 2014, and for only Division II in 2010.[2]

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[1] Individuals with current ties to any professional league cannot be on the Task Forces and must abstain from USSF Board votes on matters relating to the professional leagues.

[2] Amendments proposed in 2015 for Division I, to which NASL objected, never were adopted.

The three most prominent men's professional soccer leagues **[**4]** have historically occupied their respective divisions in isolation. Major League Soccer, LLC ("MLS") has been the only Division I men's soccer league since MLS's start in 1995. NASL has existed since 2009 and has operated as a Division II league since 2011. The United Soccer Leagues, LLC ("USL") ordinarily has filled the Division III slot. According to NASL, it long has harbored aspirations to compete against MLS in Division I; in contrast, USL has been content as an MLS feeder league.

It often pays to be at the top, of course, and MLS has enjoyed competitive benefits as the top-tier league since its inception. Indeed, USSF, when establishing men's soccer in the United States, decided "to not sanction any other league as a [Division I] men's professional outdoor league until MLS had finished its second full season in 1997—to give it a 'runway' of sorts." Gulati Decl. ¶ 64. MLS's top-tier status has economic benefit as well. MLS and USSF have a "business relationship" through which Soccer United Market ("SUM"), a marketing company, has the rights to "bundle[d]" MLS and USSF sponsorship **[*36]** and broadcasting rights. Compl. ¶ 107; Gulati Decl. ¶ 230.[3]

Like the other leagues, NASL annually applies **[**5]** to USSF for a divisional designation. It operated as a Division II league for the 2011-2017 seasons, receiving compliance waivers for all but one season. Although NASL made a play for a Division I designation for 2016, its application was denied, and NASL operated as a Division II league (with waivers) for that season. For the 2018 season, NASL applied for a Division II designation, requesting waivers for the minimum-team and time-zone requirements. The USSF Board rejected NASL's Division II application but gave NASL additional time to file for Division III status. NASL filed suit instead.

NASL contends that USSF conspired with its membership and related entities in adopting, amending, and applying its Standards in an anticompetitive manner to preclude NASL and other leagues from competing with MLS in the Division I market. *See* *15 U.S.C. §§ 1-2*. NASL requests preliminary injunctive relief in the form of a Division II league designation and permanent relief enjoining USSF from promulgating the Standards to separate leagues into divisions.

NASL's motion for a preliminary injunction is tied to its allegations in the first count of its Complaint—that USSF violated *15 U.S.C. § 1* through a conspiracy to restrain competition. **[**6]** NASL asked the District Court for a preliminary injunction allowing it to operate as a Division II league. In a 49-page decision, the district court made detailed findings of fact and conclusions of law before concluding that NASL had not made a clear showing of entitlement to relief and denying the preliminary injunction. *NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *1, *21*. NASL appeals, arguing the District Court abused its discretion in applying the preliminary injunction standard and in finding that NASL had not sufficiently showed its clear likelihood of success on the merits of its *§ 1* antitrust claim.

II

HN1[] This Court reviews a district court's legal rulings *de novo* and its ultimate denial of a preliminary injunction for abuse of discretion. *McCreary Cty. v. Am. Civil Liberties Union of Ky., 545 U.S. 844, 867, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005)*; *Almontaser v. N.Y.C. Dep't of Educ., 519 F.3d 505, 508 (2d Cir. 2008)*. "A district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law." *Almontaser, 519 F.3d at 508*.

A. Applicable Standard for the Preliminary Injunction

[3] Under the agreement, which was extended for an eight-year term in 2015, SUM guarantees an annual amount of marketing revenue, plus additional revenue if SUM hits monetary targets. The bundling financially benefits both USSF and MLS.

HN2[] Courts refer to preliminary injunctions as prohibitory or mandatory. Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it.[4] Tom Doherty Assocs., Inc. v. Saban Entm't, Inc., 60 F.3d 27, 34 **[*37]** (2d Cir. 1995) (internal citation omitted). A party seeking a preliminary injunction must show (1) **[**7]** irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest. New York ex rel. Schneiderman v. Actavis PLC, 787 F.3d 638, 650 (2d Cir. 2015). Because mandatory injunctions disrupt the status quo, a party seeking one must meet a heightened legal standard by showing "a clear or substantial likelihood of success on the merits." N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012) (internal quotation marks omitted). The District Court concluded that NASL was seeking a mandatory injunction and imposed the heightened standard. NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *7. NASL argues that using the heightened standard was error.

Because the proposed injunction's effect on the status quo drives the standard, we must ascertain the status quo—that is, "the last actual, peaceable uncontested status which preceded the pending controversy." Mastrio v. Sebelius, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam) (quoting LaRouche v. Kezer, 20 F.3d 68, 74 n.7 (2d Cir. 1994)).[5] Before this litigation, USSF would regularly evaluate NASL's applications and determine NASL's divisional designation. The relationship of annual application, assessment, and sanction determination was the last uncontested status between the parties preceding the present controversy. This is how the parties **[**8]** operated, year after year.

NASL seeks to alter this near-decade-long relationship of annual sanctioning between the parties. Although NASL has never received a designation absent the annual process, it now requests a Division II designation for the duration of this litigation. NASL, looking to upend the federation-league sanctioning framework, seeks a mandatory injunction.

NASL argues that applying a heightened standard here would require applying that standard any time a party seeks an injunction to maintain "critical benefits" they have long received. Appellant's Br. 3. This case is different than the benefits-termination cases, however. In those cases, the status quo is one in which the plaintiff continues receiving previously granted benefits. *See* Holt v. Cont'l Grp., 708 F.2d 87, 90 (2d Cir. 1983) (reinstating benefits restores the status quo ante); *see also* Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 99-101, 107 (2d Cir. 2009) (permitting suspended students to continue attending school). Here, USSF decides anew each year which divisional designation applies to NASL, if any. NASL's Division II sanctions never last beyond one season of play. Unlike in the benefits-termination cases, the status quo here involves a periodic sanction of limited life.

"The purpose of a preliminary **[**9]** injunction is . . . to preserve the relative positions of the parties." Univ. of Tex. v. **[*38]** Camenisch, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981). Conflating status with status quo, the parties center their arguments on NASL's status as a Division II league. However, the status quo is not that NASL regularly received a Division II designation, nor is it NASL's lack of a Division II designation for 2018. The status quo is the parties' pre-controversy position vis-à-vis the other.[6] Directing USSF to grant NASL a divisional

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[4] We focus on the status quo rather than the "mandatory" and "prohibitory" terminology because "in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms." Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 835, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994) ("'Do not strike,'" would appear to be prohibitory . . . [but] 'Continue working,' would be mandatory."); Abdul Wali v. Coughlin, 754 F.2d 1015, 1025 (2d Cir. 1985), *overruled on other grounds by* O'Lone v. Estate of Shabaze, 482 U.S. 342, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987) ("In many instances, this distinction is more semantic[] than substantive.").

[5] The "status quo" in preliminary-injunction parlance is really a "status quo ante." *See* Holt v. Cont'l Grp., Inc., 708 F.2d 87, 90 (2d Cir. 1983) (referring to reinstatement of benefits as "restoration of the *status quo ante*"); *accord* O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 389 F.3d 973, 1013 (10th Cir. 2004) (en banc) (per curiam) ("requir[ing] a party who has recently disturbed the status quo to reverse its actions . . . restores, rather than disturbs, the status quo ante, and is thus not an exception" to the ordinary standard for preliminary injunctions). This special "ante" formulation of the status quo in the realm of equities shuts out defendants seeking shelter under a current "status quo" precipitated by their wrongdoing.

designation for 2018 and beyond would alter that relationship.[7] NASL's request for a preliminary injunction was correctly analyzed by the District Court under the heightened standard for a mandatory injunction.[8]

B. Clear Likelihood of Success on the Merits

NASL's claim is anchored in *§ 1* of the Sherman Act.[9] ***HN3***[] *Section 1* prohibits "[e]very contract, combination . . . or conspiracy[] in restraint of trade or commerce." *15 U.S.C. § 1*; *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 189, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. Thus, to establish a clear likelihood of success under its *§ 1* claim, NASL must show "there is a contract, combination . . . or conspiracy amongst separate economic actors pursuing separate economic interests such that the agreement deprives the marketplace . . . of actual or potential competition." **[**10]** *Am. Needle, 560 U.S. at 195* (internal citations and quotation marks omitted).

NASL alleges that "USSF and co-conspirators MLS, USL and SUM have entered into a continuing agreement, combination, or conspiracy in restraint of trade with the purpose, intent and effect of restraining **[*39]** horizontal competition among top-tier [and second-tier] men's professional soccer leagues . . . ." Compl. ¶ 200. NASL asserts that the arrangement "enables MLS to be the only men's top-tier professional soccer league . . . by promulgating, revising, manipulating, and selectively granting and denying waivers from anticompetitive Professional League Standards so that MLS, and only MLS, will satisfy the USSF's requirements . . . to qualify for men's top-tier Division I sanctioning." Compl. ¶ 201.

1. Contract, Combination, or Conspiracy[10]

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[6] Some of our sister circuits have explicitly incorporated this principle into their formulations of the status quo. *See, e.g., SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1100 (10th Cir. 1991)*, *overruled on other grounds by O Centro Espirita, 389 F.3d at 975* ("The status quo . . . is defined by the reality of the existing status and relationships between the parties.") (emphasis omitted); *Stemple v. Bd. of Ed. of Prince George's Cty., 623 F.2d 893, 898 (4th Cir. 1980)* ("[C]ourts . . . will frame any equitable relief to preserve the last uncontested status between the parties."); *Wash. Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 475 (9th Cir. 1969)* ("maintain[ing] the status quo between the litigants") (citing *Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738 (2d Cir. 1953))*.

[7] The case might be different if USSF designated NASL a Division II league and revoked that designation mid-season. There, the status quo between the parties arguably would be NASL's Division II designation for that season, in which case we would evaluate NASL's challenge to USSF's revocation under the ordinary standard for a preliminary injunction.

[8] NASL contends that, as an alternative to a showing of a clear or substantial likelihood of success, it can satisfy the higher standard by showing that failure to issue the injunction would result in extreme or very serious damage. It relies on our earlier statement "that a mandatory injunction should issue 'only upon a clear showing that the moving party is entitled to the relief requested, or where extreme or very serious damage will result from a denial of preliminary relief.'" *Tom Doherty, 60 F.3d at 34* (quoting *Abdul Wali, 754 F.2d at 1025*). Irreparable harm, however, is "indistinguishable" from extreme damage. *Jacobson & Co., Inc. v. Armstrong Cork Co., 548 F.2d 438, 441 n.3 (2d Cir. 1977)*. Therefore, as we have previously noted, the extreme-damage language in our jurisprudence remains "merely a reaffirmation of the traditional reluctance to issue mandatory injunctions . . . ." *Id.*

[9] The District Court found that NASL had established irreparable harm and that the injunction would not harm the public interest. *NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *8-9, *21*. USSF does not focus on a failure by NASL in either area. Thus, we start and finish with the lower court's determination that NASL had not demonstrated its clear likelihood of success on the merits.

[10] Because "[t]he question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade," *Am. Needle, 560 U.S. at 186*, we first examine, pursuant to NASL's allegations, whether USSF, MLS, USL, and SUM conspired within the meaning of *§ 1* of the Sherman Act. Although we ultimately assume the existence of a conspiracy, we address this antecedent question to clarify the framework the lower court must use on remand.

HN4[] For an arrangement to be a conspiracy under *§ 1*, it "must embody concerted action." *Am. Needle, 560 U.S. at 191*. Concerted action exists where there is an agreement between "separate economic actors pursuing separate economic interests." *Id. at 195* (internal quotation marks omitted). The fact that the co-conspirators are capable, due to their separateness, of acting in concert is not sufficient. Proof of a conspiracy is required. *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 545 (2d Cir. 1993)*.

HN5[] A plaintiff must **[**11]** offer "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*. Rarely do co-conspirators plainly state their purpose. As a result, courts often must evaluate circumstantial evidence of a conspiracy by weighing "plus factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)* (citation and internal quotation marks omitted). In *Monsanto*, the Supreme Court noted that courts should look for evidence that "tends to exclude the possibility that the [defendant was] acting independently." *Monsanto, 465 U.S. at 764*. In *Matsushita*, the Supreme Court elaborated on what this meant: "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*.

The District Court concluded that the USSF Board's promulgation of the Standards was not direct evidence of concerted action among USSF, the leagues, and SUM. According to the court, NASL needed to show there was "an agreement to agree to vote a particular way" before the Standards could satisfy the concerted-action requirement. **[**12]** *NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *10* (emphasis omitted). The court then evaluated circumstantial evidence of a conspiracy. Regarding the USSF Board's votes to adopt and amend the Standards as parallel conduct, the court examined whether there were plus factors demonstrating an antitrust conspiracy. *2017 U.S. Dist. LEXIS 183202, [WL] at *11*. Although acknowledging that the SUM agreement **[*40]** poses "a conflict of interest," and describing as "troubling" USSF's admitted past intent to give MLS a head start in the industry, the District Court concluded that there was insufficient evidence of concerted action because the evidence did not tend to exclude the possibility of independent action. *2017 U.S. Dist. LEXIS 183202, [WL] at *11, *13, *15*.

NASL argues that the District Court erred in applying the *Monsanto* standard for inferring a conspiracy because the Standards are direct evidence of a conspiracy. We disagree.

The *Monsanto-Matsushita* framework works here. *See Monsanto, 465 U.S. at 764, 768*; *Matsushita, 475 U.S. at 588*. *HN6*[] Courts use this framework for assessing conspiracies, including those conspiracies provable by direct evidence. *See, e.g., Monsanto, 465 U.S. at 765* (finding substantial direct evidence of vertical price-fixing agreement). A plaintiff who can proffer direct evidence of a conspiracy should have no qualms with the *Monsanto-Matsushita* framework because direct evidence by definition **[**13]** shows the requisite concerted action. *See Cosmetic Gallery, Inc. v. Schoeneman Corp., 495 F.3d 46, 52 (3d Cir. 2015)* ("'Direct' evidence must evince with clarity a concert of illegal action.").

Moreover, *HN7*[] organizational decisions do not inherently constitute *§ 1* concerted action. NASL's argument misinterprets the meaning of concerted action in ***antitrust law***. "[Not] every action by a trade association is . . . concerted action by the association's members." *AD/SAT, Div. of Skylight, Inc. v. Associated Press, 181 F.3d 216, 234 (2d Cir. 1999)* (per curiam). Indeed, even though a "trade association by its nature involves collective action by competitors[,] . . . a trade association is not by its nature a 'walking conspiracy.'" *Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 293-94 (5th Cir. 1988)*. Rather, it is when "a *§ 1* plaintiff establishes the existence of *an illegal* contract or combination" that the plaintiff can "proceed to demonstrate that the agreement constituted an unreasonable restraint of trade.'" *Capital Imaging, 996 F.2d at 542* (emphasis added). Evidence should "tend[] to show that association members, in their individual capacities, consciously committed themselves to a common scheme *designed to achieve an unlawful objective*." *AD/SAT, 181 F.3d at 234* (emphasis added).

In fairness to NASL, organizational decisions sometimes are § 1 concerted action. For example, when there is direct evidence of an alleged conspiracy via an association's express regulation of its **[**14]** members' market. In *Associated Press*, the government challenged as illegal a cooperative news association's by-laws that restricted membership and prohibited members from distributing news to nonmembers. Associated Press v. United States, 326 U.S. 1, 5, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945). In ruling for the government, the Supreme Court endorsed the district court's conclusion that "[t]he bylaws of AP are in effect agreements between the members . . . . [They are] contracts in restraint of commerce." Id. at 11 n.6. Similarly, in *Indiana Federation of Dentists*, the Supreme Court found that a federation's policy constituted a collective refusal to deal with insurers and was an illegal agreement. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 457-58, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (2009). These cases corroborate the obvious—that **HN8**[] direct evidence of an illegal "contract, combination, or conspiracy" satisfies § 1's concerted-action requirement. *See* Allied Tube & Conduit Corp. v. Indian **[*41]** Head, Inc., 486 U.S. 492, 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988) (finding agreement, in violation of § 1, to subvert standard-setting process by packing vote); *see also* United States v. Topco Assocs., Inc., 405 U.S. 596, 601-02, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972) (by-laws allocating market territory among chain members found anticompetitive); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457, 462-64, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941) (Guild's rules and policies found anticompetitive where purpose was to prevent sales and create a monopoly).

If NASL were challenging the Standards themselves—in totality—as violative of the antitrust laws, then the USSF Board's promulgation of them would **[**15]** constitute direct evidence of § 1 concerted action in that undertaking.[11] As for the clearly alleged overarching conspiracy to restrain competition in markets for top-and second-tier men's professional soccer leagues in North America, the promulgation of the Standards is circumstantial evidence of that conspiracy. The District Court properly evaluated the Standards along with other circumstantial evidence of NASL's conspiracy allegations, concluding that NASL had not sufficiently shown the presence of concerted action. *See* NASL, 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *11-15. But even assuming NASL's allegations show a conspiracy, NASL has failed to show that the agreement was an unreasonable restraint on competition under § 1.

2. Unreasonable Restraint

HN9[] Only unreasonable restraints on competition violate § 1 of the Sherman Act. Courts use one of two tests here. "[A] restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" Ind. Fed'n of Dentists, 476 U.S. at 457-58. Regulation of league sports is a textbook example of when the rule of reason applies. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984).

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[11] How NASL is challenging the Standards is unclear. *See* A-135 (the District Court, with NASL's later agreement, summarized NASL's position as: "You're saying standards are okay, Division I, Division II is okay; the manner in which [USSF] set[s] the requirements for each is wrong"); *see also* A-137 (NASL stating "I'm challenging the requirements here . . . that a standard setting body should set [the minimum-team requirement] . . . [challenging] [t]hat particular rule"). There is room for disagreement as to whether NASL's reference to the Standards, as "effectuat[ing] the USSF's anticompetitive conspiracy," wages war on the Standards or just fires shots at their role in the larger alleged conspiracy. Compl. ¶ 122. *See* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 339-40, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991) (Scalia, *J.*, dissenting) (describing an alleged agreement to boycott as "not the totality of the conspiracy, but merely the means used to enforce it"). *Compare* Wilk v. Am. Med. Ass'n, 895 F.2d 352, 374 n.9 (7th Cir. 1990) (saying plaintiffs did not directly challenge standards alleged to "*perpetuate[]* the boycott"), *with* Robertson v. Sea Pines Real Estate Cos., Inc., 679 F.3d 278, 283, 288, 289 (4th Cir. 2012) (finding direct evidence of conspiracy where defendants used joint venture as an "instrumentality" and "conduit," saying that "board members conspired in the form of [their] rules, the very passage of which establishes that the defendants convened and came to an agreement").

NASL argues for an **[**16]** abbreviated, "quick look" version of the rule of reason,[12] which applies when "no elaborate industry analysis is required to demonstrate the anticompetitive character of [the challenged] agreement." *Ind. Fed'n of Dentists, 476* ***[*42]*** *U.S. at 459* (internal quotation mark omitted). Here, however, far from being obviously anticompetitive, the Standards could be found to have a net procompetitive effect, or no competitive effect at all. *See* *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Indeed, the Standards are seemingly designed to avoid a flaw in the relevant market: implosion of leagues due to minimal consumer demand and teams' financial instability. Because the alleged restraints might avoid a flaw in the market, the full rule-of-reason analysis applies. *See id.* (using three-step rule of reason when reviewing restrictions designed to address deceptive advertising in market prone to information gaps).

The District Court properly applied ***HN10***[] the three-step rule-of-reason framework. First, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market. *United States v. Am. Express Co., 838 F.3d 179, 194 (2d Cir. 2016)*, *cert. granted, Ohio v. Am. Express Co., 138 S. Ct. 355, 199 L. Ed. 2d 261 (Oct. 16, 2017)* (mem.). Second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate **[**17]** the procompetitive effects of the challenged restraint. *Id. at 195*. Third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these "legitimate competitive benefits . . . could have been achieved through less restrictive means." *Id.* (internal quotation marks omitted). Ultimately, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (quoting *Chi. Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918))*.

HN11[] Under the first step of the rule of reason, a plaintiff must demonstrate that the alleged restraint has an adverse effect on competition. *Am. Express, 838 F.3d at 194*. The plaintiff can do this directly, by showing an "actual adverse effect on competition as a whole in the relevant market." *Id.* (emphasis omitted) (internal quotation mark omitted) (giving examples of higher prices or reduced output).[13] Or the plaintiff can make her case indirectly, "by showing that the defendant has sufficient market power to cause an adverse effect on competition." *Id.* (internal quotation marks omitted). Plaintiffs seeking to show adverse effect indirectly must demonstrate both the defendant's market power and "other **[**18]** grounds" for believing the challenged restraint harms competition. *MacDermid Printing Sols. LLC v. Cortron Corp., 833 F.3d 172, 183-84 (2d Cir. 2016)*. These other grounds might include price increases, reduced output or market quality, significantly heightened barriers to entry, or reduced consumer choice. *Id. at 183 & n.42, 184, 186 n.56*.

The District Court did not err in finding that NASL indirectly established an adverse effect on competition in "the market for (1) top-tier and (2) second-tier men's professional soccer leagues located in the United States and Canada." *NASL, 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017* ***[*43]*** *WL 5125771, at *17 & n.40*.[14] USSF's market power is evident in its "power to . . . exclude competition" through the Standards. *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. And the ratcheting up of the Standards over the last two decades imposes increasingly "significant barriers to entry" in the relevant soccer market. *CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74, 80 (2d Cir. 1999)*; *see also* *MacDermid, 833 F.3d at 183-84, 186 n.56*.

The burden then shifts to USSF to offer evidence of the Standards' procompetitive effects. *See* *Am. Express, 838 F.3d at 195*. ***HN12***[] Although fraught with anticompetitive potential, standards promulgated by standard-setting

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[12] The parties did not, and do not, dispute the rule of reason's applicability.

[13] The District Court found that NASL had not directly shown an actual adverse effect on competition in the market. *NASL, 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *18 & n.41* (no customer confusion and no reduced output beyond NASL's own exclusion from Division II).

[14] The District Court defined the market as proposed by NASL, and the parties do not contest this definition. In light of that consensus, we regard the relevant market to be the same.

organizations can be flush with "significant procompetitive advantages." *See* Allied Tube, 486 U.S. at 501. "The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all **[**19]** relevant facts." Capital Imaging, 996 F.2d at 543 (quoting Chi. Bd. of Trade, 246 U.S. at 238).

The District Court also did not err in finding that USSF offered sufficient evidence of the Standards' procompetitive virtues. *See* NASL 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *18-19 (considering minimum-team count, time zones, market size, stadium capacity, and financial viability). The court found that the minimum-team requirement increases output through sustained fan interest and provides stability because larger leagues are less likely to collapse. 2017 U.S. Dist. LEXIS 183202, [WL] at *19. The court further found that the time-zone and market-size requirements generate fan and media interest, and, along with the stadium-capacity requirement, promote league quality. *Id.* The court lastly determined that the financial-viability requirements keep fans interested, stabilize the leagues financially, and prevent free riding. *Id.* These findings by the District Court are not clearly erroneous. *See* Almontaser, 519 F.3d at 508.

The Standards further benefit the market by coordinating necessary competition. As the Supreme Court recognized when addressing the National Collegiate Athletic Association's ("NCAA") role in regulating intercollegiate athletics, "this case involves an industry in which horizontal restraints on competition are essential if the product **[**20]** is to be available at all." Bd. of Regents, 468 U.S. at 101; *see also* id. at 102 ("[The NCAA's] actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.").

NASL argues that the District Court erred in finding some of the Standards' requirements justified in part by their procompetitive effects of eliminating free riding and stabilizing the market. However,***HN13***[] it is permissible for courts to consider free riding and stability as two potential procompetitive justifications in the standard-setting context.

Eliminating free riders can be a procompetitive advantage of alleged restraints on competition like vertical price agreements. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 889-92, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (discussing free riding and other procompetitive justifications). The same holds true in the standard-setting context. Here, the District **[*44]** Court did not err in finding that the Standards reduce leagues' incentive to free ride on USSF's efforts and expenditures without making similar investments to generate fan interest in the sport. NASL, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *19.

HN14[] Courts can also consider whether evidence of a defendant's stabilizing behavior constitutes a procompetitive benefit of standard-setting. NASL argues that anticompetitive **[**21]** behavior cannot be justified as preventing "[r]uinous competition, financial disaster, [or the] evils of price cutting." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 60 S. Ct. 811, 84 L. Ed. 1129 (1940). However, that logic is tied to cases where courts were confronted with per se illegal practices. Per se illegal practices, like horizontal price-fixing, are those that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). Though courts might reject the stability rationale where conduct is so anticompetitive as to be beyond redemption, *see* Socony-Vacuum, 310 U.S. at 228, that and other procompetitive justifications still can be relevant elsewhere—as in the sports standards context.

HN15[] A defendant cannot, of course, justify anticompetitive arrangements by saying an industry's "special characteristics" warrant them. Nat'l Soc'y of Prof'l Eng'rs, 435 U.S. at 689. But in the context of a soccer industry historically prone to collapse, the free-rider and stability justifications do not rationalize anticompetitive effects—they evince procompetitive ones. Specifically, as USSF urges, the Standards avoid free riders on, and lock in consumer interest **[**22]** for, the relevant competitive market. *See* Bd. of Regents, 468 U.S. at 117 ("[M]ost of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and *therefore procompetitive because they enhance public interest in intercollegiate athletics*.") (emphasis added).

NASL separately argues that the District Court should have concluded NASL was clearly likely to succeed on the merits once the court found problems with the SUM agreement and USSF's early use of the Standards to favor MLS. *NASL, No. 17-CV-05495, 2017 U.S. Dist. LEXIS 183202, 2017 WL 5125771, at *11, *13*. As the District Court noted, however, USSF's voting procedures and early history are a far cry from the collusive activity that would warrant per se antitrust analysis. *See* *Allied Tube, 486 U.S. at 501* (excluding product by packing the annual meeting vote); *Gelboim v. Bank of Am. Corp., 823 F.3d 759, 775 (2d Cir. 2016)* (acting collusively by circumventing LIBOR-setting rules). NASL has not shown a meaningful financial conflict of interest stemming from the SUM agreement; Board members with ties to professional leagues do not participate in the Task Forces and must abstain from votes regarding the Standards. As for USSF sheltering MLS from competition in the mid-1990s, USSF's alleged co-conspirator leagues did not yet exist. Any anticompetitive promulgation or misuse of the **[**23]** Standards would be attributable to USSF alone. And ***HN16***[] unilateral action does not violate *§ 1* of the Sherman Act. *Am. Needle, 560 U.S. at 190-91*; *see also* *United States* ***[*45]*** *Football League v. Nat'l Football League, 842 F.2d 1335, 1372 (2d Cir. 1988)* (saying prior judgments against defendant, "admitted as evidence of a longstanding conspiracy," were "at best marginally probative of an ongoing intent to exclude competitors").

Because USSF has demonstrated procompetitive effects of the Standards, the burden shifts to NASL to prove that "any legitimate competitive benefits offered by [USSF] could have been achieved through less restrictive means." *Am. Express, 838 F.3d at 195* (internal quotation mark omitted). Less restrictive alternatives are "those that would be less prejudicial to competition as a whole." *Capital Imaging, 996 F.2d at 543*. The District Court did not err in concluding that NASL failed to demonstrate viable less restrictive alternatives to the current Standards.

NASL points to the earlier renditions of the Standards as less restrictive alternatives to the current version of the Standards.[15] NASL notes, for example, that the Standards' eight-team requirement for Division II is less restrictive than its current twelve-team requirement. Having fewer requirements generally is less restrictive than having more. But NASL fails to show how reverting to earlier versions **[**24]** of the Standards would achieve the same legitimate procompetitive objectives as the Standards' current form. The Standards' evolution could show simply that its earlier renditions were no longer viable. Growing industries have developing standards; antitrust plaintiffs cannot just point to earlier standards as less restrictive alternatives without additionally showing the equivalent viability of the alternatives proffered.

NASL also urges that eliminating the Standards—using league rules instead of federation rules—is a less restrictive alternative. Again, we fail to see that leagues-based rules would accomplish the same ends as those issued by a federation. As the Supreme Court said of the NCAA's regulating function in intercollegiate sports, "[w]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Bd. of Regents, 468 U.S. at 102*. The same holds true here.

III

NASL has a case left to make. But we cannot say at this point that NASL has shown a clear likelihood of its success on the merits under **[**25]** *15 U.S.C. § 1*. Accordingly, the order of the District Court denying NASL's motion for a preliminary injunction is **AFFIRMED**, and the matter is **REMANDED** for further adjudication of this case on the merits.

End of Document

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[15] By making this argument, NASL apparently concedes that the earlier Standards had procompetitive justifications.

General Nutrition Corp. v. Javaid

United States District Court for the Western District of Pennsylvania

February 26, 2018, Decided; February 26, 2018, Filed

CIVIL ACTION NO. 17-1074

Reporter

2018 U.S. Dist. LEXIS 30154 *; 2018-1 Trade Cas. (CCH) P80,304; 2018 WL 1089758

GENERAL NUTRITION CORPORATION, Plaintiff, v. CHOUDHRY S. JAVAID AND GULMEENA JAVAID; KELLY WONG AND HONG BIN GUAN; AHMAD FAYAZ AND KHALIDA FAYAZ, Defendants.

Subsequent History: Related proceeding at *In re Meena, Inc., 2018 Bankr. LEXIS 3427 (Bankr. E.D.N.Y., Nov. 6, 2018)*

Core Terms

conspiracy, antitrust claim, antitrust, counterclaim, franchisee, franchise agreement, anti trust law, motion to dismiss, discounts, franchise, products, partial, pricing, counts, marks, unreasonable restraint, memorandum opinion, sell product, wholesaling, Unilateral, franchisor, quotation, steep

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For CHOUDHRY S. JAVAID, AND, GULMEENA JAVAID, KELLY WONG, AND, HONG BIN GUAN, AHMAD FAYAZ, AND, KHALIDA FAYAZ, Defendants: Brett A. Nadler, LEAD ATTORNEY, PRO HAC VICE, Ballon Stoll Bader & Nadler, P.C., New York, NY; Scott Michael Hare, Pittsburgh, PA.

For HONG BIN GUAN, CHOUDHRY S. JAVAID, AND, AHMAD FAYAZ, AND, KHALIDA FAYAZ, GULMEENA JAVAID, KELLY WONG, AND, Counter Claimants: Brett A. Nadler, LEAD ATTORNEY, Ballon Stoll Bader & Nadler, P.C., New York, NY; Scott Michael Hare, Pittsburgh, PA.

Judges: Joy Flowers Conti, Chief United States District Judge.

Opinion by: Joy Flowers Conti

Opinion

MEMORANDUM OPINION

Conti, Chief District Judge.

This case involves a franchise dispute. Defendants owned seven General Nutrition Corporation ("GNC") franchises in New York, New Jersey and Maryland. GNC terminated the franchise agreements on August 17, 2017, alleging a pattern of wholesaling behavior and false purchases or returns of products close to their expiration **[*2]** date.

Defendants returned the keys to three stores, but refused as to the other four stores, which they continue to operate. GNC initiated this lawsuit, alleging breach of the franchise agreement, fraud, trademark infringement, tarnishment of GNC's proprietary marks under the Lanham Act, and breach of guarantee.

Defendants filed an answer and five-count counterclaim against GNC alleging: (1) breach of contract; (2) breach of the Sherman Antitrust Act; (3) violation of *Maryland Commercial Law §11-204*, a parallel Maryland ***antitrust law***; (4) declaratory judgment; and (5) injunctive relief. (ECF No. 70). Defendants' antitrust theory is that GNC is using its allegations of "wholesaling" as a pretext to prevent franchisees from selling product at discounts GNC considers too steep (i.e., GNC is attempting to dictate minimum prices).

GNC filed a partial motion to dismiss the antitrust claims in counts 2 and 3 of the counterclaim. GNC argues: (1) Defendants lack standing to allege antitrust harm; and (2) Defendants failed to plead facts of a conspiracy to establish minimum pricing.

The general principles of law governing antitrust claims are well known.

> *Section 1* of the Sherman Act provides that "[e]very contract, combination in the **[*3]** form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. An antitrust plaintiff must plead the following two elements: (1) "that the defendant was a party to a contract, combination ... or conspiracy" and (2) "that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." *Ins. Brokerage, 618 F.3d at 315* (citation and internal quotation marks omitted).
>
> The first element—a contract, combination, or conspiracy—requires "'some form of concerted action,'" which we define as "'unity of purpose or a common design and understanding or a meeting of minds' or 'a conscious commitment to a common scheme.'" *Id.* (citing *In re Baby Food Antitrust Litig., 166 F.3d 112, 117 (3d Cir. 1999)*; *In re Flat Glass Antitrust Litig., 385 F.3d 350, 357 (3d Cir. 2004))*. In other words, *Section 1* claims always require "the existence of an agreement." *Id.* (citations and internal quotation marks omitted); *see also Howard Hess, 602 F.3d at 254* ("*Section 1* claims are limited to combinations, contracts, and conspiracies and thus always require the existence of an agreement."); *West Penn Allegheny Health Sys. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* ("To prevail on a *section 1* claim ... a plaintiff must establish the existence of an agreement."). Unilateral action, regardless of the motivation, is not a violation of *Section 1*. *Ins. Brokerage, 618 F.3d at 321*.

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011).

To establish standing to assert an antitrust **[*4]** claim, a plaintiff "must show an injury to them resulting from the illegal conduct." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. A franchisee has standing to allege an antitrust claim even if the franchisee signed the contract. As explained in *Perma Life Mufflers, Inc. v. International Parts Corporation*:

> [W]e held in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951)*, that a plaintiff in an antitrust suit could not be barred from recovery by proof that he had engaged in an unrelated conspiracy to commit some other antitrust violation. Similarly, in *Simpson v. Union Oil Co., 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964)*, we held that a dealer whose consignment agreement was canceled for failure to adhere to a fixed resale price could bring suit under the antitrust laws even though by signing the agreement he had to that extent become a participant in the illegal, competition-destroying scheme. Both *Simpson* and *Kiefer-Stewart* were premised on a recognition that the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.

392 U.S. 134, 138-39, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

The "contract, combination or conspiracy" prong may be satisfied by the existence of a franchisor-franchisee contract. In *Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 40, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, the Supreme Court recognized an **[*5]** antitrust claim brought by a franchisee alleging that the franchisor was enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations. The franchisor, Sylvania, initially contended that its policy was unilaterally enforced, but then conceded that its location restriction involved understandings or agreements with the retailers. *Id.* at n.8.

In the counterclaim, defendants allege that multiple GNC franchise agreements are at issue. Defendants allege that GNC is improperly attempting to control discounted pricing by multiple franchisees because selling products at steep discounts reduces the amount of royalties and advertising fees GNC receives and drives customers to purchase products from franchise stores rather than company stores or the GNC online website. Counterclaim ¶¶ 38-39.

The alleged vertical price fixing scheme is analyzed under the fact-intensive "rule of reason" to determine if there is an unreasonable restraint on trade. *Burtch, 662 F.3d at 222*. At this stage of the case there are sufficient facts pleaded, when viewed in the light most favorable to Defendants, to state a federal antitrust claim under this theory. The same analysis governs the **[*6]** parallel Maryland state law antitrust claim. In summary, GNC's partial motion to dismiss counts 2 and 3 (ECF No. 78) will be DENIED.

An appropriate order follows.

February 26, 2018.

/s/ Joy Flowers Conti

Joy Flowers Conti

Chief United States District Judge

ORDER OF COURT

AND NOW, this 26th day of February, 2018, IT IS HEREBY ORDERED that for the reasons set forth in the accompanying memorandum opinion, GNC's partial motion to dismiss counts 2 and 3 of the counterclaim (ECF No. 78) is DENIED.

/s/ Joy Flowers Conti

Joy Flowers Conti

Chief United States District Judge

In re LIBOR-Based Fin. Instruments Antitrust Litig.

United States District Court for the Southern District of New York

February 28, 2018, Decided; February 28, 2018, Filed

11 MD 2262 (NRB); 11 Civ. 2613 (NRB); 11 Civ. 5450 (NRB); 12 Civ. 5723 (NRB)

Reporter

299 F. Supp. 3d 430 *; 2018 U.S. Dist. LEXIS 33640 **; 2018-1 Trade Cas. (CCH) P80,313

In re: LIBOR-Based Financial Instruments Antitrust Litigation. This Document Applies to: Exchange-Based Plaintiff Action, OTC Plaintiff Action, Lender Plaintiff Action

Prior History: *In re Libor-Based Fin. Instruments Antitrust Litig., 2017 U.S. Dist. LEXIS 182157 (S.D.N.Y., Oct. 12, 2017)*

Core Terms

LIBOR, manipulation, plaintiffs', initial report, prices, class member, suppression, Rebuttal, artificiality, damages, models, traders, trading, trader-based, class certification, predominance, changes, rates, methodology, calculated, class action, but-for, banks, named plaintiff, Reply, reliability, transactions, Lender, opines, swap

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN1[] **Class Actions, Certification of Classes**

The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with *Fed. R. Civ. P. 23*. When presented with a motion for class certification, a court is to assess all of the relevant evidence admitted at the class certification stage and determine whether each *Rule 23* requirement has been met, just as the court would resolve a dispute about any other threshold prerequisite for continuing a lawsuit. This assessment necessarily entails the resolution of factual disputes relevant to each *Rule 23* requirement, an obligation that is not lessened by overlap between a *Rule 23* requirement and a merits issue, even a merits issue that is identical with a *Rule 23* requirement. The preponderance of the evidence standard applies to evidence proffered to establish Rule 23's requirements.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Elements

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN2[] Class Actions, Certification of Classes

Before considering the *Fed. R. Civ. P. 23* requirements, a court first considers threshold standing issues. Standing in the class action context refers to two related but analytically distinct doctrines separated by a murky line: traditional U.S. Const. art. III standing on the one hand and so-called class standing on the other. Article III standing is assessed using a three-part formulation set forth by the Supreme Court: a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. While an injury-in-fact must be concrete and particularized and actual or imminent, an injury-in-fact need not be capable of sustaining a valid cause of action. Rather, the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate Article III standing. In the class action context, the Second Circuit has made clear that no class may be certified that contains members lacking Article III standing and that any class must therefore be defined in such a way that anyone within it would have Article III standing.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > Special Proceedings > Class Actions > Class Members

HN3[] Class Actions, Certification of Classes

When presented with a putative class, a court does not require that each member submit evidence of personal standing. Rather, only one of the named plaintiffs is required to establish standing in order to seek relief on behalf of the entire class. Passive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff is properly before the court, not whether represented parties or absent class members are properly before the court. While only one named plaintiff need establish U.S. Const. art. III standing and the court's analysis need not consider evidence from absent class members, the court must nonetheless consider Article III standing as against each defendant. For every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant. At that point, Article III standing is satisfied and only then will the inquiry shift to a class action analysis and the question of class standing, which refers to a named plaintiff's ability to assert claims on behalf of absent class members.

Civil Procedure > Special Proceedings > Class Actions > Class Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN4[] Class Actions, Class Members

In a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants. This standard, derived from constitutional standing principles but also distinct from U.S. Const. art. III standing itself, serves to insure that the named plaintiff's litigation incentives are sufficiently aligned with those of the absent class members that the named plaintiff may properly assert claims on their behalf. Class standing is assessed based on allegations rather than evidence.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN5[] Class Actions, Prerequisites for Class Action

To proceed as a class action, each of the requirements of Fed. R. Civ. P. 23(a) must be met. Rule 23(a) provides that one or more members of a class may sue as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. These requirements are generally referred to as numerosity, commonality, typicality, and adequacy of representation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN6[] Prerequisites for Class Action, Numerosity

Fed. R. Civ. P. 23(a)(1) requires a class to be sufficiently numerous such that joinder of all members is impracticable, but this requirement does not mandate that joinder of all parties be impossible. Though the numerosity inquiry is not strictly mathematical, numerosity is presumed for classes larger than forty members. Plaintiffs need not furnish evidence of exact class size or identity of class members to satisfy the numerosity requirement.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN7[] Prerequisites for Class Action, Commonality

The requirement of commonality demands that there be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). A question is common to the class if it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. That is, commonality requires the plaintiff to demonstrate that the class members have suffered the same injury, which requires establishing more than the mere fact that class members have all suffered a violation of the same provision of law. However, where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN8[] Prerequisites for Class Action, Typicality

To establish typicality under Fed. R. Civ. P. 23(a)(3), the party seeking certification must show that each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability. This requirement is related to, but distinct from, the requirement of class standing. Typicality requires that the disputed issues of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class. Accordingly, typicality is not satisfied where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation. The defendant need not show at the certification stage that a unique defense will prevail, only that it is meritorious enough to require the plaintiff to devote considerable time to rebut the unique defense. However, the court should not disqualify a named plaintiff based upon any groundless, far-fetched defense that the defendant manages to articulate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN9[] Prerequisites for Class Action, Adequacy of Representation

The representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). This requirement overlaps in part with those of commonality and typicality, but adequacy of representation also raises concerns about the competency of class counsel and conflicts of interest. Accordingly, an analysis of adequacy of representation considers whether the class representative has adequate incentive to pursue the class's claim, and whether some difference between the class representative and some class members might undermine that incentive. However, not every conflict among subgroups of a class will prevent class certification — the conflict must be fundamental to violate Rule 23(a)(4).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN10[] Prerequisites for Class Action, Predominance

In addition to satisfying each requirement of Fed. R. Civ. P. 23(a), a putative class must also meet one of the bases for certification under Rule 23(b). A class action may proceed as such if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Rule 23(b)(3). Predominance and superiority must each be satisfied.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN11[] Prerequisites for Class Action, Predominance

The Fed. R. Civ. P. 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. It serves to ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. The predominance analysis entails careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof. As its name suggests, the predominance requirement calls only for predominance, not exclusivity, of common questions. The inquiry is inherently comparative, taking into account the weight and significance of common and individual issues rather than simply their numbers.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN12[] Prerequisites for Class Action, Commonality

The existence of a single common question suffices to establish commonality, but the Fed. R. Civ. P. 23(b)(3) predominance requirement is more demanding than Rule 23(a). Ultimately, the court asks whether issues susceptible to generalized proof outweigh individual issues, or put differently, whether common issues are more substantial than individual ones. In conducting this balancing test, a court assesses (1) the elements of the claims and defenses to be litigated; and (2) whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to relief. This analysis is more qualitative than quantitative, and must account for the nature and significance of the material common and individual issues in the case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN13[] **Prerequisites for Class Action, Predominance**

In addition to establishing the predominance of common questions, plaintiffs must also establish that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *Fed. R. Civ. P. 23(b)(3)*. *Rule 23(b)(3)* sets forth four matters pertinent to the superiority inquiry: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. While these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN14[] **Prerequisites for Class Action, Superiority**

While *Fed. R. Civ. P. 23(b)(3)* sets out four individual factors for courts to consider, manageability is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication. Despite the importance of manageability, the Second Circuit has also cautioned that failure to certify an action under *Rule 23(b)(3)* on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule. Ultimately, these factors are nonexhaustive and nonexclusive, and assessing superiority is a fact-specific inquiry.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN15[] **Class Actions, Prerequisites for Class Action**

In addition to the express requirements of *Fed. R. Civ. P. 23(a)*, *(b)*, the Second Circuit has recognized an implied requirement of ascertainability in *Rule 23*. Though the touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member, the Second Circuit has clarified that ascertainability does not itself require that a proposed class be administratively feasible. Rather, ascertainability imposes only a modest threshold requirement that asks only whether a proposed class is defined using objective criteria that establish a membership with definite boundaries. It will only preclude certification if a proposed class definition is indeterminate in some fundamental way.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN16[] **Class Actions, Prerequisites for Class Action**

Given that ascertainability is distinct from the predominance requirement, the case law does not preclude a consideration of administrative feasibility concerns in analyzing predominance and superiority. A freestanding administrative feasibility requirement as part of ascertainability would be duplicative of the manageability factor of the superiority inquiry (if administrative feasibility were considered comparatively rather than absolutely) and would risk encroaching on territory belonging to the predominance requirement, such as classes that require highly individualized determinations of member eligibility.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN17[] Class Actions, Certification of Classes

A court is not bound by the class definition proposed in the complaint and should not dismiss the action simply because the complaint seeks to define the class too broadly. *Fed. R. Civ. P. 23(c)(4)*, *(5)* provide two specific means of modification, but a court also has broad discretion to modify the class definition as appropriate.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN18[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c)(4) provides that when appropriate, an action may be brought or maintained as a class action with respect to particular issues. The rule may be applied to certify a class on a particular issue even if the action as a whole does not satisfy *Rule 23(b)(3)*'s predominance requirement. Additionally, if an action includes multiple claims, one or more of which might qualify as a certifiable class claim, the court may separate such claims from other claims in the action and certify them under the provisions of *Rule 23(c)(4)*. The Second Circuit has instructed that district courts should take full advantage of this provision to certify separate issues, but has also recognized that issue certification may be inappropriate if a number of questions would remain for individual adjudication or if issue certification would not materially advance the litigation because it would not dispose of larger issues relevant to the case.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN19[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c)(4) should not be invoked merely to postpone confronting difficult certification questions, and indeed, overly aggressive application of *Rule 23(c)(4)* would nullify *Rule 23(b)(3)*'s predominance requirement, as a class may be certified only as to the common issues raised. A class action movant cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment (in which, by definition, it will predominate) when more substantial individual issues remain.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN20[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c)(5) provides that when appropriate, a class may be divided into subclasses that are each treated as a class under this rule. For example, when conflicts exist between class members, they can be cured by dividing the class into separate homogeneous subclasses with separate representation to eliminate conflicting interests. However, the placement of plaintiffs into multiple subclasses can generate unnecessary administrative inefficiencies, and at some point there must be an end to reclassification. The necessity of a large number of subclasses may indicate that common questions do not predominate, and the creation of a number of subclasses may make the case unmanageable and may defeat the superiority requirement.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN21[] Class Actions, Certification of Classes

Fed. R. Civ. P. 23(c)(4), *(5)* are phrased permissively. Consistent with the text of the rule, the court is not obligated to implement *Rule 23(c)(4)*, *(5)* on its own initiative by certifying classes only as to certain issues or creating subclasses. It remains the plaintiff's burden to show how the action may be modified to avoid certification problems. Similarly, the decision to otherwise modify a class definition is a discretionary one. Accordingly, in order to avoid the perverse effect of turning defense counsel and the court into the plaintiffs' counsel's co-counsel, with the plaintiffs waiting to see what objections defendants raise and how the court rules on those objections and then amending their proposed class definitions as necessary based on what they learned in the process, it is appropriate to consider issue certification under *Rule 23(c)(4)*, subclass creation under *Rule 23(c)(5)*, and other modifications of the proposed class definitions under the court's discretionary authority only where the plaintiffs have set forth such proposals in sufficient detail.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN22[] Expert Witnesses, Daubert Standard

Courts have a gatekeeping function under *Fed. R. Evid. 702*, under which a court is charged with the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. The proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of *Rule 702* are satisfied. The Second Circuit has distilled Rule 702's requirements into three broad criteria: (1) qualifications, (2) reliability, and (3) relevance and assistance to the trier of fact.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN23[] Expert Witnesses, Qualifications

When presented with expert testimony, courts first consider the threshold question of whether a witness is qualified as an expert by knowledge, skill, experience, training, or education to render his or her opinions. *Fed. R. Evid. 702*. The court analyzes the totality of the witness's background to determine whether he or she exhibits any one or more of the qualifications listed in *Rule 702* with respect to a relevant field. As Rule 702's use of the disjunctive suggests, any one of the five forms of qualifications will satisfy the rule. A formal education in a particular field is sufficient to qualify a witness as an expert as a general matter, such that a lack of extensive practical experience directly on point does not necessarily preclude the expert from testifying. Similarly, a lack of formal training does not necessarily disqualify an expert from testifying if he or she has equivalent relevant practical experience.

Evidence > ... > Testimony > Expert Witnesses > Qualifications

HN24[] Expert Witnesses, Qualifications

Courts in the Second Circuit have noted that an expert should not be required to satisfy an overly narrow test of his own qualifications. The Second Circuit has allowed an expert to testify as to matters within his general expertise even though he lacked qualifications as to certain technical matters within that field. A court compares the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony, which must overlap. Because a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields. Conversely, an expert's lack of qualifications as to some of the opinions offered does not render inadmissible the opinions that he is qualified to offer.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN25[] **Expert Witnesses, Daubert Standard**

A court, after assessing an expert's qualifications, next determines whether the proffered testimony has a sufficiently reliable foundation to permit it to be considered. In this inquiry, the court should consider the indicia of reliability identified in *Fed. R. Evid. 702*, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony is the product of reliable principles and methods; and (3) that the witness has applied the principles and methods reliably to the facts of the case. The Supreme Court has identified a number of factors that may be considered in assessing reliability: (1) whether a theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) a technique's known or potential rate of error, and the existence and maintenance of standards controlling the technique's operation; and (4) whether a particular technique or theory has gained general acceptance in the relevant scientific community. These factors are not a definitive checklist or test, as the gatekeeping inquiry must be tied to the facts of a particular case and will necessarily vary from case to case.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN26[] **Expert Witnesses, Daubert Standard**

The law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination. Accordingly, in assessing the reliability of an expert opinion, a resort to common sense is not inappropriate.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN27[] **Expert Witnesses, Daubert Standard**

Though flexible, the reliability inquiry must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the court's belief as to the correctness of those conclusions. The expert's methodology is to be assessed step-by-step, and it is critical that an expert's analysis be reliable at every step. Any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible. But conclusions and methodology are not entirely distinct from one another. Nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert, and a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and *Fed. R. Evid. 702* mandate the exclusion of that unreliable opinion testimony.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN28[] Expert Witnesses, Daubert Standard

Regarding the incomplete distinction between "methodology" on the one hand and "conclusions" and "results" on the other, first, a challenge to an expert's methodology will necessarily call into question the conclusions derived from the application of that methodology. Such a challenge does not impermissibly attack an expert's results simply because those results are collaterally damaged by the challenge directed towards the expert's methodology. Second, robustness testing of an expert's methodology — by applying that methodology to different data or with different assumptions and examining the results produced by the methodology so applied — is not an impermissible challenge to the expert's results. Rather, this robustness and sensitivity testing relates directly to two of the Daubert factors articulated by the Supreme Court: whether the methodology can be (and has been) tested and the methodology's known or potential rate of error. Robustness testing and sensitivity testing that produces contradictory or otherwise implausible results strongly suggest that a methodology has been insufficiently tested and that the methodology has a high potential rate of error.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN29[] Expert Witnesses, Daubert Standard

Inconsistent results are an indicia of unreliability in an expert's methodologies. This principle is clearest in the context of inconsistent results produced by the same methodology. However, it is no less applicable to multiple methodologies intended to measure the same phenomenon that ultimately produce inexplicably inconsistent results.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN30[] Expert Witnesses, Daubert Standard

When faced with expert testimony that contains both reliable and unreliable opinions, district courts often exclude only the unreliable testimony. If the unreliable portion of an opinion can easily be distinguished from testimony that could help the trier of fact, it may be an abuse of discretion to throw the good out with the bad. However, courts are not obligated to prune away all of the problematic elements of an expert's proposed testimony to save the remaining portions, however small.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

Evidence > Relevance > Relevant Evidence

HN31[] Expert Witnesses, Daubert Standard

Even after determining that a witness is qualified as an expert to testify as to a particular matter, and that the opinion is based upon reliable data and methodology, Fed. R. Evid. 702(a) requires a district court to make a third inquiry: whether the expert's testimony will assist the trier of fact in understanding the evidence or determining a fact in issue. This condition goes primarily to relevance, as expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful. Relevance, in turn, is assessed with respect to *Fed. R. Evid. 401*: whether it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Accordingly, the Second Circuit has consistently held that expert testimony that usurps either the role of the trial judge in determining the applicable law or the role of the trier of fact in applying that law to the facts before it is inadmissible because it by definition does not aid the trier of fact in making a decision.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN32[] **Expert Witnesses, Daubert Standard**

Expert testimony that seeks to address lay matters which the trier of fact is capable of understanding and deciding without the expert's help is not relevant and is therefore inadmissible. That is, testimony addressing lay matters is not based on an expert's scientific, technical, or other specialized knowledge, and therefore fails to satisfy the first part of Fed. R. Evid. 702(a). Accordingly, it is inappropriate for experts to become a vehicle for factual narrative.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN33[] **Expert Witnesses, Daubert Standard**

As with qualifications and reliability, courts also disaggregate an expert's opinions before assessing their relevance and helpfulness: the fact that some of an expert's opinions are irrelevant does not render all of the expert's opinions inadmissible. Nonetheless, a court need not overly fragment an expert's opinions in order to pick out only the relevant and helpful portions.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN34[] **Class Actions, Certification of Classes**

Neither the Supreme Court nor the Second Circuit has definitely decided whether the Daubert standard governs the admissibility of expert evidence submitted at the class certification stage. Indeed, the issue remains unsettled nationally and in the Southern District of New York. The view that expert evidence submitted at the class certification stage is subject to the Daubert standard is persuasive. The Supreme Court has suggested in dicta that Daubert applies, and the Second Circuit's decisions support a more searching examination of expert testimony offered at the class certification stage. Indeed, given the Second Circuit's direction that courts consider the relevant evidence admitted at the class certification stage, it appears that the standard rules of evidence should apply. At least two leading treatises endorse this view. An undiluted Daubert analysis is consonant with a class certification standard that requires a determination by a preponderance of the evidence that each *Fed. R. Civ. P. 23* requirement has been met, and under which head-to-head weighing of competing expert evidence is proper. It is not sufficient for the court simply to determine that the testimony could evolve into something admissible by the time of trial.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN35[] Class Actions, Certification of Classes

Though Daubert applies at the class certification stage, a court's inquiry is guided by the purpose for which the evidence is introduced — establishing the various class certification requirements. The question is not whether a jury at trial should be permitted to rely on the expert's report to find facts as to liability, but rather whether the court may utilize it in deciding whether the requisites of *Fed. R. Civ. P. 23* have been met. However, a conclusion that proffered expert evidence is sufficiently reliable and relevant to pass Daubert muster does not end the inquiry on class certification. Rather, expert opinion deemed to be admissible comprises only one part of the relevant evidence admitted at the class certification stage to be weighed in determining whether each *Rule 23* requirement has been met, and each requirement must still be established by a preponderance of the evidence.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN36[] Class Actions, Certification of Classes

To the extent that flaws in expert testimony proffered at class certification do not warrant that testimony's exclusion by the court as gatekeeper under Daubert at the threshold, those flaws may nonetheless be considered in the *Fed. R. Civ. P. 23* analysis undertaken by the court as trier of fact. Put differently, though a Daubert motion is an improper venue in which to take sides in a battle of the experts offered by competing parties, disputes between experts must be resolved if necessary to the *Rule 23* analysis.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN37[] Expert Witnesses, Daubert Standard

There is case law holding that purported inconsistencies in an expert's methodology go to the weight, not the admissibility, of his testimony. However, the cases establish a distinction between inconsistencies within an expert's application of a single methodology on the one hand and inconsistencies across an expert's multiple methodologies on the other. The former has been held not to be a basis for exclusion.

Evidence > Admissibility > Expert Witnesses > Helpfulness

HN38[] Expert Witnesses, Helpfulness

Acting simply as a narrator of the facts does not convey opinions based on an expert's knowledge and expertise. This concern is heightened where the expert offers no explanation of how the communications that she reviewed were selected. Similarly, to the extent an expert interprets communications to opine on their authors' actual motives and states of mind, these opinions are impermissible. While an expert may opine on economic incentives as a general matter, those opinions may not extend to specific states of mind.

Evidence > Admissibility > Expert Witnesses

HN39[] Admissibility, Expert Witnesses

An expert may rely on the admissible opinions of another expert under *Fed. R. Evid. 703*, but an expert is not entitled to rely on another expert's unreliable opinions for support.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN40[] **Expert Witnesses, Daubert Standard**

An expert opinion need not have been peer reviewed and need not be generally accepted in the community in order to be admissible. Peer review is relevant, though not dispositive.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN41[] **Expert Witnesses, Daubert Standard**

Methodology and results are not entirely distinct from one another, and robustness testing of an expert's methodology relates directly to two of the reliability factors identified by the Supreme Court: whether a methodology can be (and has been) tested, and a methodology's known or potential rate of error.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN42[] **Expert Witnesses, Daubert Standard**

While Monte Carlo simulation is a generally accepted technique, general acceptance does not end the reliability inquiry. Problems in implementing the technique may nonetheless render it unreliable as applied.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN43[] **Expert Witnesses, Daubert Standard**

A court's role at the Daubert stage is not to conclusively assess the correctness of an expert's opinions. A court must undertake a Daubert analysis without regard to the conclusions the expert has reached or the court's belief as to the correctness of those conclusions.

Evidence > Types of Evidence > Judicial Admissions > Amendments

Evidence > Types of Evidence > Judicial Admissions > Pleadings

HN44[] **Judicial Admissions, Amendments**

The amendment of a pleading does not make it any less an admission of the party. The facts alleged in a complaint can be self-defeating.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN45[] **Expert Witnesses, Daubert Standard**

It seems safe to assume that an expert, as a practitioner of the scientific method, would consider relevant additional information and incorporate that information into his opinions. There is little reason why experts should be required to explicitly disclaim as much.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN46[] **Class Actions, Certification of Classes**

Courts have taken varying approaches to the propriety of certifying a fail-safe class, or one that begs the liability question and is defined circularly in terms of legal injury. For instance, some cases suggest that a fail-safe class raises predominance issues under *Fed. R. Civ. P. 23(b)(3)*, reasoning that such a class necessarily raises individual questions, as the factfinder must determine whether an individual has a claim in order to determine whether he or she belongs in the class. Courts have also concluded that fail-safe classes create manageability problems bearing on superiority under *Rule 23(b)(3)*, are fundamentally unfair, or render the proposed class unascertainable. Other courts have rejected these concerns, often reasoning that potentially fail-safe language such as "and were damaged thereby" is superfluous and does not substantively alter the class definition's scope.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN47[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23 does not explicitly preclude certification of fail-safe classes. Rather, the contention that a class is "fail-safe" often serves as shorthand for defects in the requirements explicitly set forth in *Rule 23*, including predominance in particular.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN48[] **Class Members, Absent Members**

Since the elements of U.S. Const. art. III standing are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. Accordingly, Article III standing is assessed based on the plaintiff's allegations at the pleading stage. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts that are taken as true. Class certification does not always fit neatly into this framework. For example, when the consideration of class certification occurs at the pleading stage and precedes motions to dismiss, allegations as to the named plaintiffs' standing would appear to suffice. However, where the case has proceeded beyond the pleading stage but has not yet reached summary judgment, this framework does not directly address whether standing should be assessed at this point based on allegations or evidence. The Second Circuit does not require that each member of a class submit evidence of personal standing, but it has referenced standing in terms of allegations and further held that passive members need not make any individual showing of standing.

Civil Procedure > ... > Class Actions > Class Members > Absent Members

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

Civil Procedure > ... > Class Actions > Class Members > Named Members

HN49[] Class Members, Absent Members

Though the law remains somewhat unsettled, the following principles guide an analysis of standing when class certification is considered in a case that has proceeded beyond the pleading stage but has not yet reached summary judgment. First, the class must be defined in such a way that anyone within it would have U.S. Const. art. III standing. Second, because absent class members need not submit evidence of personal standing, the court considers absent class members' Article III standing solely based on plaintiffs' allegations and the class definition. Third, by negative implication, evidence of the named plaintiffs' standing is required at this juncture. Though the record may not be as well-developed as at summary judgment, the class certification process has nonetheless entailed discovery, and evidence establishing a named plaintiff's standing should be well within that plaintiff's control in any event.

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN50[] Class Actions, Prerequisites for Class Action

Though a class definition's use of language may not be as definite as would be ideal, if it remains clear who is suing about what, this is all that ascertainability requires.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

HN51[] Prerequisites for Class Action, Commonality

Fed. R. Civ. P. 23(a)(2) simply requires that there be issues whose resolution will affect all or a significant number of the putative class members.

Business & Corporate Compliance > ... > Contracts Law > Standards of Performance > Assignments

Civil Procedure > ... > Justiciability > Standing > Personal Stake

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN52[] Standards of Performance, Assignments

As a general matter, the assignee of a claim possesses the same interest as the assignor and thus may continue to assert a claim for the same injury shared by all members of the class. It is commonplace for an assignee to institute or continue an action of his or her assignor on an assigned claim even though he or she, apart from the assignment, is without standing.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Remedies

HN53[] Actual Fraud, Remedies

A plaintiff both injured and enriched by illegal activity cannot choose to recover for his injuries yet retain his windfall where both result from a single wrong. That is, a plaintiff cannot claim damages where the same fraud alleged to be the cause of a loss to certain funds also permitted a countervailing gain to other funds.

Securities Law > Commodities Futures Trading

HN54[] Securities Law, Commodities Futures Trading

A plaintiff asserting a direct *Commodity Exchange Act* claim must establish (1) that the defendant had the ability to influence market prices; (2) that he specifically intended to do so; (3) that artificial prices existed; and (4) that the defendant caused the artificial prices.

Securities Law > Commodities Futures Trading

HN55[] Securities Law, Commodities Futures Trading

Vicarious liability may be imposed where (1) the agent participated in the alleged unlawful activity and (2) his actions were within the scope of his employment or office, and requires a primary violation of the *Commodity Exchange Act* (CEA) in the first instance. Aiding-and-abetting claims are also contingent on a primary CEA violation.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Securities Law > Commodities Futures Trading

Securities Law > ... > Remedies > Damages > Compensatory Damages

HN56[] Prerequisites for Class Action, Predominance

The question of damages, to some extent, is necessarily individual in every securities case, because damages will almost always be a function of the specific transactions undertaken by each class member and the prices and quantities involved in those transactions. Accordingly, individualized damages determinations alone cannot preclude certification under *Fed. R. Civ. P. 23(b)(3)*, though the fact that damages may have to be ascertained on an individual basis is a factor that a court must consider in the predominance analysis. Though a court may set forth at class certification the netting principles to be applied in determining actual damages under *7 U.S.C.S. § 25(a)*, the court need not finalize any netting principles in order to find that they introduce individual issues. Netting of gains and losses is not a hard-and-fast rule, as courts decline to net where doing so would unjustly enrich the defendant, shelter it from any appreciable liability, or undermine the goal of deterrence. Nonetheless, there is no unjust enrichment where a claimant has actually benefited from the alleged wrongdoing of another, and undeserved windfalls to plaintiffs may be inappropriate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN57[] Prerequisites for Class Action, Superiority

Courts should distinguish claims in which the cost of prosecution exceeds recovery from truly negative value claims — those in which the class member actually benefited from the conduct in question. To the extent a putative class includes a substantial number of members who were not ultimately damaged, a negative value rationale for superiority is properly evaluated against a concern regarding the in terrorem effect that a certified class may have.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

HN58[] **Prerequisites for Class Action, Superiority**

Concerns about foreign recognition of the court's judgments are reasonably related to superiority. Status as foreign entities does not preclude parties from serving as class representatives, but the presence of a significant number of foreign putative class members can give a court pause on whether concentration is desirable.

Torts > Remedies > Damages > Proof

HN59[] **Damages, Proof**

A defendant must bear the risk of uncertainty from its wrongdoing, but a plaintiff first bears the burden of showing that the claimed damages are the certain result of the wrong.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN60[] **Prerequisites for Class Action, Commonality**

In the context of fraud claims based on uniform misrepresentations made to all members of the class, misrepresentation is a common question because the standardized misrepresentations may be established by generalized proof.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN61[] **Prerequisites for Class Action, Adequacy of Representation**

Adequacy of representation is called into question when some difference between the class representative and some class members might undermine the class representative's incentive to pursue the class's claims. A key element in the determination of whether a plaintiff's interests are antagonistic to those of other members of the class is the relationship between the class representative and class counsel. This concern arises because, when a class representative is closely associated with class counsel, he or she may permit a settlement less favorable to the interests of absent class members. However, a relationship between a class representative and class counsel is not inevitably disabling, and there is no per se rule against relatives of class counsel serving as class representatives.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN62[] **Prerequisites for Class Action, Adequacy of Representation**

Whether a close relationship with class counsel renders a named plaintiff inadequate is a fact-intensive inquiry. In making this assessment, courts have considered numerous factors such as: (1) the closeness and extent of the relationship; (2) whether the related attorney's relationship and role in the litigation have been disclosed; (3) whether attorneys' fees will greatly exceed the class representative's recovery; and (4) the extent of the related attorney's involvement in the litigation. A potential conflict of interest is sufficient to render a named plaintiff an inadequate class representative, and a conflict need not violate state law or professional responsibility rules in order to render a named plaintiff inadequate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN63[] Prerequisites for Class Action, Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) requires a court to ask whether the representative parties will fairly and adequately protect the interests of the class, not whether the court believes the interests of absent class members are being fairly treated. Consistent with this distinction set forth in the structure of Rule 23, the Supreme Court and Second Circuit have made clear that the adequacy of a named plaintiff's representation and the fairness of a subsequent settlement are wholly distinct inquiries. The adequacy of the proposed class representative is widely considered the most important of the Rule 23(a) factors because it directly implicates the due process rights of absent class members who will be bound by the judgment.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN64[] Actual Fraud, Elements

Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN65[] Prerequisites for Class Action, Commonality

Though misrepresentation is a common question when fraud claims are based on uniform misrepresentations to all members of the class, proof of misrepresentation — even widespread and uniform misrepresentation — only satisfies half of the equation. The answer to the other half, reliance on the misrepresentation, is not dictated by the first half.

Securities Law > ... > Elements of Proof > Reliance > Fraud on the Market

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN66[] Reliance, Fraud on the Market

The common law does not generally recognize a fraud on the market theory of reliance. Common-law fraud claims require a different analysis than those brought under the federal securities regulation scheme.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN67[] Prerequisites for Class Action, Predominance

An assessment of predominance requires consideration of the elements of the claims and defenses to be litigated. Though the question for purposes of determining predominance is not whether a defense exists, but whether the common issues will predominate over the individual questions raised by that defense, affirmative defenses may, and must, be considered in the predominance analysis. Statutes of limitations are no exception to this general rule. Situations abound where statute-of-limitations issues overlap with certain of the *Fed. R. Civ. P. 23* requirements. Indeed, defendants may oppose class certification on the ground that class members with untimely claims must rely on equitable tolling to save their claims, which presents an individual question of law and fact that could predominate over common questions under *Rule 23(b)(3)*, or challenge the predominance requirement in light of the presence of idiosyncratic statute-of-limitations issues among the laws of various states in a nationwide class action.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN68[] Prerequisites for Class Action, Predominance

While an affirmative defense affecting different class members differently does not compel a finding that individual issues predominate, the varying applicability of affirmative defenses weighs on the individual question side of the scale.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN69[] Prerequisites for Class Action, Predominance

Variations in state law may swamp any common issues and defeat predominance. One of the matters pertinent to a finding of predominance is the likely difficulties in managing a class action. *Fed. R. Civ. P. 23(b)(3)(D)*. When claims in a class action arise under state law — and the class comprises multiple states — the court must consider whether different state laws will apply to different members of the class. If the forum state's choice-of-law rules require the application of only one state's laws to the entire class, then the representation of multiple states within the class does not pose a barrier to class certification.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Torts > Procedural Matters > Conflict of Law > Place of Injury

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Governmental Interests

HN70[] Choice of Law, Forum & Place

Under New York's choice-of-law rules, the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws. If there is a conflict of laws, New York courts apply an interests analysis, under which the law of the jurisdiction having the greatest interest in the litigation is applied.

Applying this test, fraud claims are governed by the law of the state in which the injury occurred, which is where the plaintiff maintains its principal place of business.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN71[] Prerequisites for Class Action, Predominance

Putative class actions involving the laws of multiple states are often not properly certified pursuant to *Fed. R. Civ. P. 23(b)(3)* because variation in the legal issues to be addressed overwhelms the issues common to the class. Accordingly, courts routinely deny class certification because the plaintiffs' claims would require application of the substantive law of multiple states. Nonetheless, the specter of having to apply different substantive laws does not necessarily warrant refusing to certify a class. Nationwide class action movants must creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN72[] Prerequisites for Class Action, Typicality

A representative may satisfy the typicality requirement even though that party may later be barred from recovery by a defense particular to him or her that would not impact other class members.

Antitrust & Trade Law > Sherman Act > Claims

HN73[] Sherman Act, Claims

An antitrust claim has three elements: (1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages. The second element has also been termed "antitrust injury" and "causation or impact."

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN74[] Sherman Act, Claims

The second element of an antitrust cause of action — antitrust injury — poses two distinct questions. One is the familiar factual question whether the plaintiff has indeed suffered harm, or injury-in-fact. The other is the legal question whether any such injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN75[] Sherman Act, Claims

The Second Circuit has held that antitrust injury and damages are related, but nonetheless distinct, concepts. The injury-in-fact question considers whether a plaintiff was harmed, and the damages question considers by how much a plaintiff was harmed. Antitrust plaintiffs at class certification need not demonstrate through common evidence the precise amount of damages incurred by each class member, but are expected to provide common evidence to show all class members suffered some injury.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Significant Relationships

HN76[] **Contracts, Contract Conditions & Provisions**

Under New York law, the center of gravity or grouping of contacts is the appropriate analytical approach to choice of law questions in contract cases. In addition to the traditionally determinative choice of law factor of the place of contracting, four other factors are considered in establishing this most significant relationship: the places of negotiation and performance; the location of the subject matter; and the domicile or place of business of the contracting parties. However, when a contract contains a choice-of-law provision, that provision may reasonably be read as a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship. Indeed, as a general rule, choice of law provisions are valid and enforceable in New York.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Choice of Law

Contracts Law > Remedies > Restitution

HN77[] **Contracts, Contract Conditions & Provisions**

Under New York law, the choice of law analysis is generally done separately for each claim and defense. Some controversy appears to exist as to whether a claim for unjust enrichment is governed by a contract's enforceable choice-of-law provision, or whether it is instead governed by the law of the state that New York's interest analysis yields, being a fundamentally non-contractual cause of action. While in general, New York courts are reluctant to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action, the more an unjust enrichment claim relates to an enforceable contract, the more likely it is to be considered contractual in nature for the purposes of New York's choice-of-law analysis.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Contracts Law > Remedies > Restitution

HN78[] **Prerequisites for Class Action, Predominance**

Variations in state law have generally precluded nationwide class certifications based on unjust enrichment theories. Rejection of nationwide unjust-enrichment classes is not a universal rule, and some decisions have certified nationwide unjust enrichment classes. More persuasive is the line of cases declining to certify a nationwide class. The states' different approaches to, or elements of, unjust enrichment are significant.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN79[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(c) contemplates that class certification is not a one-shot process, as an order that grants or denies class certification may be altered or amended before final judgment. The Second Circuit has interpreted *Rule 23(c)(1)(C)* to require courts to reassess class rulings as the case develops. Though class certification is not an iterative process and proponents of class certification should be diligent in establishing their compliance with class certification requirements the first time around, a court may nonetheless exercise its discretion and consider a proposal that the class definition be modified.

Business & Corporate Compliance > ... > Contract Conditions & Provisions > Contracts Law > Contract Conditions & Provisions

HN80[] **Contracts, Contract Conditions & Provisions**

New York law appears to treat as identical a choice-of-law provision designating New York law exclusive of New York conflict-of-law principles and a choice-of-law provision designating New York law without such an exclusion.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN81[] **Federal & State Interrelationships, Erie Doctrine**

A federal court in New York sitting in diversity is bound to apply New York law as established by the New York Court of Appeals.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN82[] **Contract Interpretation, Good Faith & Fair Dealing**

Under New York law, a covenant of good faith and fair dealing in the course of contract performance is implicit in all contracts. The implied covenant of good faith and fair dealing obligates a promisor to fulfill any promises which a reasonable person in the position of the promisee would be justified in understanding were included in the contract. Specifically, implied in every contract is a promise that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that would be inconsistent with other terms of the contractual relationship. The relevant inquiry called for by the implied covenant is objective, not subjective: the court considers any promises which a reasonable person in the position of the promisee would be justified in understanding were included.

Civil Procedure > Special Proceedings > Class Actions > Appellate Review

HN83[] **Class Actions, Appellate Review**

Under *Fed. R. Civ. P. 23(f)*, a court of appeals may permit an appeal from an order granting or denying class-action certification. The Second Circuit has held that views expressed by the district court at the time of class certification, although not required, are relevant to a determination of whether interlocutory appeal is warranted. A party seeking leave to appeal pursuant to *Rule 23(f)* must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution. The first category comprises the so-called "death knell" cases and their counterparts — namely cases in which the class certification order effectively terminates the litigation either because the denial of certification makes the pursuit of individual claims prohibitively expensive or because the grant of certification forces the defendants to settle. The second category requires a novel legal question that is of fundamental importance to the development of the law of class actions and is likely to escape effective review after entry of final judgment.

Counsel: **[**1]** For FTC Capital GMBH, on behalf of themselves and all others similarly situated, Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Fred Taylor Isquith, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Roger W Kirby, Kirby McInerney LLP, New York, NY; William H. Narwold, Motley Rice LLC (CT), Hartford, CT.

For FTC Futures Fund SICAV, on behalf of themselves and all others similarly situated, FTC Futures Fund PCC Ltd, on behalf of themselves and all others similarly situated, Plaintiffs (1:11-cv-02613-NRB): Christopher Lovell, Fred Taylor Isquith, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Karen M. Lerner, Meghan Joan Summers, Roger W Kirby, Kirby McInerney LLP, New York, NY; Thomas W. Elrod, Kirby McInerney, LLP, New York, NY; William H. Narwold, Motley Rice LLC (CT), Hartford, CT.

For Mayor and City Council of Baltimore, Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Ralph Johnson Bunche, III, Hausfeld, LLP (DC), Washington, DC; William Christopher Carmody, Susman Godfrey LLP (NYC), New York, NY.

For Metzler Investment GmbH, Plaintiff (1:11-cv-02613-NRB): Christopher **[**2]** Lovell, Fred Taylor Isquith, Lovell Stewart Halebian Jacobson LLP, New York, NY; David E Kovel, Karen M. Lerner, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Ellen Meriwether, Miller Faucher & Cafferty, LLP (Philadelphia), Philadelphia, PA; Thomas W. Elrod, Kirby McInerney, LLP, New York, NY; William H. Narwold, Motley Rice LLC (CT), Hartford, CT.

For Roberto E. Calle Gracey, Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Fred Taylor Isquith, Lovell Stewart Halebian Jacobson LLP, New York, NY.

For The Berkshire Bank, Government Development Bank for Puerto Rico, Direcors Financial Group, Plaintiffs (1:11-cv-02613-NRB): Francis Paul McConville, Pomerantz LLP (NYC), New York, NY.

For Roberto E. Calle Gracey, on behalf of himself and all others similarly situated, Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Fred Taylor Isquith, Lovell Stewart Halebian Jacobson LLP, New York, NY.Lori Ann Fanning, Lori Ann Fanning, PRO HAC VICE, Miller Law LLC, Chicago, IL; Matthew E Van Tine, Miller Law LLC, Chicago, IL; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For 303030 Trading, LLC, Consolidated Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Lovell **[**3]** Stewart Halebian Jacobson LLP, New York, NY; David E Kovel, Karen M. Lerner, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Patrick Edward Cafferty, Miller, Faucher, Cafferty and Wexler, L.L.P., Chicago, IL; Thomas W. Elrod, Kirby McInerney, LLP, New York, NY.

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For AVP Properties, LLC, Consolidated Plaintiff (1:11-cv-02613-NRB): Charles S. Zimmerman, PRO HAC VICE, Zimmerman & Reed, Minneapolis, MN; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel E. Gustafson, Daniel C. Hedlund, PRO HAC VICE, Gustafson Gluek PLLC, Minneapolis, MN; Dianne M.

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For Independence Trading Inc., Consolidated Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Douglas A. Abrahams, PRO HAC VICE, KOHN, SWIFT & GRAF, P.C., Philadelphia, PA; Jay W. Eisenhofer, Grant & Eisenhofer P.A. (NY), New York, NY; John D. Radice,Grant & Eisenhofer, PA, New York, NY; Joseph C. Kohn, Kohn, Swift, & Graf, P.C., Philadelphia, PA; Linda P. Nussbaum, Nussbaum Law Group, P.C., New York, NY; Warren Rubin, Law Office of Bernard M. Gross, Philadelphia,, PA; William E. Hoese, Kohn, Swift & Graf, P.C., Philadelphia, PA.

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For Maxwell Van De Velde, Individually and on behalf of all others similarly situated, Consolidated Plaintiff (1:11-cv-02613-NRB): Charles E. Tompkins, PRO HAC VICE, Shapiro Haber & Urmy LLP, Boston, MA; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Edward F. Haber, PRO HAC VICE, Shapiro, Haber & Urmy, L.L.P., Boston, MA; Lesley Elizabeth Weaver, PRO HAC VICE, Block & Leviton LLP, Oakland, CA; Patrick Anthony Klingman, Shepherd, Finkelman, Miller & Shah, LLC, Chester, CT.

For Nathaniel Haynes, on behalf of himself and all others similarly situated, Consolidated Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; David E Kovel, Karen M. Lerner, Meghan Joan Summers, **[**6]** Kirby McInerney LLP, New York, NY;Lisa J. Rodriguez, Trujillo, Rodriguez & Richards, LLP, Haddonfield, NJ; Thomas W. Elrod, Kirby McInerney, LLP, New York, NY.

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For Jeffrey Laydon, on behalf of himself and all others similarly situated, Consolidated Plaintiff (1:11-cv-02613-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Douglas Mason Chalmers, Douglas M. Chalmers P.C., Chicago, IL;Geoffrey **[**7]** Milbank Horn, Vincent Briganti, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Robert F. Coleman, PRO HAC VICE, Coleman Law Firm, Chicago, IL; Steve R. Jakubowski, Coleman Law Firm, Chicago, IL.

For Credit Suisse Group AG, WestLB AG, Defendants (1:11-cv-02613-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Bank of America Corporation, Defendant (1:11-cv-02613-NRB): Arthur J. Burke, LEAD ATTORNEY, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, LEAD ATTORNEY, Davis Polk & Wardwell L.L.P., New York, NY; Edward Fu, Davis Polk & Wardwell LLP (NYC), New York, NY; Patrick Wyatt Blakemore, Davis Polk & Wardwell LLP, New York, NY; Peter John Davis, Davis Polk & Wardwell LLP, New York, NY.

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For HSBC Holdings plc., Defendant (1:11-cv-02613-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY; Roger Brian Cowie, PRO HAC VICE, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

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For UBS AG, Defendant (1:11-cv-02613-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

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For Citigroup Inc., HSBC Bank plc, Portigon AG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., WestDeutsche Immobilienbank AG, Defendants (1:11-cv-02613-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Cooperatieve Centrale Raiffeisenbank B.A., Defendant (1:11-cv-02613-NRB): Mark David Villaverde, Milbank, Tweed, Hadley & McCloy LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For HBOS plc, Defendant (1:11-cv-02613-NRB): Benjamin Andrew Fleming, Kevin Timothy Baumann, Hogan Lovells US LLP (nyc), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For JP Morgan Chase Bank, N.A., Defendant (1:11-cv-02613-NRB): Mary Beth Forshaw, Paul Christopher Gluckow, Simpson Thacher & Bartlett LLP (NY), New York, NY; Robert Frank **[**10]** Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For UBS AG, Defendant (1:11-cv-02613-NRB): Eric Jonathan Stock, Gibson, Dunn & Crutcher, LLP (NY), New York, NY.

For Bank of America LLC, Consolidated Defendant (1:11-cv-02613-NRB): Patrick Wyatt Blakemore, Davis Polk & Wardwell LLP, New York, NY.

For Citigroup Global Markets Inc., Consolidated Defendant (1:11-cv-02613-NRB): Alan M. Wiseman, Jonathan James Gimblett, Thomas A. Isaacson, PRO HAC VICE, Covington & Burling, LLP (DC), Washington, DC; Andrew Arthur Ruffino, Covington & Burling LLP(NYC), New York, NY.

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For HSBC Securities (USA) Inc., Consolidated Defendant (1:11-cv-02613-NRB): Roger Brian Cowie, PRO HAC VICE, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

For Bank of Tokyo-Mitsubishi UFJ Ltd, Consolidated Defendant (1:11-cv-02613-NRB): Christopher Michael Viapiano, Daryl Andrew Libow, LEAD ATTORNEYS, Sullivan & Cromwell LLP (Washington DC), Washington, DC; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Rabobank Group, Consolidated Defendant (1:11-cv-02613-NRB): David Robert **[**11]** Gelfand, Milbank, Tweed, Hadley & McCloy LLP, New York, NY; Sean Miles Murphy, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY.

For Royal Bank of Canada, Consolidated Defendant (1:11-cv-02613-NRB): Brian J. Poronsky, Katten Muchin Rosenman LLP, Chicago, Il; Christian T. Kemnitz, Katten Muchin Rosenman LLP (Chicago), Chicago, IL; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Societe Generale S.A., Consolidated Defendant (1:11-cv-02613-NRB): Steven Wolowitz, LEAD ATTORNEY, Andrew Jonathan Calica, Henninger Simons Bullock, Mayer Brown LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Lloyds Bank PLC (formerly known as Lloyds TSB Bank PLC), ADR Provider (1:11-cv-02613-NRB): Benjamin Andrew Fleming, Kevin Timothy Baumann, Hogan Lovells US LLP (nyc), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Merrill Lynch International, Interested Party (1:11-cv-02613-NRB): Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP, New York, NY.

For Mayor and City Council of Baltimore, on behalf of itself and all others similarly situated, Plaintiff (1:11-cv-05450-NRB): William Christopher **[**12]** Carmody, LEAD ATTORNEY, Arun Srinivas Subramanian, Seth D. Ard, Susman Godfrey LLP (NYC), New York, NY; Hilary Kathleen Scherrer, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC; Marc M. Seltzer, PRO HAC VICE, Susman Godfrey, L.L.P., Los Angeles, CA; Ralph Johnson Bunche, III, Hausfeld, LLP (DC), Washington, DC.

For Jennie Stuart Medical Center, Inc., Plaintiff (1:11-cv-05450-NRB): Peter J. Mougey, LEAD ATTORNEY, Levin, Papantonio, Thomas, Mitchell, Fafferty & Proctor, P.A, Pensacola, FL; Todd Michael Schneider, LEAD ATTORNEY, Schneider Wallace Cottrell Konecky Wotkyns LLP, Emeryville, CA; William Christopher Carmody, Susman Godfrey LLP (NYC), New York, NY, New Orleans, LA; Kyle G. Bates, Schneider Wallace Cottrell Konecky Wotkyns, San Francisco, CA; Laura S Dunning, Levin Papantonio Thomas Mitchell Rafferty & Proctor P.A., Pensacola, FL.

For Carpenters Pension Fund of West Virginia, Consolidated Plaintiff (1:11-cv-05450-NRB): Darren J. Robbins, David W. Mitchell, PRO HAC VICE, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Lucas F. Olts, Robbins Geller Rudman & Dowd LLP (San Diego), San Diego, CA; Patrick Joseph Coughlin, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Randi **[**13]** Dawn Bandman, Robbins Geller Rudman & Dowd LLP (LA), Los Angeles, CA.

For City of Dania Beach Police & Firefighters' Retirement System, Individually and on behalf of all others similarly situated, Consolidated Plaintiff (1:11-cv-05450-NRB): George E. Barrett, Barrette, Johnsn & Parsley, Nashville, TN; Patrick Joseph Coughlin, Robbins Geller Rudman & Dowd LLP, San Diego, CA; Randi Dawn Bandman, Robbins Geller Rudman & Dowd LLP (LA), Los Angeles, CA. Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; Timothy L. Miles, Barrett, Johnston & Parsley, Nashville, TN.

For Ravan Investments, LLC, Consolidated Plaintiff (1:11-cv-05450-NRB): Jay W. Eisenhofer, Grant & Eisenhofer P.A. (NY), New York, NY; John D. Radice, Grant & Eisenhofer, PA, New York, NY; Kevin Bruce Love, Hanzman and Criden, Coral Gables, FL; Linda P. Nussbaum, Nussbaum Law Group, P.C., New York, NY; Michael Criden, Criden & Love, P.A., South Miami, FL.

For Insulators and Asbestos Workers Local #14, Individually and on behalf of all others similarly situated, Consolidated Plaintiff (1:11-cv-05450-NRB): A. Arnold Gershon, William J. Ban, Barrack, Rodos & Bacine(NYC), New York, NY; Chad Allen Carder, Gerald **[**14]** J. Rodos, Jeffrey B. Gittleman, Barrack, Rodos & Bacine, Philadelphia, PA; Daniel E. Bacine, PRO HAC VICE, Barrack, Rodos & Bacine, Philadelphia, PA.

For Courmont & Wapner Associates, L.P., on behalf of itself and all others similarly situated, Consolidated Plaintiff (1:11-cv-05450-NRB): Elizabeth Mary Levy, Glancy Prongay & Murray LLP, Los Angeles, CA; Joseph Patrick Garland, Korsinky & Klein, LLP, Brooklyn, NY; Lionel Z. Glancy, PRO HAC VICE, Glancy & Binkow Goldberg LLP, Los Angeles, CA.

For City of New Britain, Consolidated Plaintiff (1:11-cv-05450-NRB): William Christopher Carmody, Susman Godfrey LLP (NYC), New York, NY, New Orleans, LA.

For Bank of America Corporation, Defendant (1:11-cv-05450-NRB): Arthur J. Burke, LEAD ATTORNEY, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, LEAD ATTORNEY, Davis Polk & Wardwell L.L.P., New York, NY; Edward Fu, Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP (NYC), New York, NY.

For Barclays Bank PLC, WESTLB AG, Bank of Tokyo Mitsubishi UFJ Ltd., HSBC Bank Plc., Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., Portigon AG, Defendants (1:11-cv-05450-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., **[**15]** New York, NY.

For Citibank NA, Defendant (1:11-cv-05450-NRB): Alan M. Wiseman, Jonathan James Gimblett, Thomas A. Isaacson, PRO HAC VICE, Covington & Burling, LLP (DC), Washington, DC; Andrew Arthur Ruffino, Covington & Burling LLP(NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For HSBC Holdings plc, Defendant (1:11-cv-05450-NRB): Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For J.P. Morgan Chase & Co., Defendant (1:11-cv-05450-NRB): Paul Christopher Gluckow, Thomas C. Rice, LEAD ATTORNEYS, Alan Craig Turner, Juan Alberto Arteaga, Mary Beth Forshaw, Simpson Thacher & Bartlett LLP (NY), New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Jeffery Li Ding, Simpson Thacher & Bartlett LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Lloyds Banking Group plc, Defendant (1:11-cv-05450-NRB): Marc Joel Gottridge, LEAD ATTORNEY, Benjamin Andrew Fleming, Kevin Timothy Baumann, Hogan Lovells US LLP (nyc), New York, NY; Eric Jonathan Stock, Hogan Lovells US LLP (NYC), New York, NY; Robert Frank Wise, Jr, **[**16]** Davis Polk & Wardwell L.L.P., New York, NY.

For UBS AG, Defendant (1:11-cv-05450-NRB): Lawrence Jay Zweifach, Gibson, Dunn & Crutcher, LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Bank of America Corporation, Defendant (1:11-cv-05450-NRB): Arthur J. Burke, LEAD ATTORNEY, Davis Polk & Wardwell, New York, NY; Edward Fu, Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Citigroup Inc., Defendant (1:11-cv-05450-NRB): Andrew Arthur Ruffino, Covington & Burling LLP(NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For JP Morgan Chase Bank, N.A., Defendant (1:11-cv-05450-NRB): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Alan Craig Turner, Mary Beth Forshaw, Paul Christopher Gluckow, Robert Frank Wise, Jr, Simpson Thacher & Bartlett LLP (NY), New York, NY.

For Royal Bank of Canada, Defendant (1:11-cv-05450-NRB): Brian J. Poronsky, Katten Muchin Rosenman LLP, Chicago, Il; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Societe Generale, Defendant (1:11-cv-05450-NRB): **[**17]** Henninger Simons Bullock, Steven Wolowitz, LEAD ATTORNEYS, Andrew Jonathan Calica, Mayer Brown LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Citizens Bank N.A., Defendant (1:11-cv-05450-NRB): Alan Schoenfeld, David Sapir Lesser, Fraser Lee Hunter, Jr, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Colin Reardon, Wilmerhale, New York, NY.

For The Royal Bank of Scotland Group plc, Defendant (1:11-cv-05450-NRB): Colin Reardon, Wilmerhale, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Credit Suisse International, Defendant (1:11-cv-05450-NRB): Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Credit Suisse (USA), Inc., Defendant (1:11-cv-05450-NRB): Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY.

For Credit Suisse Group AG, Consolidated Defendant (1:11-cv-05450-NRB): Jason Michael Hall, Cahill Gordon & Reindel LLP, New York, NY; Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY. Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Royal Bank of Scotland **[**18]** Group plc, Consolidated Defendant (1:11-cv-05450-NRB): Alan Schoenfeld, David Sapir Lesser, Fraser Lee Hunter, Jr, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Colin Reardon, Wilmerhale, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Deutsche Bank AG, Consolidated Defendant (1:11-cv-05450-NRB): Aidan John Synnott, LEAD ATTORNEY, Paul Weiss (NY), New York, NY; Moses Silverman, LEAD ATTORNEY, Hallie Suzanne Goldblatt, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY.

For The Norinchukin Bank, Consolidated Defendant (1:11-cv-05450-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For HBOS PLC, Consolidated Defendant (1:11-cv-05450-NRB): Benjamin Andrew Fleming, Kevin Timothy Baumann, Hogan Lovells US LLP (nyc), New York, NY; Eric Jonathan Stock, Hogan Lovells US LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Virgin Islands Public Finance Authority, Objector (1:11-cv-05450-NRB): Jennifer Lynn White, LEAD ATTORNEY, Arent Fox LLP, New York, NY.

For FTC Capital GMBH, on behalf of themselves and all others similarly situated, Plaintiff (1:11-md-02262-NRB): **[**19]** Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For FTC Futures Fund PCC Ltd, on behalf of themselves and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Andrew Martin McNeela, Kirby McInerney LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Christopher F. Moriarty, Motley Rice LLC, Mt. Pleasant, SC; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Karen M. Lerner, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Merrill G Davidoff, Berger & Montague, P.C, Philadelphia, PA; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; Thomas W. Elrod, Kirby McInerney, LLP, New York, NY.

For FTC Futures Fund SICAV, on behalf of themselves and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Andrew Martin McNeela, Kirby McInerney LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Christopher F. Moriarty, Motley Rice LLC, Mt. Pleasant, SC; Daniel Hume, David **[**20]** E Kovel, Roger W Kirby, Surya Palaniappan, Karen M. Lerner, Meghan Joan Summers, Kirby McInerney LLP, New York, NY; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; Thomas W. Elrod, Kirby McInerney, LLP, New York, NY.

For Carpenters Pension Fund of West Virginia, Plaintiff (1:11-md-02262-NRB): Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Darren J. Robbins, David W. Mitchell, PRO HAC VICE, Lucas F. Olts, Robbins Geller Rudman & Dowd LLP (SANDIEGO), San Diego, CA; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For City of Dania Beach Police & Firefighters' Retirement System, Individually and on behalf of all others similarly situated, Plaintiff (1:11-md-02262-NRB): Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; George E. Barrett, Timothy L. Miles, Barrette, Johnsn & Parsley, Nashville, TN; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Ravan Investments, LLC, Plaintiff (1:11-md-02262-NRB): Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Jay W. Eisenhofer, Grant **[**21]** & Eisenhofer P.A. (NY), New York, NY; John D. Radice, Radice Law Firm, P.C., Long Beach, NJ; Kevin Bruce Love, Hanzman and Criden, Coral

Gables, FL; Michael E. Criden, Hanzman, Criden, Korge, Chaykin, Ponce & Heise, P.A., Miami, FL; Peter Anthony Barile, III, Grant & Eisenhofer P.A. (NY), New York, NY; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Mayor and City Council of Baltimore, Plaintiff (1:11-md-02262-NRB): Arun Srinivas Subramanian, Geng Chen, Seth D. Ard, William Christopher Carmody, Susman Godfrey LLP (NYC), New York, NY; Barry Barnett, Susman Godfrey LLP, Dallas, TX; Charles Joseph LaDuca, Cuneo Gilbert & LaDuca, LLP, Bethesda, DC; Christopher Lovell, Fred Taylor Isquith, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Drew D Hansen, PRO HAC VICE, Susman Godfrey LLP (Seattle), Seattle, WA; Gary Ivan Smith, PRO HAC VICE, Hausfeld LLP, Philadelphia, PA; Glenn Charles Bridgman, Susman Godfrey LLP(CA), Los Angeles, CA; Hilary K Scherrer, Nathaniel C. Giddings, William P. Butterfield, PRO HAC VICE, Hausfeld LLP, Washington, DC; Hilary Kathleen Scherrer, **[**22]** Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC; Joel Davidow, Kile Goekjian Reed & McManus Pllc, Washington, DC; Michael C. Kelso, PRO HAC VICE, Karen Oshman, Susman Godfrey LLP (TX), Houston, TX; Marc M. Seltzer, PRO HAC VICE, Susman Godfrey, L.L.P., Los Angeles, CA; Matthew Berry, PRO HAC VICE, Susman Godfrey LLP, Seattle, WA; Ralph Johnson Bunche, III, Hausfeld, LLP (DC), Washington, DC; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; Scott Allan Martin, Hausfeld LLP, New York, NY.

For Richard Hershey, Jeffrey Laydon, on behalf of himself and all others similarly situated, Plaintiffs (1:11-md-02262-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Douglas Mason Chalmers, Douglas M. Chalmers P.C., Chicago, IL; Geoffrey Milbank Horn, Vincent Briganti, Lowey Dannenberg Cohen & Hart, P.C., White Plains, NY; Robert F. Coleman, PRO HAC VICE, Steve R. Jakubowski, Coleman Law Firm, Chicago, IL; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Charles Schwab Bank, N.A., Charles Schwab & Co., Inc., The Charles **[**23]** Schwab Corporation, Plaintiffs (1:11-md-02262-NRB): Andrew Scirica Kingsdale, Lieff Cabraser Heimann & Bernstein, LLP(SF), San Francisco, CA; Brendan Patrick Glackin, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, NY; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Eric B. Fastiff, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Joseph Richard Saveri, PRO HAC VICE, Joseph Saveri Law Firm, Inc., San Francisco, CA; Lowell Harry Haky, PRO HAC VICE, Charles Schwab and Co., Inc., Office of Corporate Counsel, San Francisco, CA; Michael Joseph Miarmi, Leiff, Cabrasser, Heimann & Bernstein LLP, New York, NY; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; Steven E. Fineman, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY.

For Metzler Investment GmbH, on behalf of itself and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Roger W Kirby, LEAD ATTORNEY, Andrew Martin McNeela, Daniel Hume, David E Kovel, Karen M. Lerner, Meghan Joan Summers, Surya Palaniappan, Thomas W. Elrod, Kirby McInerney **[**24]** LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Christopher F. Moriarty, Motley Rice LLC, Mt. Pleasant, SC; Deborah M. Sturman, Milberg Tadler Phillips Grossman LLP (NYC), New York, NY; Joseph F. Rice, PRO HAC VICE, Motley Rice LLC (SC), Mount Pleasant, SC; Michael Benjamin Eisenkraft, Cohen Milstein Sellers & Toll P.L.L.C., New York, NY; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; William H. Narwold, Motley Rice LLC (CT), Hartford, CT.

For Roberto E. Calle Gracey, Plaintiff (1:11-md-02262-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Lori Ann Fanning, PRO HAC VICE, Miller Law LLC, Chicago, IL; Marvin Alan Miller, Matthew E Van Tine, Miller Law, LLC, Chicago, IL; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For AVP Properties, LLC, Plaintiff (1:11-md-02262-NRB): Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Richard A. Lockridge, Lockridge, **[**25]** Grindal, Nauen, P.L.L.P., Minneapolis, MN; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; W. Joseph Bruckner, Lockridge, Grindal, Nauen & Holstein, P.L.L.P., Minneapolis, MN.

For 303030 Trading LLC, Plaintiff (1:11-md-02262-NRB): Andrew Martin McNeela, Daniel Hume, David E Kovel, Karen M. Lerner, Meghan Joan Summers, Roger W Kirby, Surya Palaniappan, Thomas W. Elrod, Kirby McInerney LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Merrill G Davidoff, Berger & Montague, P.C, Philadelphia, PA; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Ellen Gelboim, on behalf of herself and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Daniel Hume, David E Kovel, Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; David Haym Weinstein, Jeremy S. Spiegel, PRO HAC VICE, Weinstein Kitchenoff & Asher LLC, Philadelphia, PA; Eric Franklin Citron, Goldstein & Russell, P.C., Bethesda, MD; Karen L. Morris, Morris & Morris, LLC Counselors At Law, Wilmington, DE.

For Ellen Gelboim, on behalf of herself and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Patrick Francis **[**26]** Morris, PRO HAC VICE, Morris and Morris LLC Counselors at Law, Wilmington, DE; Robert S. Kitchenoff, PRO HAC VICE, Weinstein, Kitchenoff, Scarlato & Goldman, Ltd., Philadelphia, PA; Roger W Kirby, Surya Palaniappan, Kirby McInerney LLP, New York, NY; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY; Steven A. Asher, Weinstein Kitchenoff & Asher LLC, Philadelphia, PA; Thomas C. Goldstein, Goldstein & Russell P.C., Washington, DC.

For Atlantic Trading USA, LLC, Plaintiff (1:11-md-02262-NRB): Andrew Martin McNeela, Daniel Hume, David E Kovel, Karen M. Lerner, Meghan Joan Summers, Roger W Kirby, Surya Palaniappan, Thomas W. Elrod, Kirby McInerney LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Merrill G Davidoff, Berger & Montague, P.C, Philadelphia, PA; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Community Bank & Trust, Plaintiff (1:11-md-02262-NRB): Lesley Elizabeth Weaver, PRO HAC VICE, Block & Leviton LLP, Oakland, CA; Patrick Anthony Klingman, Shepherd, Finkelman, Miller & Shah, LLC, Chester, CT; Thomas V. Urmy, Shapiro, Haber & Urmy, L.L.P., Boston, MA.

For The Berkshire Bank, Individually **[**27]** and On Behalf of All Others Similarly Situated, Plaintiff (1:11-md-02262-NRB): Jeremy Alan Lieberman, Pomerantz LLP, New York, NY; Joshua B. Silverman, Chicago, IL; Marc Ian Gross, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Michael Morris Buchman, Motley Rice LLC (NY), New York, NY; Patrick Vincent Dahlstrom, Pomerantz LLP, Chicago, IL; Veronica Valeria Montenegro, Pomerantz LLP (NYC), New York, NY.

For Elizabeth Lieberman, Plaintiff (1:11-md-02262-NRB), Pro se.

For 33-35 Green Pond Road Associates, LLC, on behalf of itself and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Dylan J. McFarland, Vincent J. Esades, Heins Mills & Olson, P.L.C., Minneapolis, MN; Joseph J. DePalma, PRO HAC VICE, Lite DePalma Greenberg & Rivas, L.L.C., Newark, NJ; Mayra Velez Tarantino, Lite DePalma Greenberg & Rivas, L.L.C. (NJ), Newark, NJ; Steven Joesph Greenfogel, PRO HAC VICE, Lite DePalma Greenberg, LLC, Philadelphia, PA; Steven A. Kanner, Much, Shelist, Freed, Denenberg, Ament & Rubenstein, P.C., Chicago, IL; William H. London, PRO HAC VICE, Freed Kanner London & Millen LLC, Bannockburn, IL.

For Elizabeth Lieberman, on behalf of themselves and all other similarly situated, **[**28]** Todd Augenbaum, on behalf of themselves and all others similarly situated, Plaintiffs (1:11-md-02262-NRB): Brian Philip Murray, Gregory Bradley Linkh, Glancy Prongay & Murray LLP, New York, NY; Jeffrey Simon Abraham, Abraham Fruchter & Twersky LLP, New York, NY; Lionel Z. Glancy, PRO HAC VICE, Glancy & Binkow Goldberg LLP, Los Angeles, CA.

For Gary Francis, Plaintiff (1:11-md-02262-NRB): Andrew Martin McNeela, Daniel Hume, David E Kovel, Karen M. Lerner, Meghan Joan Summers, Roger W Kirby, Surya Palaniappan, Thomas W. Elrod, Kirby McInerney LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Michael Benjamin Eisenkraft, Cohen Milstein Sellers & Toll P.L.L.C., New York, NY; Robert Abraham Braun, Cohen Milstein Sellers & Toll, PLLC, Washington, DC; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Nathaniel Haynes, Plaintiff (1:11-md-02262-NRB): Andrew Martin McNeela, Daniel Hume, David E Kovel, Karen M. Lerner, Meghan Joan Summers, Roger W Kirby, Surya Palaniappan, Thomas W. Elrod, Kirby McInerney LLP, New York, NY; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Merrill G Davidoff, Berger & Montague, **[**29]** P.C, Philadelphia, PA; Samuel Howard Rudman, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Courtyard at Amwell II, LLC, Greenwich Commons II, LLC, Jill Court Associates II, LLC, Maidencreek Ventures II LP, Raritan Commons, LLC, Plaintiffs (1:11-md-02262-NRB): Jason Allen Zweig, Hagens Berman Sobol Shapiro LLP (NYC), New York, NY.

For Lawrence W. Gardner, on behalf of themselves and all others similarly situated, Plaintiff (1:11-md-02262-NRB): Jason Allen Zweig, Hagens Berman Sobol Shapiro LLP (NYC), New York, NY; Steve W. Berman, Hagens Berman Sobol Shapiro LLP (Seattle), Seattle, WA.

For Annie Bell Adams, on behalf of herself and all others similarly situated, Dennis Paul Fobes, on behalf of himself and all others similarly situated, Leigh E. Fobes, on behalf of herself and all others similarly situated, Margaret Lambert, on behalf of herself and all others similarly situated, Betty L. Gunter, on behalf of herself and all others similarly situated, Plaintiffs (1:11-md-02262-NRB): John Walter Sharbrough, John W. Sharbrough, III, PC, Mobile, AL; Stephen George Stim, Stimconsul Ltd., Mill Neck, NY.

For Government Development Bank for Puerto Rico, Plaintiff (1:11-md-02262-NRB): **[**30]** Jeremy Alan Lieberman, Pomerantz LLP, New York, NY; Joshua B. Silverman, Chicago, IL; Marc Ian Gross, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Michael Morris Buchman, Motley Rice LLC (NY), New York, NY; Patrick Vincent Dahlstrom, Pomerantz LLP, Chicago, IL.

For Carl A. Payne, individually, and on behalf of other members of the general public similarly situated, Kenneth W. Coker, individually, and on behalf of other members of the general public similarly situated, Plaintiffs (1:11-md-02262-NRB): Daniel Alberstone, PRO HAC VICE, Baron Budd, P.C., Encino, CA; Mark Philip Pifko, Peter Francis Smith, PRO HAC VICE, David Brian Fernandes, Jr., Baron & Budd, P.C., Encino, CA; Roland Karim Tellis, PRO HAC VICE, Baron Budd, P.C., Encino, CA.

For City of Riverside, The Riverside Public Financing Authority, Plaintiffs (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, Sacramento, CA; Gregory P Priamos, PRO HAC VICE, Riverside City Attorney, Riverside, CA; Joseph Winters Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Nanci E. Nishimura, **[**31]** Cotchett, Pitre & McCarthy, Burlingame, CA; Richard A Milligan, PRO HAC VICE, Riverside City Attorney, Riverside, CA.

For East Bay Municipal Utility District, Plaintiff (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Craig Stephen Spencer, Office of General Counsel, Oakland, CA; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, Sacramento, CA; Joseph Winters Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Jylana Collins, City of Richmond, Richmond, CA; Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA.

For County of San Mateo, San Mateo Couty Joint Powers Financing Authority, Plaintiffs (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, Burlingame, CA; Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Bert Shinji Nishimura, Eng & Nishimura, Los Angeles, CA; Eugene Whitlock, John C. Beiers, Lee Andrew Thompson, San Mateo County Counsel's Office, Hall of Justice & Records, Redwood City, CA; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, Sacramento, CA; Joseph Winters Cotchett, Cotchett **[**32]** Pitre and McCarthy, Burlingame, CA.

For City of Richmond, Plaintiff (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Bruce Reed Goodmiller, City Attorney's Office, Richmond, CA; Everett Jenkins, Office of the City attorney, Richmond, CA; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, burlingame, CA; Joseph Winters Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA.

For The Richmond Joint Powers Financing Authority, Successor Agency to the Richmond, Community Redevelopment Agency, Plaintiffs (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Everett Jenkins, Office of the City attorney, Richmond, CA; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, burlingame, CA; Joseph Winters

Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA.

For County of San Diego, San Diego Association of Governments, County of Sacramento, Plaintiffs (1:11-md-02262-NRB): Kevin P. O'Brien, Nanci **[**33]** E. Nishimura, LEAD ATTORNEY, PRO HAC VICE, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett.

For Guaranty Bank & Trust Company, Individually and on behalf of all others, similarly situated, Plaintiff (1:11-md-02262-NRB): Andrew Chun-Yang Shen, Joseph Solomon Hall, Michael John Guzman, Kellogg, Hansen, Todd, Figel & Frederick, PLLC (DC), Washington, DC; Caitlin Sinclair Hall, PRO HAC VICE, Kellogg, Huber,Hansen,Todd, Evans & Figel, P.L.L.C, Washington, DC; R. Bryant McCulley, PRO HAC VICE, McCulley McCluer PLLC, Sullivans Island, SC; Stuart Halkett McCluer, McCulley Mccluer PLLC, Oxford, MS; W. Percy Badham, Badham & Buck LLC, Birmingham, AL.

For Heather M. Earle, on behalf of themselves and all others, similarly situated, Henryk Malinowski, on behalf of themselves and all others similarly situated, Linda Carr, on behalf of themselves and all others similarly situated, Eric Friedman, on behalf of themselves and all others similarly situated, Plaintiffs (1:11-md-02262-NRB): Elana Katcher, Gregory Keith Arenson, Richard J. Kilsheimer, Kaplan Fox & Kilsheimer LLP (NYC), New York, NY; Jeffrey Craig Block, Whitney Erin Street, Block & Leviton LLP, New York, NY.

For County of **[**34]** Riverside, Plaintiff (1:11-md-02262-NRB): Benjamin Galdston, PRO HAC VICE, Bernstein Litowitz Berger & Grossmann LLP, (San Diego), San Diego, CA; Blair Allen Nicholas, PRO HAC VICE, Bernstein Litowitz Berger & Grossman, LLP, San Diego, CA.

For Jerry Weglarz, Nathan Weglarz, on behalf of plaintiffs and a class, Plaintiffs (1:11-md-02262-NRB): Cathleen M. Combs, PRO HAC VICE, Edelman, Combs Latturner & Goodwin, LLC, Chicago, IL; Daniel A. Edelman, PRO HAC VICE, Tiffany Nicole Hardy, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL; James O. Latturner, Edelman, Combs & Latturner, Chicago, IL.

For Directors Financial Group, individually, Plaintiff (1:11-md-02262-NRB): Jeremy Alan Lieberman, Pomerantz LLP, New York, NY; Marc Ian Gross, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY.

For Highlander Realty, LLC, Jeffrey D. Buckley, Plaintiffs (1:11-md-02262-NRB): Evans J. Carter, PRO HAC VICE, Evans J. Cart,er, P.C., Framingham, MA.

For The Federal Home Loan Mortgage, Corporation, Plaintiff (1:11-md-02262-NRB): James R. Martin, LEAD ATTORNEY, Allison Vissichelli, Zelle LLP, Washington, DC; Jennifer Abby Hoffman, LEAD ATTORNEY, Zelle LLP, New York, NY; Lisa Marie Kaas, Dickstein **[**35]** Shapiro LLP (DC), Washington, DC; Miriam R. Vishio, Zelle LLP (DC), Washington, DC; Richard James Leveridge, Adams Holcomb LLP, Washington, DC.

For County of Sonoma, David E. Sundstrom, in his official capacity as Treasurer of the county of Sonoma for and on behalf of the Sonoma County Tresury Pool Investment, Plaintiffs (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, Sacramento, CA; Joseph Winters Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Kathleen Anne Larocque, Sonoma County Counsel, Santa Rosa, CA.

For The Regents of the University of California, Plaintiff (1:11-md-02262-NRB): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA; Alexander E. Barnett; Frank Cadmus Damrell, Jr, Cotchett Pitre and McCarthy LLp, Sacramento, CA; Charles Furlonge Robinson, University of California, Oakland, Ca; Eric K. Behrens, University of California, Office of the General Counsel, Oakland, CA; Joseph Winters Cotchett, Cotchett Pitre and McCarthy, Burlingame, CA; Kathleen **[**36]** Anne Larocque, Sonoma County Counsel, Santa Rosa, CA.

For CEMA Joint Venture, Plaintiff (1:11-md-02262-NRB): William E. Walker, Jr., Massillon, OH.

For The City of Philadelphia, Plaintiff (1:11-md-02262-NRB): Daniel Lawrence Brockett, Steig Olson, LEAD ATTORNEY, Daniel Paul Cunningham, Quinn Emanuel, New York, NY; Christopher R. Barker, PRO HAC VICE, Quinn Emanuel Urguhart & Sullivan, Los Angeles, CA; Jacob J Waldman, Quinn Emanuel Urqhuart & Sullivan

(NYC), New York, NY; Jeremy Daniel Andersen, PRO HAC VICE, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Joshua D. Snyder, PRO HAC VICE, BONI & ZACK LLC, BALA CYNWYD, PA; Mathieu J. Shapiro, PRO HAC VICE, Obermayer Rebmann Maxwell & Hippel LLP, Philadelphia, PA.

For The Pennsylvania Intergovernmental, Cooperation Authority, Plaintiff (1:11-md-02262-NRB): Daniel Lawrence Brockett, Steig Olson, LEAD ATTORNEY, Daniel Paul Cunningham, Quinn Emanuel, New York, NY; Christopher R. Barker, PRO HAC VICE, Quinn Emanuel Urguhart & Sullivan, Los Angeles, CA; Jacob J Waldman, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY; Jeremy Daniel Andersen, PRO HAC VICE, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, **[**37]** CA.

For Principal Funds, Inc., PFI Bond & Mortgage Securities Fund, PFI Bond Market Index Fund, PFI Core Plus Bond I Fund, PFI Diversified Real Asset Fund, PFI Equity Income Fund, PFI Global Diversified Income Fund, PFI High Yield Fund, PFI High Yield Fund I, PFI Income Fund, PFI Inflation Protection Fund, PFI Short-Term Income Fund, PFI Money Market Fund, Plaintiffs (1:11-md-02262-NRB): Benjamin D. Steinberg, Robins Kaplan Miller & Ciresi(MN), Minneapolis, MN; Geoffrey Holmes Kozen, Robins Kaplan, Minneapolis, MN; James R. Martin, Zelle LLP, Washington, DC; Stacey Paige Slaughter, PRO HAC VICE, Robins Kaplan LLP, Minneapolis, MN; Thomas F. Berndt, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN.

For PFI Preferred Securities Fund, Principal Variable Contracts Funds, Inc., PVC Asset Allocation Account, PVC Money Market Account, PVC Balanced Account, PVC Bond & Mortgage Securities Account, PVC Equity Income Account, PVC Government & High Quality Bond Account, PVC Income Account, PVC Short-Term Income Account, Principal Financial Group, Inc., Principal Financial Services, Inc., Principal Life Insurance Company, Principal Capital Interest Only I, LLC, Principal **[**38]** Commercial Funding, LLC, Plaintiffs (1:11-m-02262): Benjamin D. Steinberg, PRO HAC VICE, Robins Kaplan Miller & Ciresi(MN), Minneapolis, MN; Geoffrey Holmes Kozen, Robins Kaplan, Minneapolis, MN; Stacey Paige Slaughter, PRO HAC VICE, Robins Kaplan LLP, Minneapolis, MN; Thomas F. Berndt, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN.

For Principal Commercial Funding, LLC, Principal Commercial Funding II, LLC, Principal Real Estate Investors, LLC, Plaintiffs (1:11-m-02262): Stacey Paige Slaughter, PRO HAC VICE, Robins Kaplan LLP, Minneapolis, MN; Thomas F. Berndt, PRO HAC VICE, Robins, Kaplan, Miller & Ciresi L.L.P., Minneapolis, MN.

For Texas Competitive Electric Holdings Company LLC, Plaintiff: Arun Srinivas Subramanian, Susman Godfrey LLP (NYC), New York, NY; Barry Barnett, Susman Godfrey LLP, Dallas, TX; Matthew Berry, PRO HAC VICE, Susman Godfrey LLP, Seattle, WA.

For Charles Schwab Corporation, Plaintiff (1:11-m-02262): Brendan Patrick Glackin, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, NY; Eric B. Fastiff, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein,LLP, San Francisco, CA; Lowell Harry Haky, PRO HAC VICE, Charles Schwab and Co., Inc., Office **[**39]** of Corporate Counsel, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Steven E. Fineman, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY.

For National Credit Union Administration Board, as Liquidating Agent of U.S. Central Federal Credit Union, Western Corporate Federal Credit Union, Members United Corporate Federal Credit Union, Southwest Corporate Federal Credit Union, and Constitution Corporate Federal Credit Union, Plaintiff (1:11-m-02262): Andrew Chun-Yang Shen, Daniel V. Dorris, David Charles Frederick, Kellogg, Hansen, Todd, Figel & Frederick PLLC (DC), Washington, DC; Norman E. Siegel, PRO HAC VICE, Stueve Siegel Hanson LLP, Kansas City, MO; Rachel E. Schwartz, Stueve Siegel Hanson LLP - KC, Kansas City, MO; Wan Joo Kim, PRO HAC VICE, Kellogg, Hansen, Todd, Figel & Frederick PLLC (DC), Washington, DC.

For Federal National Mortgage Association, Plaintiff (1:11-m-02262): Kenneth E. Warner, Warner Partners, P.C., New York, NY; Samuel William Cruse, III, Gibbs & Bruns L.L.P., Houston, TX.

For Darby Financial Products, Capital Ventures International, Plaintiffs (1:11-m-02262): Daniel Lawrence Brockett, LEAD ATTORNEY, Daniel Paul **[**40]** Cunningham, Steig Olson, Quinn Emanuel, New York, NY; Jacob J Waldman, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY; Jeremy Daniel Andersen, PRO HAC VICE, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA.

For Bay Area Toll Authority, Plaintiff (1:11-m-02262): Brendan Patrick Glackin, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, NY; Eric B. Fastiff, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein,LLP, San Francisco, CA; Richard Martin Heimann, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Steven E. Fineman, Lieff Cabraser Heimann & Bernstein, LLP, New York, NY.

For PRUDENTIAL INVESTMENT PORTFOLIOS 2, formerly known as DRYDEN CORE INVESTMENT FUND on behalf of PRUDENTIAL CORE SHORT-TERM BOND FUND, Plaintiff (1:11-m-02262): Daniel Lawrence Brockett, LEAD ATTORNEY, Daniel Paul Cunningham, Kathleen Barnett Einhorn, LEAD ATTORNEY, Genova, Burns & Giantomasi & Webster, Newark, NJ; Ross Robert Fulton, LEAD ATTORNEY, Rayburn, Cooper & Durham, P.A., Charlotte, NC; Daniel Paul Cunningham, Steig Olson, Quinn Emanuel, New York, NY; Jacob J Waldman, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY; Jeremy Daniel Andersen, PRO HAC **[**41]** VICE, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA.

For PRUDENTIAL CORE TAXABLE MONEY MARKET FUND, Plaintiff (1:11-m-02262): Jacob J Waldman, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY; Jeremy Daniel Andersen, PRO HAC VICE, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA; Steig Olson, Quinn Emanuel, New York, NY.

For The Berkshire Bank, Government Development Bank for Puerto Rico, Directors Financial Group, on behalf of all others similarly situated, Plaintiffs (1:11-m-02262): Francis Paul McConville, Pomerantz LLP (NYC), New York, NY; Jeremy Alan Lieberman, Pomerantz LLP, New York, NY.

For Triaxx Prime CDO 2006-1 ltd., Triaxx Prime CDO 2006-2 Ltd., Triaxx Prime CDO 2007-1 Ltd., Plaintiffs (1:11-m-02262): David Steven Preminger, Keller Rohrback L.L.P. (NYC), New York, NY; Derek W. Loeser, Keller Rohrback L.L.P.(WA), Seattle, WA.

For The Federal Deposit Insurance, Corporation as Receiver, Plaintiff (1:11-m-02262): James R. Martin, LEAD ATTORNEY, Allison Vissichelli, Miriam R. Vishio, Zelle LLP, Washington, DC; Jennifer Abby Hoffman, LEAD ATTORNEY, Zelle LLP, New York, NY; Richard James Leveridge, Adams Holcomb LLP, Washington, DC.

[42]** Direct Action Plaintiff, Plaintiff (1:11-m-02262), Pro se.

For Direct Action Plaintiff (1:11-m-02262): James R. Martin, Zelle LLP, Washington, DC; Richard James Leveridge, Adams Holcomb LLP, Washington, DC.

For Salix Capital US Inc., Plaintiff (1:11-m-02262): Daniel Lawrence Brockett, LEAD ATTORNEY, Daniel Paul Cunningham, Steig Olson, Quinn Emanuel, New York, NY; Christopher R. Barker, PRO HAC VICE, Quinn Emanuel Urguhart & Sullivan, Los Angeles, CA; Jacob J Waldman, Quinn Emanuel Urquhart & Sullivan (NYC), New York, NY; Jeremy Daniel Andersen, PRO HAC VICE, Quinn, Emanuel, Urquhart, Oliver & Hedges, LLP (CA), Los Angeles, CA.

For Fran P. Goldsleger, Plaintiff (1:11-m-02262): Craig B. Sokolow, LEAD ATTORNEY, CRAIG SOKOLOW & ASSOCIATES, PHILADELPHIA, PA.

For Joseph Amabile, Louie Amabile, Plaintiffs (1:11-m-02262): Jeffrey Louis Haberman, Law Office of Norman J. Finkelshteyn, Brooklyn, NY.

norman byster, Plaintiff (1:11-m-02262), Pro se.

michael cahill, Plaintiff (1:11-m-02262), Pro se.

Richard Deogracias, Plaintiff (1:11-m-02262), Pro se.

Marc Federighi, Plaintiff (1:11-m-02262), Pro se.

Scott Federighi, Plaintiff (1:11-m-02262), Pro se.

Robert Furlong, Plaintiff (1:11-m-02262), Pro se.

David **[**43]** Gough, Plaintiff (1:11-m-02262), Pro se.

Brian Haggerty, Plaintiff (1:11-m-02262), Pro se.

David Klusendorf, Plaintiff (1:11-m-02262), Pro se.

Ronald Krug, Plaintiff (1:11-m-02262), Pro se.

Christopher Lang, Plaintiff (1:11-m-02262), Pro se.

John Monckton, Plaintiff (1:11-m-02262), Pro se.

Philip Olson, Plaintiff (1:11-m-02262), Pro se.

Brett Pankau, Plaintiff (1:11-m-02262), Pro se.

David Vecchione, Plaintiff (1:11-m-02262), Pro se.

Randall Williams, Plaintiff (1:11-m-02262), Pro se.

Eduardo Restani, Plaintiff (1:11-m-02262), Pro se.

Nicholas Pesa, Plaintiff (1:11-m-02262), Pro se.

John Henderson, Plaintiff (1:11-m-02262), Pro se.

303 Proprietary Trading LLC, Plaintiff (1:11-m-02262), Pro se.

Margery Teller, Plaintiff (1:11-m-02262), Pro se.

Norman Byster, Plaintiff (1:11-m-02262), Pro se.

Michael Cahill, Plaintiff (1:11-m-02262), Pro se.

California Public Plaintiffs (1:11-m-02262), Plaintiff, Pro se.

For National Asbestos Workers Pension Fund, Pension Trust for Operating Engineers, Hawaii Annuity Trust Fund for Operating Engineers, Cement Masons' International Association Employees' Trust Fund Individually and on behalf of all others, similarly situated, Plaintiffs (1:11-m-02262): David W. Mitchell, **[**44]** LEAD ATTORNEY, PRO HAC VICE, Robbins Geller Rudman & Dowd LLP (SANDIEGO), San Diego, CA; Patrick W. Daniels, LEAD ATTORNEY, Lerach, Coughlin, Stoia Geller, Rudman & Robbins, San Diego, CA; Samuel Howard Rudman, LEAD ATTORNEY, Robbins Geller Rudman & Dowd LLP(LI), Melville, NY.

For Axiom Investment Advisors, LLC, Axiom HFT LLC, Axiom Investment Advisors Holdings L.P., Axiom Investment Company, LLC,Axion Investment Company Holdings L.P.,Axiom FX Investment Fund, L.P., Axiom FX Investment Fund II, L.P., Axiom FX Investment 2X Fund, L.P., Plaintiffs (1:11-m-02262): Bruce S. Sperling, LEAD ATTORNEY, Sperling & Slater, Chicago, IL; Eugene J. Frett, LEAD ATTORNEY, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL; Scott F Hessell, LEAD ATTORNEY, Partner, Chicago, IL.

For Ephraim F. Gildor, Gildor Family Company L.P., Gildor Management, LLC, Plaintiffs (1:11-m-02262): Brendan Patrick Glackin, Steven E. Fineman, LEAD ATTORNEYS, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, NY; Bruce S. Sperling, LEAD ATTORNEY, Sperling & Slater, Chicago, IL; Eric B. Fastiff, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Eugene J. Frett, LEAD ATTORNEY, PRO **[**45]** HAC VICE, Sperling & Slater, P.C., Chicago, IL; Michael Joseph Miarmi, LEAD ATTORNEY, Leiff, Cabrasser, Heimann & Bernstein LLP, New York, NY; Richard Martin Heimann, LEAD ATTORNEY, PRO HAC VICE, Lieff Cabraser Heimann & Bernstein, San Francisco, CA; Scott F Hessell, LEAD ATTORNEY, Partner, Chicago, IL.

For Gildor Family Advisors L.P., Plaintiff (1:11-m-02262): Brendan Patrick Glackin, Steven E. Fineman, LEAD ATTORNEYS, Lieff Cabraser Heimann & Bernstein, LLP, San Francisco, NY; Bruce S. Sperling, LEAD ATTORNEY, Sperling & Slater, Chicago, IL; Eric B. Fastiff, LEAD ATTORNEY, PRO HAC VICE, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Eugene J. Frett, LEAD ATTORNEY, PRO HAC VICE, Sperling & Slater, P.C., Chicago, IL; Michael Joseph Miarmi, LEAD ATTORNEY, Leiff, Cabrasser, Heimann & Bernstein LLP, New York, NY; Scott F Hessell, LEAD ATTORNEY, Partner, Chicago, IL.

For City of Philadelphia, Plaintiff (1:11-m-02262): Ross Robert Fulton, LEAD ATTORNEY, Rayburn, Cooper & Durham, P.A., Charlotte, NC; Daniel Lawrence Brockett, Quinn Emanuel, New York, NY.

For Pennsylvania Intergovernmental Cooperation Authority, Plaintiff (1:11-m-02262): Ross Robert Fulton, LEAD ATTORNEY, Rayburn, **[**46]** Cooper & Durham, P.A., Charlotte, NC.

For City of New Britain, Plaintiff (1:11-m-02262):: Hilary Hilary Kathleen Scherrer, Cohen, Milstein, Hausfeld & Toll, PLLC, Washington, DC; William Christopher Carmody, Susman Godfrey LLP (NYC), New York, NY.

For Jennie Stuart Medical Center, Inc., Vistra Energy Corp., Yale University, Plaintiffs (1:11-m-02262):: William Christopher Carmody, Susman Godfrey LLP (NYC), New York, NY.

County of Sacramento, Plaintiff (1:11-m-02262):, Pro se.

For Federal Deposit Insurance, as Receiver for Doral Bank, Plaintiff (1:11-m-02262):: James R. Martin, LEAD ATTORNEY, Zelle LLP, Washington, DC.

For Maxwell Van De Velde, Movant (1:11-m-02262):: Patrick Anthony Klingman, LEAD ATTORNEY, Shepherd, Finkelman, Miller & Shah, LLC, Chester, CT; Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Thomas V. Urmy, Shapiro, Haber & Urmy, L.L.P., Boston, MA.

For Brian McCormick, Vito Spillone, individually and on behalf of all others similarly situated, Movants (1:11-m-02262):: Christopher Lovell, Lovell Stewart Halebian Jacobson LLP, New York, NY; Elizabeth A. Fegan, Hagens Berman Sobol Shapiro LLP, Oak Park, IL; Karl P. Barth, Hagens Berman Sobol Shapiro LLP, **[**47]** Seattle, WA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP (Seattle), Seattle, WA.

For Bank of America Corporation, Defendant (1:11-m-02262):: Paul Steel Mishkin, LEAD ATTORNEY, Davis Polk & Wardwell L.L.P., New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Edward Fu, Neal Alan Potischman, Robert Frank Wise, Jr, Davis Polk & Wardwell LLP (NYC), New York, NY; Julie Saranow Epley, Davis Polk & Wardwell, Menlo Park, CA. Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Barclays Bank Plc, Defendant (1:11-m-02262):: Amos Emory Friedland, Boies, Schiller & Flexner LLP(Westchester), Armonk, NY; David Harold Braff, Jeffrey T. Scott, Yvonne Susan Quinn, Sullivan and Cromwell, LLP(NYC), New York, NY; Jonathan David Schiller, Boies Schiller & Flexner LLP, New York, NY.

For Citibank NA, Defendant (1:11-m-02262):: Alan M. Wiseman, PRO HAC VICE, Covington & Burling, LLP (DC), Washington, DC; Andrew Arthur Ruffino, Andrew Arthur Ruffino, Covington & Burling LLP (NYC), New York, NY; David Marx, **[**48]** McDermott, Will & Emery LLP (Chicago), Chicago, IL; Jonathan James Gimblett, PRO HAC VICE, Covington & Burling, LLP (DC), Washington, DC; Mark Jacob Altschul, PRO HAC VICE, McDermott Will & Emery LLP, Chicago, IL; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY; Tammy Albarran, Covington & Burling LLP, San Francisco, CA; Thomas A. Isaacson, PRO HAC VICE Covington & Burling, LLP (DC), Washington, DC.

For Deutsche Bank AG, Defendant (1:11-m-02262):: Aidan John Synnott, Elizabeth M. Sacksteder, LEAD ATTORNEYS, Paul Weiss (NY), New York, NY; Moses Silverman, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison, LLP (NY) New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Hallie Suzanne Goldblatt, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For J.P. Morgan Chase & Co., Defendant (1:11-md-02262-NRB): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Alan Craig Turner, Francis John Acott, Paul Christopher Gluckow, Simpson Thacher & Bartlett LLP (NY), New York, NY; Alexander Nuo **[**49]** Li, Jeffery Li Ding, Sarah Emily Phillips, Simpson Thacher & Bartlett LLP, New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Lawrence H. Heftman, Matthew Charles Crowl, Schiff Hardin LLP, Chicago, IL; Patrick E. King, Simpson Thacher & Bartlett LLP (CA), Palo Alto, CA; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Lloyds Banking Group plc, Defendant (1:11-md-02262-NRB): Benjamin Andrew Fleming, Kevin Timothy Baumann, Lisa Jean Fried, Marc Joel Gottridge, Hogan Lovells US LLP (nyc), New York, NY; Megan Polly Davis, Flemming Zulack Williamson Zauderer, LLP, One Liberty Plaza, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Royal Bank of Scotland Group plc, Defendant (1:11-md-02262-NRB): Robert G. Houck, LEAD ATTORNEY, Clifford Chance US, LLP (NYC), New York, NY; Andrea J. Robinson, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Harriet Hoder, Wilmer Cutler Pickering Hale and Dorr LLP (Bos), Boston, MA; Michael A Mugmon, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, CA; Robert Frank Wise, Jr, Davis Polk & Wardwell **[**50]** L.L.P., New York, NY.

For The Norinchukin Bank, Defendant (1:11-md-02262-NRB): Alan M. Unger, Andrew W. Stern, Kenneth Benjamin Meyer, Thomas Andrew Paskowitz, Sidley Austin LLP (NY), New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY; William J. Nissen, Sidley Austin, LLP (Chicago), Chicago, IL.

For UBS AG, Defendant (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; David Jarrett Arp, PRO HAC VICE, Gibson, Dunn & Crutcher, LLP (DC), Washington, DC; Gary Richard Spratling, PRO HAC VICE, Gibson, Dunn & Crutcher LLP, San Francisco, CA; Jefferson Eliot Bell, Gibson, Dunn & Crutcher, LLP (NY), New York, NY; Lawrence Jay Zweifach, Mark Adam Kirsch, Matthew Roffman Greenfield, Gibson, Dunn & Crutcher, LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For WestLB AG, Defendant (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Christopher Martin Paparella, Hughes Hubbard & Reed LLP (NY), One Battery Park Plaza, New York, NY; Marc Alan Weinstein, U.S. Attorney's Office, SDNY (St Andw's) One St. Andrew's Plaza, New York, NY; **[**51]** Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Rabobank Group, Defendant (1:11-md-02262-NRB): David Robert Gelfand, Milbank, Tweed, Hadley & McCloy LLP, New York, NY; Melanie Westover Yanez, Milbank, Twwed, Hadley & McCloy, LLP (DC), Washington, DC; Sean Miles Murphy, Milbank, Tweed, Hadley & McCloy LLP, New York, NY.

For Credit Suisse Group, NA, Defendant (1:11-md-02262-NRB): Elai E. Katz, Herbert Scott Washer, Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY.

For Bank of Tokyo-Mitsubishi UFJ Ltd, Defendant (1:11-md-02262-NRB): Christopher Michael Viapiano, Daryl Andrew Libow, LEAD ATTORNEYS, Sullivan & Cromwell LLP (Washington DC), Washington, DC; Arthur J. Burke Davis Polk & Wardwell, Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Royal Bank of Canada, Defendant (1:11-md-02262-NRB): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Alan J. Brudner, Katten Muchin Rosenman,LLP(NYC), New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Arthur W. Hahn, Katten Muchin Rosenman, LLP, Chicago, IL; Brian J. Poronsky, PRO HAC VICE, Katten Muchin Rosenman LLP, Chicago, Il; Christian T. Kemnitz, **[**52]** Robinson & Cole LLP, New York, NY; Matthew W Haws, Katten Muchin Rosenman LLP (Chicago), Chicago, IL; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Societe Generale, Defendant (1:11-md-02262-NRB): Steven Wolowitz, LEAD ATTORNEY, Andrew Jonathan Calica, Henninger Simons Bullock, Mayer Brown LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP (NYC), New York, NY.

For Deutsche Bank Financial LLC, Defendant (1:11-md-02262-NRB): Moses Silverman, LEAD ATTORNEY, Jessica Lillian Brach, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY.

For Deutsche Bank Securities Inc., Defendant (1:11-md-02262-NRB): Aidan John Synnott, LEAD ATTORNEY, Paul Weiss (NY), New York, NY; Moses Silverman, LEAD ATTORNEY, Jessica Lillian Brach, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY.

For Barclays Capital Inc., Defendant (1:11-md-02262-NRB): Matthew Joseph Porpora, Yvonne Susan Quinn, Sullivan & Cromwell, LLP(NYC), LEAD ATTORNEYS, New York, NY; Amos Emory Friedland, Boies, Schiller & Flexner LLP(Westchester), Armonk, NY; David Harold Braff, Jeffrey T. Scott, Sullivan and Cromwell, LLP(NYC), New York, NY; Jonathan David Schiller, Boies Schiller **[**53]** & Flexner LLP, New York, NY; Leigh Mager

Nathanson, Boies, Schiller & Flexner LLP, New York, NY; Michael Brille, PRO HAC VICE, Boies, Schiller & Flexner LLP (DC), Washington, DC.

For Barclays U.S. Funding LLC, Defendant (1:11-md-02262-NRB): David Harold Braff, Jeffrey T. Scott, Sullivan and Cromwell, LLP(NYC), New York, NY; Jonathan David Schiller, Boies Schiller & Flexner LLP, New York, NY; Leigh Mager Nathanson, Boies, Schiller & Flexner LLP, New York, NY; Michael Brille, PRO HAC VICE, Boies, Schiller & Flexner LLP (DC), Washington, DC.

For Credit Suisse Securities (USA) LLC, Defendant (1:11-md-02262-NRB): Elai E. Katz, Herbert Scott Washer, Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY; Adam Shawn Mintz, Jason Michael Hall, Cahill Gordon & Reindel LLP, New York, NY.

For Bank Of America Securities LLC, Defendant (1:11-md-02262-NRB): Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP, New York, NY.

For HSBC Securities (USA) Inc., Defendant (1:11-md-02262-NRB): James Matthew Goodin, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Julia C Webb, PRO HAC VICE, Locke Lord LLP, Chicago, IL; Roger **[**54]** Brian Cowie, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

For UBS Securities LLC, Defendant (1:11-md-02262-NRB): Jefferson Eliot Bell, Lawrence Jay Zweifach, Mark Adam Kirsch, Gibson, Dunn & Crutcher, LLP (NY), New York, NY.

For Citiigroup Global Markets Inc., Defendant (1:11-md-02262-NRB): Alan M. Wiseman, Jonathan James Gimblett, Thomas A. Isaacson, PRO HAC VICE, Covington & Burling, LLP (DC), Washington, DC; Andrew Arthur Ruffino, Covington & Burling LLP (NYC), New York, NY.

For Bank of Tokyo-Mistsubishi UFJ, Defendant (1:11-md-02262-NRB): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Bank of America, N.A., Defendant (1:11-md-02262-NRB): Paul Steel Mishkin, Robert Frank Wise, Jr, LEAD ATTORNEYS, Davis Polk & Wardwell L.L.P., New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Adam Gabor Mehes, Peter John Davis, Davis Polk & Wardwell LLP, New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Julie Saranow Epley, Davis Polk & Wardwell, Menlo Park, CA; Neal Alan Potischman, Davis Polk & Wardwell LLP (NYC), New York, NY, Peter John Davis, Davis Polk & Wardwell LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell **[**55]** L.L.P., New York, NY.

For HSBC Bank PLC, Defendant (1:11-md-02262-NRB): James Matthew Goodin, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY; Roger Brian Cowie, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

For WestDeutsche Immobilienbank AG, Defendant (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Christopher Martin Paparella, Hughes Hubbard & Reed LLP (NY), New York, NY; Marc Alan Weinstein, U.S. Attorney's Office, SDNY (St Andw's), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Citigroup Inc, Defendant (1:11-md-02262-NRB): Lev Louis Dassin, LEAD ATTORNEY, Cleary Gottlieb, New York, NY; Andrew Arthur Ruffino, Covington & Burling LLP (NYC), New York, NY; Jonathan Samuel Kolodner, Cleary Gottlieb Steen & Hamilton LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY; Tammy Albarran, Covington & Burling LLP, San Francisco, CA.

For Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Defendant (1:11-md-02262-NRB): Andrew Browning Lichtenberg, David Robert Gelfand, John Joseph **[**56]** Hughes, III, Mark David Villaverde, Sean Miles Murphy, Milbank, Tweed, Hadley & McCloy LLP, New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Delilah Garcia Vinzon, Milbank Tweed Hadley et al, Los Angeles, CA; Melanie Westover Yanez, Milbank, Twwed, Hadley & McCloy, LLP (DC), Washington, DC; Robert Charles Hora, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Robert Frank Wise, JrRobert Frank Wise, Jr, Davis Polk & Wardwell LLP (NYC), New York, NY.

For JPMorgan Chase Bank, National Association, Defendant (1:11-md-02262-NRB): Mary Beth Forshaw, Simpson Thacher & Bartlett LLP (NY), New York, NY; Patrick E. King, Simpson Thacher & Bartlett LLP (CA), Palo Alto, CA; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For JPMorgan Chase Bank, Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (NY), New York, NY.

For JPMorgan Chase & Co, Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Chet Alan Kronenberg, Simpson Thacher & Bartlett LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Barklays Bank Plc, Defendant (1:11-md-02262-NRB): **[**57]** Jonathan David Schiller, Boies Schiller & Flexner LLP, New York, NY.

For Lloyds Banking Group PLC, Defendant (1:11-md-02262-NRB): Lisa Jean Fried, LEAD ATTORNEY, Marc Joel Gottridge, Hogan Lovells US LLP (nyc), New York, NY.

For JP Morgan Chase & Co., Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Joan Eileen Flaherty, Simpson Thacher & Bartlett LLP (NY), New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Arthur J. Burke, Davis Polk & Wardwell, New York, NY.

For Barclays PLC, Defendant (1:11-md-02262-NRB): David Harold Braff, Jeffrey T. Scott, LEAD ATTORNEYS, Sullivan and Cromwell, LLP(NYC), New York, NY; Matthew Joseph Porpora, Yvonne Susan Quinn, LEAD ATTORNEYS, Sullivan & Cromwell, LLP(NYC), New York, NY; Amos Emory Friedland, Boies, Schiller & Flexner LLP(Westchester), Armonk, NY; Jonathan David Schiller, Leigh Mager Nathanson, Boies Schiller & Flexner LLP, New York, NY; Michael Brille, PRO HAC VICE, Boies, Schiller & Flexner LLP (DC), Washington, DC.

For Barclays Bank PLC, Defendant (1:11-md-02262-NRB): Adam Seth Paris, Sullivan & Cromwell LLP (Los Angeles), Los Angeles, CA; David Harold Braff, Jeffrey T. Scott, Sullivan **[**58]** and Cromwell, LLP(NYC), New York, NY; Jonathan David Schiller, Leigh Mager Nathanson, Boies Schiller & Flexner LLP, New York, NY; Matthew Joseph Porpora, Yvonne Susan Quinn, Sullivan & Cromwell, LLP(NYC), New York, NY; Michael Brille, PRO HAC VICE, Boies, Schiller & Flexner LLP (DC), Washington, DC; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For J.P. Morgan Chase Bank, N.A., Defendant (1:11-md-02262-NRB): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Alan Craig Turner, Alexander Nuo Li, Eamonn Wesley Campbell, Francis John Acott, Paul Christopher Gluckow, Simpson Thacher & Bartlett LLP (NY), New York, NY; Jeffery Li Ding, Sarah Emily Phillips, Simpson Thacher & Bartlett LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Lloyds Banking Group PLC, Defendant (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Lisa Jean Fried, Marc Joel Gottridge, Megan Dixon, Hogan Lovells US LLP (nyc), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For The Royal Bank of Scotland Group PLC, Citibank N.A., Defendants (1:11-md-02262-NRB): Arthur J. Burke, Davis **[**59]** Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For JPMorgan Chase Bank N.A., Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Joan Eileen Flaherty, Michael Steven Carnevale, Rachel Serenity Sparks Bradley, Simpson Thacher & Bartlett LLP (NY), New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Bank of America Corp., Defendant (1:11-md-02262-NRB): Patrick Wyatt Blakemore, Davis Polk & Wardwell LLP, New York, NY; Peter John Davis, Davis Polk & Wardwell LLP, New York, NY.

For Barclays Bank plc, Defendant (1:11-md-02262-NRB): Jeffrey T. Scott LEAD ATTORNEY, Sullivan and Cromwell, LLP(NYC), New York, NY; Jonathan David Schiller, LEAD ATTORNEY, Boies, Schiller & Flexner LLP, New York, NY.

For Citigroup, Inc., JPMorgan Chase Bank National Association, Defendants (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY.

For JPMorgan Chase & Co., Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Mary Beth Forshaw, Michael Steven **[**60]** Carnevale, Rachel Serenity Sparks Bradley, Simpson Thacher & Bartlett LLP (NY), New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC.

For Chase Bank USA, NA, Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Simpson Thacher & Bartlett LLP (NY), New York, NY.

For Bank Of America Corporation, Defendant (1:11-md-02262-NRB): Adam Gabor Mehes, Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP, New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Edward Fu, Davis Polk & Wardwell LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For HSBC Bank Plc., Defendant (1:11-md-02262-NRB): Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Roger Brian Cowie, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

For Lloyds Banking Group plc., Defendant (1:11-md-02262-NRB): Benjamin Andrew Fleming, Kevin Timothy Baumann, Lisa Jean Fried, Marc Joel Gottridge, Hogan Lovells US LLP (nyc), New York, NY.

For The Royal Bank of Scotland Group Plc., Defendant (1:11-md-02262-NRB): Robert G. Houck, LEAD ATTORNEY, Clifford Chance US, LLP (NYC), New York, NY.

For Citibank, N.A., Defendant (1:11-md-02262-NRB): **[**61]** Lev Louis Dassin, LEAD ATTORNEY, Cleary Gottlieb, New York, NY; Jonathan Samuel Kolodner, Cleary Gottlieb Steen & Hamilton LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For The Bank of Tokyo-Mitsubishi UFJ, Ltd., Defendant (1:11-md-02262-NRB): Daryl Andrew Libow, LEAD ATTORNEY Sullivan & Cromwell LLP (Washington DC), Washington, DC.

For HSBC Bank plc, Defendant (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Julia C Webb, PRO HAC VICE, Locke Lord LLP, Chicago, IL; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY; Roger Brian Cowie, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

For Chase Bank USA, N.A., Defendant (1:11-md-02262-NRB): Paul Christopher Gluckow, LEAD ATTORNEY, Alan Craig Turner, Mary Beth Forshaw, Simpson Thacher & Bartlett LLP (NY), New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Jeffery Li Ding, Sarah Emily Phillips, Simpson Thacher & Bartlett LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Royal Bank of Scotland Group plc, Defendant (1:11-md-02262-NRB): **[**62]** Fraser Lee Hunter, Jr, LEAD ATTORNEY, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For National Collegiate Student Loan Trust 2007-1, Defendant (1:11-md-02262-NRB): Usher T. Winslett, Winslett Studnicky McCormick & Bomser, New York, NY.

For Barclays Bank Plc, Defendant (1:11-md-02262-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Michael Brille, PRO HAC VICE; Boies, Schiller & Flexner LLP (DC), Washington, DC.

For The Royal Bank of Scotland Group plc, Defendant (1:11-md-02262-NRB): Robert G. Houck, LEAD ATTORNEY, Clifford Chance US, LLP (NYC), New York, NY; Alan Schoenfeld, David Sapir Lesser, Fraser Lee Hunter, Jr, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Michael J. Zbiegien, Jr., Taft, Stettinius & Hollister, Cleveland, OH; Tracy A. Turoff, Taft Stettinius & Hollister - Cleveland, Cleveland, OH.

For RBS Citizens, N.A. (f/k/a Citizens Bank of Massachusetts), The Royal Bank of Scotland, Plc, Defendants (1:11-m-02262): Andrea J. Robinson, David Sapir Lesser, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY.

Royal **[**63]** Bank of Scotland Group plc, Defendant (1:11-m-02262), Pro se.

For Stephanie Nagel, Defendant (1:11-m-02262): Daniel A. Edelman, PRO HAC VICE, Tiffany Nicole Hardy, Edelman, Combs, Latturner & Goodwin, LLC, Chicago, IL.

For British Bankers' Association, BBA Enterprises, Ltd., BBA Libor, Ltd, Defendants (1:11-m-02262): Jeff G. Hammel, LEAD ATTORNEY, Latham and Watkins (NY), New York, NY; Richard David Owens, LEAD ATTORNEY, Lilia Borislavova Vazova, Latham & Watkins LLP (NY), New York, NY; Jennifer Greenberg, Latham & Watkins LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Credit Suisse International, Defendant (1:11-m-02262): Adam Shawn Mintz, Elai E. Katz, Herbert Scott Washer, Jason Michael Hall, Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY; Lauren Beth Perlgut, Dentons US LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For HSBC Bank USA, N.A., Defendant (1:11-m-02262): James Matthew Goodin, LEAD ATTORNEY, Locke Lord LLP, Chicago, IL; Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Julia C Webb, PRO HAC VICE, Locke Lord LLP, Chicago, IL; Roger Brian Cowie, Locke, Liddell **[**64]** & Sapp, L.L.P., Dallas, TX.

For Portigon AG, Defendant (1:11-m-02262): David Hugh Stern, Hughes Hubbard Reed LLP, Los Angeles, CA; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For RBS Citizens, N.A., incorrectly sued as othe Charter One Bank, NA, Defendant (1:11-m-02262): Robert G. Houck, LEAD ATTORNEY, Clifford Chance US, LLP (NYC), New York, NY; Michael J. Zbiegien, Jr., Taft, Stettinius & Hollister, Cleveland, OH; Tracy A. Turoff, Taft Stettinius & Hollister - Cleveland, Cleveland, OH.

For Lloyds TSB Bank PLC, Defendant (1:11-m-02262): Lisa Jean Fried, LEAD ATTORNEY, Marc Joel Gottridge, Hogan Lovells US LLP (nyc), New York, NY. .

For Norinchukin Bank, Defendant (1:11-m-02262): Alan M. Unger, Andrew W. Stern, Thomas Andrew Paskowitz, Sidley Austin LLP (NY), New York, NY.

For The Royal Bank of Scotland plc, Defendant (1:11-m-02262): Fraser Lee Hunter, Jr, LEAD ATTORNEY, David Sapir Lesser, Alan Schoenfeld, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Robert G. Houck, LEAD ATTORNEY, Clifford Chance US, LLP (NYC), New York, NY.

For Citigroup Inc., Defendant (1:11-m-02262): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For J.P. Morgan **[**65]** Bank Dublin PLC, formerly known as Bear Stearns Bank PLC, Defendant (1:11-m-02262): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Alan Craig Turner, Paul Christopher Gluckow, Simpson Thacher & Bartlett LLP (NY), New York, NY; Jeffery Li Ding, Simpson Thacher & Bartlett LLP, New York, NY; Sarah Emily Phillips, Simpson Thacher & Bartlett LLP, New York, NY.

For UBS Limited, Defendant (1:11-m-02262): Jefferson Eliot Bell, Gibson, Dunn & Crutcher, LLP (NY), New York, NY; Lawrence Jay Zweifach, Mark Adam Kirsch, Gibson, Dunn & Crutcher, LLP (NY), New York, NY.

For The Royal Bank of Scotland PLC, Defendant (1:11-m-02262): Alan Schoenfeld, David Sapir Lesser, Fraser Lee Hunter, Jr, Jamie Stephen Dycus, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY.

For Citigroup Financial Products, Inc., Defendant (1:11-m-02262): Lev Louis Dassin, LEAD ATTORNEY, Cleary Gottlieb, New York, NY; Andrew Arthur Ruffino, Covington & Burling LLP (NYC), New York, NY; Jonathan Samuel Kolodner, Cleary Gottlieb Steen & Hamilton LLP, New York, NY.

For ICAP plc, Defendant (1:11-m-02262): H. Rowan Gaither, IV, Shari A. Brandt, Richards Kibbe & Orbe LLP (NYC), New York, NY. **[**66]**

For Credit Suisse (USA) Inc., Defendant (1:11-m-02262): Adam Shawn Mintz, Elai E. Katz, Herbert Scott Washer, Jason Michael Hall, Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY; Lauren Beth Perlgut, Dentons US LLP (NY), New York, NY.

For J.P. Morgan Markets Ltd., Defendant (1:11-m-02262): Paul Christopher Gluckow, LEAD ATTORNEY, Mary Beth Forshaw, Simpson Thacher & Bartlett LLP (NY), New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC), Washington, DC; Alan Craig Turner, Jeffery Li Ding, Simpson Thacher & Bartlett LLP, New York, NY; Sarah Emily Phillips, Simpson Thacher & Bartlett LLP, New York, NY.

For Lloyds Bank PLC (formerly known as Lloyds TSB Bank PLC), Defendant (1:11-m-02262): Lisa Jean Fried, LEAD ATTORNEY, Marc Joel Gottridge, Hogan Lovells US LLP (nyc), New York, NY.

For RBC Capital Markets, LLC, Defendant (1:11-m-02262): Brian J. Poronsky, PRO HAC VICE, Arthur W. Hahn, Katten Muchin Rosenman, LLP, Chicago, IL; Christian T. Kemnitz, Katten Muchin Rosenman LLP (Chicago), Chicago, IL.

For Bank of America Home Loans, Defendant (1:11-m-02262): Debra A. Djupman, LEAD ATTORNEY, REED SMITH LLP, PHILADELPHIA, PA.

For Bank of America National Association, **[**67]** Defendant (1:11-m-02262): Debra A. Djupman, LEAD ATTORNEY, REED SMITH LLP, PHILADELPHIA, PA; Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For CITI SWAPCO INC., CITI SWAPCO INC., Defendant (1:11-m-02262): Andrew Arthur Ruffino, Covington & Burling LLP (NYC), New York, NY.

For Citigroup Global Markets, Inc., Citigroup Funding Inc., Citi Swapco Inc., Defendants (1:11-m-02262): Lev Louis Dassin, LEAD ATTORNEY, Cleary Gottlieb, New York, NY; Jonathan Samuel Kolodner, Cleary Gottlieb Steen & Hamilton LLP New York, NY.

For J.P. Morgan Securities, LLC, Bear Stearns Capital Markets, Inc., Defendants (1:11-m-02262): Paul Christopher Gluckow, Alan Craig Turner, Mary Beth Forshaw, Simpson Thacher & Bartlett LLP (NY) New York, NY; Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC) Washington, DC; Jeffery Li Ding, Sarah Emily Phillips, Simpson Thacher & Bartlett LLP, New York, NY.

For Merrill Lynch Capital Services, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch & Co., Banc of America Securities LLC, Merrill Lynch International Bank, Ltd., Defendants (1:11-m-02262): Adam Gabor Mehes, Patrick Wyatt Blakemore, Peter John Davis, Davis Polk & Wardwell LLP, New **[**68]** York, NY; Edward Fu, Davis Polk & Wardwell LLP (NYC), New York, NY.

For Citigroup Global Markets Limited, Defendant (1:11-m-02262): Lev Louis Dassin, LEAD ATTORNEY, Cleary Gottlieb, New York, NY; Andrew Arthur Ruffino, Covington & Burling LLP (NYC), New York, NY; Jonathan Samuel Kolodner Cleary Gottlieb Steen & Hamilton LLP New York, NY.

For HSBC Finance Corp., HSBC USA Inc., Defendants (1:11-m-02262): James Matthew Goodin, LEAD ATTORNEY, Julia C Webb, PRO HAC VICE, Locke Lord LLP, Chicago, IL; Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Roger Brian Cowie Locke, Liddell & Sapp, L.L.P. Dallas, TX.

For Citizens Bank, N.A., Defendant (1:11-m-02262): Alan Schoenfeld, David Sapir Lesser, Fraser Lee Hunter, Jr, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY.

For Lloyds Bank plc, Defendant (1:11-m-02262): Robert Frank Wise, Jr, Davis Polk & Wardwell L.L.P., New York, NY.

For Credit Suisse AG, Defendant (1:11-m-02262): Adam Shawn Mintz, Jason Michael Hall, Joel Laurence Kurtzberg, Cahill Gordon & Reindel LLP, New York, NY; Lauren Beth Perlgut, Dentons US LLP (NY), New York, NY.

For HSBC Holdings, PLC, Defendant (1:11-m-02262): Arthur J. Burke, Davis Polk & Wardwell, **[**69]** New York, NY.

For UBS AG, Defendant (1:11-m-02262): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC) Washington, DC; Eric Jonathan Stock, Gibson, Dunn & Crutcher, LLP (NY), New York, NY.

For Cooperatieve Rabobank U.A., Defendant (1:11-m-02262): David Robert Gelfand, LEAD ATTORNEY, Milbank, Tweed, Hadley & McCloy LLP, New York, NY.

For JPMorgan Chase Bank, N.A., Defendant (1:11-m-02262): Abram Jeremy Ellis, Simpson Thacher & Bartlett LLP(DC) Washington, DC.

For FDIC, as receiver, Receiver (1:11-m-02262): James R. Martin, Allison Vissichelli, Zelle LLP, Washington, DC; Miriam R. Vishio, Zelle LLP (DC), Washington, DC.

For County of Mendocino, ADR Provider (1:11-m-02262): Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA.

For City of Houston, ADR Provider (1:11-m-02262): Richard Warren Mithoff, Jr, LEAD ATTORNEY, Warner Vandergriff Hocker, Mithoff Law, Houston, TX; Kevin P. O'Brien, LEAD ATTORNEY, PRO HAC VICE, Nanci E. Nishimura, Cotchett, Pitre & McCarthy, Burlingame, CA.

Tradition America LLC, Non-party, Objector (1:11-m-02262), Pro se, New York, NY.

For Managed Care Advisory Group, LLC, 3434 Granite Circle, Toledo, OH 43617, **[**70]** 800-355-0466, Objector (1:11-m-02262): Joseph Devon Carney, LEAD ATTORNEY, Joseph D. Carney & Associates, L.L.C., Westlake, OH; Victoria Lynn Ferrise, LEAD ATTORNEY, Chad R. Rothschild Brennan, Manna & Diamond, LLC Akron, OH.

For Maimonides Medical Center, Maimonides Medical Center, Virgin Islands Public Finance Authority, Objectors (1:11-m-02262): Jennifer Lynn White, Arent Fox LLP, New York, NY.

For Direct Action Plaintiffs, All Plaintiffs (1:11-m-02262), Pro se.

For The Berkshire Bank, Individually and On Behalf of All Others Similarly Situated, Plaintiff (1:12-cv-05723-NRB): Jeremy Alan Lieberman, Pomerantz LLP, New York, NY; Joshua B. Silverman, PRO HAC VICE, Pomerantz Grossman Hufford Dahlstrom & Gross, Chicago, IL; Marc Ian Gross, Pomerantz Haudek Block Grossman & Gross LLP, New York, NY; Michael Morris Buchman, Motley Rice LLC (NY), New York, NY; Patrick Vincent Dahlstrom, Pomerantz LLP, Chicago, IL.

For Government Development Bank for Puerto Rico, Plaintiff (1:12-cv-05723-NRB): Jeremy Alan Lieberman, Michael Jonathan Wernke, Pomerantz LLP, New York, NY; Joshua B. Silverman, PRO HAC VICE, Pomerantz Grossman Hufford Dahlstrom & Gross, Chicago, IL; Marc Ian Gross, Pomerantz Haudek **[**71]** Block Grossman & Gross LLP, New York, NY; Michael Morris Buchman, Motley Rice LLC (NY), New York, NY; Patrick Vincent Dahlstrom, Pomerantz LLP, Chicago, IL.

For The Berkshire Bank, Plaintiff (1:12-cv-05723-NRB): Francis Paul McConville, Pomerantz LLP (NYC), New York, NY; Jeremy Alan Lieberman, Michael Jonathan Wernke, Pomerantz LLP, New York, NY; Veronica Valeria Montenegro, Pomerantz LLP (NYC), New York, NY.

For Government Development Bank for Puerto Rico, Plaintiff (1:12-cv-05723-NRB): Francis Paul McConville, Pomerantz LLP (NYC), New York, NY; Jeremy Alan Lieberman, Pomerantz LLP, New York, NY.

For Bank of America Corporation, Defendant (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Edward Fu, Davis Polk & Wardwell LLP (NYC), New York, NY; Patrick Wyatt Blakemore, Peter John Davis, Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Bank of America N.A., Defendant (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Edward Fu, Davis Polk & Wardwell LLP (NYC), New York, NY; Patrick Wyatt Blakemore, Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Bank of Tokyo Mitsubishi UFJ Ltd., Defendant (1:12-cv-05723-NRB): **[**72]** Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Christopher Michael Viapiano, Daryl Andrew Libow, Sullivan & Cromwell LLP (Washington DC), Washington, DC; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Barklays Bank Plc, Defendant (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Jeffrey T. Scott, Sullivan and Cromwell, LLP(NYC), New York, NY; Jonathan David Schiller, Boies Schiller & Flexner LLP, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Citigroup Inc., Citibank N.A., Defendants (1:12-cv-05723-NRB): Andrew Arthur Ruffino, Covington & Burling LLP(NYC), New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Cooperative Centrale Raiffeisenboerenleenbank B.A., Defendant (1:12-cv-05723-NRB): David Robert Gelfand, LEAD ATTORNEY, Mark David Villaverde, Sean Miles Murphy, Milbank, Tweed, Hadley & McCloy LLP, New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Melanie Westover Yanez, Milbank, Tweed, Hadley & McCloy LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Credit **[**73]** Suisse Group AG, Royal Bank of Canada, The Norinchukin Bank, UBS AG, Westdeutsche Immobilienbank AG, Defendants (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For Deutsche Bank AG, Defendant (1:12-cv-05723-NRB): Aidan John Synnott, LEAD ATTORNEY, Paul Weiss (NY), New York, NY; Moses Silverman, LEAD ATTORNEY, Paul, Weiss, Rifkind, Wharton & Garrison LLP (NY), New York, NY; Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For HSBC Holdings plc., HSBC Bank Plc., Defendants (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Gregory Thomas Casamento, Locke Lord LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY. Roger Brian Cowie, Locke, Liddell & Sapp, L.L.P., Dallas, TX.

For JPMorgan Chase & Co., JPMorgan Chase Bank, National Association, Defendants (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Mary Beth Forshaw, Paul Christopher Gluckow, Simpson Thacher & Bartlett LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New **[**74]** York, NY.

For Lloyds Banking Group plc., HBOS Plc., Defendants (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY; Lisa Jean Fried, Hogan Lovells US LLP (nyc), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For The Royal Bank of Scotland Group Plc., Defendant (1:12-cv-05723-NRB): Alan Schoenfeld, David Sapir Lesser, Fraser Lee Hunter, Jr, Wilmer Cutler Pickering Hale & Dorr LLP (NYC), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For WestLB AG, Royal Bank of Scotland Group plc, Defendants (1:12-cv-05723-NRB): Arthur J. Burke, Davis Polk & Wardwell, New York, NY.

For British Bankers' Association, BBA Enterprises Ltd., BBA Libor Ltd., Defendants (1:12-cv-05723-NRB): Jeff G. Hammel, LEAD ATTORNEY, Latham and Watkins (NY), New York, NY; Richard David Owens, LEAD ATTORNEY, Latham & Watkins LLP (NY), New York, NY; Robert Frank Wise, Jr, Davis Polk & Wardwell LLP, New York, NY.

For UBS AG, Defendant (1:12-cv-05723-NRB): Eric Jonathan Stock, Gibson, Dunn & Crutcher, LLP (NY), New York, NY.

Judges: NAOMI REICE BUCHWALD, UNITED STATES DISTRICT JUDGE.

Opinion by: NAOMI REICE BUCHWALD

Opinion

[*456] MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD

UNITED STATES [75] DISTRICT JUDGE**

LIBOR VII

Table of Contents

[*457] I. INTRODUCTION [76]**

After more than six years of litigation and six substantial opinions[1] considering extensively the nature of LIBOR and its alleged manipulation,[2] we consider in this, our seventh major opinion, whether three of the cases consolidated into this multidistrict litigation should proceed as class actions: the Exchange-Based action, Metzler Investment GmbH v. Credit Suisse Group AG, No. 11 Civ. 2613; the Lender action, Berkshire Bank v. Bank of America Corp., No. 12 Civ. 5723; and the Over-the-Counter (OTC) action, Mayor of Baltimore v. **[*458]** Credit Suisse Group AG, No. 11 Civ. 5450. For the reasons stated below, Exchange plaintiffs' and Berkshire Bank's motions for certification of an Exchange-based class and a Lender class are denied. We grant in part and deny in part OTC plaintiffs' motion, certifying a class only as to the antitrust claims in that action.

In litigating the question of class certification, the parties have also filed ten motions to exclude expert testimony under the admissibility standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. The only one-line summary we can provide is that some of the Daubert motions are granted, some are denied, and others are granted in part and denied in part, as set forth in extensive detail below.

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[1] *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR VI"), 2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980 (S.D.N.Y. Dec. 20, 2016)*, ECF No. 1676; *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR V"), 2015 U.S. Dist. LEXIS 149629, 2015 WL 6696407 (S.D.N.Y. Nov. 3, 2015)*, ECF No. 1234; *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR IV"), 2015 U.S. Dist. LEXIS 147561, 2015 WL 6243526 (S.D.N.Y. Oct. 20, 2015)*, ECF No. 1222, aff'd in part, vacated and remanded in part sub nom. *Charles Schwab Corp. v. Bank of Am. Corp. ("Schwab"), 2018 U.S. App. LEXIS 4519, 883 F.3d 68, 2018 WL 1022541 (2d Cir. 2018)*; *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR III"), 27 F. Supp. 3d 447 (S.D.N.Y. 2014)*, ECF No. 568; **[**77]** *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR II"), 962 F. Supp. 2d 606 (S.D.N.Y. 2013)*, ECF No. 389; *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR I"), 935 F. Supp. 2d 666 (S.D.N.Y. 2013)*, ECF No. 286, vacated and remanded sub nom. *Gelboim v. Bank of Am. Corp. ("Gelboim"), 823 F.3d 759 (2d Cir. 2016)*.

[2] "Even where we omit to use a word such as 'alleged' in reference to claims against defendants, nothing in this opinion should be taken as a finding that any defendant manipulated LIBOR, that any defendant committed any other form of wrongdoing, or that any plaintiff suffered injury." LIBOR V, 2015 WL

II. GENERAL LEGAL STANDARDS

We first set forth the general legal standards applicable to our resolution of the pending motions.

1. Class Certification

HN1[] "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 348, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)* (quoting *Califano v. Yamasaki, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979))*. "To come within the exception, a party seeking to maintain a class action 'must affirmatively demonstrate his compliance' with *Rule 23*." *Comcast Corp. v. Behrend, 569 U.S. 27, 33, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)* (quoting *Dukes, 564 U.S. at 350*). When presented with a motion for class certification, we are to "assess all of the relevant evidence admitted at the class certification stage and determine whether each *Rule 23* requirement has been met, just as [we] would resolve **[**78]** a dispute about any other threshold prerequisite for continuing a lawsuit." *In re Initial Pub. Offerings Sec. Litig. ("In re IPO"), 471 F.3d 24, 42 (2d Cir. 2006)*. This assessment necessarily entails the resolution of "factual disputes relevant to each *Rule 23* requirement," an obligation that "is not lessened by overlap between a *Rule 23* requirement and a merits issue, even a merits issue that is identical with a *Rule 23* requirement." *Id. at 41*; see also *Dukes, 564 U.S. at 351* (noting that the "rigorous analysis" of the *Rule 23* requirements "will entail some overlap with the merits of the plaintiff's underlying claim"). "[T]he preponderance of the evidence standard applies to evidence proffered to establish *Rule 23*'s requirements." *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc., 546 F.3d 196, 202 (2d Cir. 2008)*.

1.1. Standing

HN2[] Before considering the *Rule 23* requirements, we first consider threshold standing issues. "Standing" in the class action context refers to two related but analytically distinct doctrines separated by a "murky line": "traditional Article III standing" on the one hand and "so-called 'class standing'" on the other. *Ret. Bd. of the Policemen's Annuity & Benefit Fund v. Bank of N.Y. Mellon ("RBPA"), 775 F.3d 154, 160 (2d Cir. 2014)*; see also *LIBOR III, 27 F. Supp. 3d at 480-82, slip op. at *108*.

Article III standing is assessed using the oft-recited threepart formulation set forth by the Supreme Court: a "plaintiff must have (1) suffered **[**79]** an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*; see also *LIBOR III, 27 F. Supp. 3d at 481, slip op. at *66* (citing *Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61,* ***[*459]*** *112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))*. While an injury-in-fact must be "concrete and particularized" and "actual or imminent," *Lujan, 504 U.S. at 560*, "an injury-in-fact need not be capable of sustaining a valid cause of action," *Denney v. Deutsche Bank AG, 443 F.3d 253, 264 (2d Cir. 2006)*. Rather, "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate [Article III] standing." *Id. at 265*.

In the class action context, the Second Circuit has made clear that "no class may be certified that contains members lacking Article III standing" and that any "class must therefore be defined in such a way that anyone within it would have [Article III] standing." *Id. at 264*. However, HN3[] when presented with a putative class, "[w]e do not require that each member . . . submit evidence of personal standing." *Id. at 263*. Rather, "only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 504 F.3d 229, 241 (2d Cir. 2007)* (emphasis added). "[P]assive members need not make any individual showing of standing, because the standing issue focuses on whether the plaintiff **[**80]** is properly before the court, not whether represented parties or absent class members are properly before the court." *Denney, 443 F.3d at 264* (alteration in original) (quoting 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 2:7 (4th ed. 2002)).

While only one named plaintiff need establish Article III standing and our analysis need not consider evidence from absent class members, we must nonetheless consider Article III standing as against each defendant. "[F]or every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant." *LIBOR III, 27 F. Supp. 3d at 481, slip op. at *66* (emphasis omitted) (quoting *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co. ("NECA"), 693 F.3d 145, 159 (2d Cir. 2012))*.

"[A]t that point, [Article III] standing is satisfied and only then will the inquiry shift to a class action analysis" and the question of class standing, which refers to a named plaintiff's ability to assert claims on behalf of absent class members. *NECA, 693 F.3d at 159* (quoting *Merck-Medco, 504 F.3d at 241*). ***HN4***[] "[I]n a putative class action, a plaintiff has class standing if he plausibly alleges (1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns **[**81]** as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *RBPA, 775 F.3d at 161* (emphasis added) (alteration in original) (quoting *NECA, 693 F.f3d at 162*). This standard, "derive[d] from constitutional standing principles" but also distinct from Article III standing itself, serves to insure that "the named plaintiff's litigation incentives are sufficiently aligned with those of the absent class members that the named plaintiff may properly assert claims on their behalf." Id. As the Second Circuit's formulation of the class standing test makes clear, class standing is assessed based on allegations rather than evidence. See, e.g., id. (holding that named plaintiffs had satisfied the first prong of the two-prong class standing test because "they ha[d] adequately pled that they have personally suffered an actual injury as a result of [the defendant's] putatively illegal conduct").

1.2. *Rule 23(a)*

HN5[] To proceed as a class action, each of the requirements of *Rule 23(a)* must be met. **[*460]** As relevant here, *Rule 23(a)* provides that "[o]ne or more members of a class may sue . . . as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there **[**82]** are questions of law or fact common to the class; (3) the claims . . . of the representative parties are typical of the claims . . . of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." *Fed. R. Civ. P. 23(a)*. These requirements are generally referred to as numerosity, commonality, typicality, and adequacy of representation.

HN6[] *Rule 23(a)(1)* requires the class to be sufficiently numerous such that "joinder of all members is impracticable," *Fed. R. Civ. P. 23(a)(1)*, but this requirement "does not mandate that joinder of all parties be impossible," *Merck-Medco, 504 F.3d at 244*. Though "the numerosity inquiry is not strictly mathematical," numerosity "is presumed for classes larger than forty members." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co., 772 F.3d 111, 120 (2d Cir. 2014)*. Plaintiffs need not furnish "evidence of exact class size or identity of class members to satisfy the numerosity requirement." *Robidoux v. Celani, 987 F.2d 931, 935 (2d Cir. 1993)*.

HN7[] The next requirement, commonality, demands that there be "questions of law or fact common to the class." *Fed. R. Civ. P. 23(a)(2)*. A question is common to the class if it is "capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes, 564 U.S. at 350*. That is, "[c]ommonality requires the plaintiff to demonstrate **[**83]** that the class members 'have suffered the same injury,'" which requires establishing more than the mere fact that class members "have all suffered a violation of the same provision of law." *Id. at 349-50* (quoting *Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 157, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. However, "[w]here the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Johnson v. Nextel Commc'ns, Inc., 780 F.3d 128, 137 (2d Cir. 2015)* (quoting *Suchanek v. Sturm Foods, Inc., 764 F.3d 750, 756 (7th Cir. 2014))*.

Third, ***HN8***[] "[t]o establish typicality under *Rule 23(a)(3)*, the party seeking certification must show that 'each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability.'" *In re Flag Telecom Holdings, Ltd. Sec. Litig., 574 F.3d 29, 35 (2d Cir.*

2009) (quoting Robidoux, 987 F.2d at 936). This requirement is related to, but distinct from, the requirement of class standing. See RBPA, 775 F.3d at 161 (citing NECA, 693 F.3d at 158 n.9). "Typicality requires that 'the disputed issue[s] of law or fact occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.'" Mazzei v. Money Store, 829 F.3d 260, 272 (2d Cir. 2016) (internal quotation marks omitted) (quoting Caridad v. Metro-N. Commuter R.R., 191 F.3d 283, 293 (2d Cir. 1999), overruled on other grounds by In re IPO, 471 F.3d 24). Accordingly, typicality is not satisfied "where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 59 (2d Cir. 2000) (quoting Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d Cir. 1990)). "[T]he defendant **[**84]** need not show at the certification stage that [a] unique defense will prevail, only that it is meritorious enough to **[*461]** require the plaintiff to devote considerable time to rebut the unique defense," In re Digital Music Antitrust Litig., 321 F.R.D. 64, 97 (S.D.N.Y. 2017) (quoting Lapin v. Goldman Sachs & Co., 254 F.R.D. 168, 179 (S.D.N.Y. 2008)). "However, the court should not disqualify a named plaintiff based upon any groundless, far-fetched defense that the defendant manages to articulate." Lapin, 254 F.R.D. at 179 (quoting Hallet v. Li & Fung Ltd., No. 95 Civ. 8917 (JSM), 1997 U.S. Dist. LEXIS 15509, 1997 WL 621111, at *3 (S.D.N.Y. Oct. 6, 1997)).

Finally, **HN9**[] "the representative parties [must] fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement overlaps in part with those of commonality and typicality, but adequacy of representation "also raises concerns about the competency of class counsel and conflicts of interest." Dukes, 564 U.S. at 349 n.5 (quoting Falcon, 457 U.S. at 158 n.13); see also Baffa, 222 F.3d at 60 ("Generally, adequacy of representation entails inquiry as to whether: 1) plaintiff's interests are antagonistic to the interest of other members of the class and 2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation."). Accordingly, an analysis of adequacy of representation considers "whether the class representative has adequate incentive to pursue the class's claim, and whether some difference between the class representative and some class members might undermine that **[**85]** incentive." In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 827 F.3d 223, 231 (2d Cir. 2016). However, "[n]ot every conflict among subgroups of a class will prevent class certification -- the conflict must be 'fundamental' to violate Rule 23(a)(4)." In re Literary Works in Elec. Databases Copyright Litig., 654 F.3d 242, 249 (2d Cir. 2011).

1.3. Rule 23(b)(3)

HN10[] In addition to satisfying each requirement of Rule 23(a), a putative class must also meet "[o]ne of the bases for certification under Rule 23(b)." Roach v. T.L. Cannon Corp., 778 F.3d 401, 405 (2d Cir. 2015). Each class of plaintiffs here seeks to proceed under Rule 23(b)(3), which provides that a class action may proceed as such if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added). Predominance and superiority must each be satisfied. See Sykes v. Mel S. Harris & Assocs., 780 F.3d 70, 82 (2d Cir. 2015) (referring to Rule 23(b)(3) as a "disjunctive inquiry"); see also Roach, 778 F.3d at 405.

HN11[] "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997). It serves to "ensure[] that the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable **[**86]** results.'" Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc., 502 F.3d 91, 104 (2d Cir. 2007) (omission in original) (quoting Amchem, 521 U.S. at 615).

The predominance analysis entails "careful scrutiny to the relation between common and individual questions in a case." Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045, 194 L. Ed. 2d 124 (2016). "An individual question is one where 'members of a proposed **[*462]** class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'" Id. (alterations in original) (quoting 2

William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)). As its name suggests, "[t]he predominance requirement calls only for predominance, not exclusivity, of common questions." *In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001)* (quoting *In re Alcoholic Beverages Antitrust Litig., 95 F.R.D. 321, 328 (E.D.N.Y. 1982)*, overruled on other grounds by *In re IPO, 471 F.3d 24*. The inquiry is inherently comparative, taking into account the weight and significance of common and individual issues rather than simply their numbers. See, e.g., *In re Petrobras Sec., 862 F.3d 250, 268 (2d Cir. 2017)* ("[P]redominance is a comparative standard.").

HN12[] The existence of a single common question suffices to establish commonality, but "*Rule 23(b)(3)*'s predominance requirement is 'more demanding than *Rule 23(a)*.'" *Nextel, 780 F.3d at 138* (quoting *Comcast, 569 U.S. at 34*)). Ultimately, we ask "whether issues susceptible to generalized proof outweigh individual **[**87]** issues," *Sykes, 780 F.3d at 88* (internal quotation marks omitted) (quoting *McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 231 (2d Cir. 2008)*, abrogated on other grounds by *Bridge v. Phx. Bond & Indem. Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008))*, or put differently, whether "common issues are 'more substantial' than individual ones," *Myers v. Hertz Corp., 624 F.3d 537, 549 (2d Cir. 2010)* (quoting *Moore v. PaineWebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002))*. In conducting this balancing test, we "assess (1) the 'elements of the claims and defenses to be litigated,' and (2) 'whether generalized evidence could be offered to prove those elements on a class-wide basis or whether individualized proof will be needed to establish each class member's entitlement to relief.'" *Nextel, 780 F.3d at 138* (quoting 1 McLaughlin on Class Actions § 5:23 (11th ed. 2014)); see also *Erica P. John Fund, Inc. v. Halliburton Co. ("Halliburton I"), 563 U.S. 804, 809, 131 S. Ct. 2179, 180 L. Ed. 2d 24 (2011)* ("Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." (quoting *Fed. R. Civ. P. 23(b)(3)*)). "This analysis is 'more[] qualitative than quantitative,' and must account for 'the nature and significance of the material common and individual issues in the case.'" *In re Petrobras, 862 F.3d at 271* (alterations in original) (citations omitted) (quoting 1 William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)).

HN13[] In addition to establishing the predominance of common questions, plaintiffs must also establish "that **[**88]** a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Fed. R. Civ. P. 23(b)(3)*. *Rule 23(b)(3)* sets forth four "matters pertinent" to the superiority inquiry: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." *Fed. R. Civ. P. 23(b)(3)*. "[W]hile these factors, structurally, apply to both predominance and superiority, they more clearly implicate the superiority inquiry." *Sykes, 780 F.3d at 82*; see also *In re Am. Int'l Grp., Inc. Sec. Litig., 689 F.3d 229, 242 (2d Cir. 2012)* ("[T]he plain text of *Rule 23(b)(3)* states that one of the 'matters pertinent' to a finding of **[*463]** predominance is 'the likely difficulties in managing a class action.'" (quoting *Fed. R. Civ. P. 23(b)(3)*)).

HN14[] "While *Rule 23(b)(3)* sets out four individual factors for courts to consider, manageability 'is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication.'" *Sykes, 780 F.3d at 82* (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:72 (5th ed. 2014)). Despite the importance of manageability, **[**89]** the Second Circuit has also cautioned that "failure to certify an action under *Rule 23(b)(3)* on the sole ground that it would be unmanageable is disfavored and should be the exception rather than the rule." *In re Petrobras, 862 F.3d at 268* (quoting *In re Visa Check, 280 F.3d at 140*). Ultimately, these factors are "nonexhaustive" and nonexclusive, *Amchem, 521 U.S. at 615*, and "assessing superiority is a fact-specific inquiry," *In re Vivendi, S.A., Sec. Litig., 838 F.3d 223, 264 (2d Cir. 2016)*.

1.4. Ascertainability

HN15[] In addition to the express requirements of *Rule 23(a)* and *Rule 23(b)*, the Second Circuit has "recognized an 'implied requirement of ascertainability' in *Rule 23*." *Brecher v. Republic of Argentina, 806 F.3d 22, 24 (2d Cir. 2015)* (quoting *In re IPO, 471 F.3d at 30*). Though "the touchstone of ascertainability is whether the class is 'sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member,'" id. (quoting 7A Charles A. Wright et al., Federal Practice & Procedure § 1760 (3d ed. 1998)), the Second Circuit has clarified that ascertainability does not itself require that a proposed class be administratively feasible, see *In re Petrobras, 862 F.3d at 268-69*. Rather, ascertainbility imposes only a "modest threshold requirement" that asks only "whether a proposed class is defined using objective criteria that establish a membership with definite boundaries." *Id. at 269*. It "will only preclude certification if a proposed class definition **[**90]** is indeterminate in some fundamental way." Id.

HN16[] Given that ascertainability is "distinct from the predominance requirement," *id. at 264 n.15* (quoting *In re IPO, 471 F.3d at 45*), we do not read In re Petrobras to preclude a consideration of administrative feasibility concerns in analyzing predominance and superiority. Indeed, In re Petrobras reasoned that a freestanding administrative feasibility requirement as part of ascertainability would be duplicative of the manageability factor of the superiority inquiry (if administrative feasibility were considered comparatively rather than absolutely), *id. at 268*, and would "risk[] encroaching on territory belonging to the predominance requirement, such as classes that require highly individualized determinations of member eligibility," id. (citing *Mazzei, 829 F.3d at 272*). Accordingly, to the extent that any of the putative classes present administrative feasibility concerns, we will consider those issues not as part of the ascertainability analysis, but as part of the *Rule 23(b)(3)* predominance and superiority inquiries.

1.5. Modifications to the Class Definition

As we have recognized in denying defendants' motions to strike plaintiffs' class-action allegations, ***HN17***[] "[a] court is not bound by the class definition proposed in the complaint **[**91]** and should not dismiss the action simply because the complaint seeks to define the class too broadly." May 13, 2016 Order, *2016 U.S. Dist. LEXIS 63745 at 74, 2016 WL 2851333, at *2,* (quoting *Robidoux, 987 F.2d at 937*), ECF No. 1408. *Rule 23(c)(4)* and *Rule 23(c)(5)* provide two specific means of modification, but a court also "has broad **[*464]** discretion to modify the class definition as appropriate." 5 *Moore's Federal Practice § 23.21[6]* (3d ed. 2017).

HN18[] *Rule 23(c)(4)* provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." *Fed. R. Civ. P. 23(c)(4)*. The rule may be applied "to certify a class on a particular issue even if the action as a whole does not satisfy *Rule 23(b)(3)*'s predominance requirement." *In re Nassau Cty. Strip Search Cases, 461 F.3d 219, 225 (2d Cir. 2006)*. Additionally, "[i]f an action includes multiple claims, one or more of which might qualify as a certifiable class claim, the court may separate such claims from other claims in the action and certify them under the provisions of *subsection (c)(4) of Rule 23*." 1 McLaughlin on Class Actions § 4:44 (14th ed.) (Westlaw 2017) (internal quotation marks omitted); see also, e.g., *In re AMF Bowling Secs. Litig., No. 99 Civ. 3023 (DC), 2002 U.S. Dist. LEXIS 4949, 2002 WL 461513 (S.D.N.Y. Mar. 26, 2002)*.

The Second Circuit has instructed that "[d]istrict courts should take full advantage of this provision to certify separate issues," *Robinson v. Metro-N. Commuter R.R. Co., 267 F.3d 147, 167 (2d Cir. 2001)* (alterations incorporated) (internal quotation marks omitted), abrogated on other grounds by *Dukes, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374*, but has also recognized that issue certification may be **[**92]** inappropriate if a "number of questions . . . would remain for individual adjudication" or if issue certification "would not materially advance the litigation because it would not dispose of larger issues" relevant to the case. *McLaughlin, 522 F.3d at 234*.

That is, ***HN19***[] "the rule should not be invoked merely to postpone confronting difficult certification questions," 7AA Charles A. Wright et al., Federal Practice & Procedure § 1790 (3d ed.) (Westlaw 2017), and indeed, overly aggressive application of *Rule 23(c)(4)* would nullify *Rule 23(b)(3)*'s predominance requirement, as a class may be certified only as to the common issues raised, cf. *Castano v. Am. Tobacco Co., 84 F.3d 734, 745 n.21 (5th Cir. 1996)* ("[T]he result would be automatic certification in every case where there is a common issue, a result that could not have been intended."). "[A] class action movant cannot gerrymander predominance by suggesting that only a single issue be certified for class treatment (in which, by definition, it will 'predominate')" when more substantial individual issues remain. 1 McLaughlin on Class Actions § 4:43 (14th ed.) (Westlaw 2017) (quoting *Hyderi v. Wash. Mut. Bank, FA, 235 F.R.D. 390, 398 (N.D. Ill. 2006))*.

Paralleling *Rule 23(c)(4)*, ***HN20***[] *Rule 23(c)(5)* provides that "[w]hen appropriate, a class may be divided into subclasses that are each treated as a class under this rule." *Fed. R. Civ. P. 23(c)(5)*.[3] For example, when conflicts exist between class **[**93]** members, they "can be cured by dividing the class into separate 'homogeneous subclasses . . . with separate representation to eliminate conflicting interests.'" *In re Literary Works, 654 F.3d at 249-50* (quoting *Ortiz v. Fibreboard Corp., 527 U.S. 815, 856, 119 S. Ct. 2295, 144 L. Ed. 2d 715 (1999)*). However, the placement of plaintiffs into "multiple subclasses **[*465]** . . . can generate unnecessary administrative inefficiencies," 3 William B. Rubenstein, Newberg on Class Actions § 7:30 (5th ed.) (Westlaw 2017) (footnote omitted), and "at some point there must be an end to reclassification," *Ortiz, 527 U.S. at 857*; see also *In re Literary Works, 654 F.3d at 257* (describing seven subclasses as "surely beyond the point at which 'reclassification with separate counsel' must end"). "The necessity of a large number of subclasses may indicate that common questions do not predominate," and "[t]he creation of a number of subclasses . . . may make the case unmanageable [and] may defeat the superiority requirement." Manual for Complex Litigation § 21.23 (4th ed. 2004).

HN21[] *Rule 23(c)(4)* and *Rule 23(c)(5)* are phrased permissively. Consistent with the text of the rule, "[t]he court . . . is not obligated to implement *Rule 23(c)(4)* [and *Rule 23(c)(5)*] on its own initiative" by certifying classes only as to certain issues or creating subclasses. *Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 14 (2d Cir. 1993)* (citing *U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 408, 100 S. Ct. 1202, 63 L. Ed. 2d 479 (1980)*); see also 7AA Charles A. Wright et al., Federal Practice & Procedure § 1790 (3d ed.) (Westlaw 2017) ("[T]he trial court has no independent **[**94]** obligation to utilize *Rule 23(c)(4)* sua sponte."). It remains "plaintiff's burden to show how the action may be [modified] to avoid certification problems." *Lundquist, 993 F.2d at 14* (quoting *Geraghty, 445 U.S. at 408*).[4] Similarly, the decision to otherwise modify a class definition is a discretionary one. See *Mazzei v. Money Store, 288 F.R.D. 45, 55 (S.D.N.Y. 2012)* ("[C]ourts have the discretion to construe the complaint or redefine the class to bring it within the scope of *Rule 23*." (internal quotation marks omitted)); see also 7A Charles A. Wright et al., Federal Practice & Procedure § 1759 (3d ed.) (Westlaw 2017).

Accordingly, in order to avoid "the perverse effect of turning defense counsel and the Court into plaintiffs' counsel's co-counsel, with plaintiffs waiting to see what objections defendants raise and how the Court rules on those objections and then amending their [proposed class definitions] as necessary based on what they learned in the process," *LIBOR II, 962 F. Supp. 2d at 626-27, slip op. at *42*, we will consider issue certification under *Rule 23(c)(4)*, subclass creation under *Rule 23(c)(5)*, and other modifications of the proposed class definitions under our discretionary authority only where plaintiffs have set forth such proposals in sufficient detail.

2. Expert Opinion

2.1. The Daubert Standard

Expert testimony is admissible under *Rule 702 of the Federal Rules of Evidence*, which provides in full: **[**95]**

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help

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[3] Prior to the 2007 amendments to the *Federal Rules of Civil Procedure, Rule 23(c)(4)* encompassed the current version of *Rule 23(c)(4)* as *Rule 23(c)(4)(A)* and the current version of *Rule 23(c)(5)* as *Rule 23(c)(4)(B)*. In its entirety, the pre-2007 version of *Rule 23(c)(4)* read as follows: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." 5 *Moore's Federal Practice § 23App.07[1]* (3d ed. 2017).

[4] We accordingly do not read *Robidoux*'s statement that a court "should not dismiss the action simply because the complaint seeks to define the class too broadly," *987 F.2d at 937*, to require that a court explore every avenue in order to certify a class in some form in each case. See *Lundquist, 993 F.2d at 15* ("[T]he district court's refusal to shoulder what, in the final analysis, is plaintiff's burden cannot be regarded in this case as an abuse of discretion.").

> the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the **[*466]** expert has reliably applied the principles and methods to the facts of the case.

Under the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and *Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*, ***HN22***[] we have a "'gatekeeping' function under *Rule 702*," under which we are "charged with 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Amorgianos v. AMTRAK, 303 F.3d 256, 265 (2d Cir. 2002)* (quoting *Daubert, 509 U.S. at 597*). "[T]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence that the admissibility requirements of *Rule 702* are satisfied." *United States v. Williams, 506 F.3d 151, 160 (2d Cir. 2007)*.

The Second Circuit has distilled *Rule 702*'s requirements into three broad criteria: (1) qualifications, (2) reliability, and (3) relevance and assistance to the trier of fact. See *Nimely v. City of New York, 414 F.3d 381, 396-97 (2d Cir. 2005)*.

2.1.1. Qualifications

HN23[] When presented with expert testimony, we first consider "the **[**96]** threshold question of whether a witness is 'qualified as an expert by knowledge, skill, experience, training, or education' to render his or her opinions." *Id. at 396 n.11* (quoting *Fed. R. Evid. 702*). We analyze "the totality of the witness's background to determine whether he or she exhibits any one or more of the qualifications listed in *Rule 702* . . . with respect to a relevant field." *Washington v. Kellwood Co., 105 F. Supp. 3d 293, 304 (S.D.N.Y. 2015)*.

As *Rule 702*'s use of the disjunctive suggests, "any one of [the] five forms of qualifications will satisfy the rule." *Tiffany (NJ) Inc. v. eBay, Inc., 576 F. Supp. 2d 457, 458 (S.D.N.Y. 2007)*. "A formal education in a particular field is sufficient to qualify a witness as an expert" as a general matter, such that a "lack of extensive practical experience directly on point does not necessarily preclude [the] expert from testifying." *Cary Oil Co. v. MG Ref. & Mktg., Inc., No. 99 Civ. 1725 (VM), 2003 U.S. Dist. LEXIS 6150, 2003 WL 1878246, at *2 (S.D.N.Y. Apr. 11, 2003)* (internal quotation marks omitted). Similarly, "a lack of formal training does not necessarily disqualify an expert from testifying if he or she has equivalent relevant practical experience." *In re Rezulin Prods. Liab. Litig., 309 F. Supp. 2d 531, 559 (S.D.N.Y. 2004)*.

Indeed, ***HN24***[] "[c]ourts in this circuit have noted that an expert should not be required to satisfy an overly narrow test of his own qualifications." *United States v. Tuzman, No. 15 Cr. 536 (PGG), 2017 U.S. Dist. LEXIS 208410, 2017 WL 6527261, at *9 (S.D.N.Y. Dec. 18, 2017)* (collecting cases) (quoting *Arista Records LLC v. Lime Grp. LLC, No. 06 Civ. 5936 (KMW), 2011 U.S. Dist. LEXIS 47416, 2011 WL 1674796, at *3 (S.D.N.Y. May 2, 2011))*. "[T]he Second Circuit [has] allowed an expert to testify as to matters within his general expertise **[**97]** even though he lacked qualifications as to certain technical matters within that field." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 691 F. Supp. 2d 448, 457 (S.D.N.Y. 2010)* (citing *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042-43 (2d Cir. 1995))*.

We then "compare the area in which the witness has superior knowledge, education, experience, or skill with the subject matter of the proffered testimony," which must overlap. *United States v. Tin Yat Chin, 371 F.3d 31, 40 (2d Cir. 2004)*. "[I]t is worth emphasizing that, because a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields." *Nimely, 414 F.3d at 399 n.13*. **[*467]** Conversely, an expert's lack of qualifications as to some of the opinions offered does not render inadmissible the opinions that he is qualified to offer.

2.1.2 Reliability

HN25[] We next determine "whether the proffered testimony has a sufficiently 'reliable foundation' to permit it to be considered." Campbell ex rel. Campbell v. Metro. Prop. & Cas. Ins. Co., 239 F.3d 179, 184 (2d Cir. 2001) (quoting Daubert, 509 U.S. at 597). "In this inquiry, [we] should consider the indicia of reliability identified in Rule 702, namely, (1) that the testimony is grounded on sufficient facts or data; (2) that the testimony 'is the product of reliable principles and methods'; and (3) that 'the witness has applied the principles and methods reliably to the facts of the case.'" Amorgianos, 303 F.3d at 265 (quoting Fed. R. Evid. 702).

The Supreme Court has identified a number **[**98]** of factors that may be considered in assessing reliability: "(1) whether a theory or technique 'can be (and has been) tested,' (2) 'whether the theory or technique has been subjected to peer review and publication,' (3) a technique's 'known or potential rate of error,' and 'the existence and maintenance of standards controlling the technique's operation,' and (4) whether a particular technique or theory has gained 'general acceptance' in the relevant scientific community." Id. at 266 (citations omitted) (quoting Daubert, 509 U.S. at 593-94). These factors are not a "definitive checklist or test," Daubert, 509 U.S. at 593, as "the gatekeeping inquiry must be tied to the facts of a particular case," Kumho Tire, 526 U.S. at 150 (internal quotation marks omitted), and "will necessarily vary from case to case," Amorgianos, 303 F.3d at 266. HN26[] "[T]he law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determination." Restivo v. Hessemann, 846 F.3d 547, 576 (2d Cir. 2017) (emphasis omitted) (quoting Kumho Tire, 526 U.S. at 142).[5] Accordingly, "[i]n assessing the reliability of an expert opinion, a resort to common sense is not inappropriate." Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp., 103 F. Supp. 2d 268, 286 (S.D.N.Y. 2000).

HN27[] Though "flexible," the reliability inquiry "must focus on the principles and methodology employed by the expert, without **[**99]** regard to the conclusions the expert has reached or [our] belief as to the correctness of those conclusions." Amorgianos, 303 F.3d at 266. The expert's methodology is to be assessed step-by-step, and "it is critical that an expert's analysis be reliable at every step." Id. at 267. "[A]ny step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible." Id. (emphasis omitted) (quoting In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994)).

"But conclusions and methodology are not entirely distinct from one another." GE v. Joiner, 522 U.S. 136, 146, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997). "[N]othing in either Daubert or the Federal Rules of Evidence requires a district **[*468]** court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert," and "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id. That is, "when an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, Daubert and Rule 702 mandate the exclusion of that unreliable opinion testimony." Amorgianos, 303 F.3d at 266.

We offer three additional observations HN28[] regarding the incomplete distinction between "methodology" on the one hand and "conclusions" and "results" on the other. First, a challenge to an expert's **[**100]** methodology will necessarily call into question the conclusions derived from the application of that methodology. Such a challenge does not impermissibly attack an expert's results simply because those results are collaterally damaged by the challenge directed towards the expert's methodology.

Second, robustness testing of an expert's methodology -- by applying that methodology to different data or with different assumptions and examining the results produced by the methodology so applied -- is not an impermissible challenge to the expert's results. Rather, this robustness and sensitivity testing relates directly to two of the Daubert factors articulated by the Supreme Court: whether the methodology "can be (and has been) tested" and the methodology's "known or potential rate of error." Daubert, 509 U.S. at 594. Robustness testing and sensitivity

[5] "While the gatekeeping function requires the district court to ascertain the reliability of [an expert's] methodology, it does not necessarily require that a separate hearing be held in order to do so." Williams, 506 F.3d at 161. Because the parties' Daubert motions have been extensively briefed and the record is well-developed, we conclude that the "formality of a separate hearing [is] not required." Id.; see also In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 130 (2d Cir. 2013) ("[E]ven though the district court did not conduct a Daubert hearing, it considered the admissibility of the expert testimony on the papers.").

testing that produces contradictory or otherwise implausible results strongly suggest that a methodology has been insufficiently tested and that the methodology has a high potential rate of error.

Third, ***HN29***[] inconsistent results are an "indicia of unreliability" in an expert's methodologies. *Lippe v. Bairnco Corp., 99 F. App'x 274, 279 (2d Cir. 2004)*. This principle is clearest in the context of inconsistent results produced by **[**101]** the same methodology. See, e.g., *Louis Vuitton Malletier v. Dooney & Bourke, Inc., 525 F. Supp. 2d 558, 569 (S.D.N.Y. 2007)* (finding "unexplained inconsistency between the results" produced by two iterations of the same methodology to be a basis for exclusion); *United States v. Hermanek, 289 F.3d 1076, 1097 (9th Cir. 2002)* ("Inconsistent results may be an indicator of unreliability."). However, it is no less applicable to multiple methodologies intended to measure the same phenomenon that ultimately produce inexplicably inconsistent results. See *Lippe, 99 F. App'x at 279*; see also *In re Paoli, 35 F.3d at 777* (identifying "inconsistent results" produced by two analyses as supporting the exclusion of an expert's evidence).

HN30[] "When faced with expert testimony that contains both reliable and unreliable opinions, district courts often exclude only the unreliable testimony." *In re Pfizer Inc. Sec. Litig., 819 F.3d 642, 665 (2d Cir. 2016)*. If "the unreliable portion of an opinion can easily be distinguished from testimony that could help the [trier of fact], it may be an abuse of discretion to throw the good out with the bad." Id. However, "[we] are 'not obligated to prune away all of the problematic' elements of an expert's proposed testimony 'to save the remaining portions, however small.'" Id. (quoting *Bricklayers & Trowel Trades Int'l Pension Fund v. Credit Suisse Sec. (USA) LLC, 752 F.3d 82, 96 (1st Cir. 2014))*.

2.1.3 Relevance and Assistance to the Factfinder

HN31[] "Even after determining that a witness is 'qualified as an expert' to testify as to a particular matter, **[**102]** and that the opinion is based upon reliable data and methodology, *Rule 702*[(a)] requires the district court to make a third inquiry: whether the expert's testimony . . . will **[*469]** 'assist the trier of fact'" in understanding the evidence or determining a fact in issue. *Nimely, 414 F.3d at 397* (citations momitted) (quoting *Fed. R. Evid 702*). "This condition goes primarily to relevance," *Daubert, 509 U.S. at 591*, as "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful," *Raskin v. Wyatt Co., 125 F.3d 55, 66 (2d Cir. 1997)* (alteration in original) (quoting *Daubert, 509 U.S. at 591*). Relevance, in turn, is assessed with respect to *Rule 401 of the Federal Rules of Evidence*: "whether it 'ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Campbell, 239 F.3d at 184* (alteration in original) (quoting *Fed. R. Evid. 401*).

Accordingly, the Second Circuit has "consistently held . . . that expert testimony that usurps either the role of the trial judge" in determining "the applicable law or the role of the [trier of fact] in applying that law to the facts before it" is inadmissible because it "by definition does not aid the [trier of fact] in making a decision," *Nimely, 414 F.3d at 397* (quoting *United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991)* and *United States v. Duncan, 42 F.3d 97, 101 (2d Cir. 1994))* (alterations incorporated and citations omitted).

Similarly, ***HN32***[] "expert testimony **[**103]** that seeks to address 'lay matters which [the trier of fact] is capable of understanding and deciding without the expert's help' is not relevant and is therefore inadmissible." *United States v. Jiau, 734 F.3d 147, 154 (2d Cir. 2013)* (quoting *Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 708 (2d Cir. 1989))*. That is, testimony addressing lay matters is not based on an "expert's scientific, technical, or other specialized knowledge," and therefore fails to satisfy the first part of *Rule 702(a)*. Accordingly, it is "inappropriate for experts to become a vehicle for factual narrative." *SEC v. Tourre, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013)* (citing, inter alia, *Highland Capital Mgmt., L.P. v. Schneider, 551 F. Supp. 2d 173, 187 (S.D.N.Y. 2008))*.[6]

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[6] Further, as Tourre recognized, factual narrative offered by an expert is not "traceable to a reliable methodology" and therefore "fails to fulfill Daubert's most basic requirements" in a second way. *950 F. Supp. 2d at 675* (citing *In re Rezulin, 309 F. Supp. 2d at 551*).

HN33[] As with qualifications and reliability, we also disaggregate an expert's opinions before assessing their relevance and helpfulness: the fact that some of an expert's opinions are irrelevant does not render all of the expert's opinions inadmissible. Nonetheless, we need not overly fragment an expert's opinions in order to pick out only the relevant and helpful portions. Cf. *In re Pfizer, 819 F.3d at 665*.[7]

[*470] 2.2 Application at Class Certification

HN34[] "Neither the Supreme Court nor the Second Circuit has definitely decided whether the Daubert standard governs the admissibility of expert evidence submitted at the class certification stage." *Adkins v. Morgan Stanley, 307 F.R.D. 119, 148 (S.D.N.Y. 2015)* (quoting *Chen-Oster v. Goldman, Sachs & Co., 114 F. Supp. 3d 110, 114 (S.D.N.Y. 2015))*. Indeed, **[**104]** the issue remains unsettled nationally and in this district. Compare, e.g., *In re Blood Reagents Antitrust Litig., 783 F.3d 183, 187 (3d Cir. 2015)* ("[A] plaintiff cannot rely on challenged expert testimony, when critical to class certification, to demonstrate conformity with *Rule 23* unless the plaintiff also demonstrates, and the trial court finds, that the expert testimony satisfies the standard set out in Daubert."); *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 812-14 (7th Cir. 2012)*; *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir. 2011)*; *Sher v. Raytheon Co., 419 F. App'x 887, 890-91 (11th Cir. 2011)*; and *Dandong v. Pinnacle Performance Ltd., No. 10 Civ. 8086 (JMF), 2013 U.S. Dist. LEXIS 150259, 2013 WL 5658790, at *13 (S.D.N.Y. Oct. 17, 2013)*, with, e.g., *In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011)* ("The main purpose of Daubert exclusion is to protect juries from being swayed by dubious scientific testimony. That interest is not implicated at the class certification stage where the judge is the decision maker."), and *In re Scotts EZ Seed Litig., 304 F.R.D. 397, 412 n.8 (S.D.N.Y. 2015)* (analyzing "whether each of [the expert's] proposed methodologies satisfy Comcast" rather than conducting a Daubert analysis).

We are persuaded by the view that expert evidence submitted at the class certification stage is subject to the Daubert standard. First, the Supreme Court has suggested in dicta that Daubert applies, commenting that "the District Court concluded that Daubert did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . ." *Dukes, 564 U.S. at 354*. Not only has the Second Circuit characterized this statement as "suggesting that a Daubert analysis **[**105]** may be required at least in some circumstances," *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 129 (2d Cir. 2013)*, but this statement (though dicta) is also "the only discussion of [the issue] by the Supreme Court of which we are aware" such that we consider it "to be persuasive authority here," *Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 108 (2d Cir. 2010)*.

Second, we interpret the Second Circuit's decisions in *In re IPO*, *Bombardier*, and *In re U.S. Foodservice*, as supporting a more searching examination of expert testimony offered at the class certification stage. See 1 McLaughlin on Class Actions § 3:14 (14th ed.) (Westlaw 2017) (describing the Second Circuit's "substantial expansion of the extent to which district courts may evaluate expert testimony on class certification" and citing, inter alia, In re IPO and Bombardier). Though the Second Circuit did not decide in In re U.S. Foodservice whether or when a Daubert analysis forms a necessary component of a district court's rigorous analysis," it reasoned that "[i]n In re IPO, we disavowed our earlier statement that 'an expert's testimony may establish a component of a *Rule 23* requirement simply by not being fatally flawed.'" *In re U.S. Foodservice, 729 F.3d at 129-30* (quoting *In re IPO, 471*

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[7] We note that expert opinion is additionally subject to the requirements of *Rule 403 of the Federal Rules of Evidence* and "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Nimely, 414 F.3d at 397* (quoting *Fed. R. Evid. 403*). Accordingly, some courts have subjected expert opinion offered at, or prior to, the class certification to the strictures of *Rule 403*. See, e.g., *Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33, 44, 47 (S.D.N.Y. 2016)*; *In re Air Cargo Shipping Servs. Antitrust Litig., No. 06 md-1175 (JG)(VVP), 2014 U.S. Dist. LEXIS 180914, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014)*.

However, we decline to apply *Rule 403* to expert testimony offered at this stage. *Rule 403*'s concerns regarding unfair prejudice and misleading the jury have less force in the class certification context, where the Court serves as the trier of fact. Cf. *Nimely, 414 F.3d at 397* (identifying "the uniquely important role that *Rule 403* has to play in a district court's scrutiny of expert testimony, given the unique weight such evidence may have in a jury's deliberations" (emphasis added)).

F.3d at 41). Indeed, given the Second Circuit's direction that we consider "the relevant evidence admitted at the class **[**106]** certification stage," In re IPO, 471 F.3d at 42 (emphasis added), it appears to us that the standard rules of evidence should apply, see Chen-Oster, 114 F. Supp. 3d at 114 ("Daubert is an amplification of Rule 702, **[*471]** and the Federal Rules of Evidence apply generally to 'proceedings' in the courts of the United States.").

Third, at least two leading treatises endorse this view. "An undiluted Daubert analysis is consonant with a class certification standard that requires a determination by a preponderance of the evidence that each Rule 23 requirement has been met, and under which head-to-head weighing of competing expert evidence is proper." 1 McLaughlin on Class Actions § 3:14 (14th ed.) (Westlaw 2017). "It is not sufficient for the court simply to determine that the testimony could evolve into something admissible by the time of trial." 7AA Charles A. Wright et al., Federal Practice & Procedure § 1785 (4th ed.) (Westlaw 2017).

HN35[] Though we conclude that *Daubert* applies, our inquiry is guided by the purpose for which the evidence is introduced -- establishing the various class certification requirements. "[T]he question is not whether a jury at trial should be permitted to rely on the expert's report to find facts as to liability, but rather whether the Court may utilize it **[**107]** in deciding whether the requisites of Rule 23 have been met." Pinnacle Performance, 2013 U.S. Dist. LEXIS 150259, 2013 WL 5658790, at *13 (alterations incorporated) (quoting In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 77 (E.D.N.Y. 2000)); see also Fort Worth Emps.' Ret. Fund v. J.P. Morgan Chase & Co., 301 F.R.D. 116, 126 (S.D.N.Y. 2014) (limiting the Daubert inquiry "to whether or not the expert reports are admissible to establish the requirements of Rule 23" (quoting Pinnacle Performance, 2013 U.S. Dist. LEXIS 150259, 2013 WL 5658790, at *13)).

However, "[a] conclusion that proffered expert evidence is sufficiently reliable and relevant to pass Daubert muster does not end the inquiry on class certification." 1 McLaughlin on Class Actions § 3:14 (14th ed.) (Westlaw 2017); see In re IPO, 471 F.3d at 42 ("[W]e also disavow the suggestion . . . that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed."). Rather, expert opinion deemed to be admissible comprises only one part of "the relevant evidence admitted at the class certification stage" to be weighed in determining "whether each Rule 23 requirement has been met," In re IPO, 471 F.3d at 42, and each requirement must still be established by a preponderance of the evidence, see Bombardier, 546 F.3d at 202.

Therefore, ***HN36***[] to the extent that flaws in expert testimony proffered at class certification do not warrant that testimony's exclusion by the Court as gatekeeper under Daubert at the threshold, those flaws may nonetheless be considered in the Rule 23 analysis undertaken by the Court as trier of fact. **[**108]** Put differently, though a Daubert motion is an improper venue in which to take sides in a "battle of the experts" offered by competing parties, In re Joint E. & S. Dist. Asbestos Litig., 52 F.3d 1124, 1135 (2d Cir. 1995), disputes between experts must be resolved if necessary to the Rule 23 analysis, see In re IPO, 471 F.3d at 42.

III. EXCHANGE-BASED ACTION

Exchange plaintiffs seek certification of a class comprised of traders of Eurodollar futures (EDF) contracts and options on EDF contracts. Specifically, they seek certification of a class defined as follows:

> All persons, corporations and other legal entities (other than Defendants, their employees, affiliates, parents, subsidiaries, and co-conspirators) ("Eligible Persons") that transacted in Eurodollar futures and options on Eurodollar futures on the Chicago Mercantile Exchange between January 1, 2005 and May 17, 2010 (the "Class Period") and that were harmed or satisfy one or more of "A," "B," or "C" below.[8]

[8] We have previously broken the class period into several "Periods" to facilitate our discussion of statutes of limitations, inquiry notice, and tolling. "Period 0" refers to the period between the start of the class period and August 8, 2007. "Period 1" refers to the period between August 9, 2007 and May 28, 2008. "Period 2" refers to the period between May 29, 2008 and April 14, 2009. "Period 3" refers to the period between April 15, 2009 and the end of the class period. See LIBOR IV, 2015 U.S. Dist. LEXIS 147561 at *277-78, 2015 WL 6243526, at *115-16. We use "Suppression Period" to refer to Periods 1, 2, and 3.

[*472] The proposed class definition then defines three subcriteria, the second of which consists of three sub-subcriteria and the third of which consists of two sub-subcriteria:

> SUBPART A. Eligible Persons that sold a Eurodollar futures contract, or bought a put option or sold a call option on Eurodollar futures before August 7, 2007 and purchased **[**109]** all or part of this short position back at the final expiration formula price of a Eurodollar futures contract expiring after August 7, 2007 and before May 17, 2010.
>
> SUBPART B. Eligible Persons that (1) purchased Eurodollar futures contract(s) or call options on Eurodollar futures on the following dates: April 7, 2006, August 17, 2006, October 26, 2006, and December 22, 2006; or (2) sold Eurodollar futures contracts or purchased put options on Eurodollar futures on the following dates: September 29, 2005, November 28, 2005, June 30, 2006, September 1, 2006, November 29, 2006, February 28, 2007, March 1, 2007, July 30, 2007, and August 6, 2007; or (3) purchased or sold Eurodollar futures contracts (or options) and that were harmed between January 1, 2005 and August 6, 2007 inclusive.[9]
>
> SUBPART C. Eligible Persons that initiated a Eurodollar futures contract or options position on or after April 15, 2009 and on or before May 17, 2010 ("Period 3"), and who satisfy "1" or "2" below.
>
> > 1. Eligible Persons included in "C" are those that purchased or sold a Eurodollar futures or options contract to initiate a position during Period 3 and that were harmed.
> >
> > 2. Eligible Persons included in "C" are also **[**110]** those that purchased a Eurodollar futures contract (including Eurodollar futures contracts the expiration for which was less than 365 calendar days after the date of such purchase) to initiate a long position during Period 3, and continued to hold all or part of such long position until liquidating the position after Period 3.

The operative Corrected Fourth Amended Consolidated Class Action Complaint, identified panel banks Bank of America, Barclays, Citi, Deutsche Bank, JPMorgan Chase, Rabobank, and UBS (and certain affiliates of these panel banks) as defendants. (Corrected Fourth Am. Consolidated Class Action Compl. ("Corrected 4AC") ¶¶ 34-38, 45, 57-59, 66-68, 77-78, Dec. 11, 2017, ECF No. 2363.) Exchange plaintiffs assert five claims, four under the *Commodities Exchange Act* (CEA) and the fifth under the *Sherman Act*. The CEA claims are asserted against all defendants, whereas the antitrust claims are asserted against only Bank of America, Citi, and JPMorgan Chase consistent with our rulings in LIBOR VI, see *2016 U.S. Dist. LEXIS 175929, 2016 WL 7378980, at *25*, slip op. at app. A-1. (Corrected 4AC ¶¶ 668-705.)

The scope of claims remaining in this action has also been narrowed by several settlements between Exchange plaintiffs and **[**111]** particular defendants. We preliminarily approved a settlement with Barclays, **[*473]** see Dec. 2, 2014 Order, *2014 U.S. Dist. LEXIS 172487, 2014 WL 6851096*, ECF No. 861, and we deferred preliminary approval of the settlements with Citi and Deutsche Bank (Letter from Christopher Lovell & David Kovel to the Court, Oct. 11, 2017, ECF No. 2307) pending our resolution of the class-certification motions. Bank of America and JPMorgan Chase have also reached settlements with Exchange plaintiffs, though no documentation memorializing the settlement has yet been filed.[10] (Jan. 18, 2018 Hr'g Tr. ("Hr'g Tr.") 24:10-25:21.) As a result of these settlements, only CEA claims remain in this action: those based on trader-based manipulation under direct and vicarious liability theories against Rabobank, and those based on persistent suppression under direct, vicarious liability, and aiding and abetting theories against UBS. (Corrected 4AC ¶¶ 668-705.)

As part of briefing the motion for class certification, the parties have submitted reports and deposition testimony from eight experts. Seven of these experts' opinions have prompted Daubert motions. Rabobank has moved to exclude the opinions of (1) Dr. H. Nejat Seyhun, (2) Dr. Janet Netz, (3) Mr. Craig **[**112]** Beevers, and (4) Mr. Eric

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[9] The dates in subparts A and B of the proposed class definition therefore do not track exactly the Periods we have previously specified. We follow Exchange plaintiffs' proposed definition where applicable.

[10] Though no longer a defendant following our personal-jurisdiction rulings in LIBOR IV and LIBOR VI, HSBC has also settled with the Exchange plaintiffs (Letter from Christopher Lovell & David Kovel to the Court, Oct. 11, 2017, ECF No. 2307), and we similarly deferred preliminary approval of that settlement.

Miller. Exchange plaintiffs have moved to exclude the opinions of (5) Dr. Robert Willig, (6) Dr. Christopher Culp, and (7) Dr. R. Glenn Hubbard. We first consider the Daubert motions before proceeding to the motion for class certification itself.[11]

1. Rabobank's Daubert Motions

1.1 Dr. Seyhun

Exchange plaintiffs offer two reports from Dr. H. Nejat Seyhun: (1) an initial report dated February 2, 2017 (Decl. of David Kovel ex. G., July 10, 2017, ECF No. 2071); and (2) a rebuttal report dated May 3, 2017 (Decl. of Jefferson Bell ex. 5, June 30, 2017, ECF No. 2008). We refer to these as the Seyhun Initial Report and the Seyhun Rebuttal Report. Across these two reports, Dr. Seyhun's opinions relate primarily to two subjects: (1) the determination of what LIBOR, and each bank's LIBOR submissions, would have been but-for the alleged manipulative conduct, and (2) the determination of what effect changes in LIBOR have on the trading prices of EDF contracts and options. Rabobank does not challenge Dr. Seyhun's qualifications, and we agree that Dr. Seyhun is well qualified to offer these opinions.[12]

Models of But-For Published LIBOR and But-For LIBOR Submissions

Dr. Seyhun **[**113]** first opines that certain statistical and mathematical analyses can demonstrate that the defendants' alleged conduct impacted LIBOR and calculate the amount of impact. (Seyhun Initial Report **[*474]** ¶ 12.) To support this conclusion, Dr. Seyhun offers several models for estimating but-for LIBOR and each bank's but-for LIBOR submissions as evidence that these statistical and mathematical analyses are available. (E.g., Seyhun Initial Report ¶ 87.) In his initial report, Dr. Seyhun offers two methodologies that involve first the calculation of but-for published LIBOR and then the derivation of each bank's but-for LIBOR submission from but-for published LIBOR. In his rebuttal report, Dr. Seyhun offers two additional models that are entirely distinct from the two models presented in his initial report. In each of these models, Dr. Seyhun first calculates but-for LIBOR submissions for each panel bank and then applies the BBA's trimming methodology -- which excludes the top quartile of submissions and the bottom quartile of submissions and averages the remaining submissions -- in order to determine but-for published LIBOR.

The two models presented in Dr. Seyhun's initial report each begin with the **[**114]** calculation of but-for published LIBOR. Dr. Seyhun models the mathematical relationship between LIBOR and a reference rate on a daily basis during a "clean period" using an ordinary least squares (OLS) regression,[13] and uses that relationship to predict LIBOR over the Class Period. Though Dr. Seyhun varies the reference rate and clean period at various points in his report,[14] Dr. Seyhun primarily uses the ICAP-Ask rate[15] as the reference rate and the aggregated period from 2000

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[11] UBS also submitted two expert reports from Dr. Janusz Ordover: (1) an initial report dated April 21, 2017 (Decl. of Jefferson Bell ex. 1, June 30, 2017, ECF No. 2008); and (2) a sur-rebuttal report dated June 30, 2017 (Decl. of Jefferson Bell ex. 2, June 30, 2017, ECF No. 2008). Exchange plaintiffs did not seek to exclude any portion of Dr. Ordover's reports. UBS also did not file any Daubert motions.

[12] Dr. Seyhun is the Jerome B. and Eilene M. York Professor of Business Administration and a Professor of Finance at the University of Michigan's Ross School of Business. He holds a Ph.D. and M.S. from the University of Rochester and a B.S. from Northwestern University, and has written a number of published papers on various finance and securities topics. (Seyhun Initial Report app. B.)

[13] "Specifically, the ordinary least-squares (OLS) method of linear regression solves for a [line of best fit] that minimizes the sum of the squared residuals." *Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 397 n.5 (S.D.N.Y. 2014)*. Each "residual" is the difference between the actual observed value of the dependent variable and the value of the dependent variable estimated using the line of best fit.

through 2004 combined with 2013 as the clean period. (Seyhun Initial Report ¶¶ 70-78, tbl.2.2.) Dr. Seyhun defines LIBOR "artificiality" to be the difference between his calculated but-for published LIBOR and actual published LIBOR and tests the statistical significance of the artificiality during the Suppression Period (but not Period 0) using another regression. (Seyhun Initial Report tbl.2.3.)

Dr. Seyhun also estimates but-for LIBOR using the ICAP-Ask rate as the reference rate in a second regression. Otherwise identical, this second ICAP-Ask model uses a clean period of 2000 through 2002 aggregated with 2013. Dr. Seyhun presents an analysis of the statistical significance of his artificiality estimates **[*475]** based on **[**115]** this specification (Seyhun Initial Report tbl.2.4), but does not present the results of the regression itself and does not reference this 2000-2002 plus 2013 regression elsewhere in his initial report.

Dr. Seyhun then derives, for each panel bank, but-for LIBOR submissions from the first ICAP-Ask-based model of but-for LIBOR using two different methods.[16] Under the first method (the "Relative Artificiality" model), Dr. Seyhun assesses the "relative artificiality" of a bank's submission by calculating the difference between a bank's actual submission and actual published LIBOR. If the bank's submission was not trimmed from the calculation of published LIBOR, the relative artificiality equals the difference between published LIBOR and the bank's LIBOR submission. If the bank's submission was trimmed from the calculation of published LIBOR by virtue of being higher than the third quartile submission (or lower than the first quartile submission), Dr. Seyhun limits the bank's relative artificiality to the relative artificiality of the highest (or lowest) submission that was retained in the actual LIBOR calculation. This "relative artificiality" in the bank's submission is then added to overall **[**116]** LIBOR artificiality to estimate the total extent of artificiality in the bank's submission. (Seyhun Initial Report ¶¶ 92-94, figs.1E1-1E17.)

Under the second method (the "CDS Spread" model), Dr. Seyhun first estimates, for each panel bank, the relationship between the bank's LIBOR submission and the spreads on the bank's credit default swaps (CDS).[17] Dr. Seyhun uses a regression specified as the natural logarithm of the LIBOR submission against the natural logarithm of the CDS spread and a set of "dummy" indicator variables corresponding to each day, over a clean period from May 18, 2010 to December 31, 2015.[18] Then, for each bank, Dr. Seyhun calculates the percentage deviation of the bank's CDS spread from the average CDS spread across all panel banks and uses that deviation to calculate the

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[14] Dr. Seyhun also uses Federal Reserve Eurodollar Rate (FRED) as the reference rate in part of his analysis. (Seyhun Initial Report 9191 59-69, tbl.2.1.) However, his subsequent calculations do not rely on but-for LIBOR calculated using the FRED rate.

[15] The ICAP-Ask rate is a data series, published alongside the ICAP-Bid rate, by ICAP Capital Markets LLC. In response to subpoenas issued in this case, ICAP explained that this rate is "meant to provide general 'market color' regarding the range of offer rates by top tier banks on unsecured liabilities in the overnight wholesale money market" and was "formed from pricing indications and other market information, including but not limited to the range of offers that ICAP's brokers observe in the market." (Decl. of Jamie Heine ex. 41, July 1, 2017, ECF No. 2031.) The parties dispute whether the ICAP-Ask rate in fact represents ask (or offer) rates, and ICAP explained that it "interpreted the range that it quoted as a high and a low for the expected range for trades done by upper tier banks," which "Bloomberg's methodology converted . . . to a bid and an offer." (Decl. of Jamie Heine ex. 41, July 1, 2017, ECF No. 2031.) In referring to this rate as the "ICAP-Ask rate," we do not suggest that the data series in fact corresponds to ask (or offer) rates rather than bid rates or some other indicator.

[16] Dr. Seyhun suggests that these methods apply only during the Suppression Period and not Period 0, but presents data for both periods. (Seyhun Initial Report ¶¶ 91-102, figs.1E1-1F17.)

[17] "[A] credit default swap allows an investor to buy . . . in essence an insurance policy, to protect him against the probability of default by requiring the seller of protection to pay the investor the par value if there is a default before the bond matures. A credit default swap spread [is] the price the seller of protection charges, capturing 'the spread between a risk-free bond and . . . a risky bond.'" *In re Enron Corp. Sec. Derivative & "ERISA" Litig., 529 F. Supp. 2d 644, 764 (S.D. Tex. 2006)*.

[18] A logarithm (or log) is the mathematical inverse of exponentiation: if x taken to the yth power equals z, the log base x of z equals y. To take a specific example: 10 to the third power equals 1000, and the log base 10 of 1000 equals 3. The natural logarithm is one specific logarithm in which the base is the mathematical constant e, which is equal to approximately 2.7183. Because Dr. Seyhun has specified this regression using the natural log of LIBOR submissions and the natural log of CDS spreads, the results may be interpreted in percentage terms.

percentage difference between the bank's but-for LIBOR submission from published LIBOR, and applies that difference to but-for LIBOR to calculate the bank's but-for LIBOR submission. (Seyhun Initial Report ¶¶ 95-102.)

In his third model (his rebuttal report's first model), which we refer to as the "Rebuttal Period 0 Model," Dr. Seyhun reviews documents **[**117]** to identify "events" of trader-based manipulation and determines whether the event has "a clear directionality," finding 63 "events" over 45 different days. (Seyhun Rebuttal Report ¶ 488.) Independently, to estimate each bank's but-for **[*476]** LIBOR submission, Dr. Seyhun regresses each bank's LIBOR submission on a given day against the ICAP-Ask rate, a one-day lag of the ICAP-Ask rate,[19] a set of dummy variables for each month over Period 0, a first set of interaction terms between the monthly dummy variables and the ICAP-Ask rate, and a second set of interaction terms between the monthly dummy variables and the lagged ICAP-Ask rate. (Seyhun Rebuttal Report ¶¶ 489-91.) That is, Dr. Seyhun estimates, for each panel bank on a given day, the bank's but-for LIBOR submission based on, among other variables, that day's ICAP-Ask rate and the prior day's ICAP-Ask rate. From these but-for LIBOR submissions, Dr. Seyhun then calculates but-for LIBOR by applying the BBA's trimming methodology. Comparing the results from this model and his documentary analysis, Dr. Seyhun concludes that there is "confirmed manipulation by at least one bank on 45 different occasions." (Seyhun Rebuttal Report ¶ 494.)

In his **[**118]** fourth model (his rebuttal report's second model), which we refer to as the "Rebuttal Suppression model," Dr. Seyhun conducts another regression in order to estimate each panel bank's but-for LIBOR submissions. He regresses, using an aggregated clean period of January 1, 2004 through August 7, 2007 and May 18, 2010 through December 31, 2012,[20] each bank's actual LIBOR submission against (1) the ICAP-Ask rate, (2) a one-day lag of the ICAP-Ask rate, (3) the one-month overnight indexed swap (OIS) rate, (4) the standard deviation of the panel banks' CDS spreads, and (5) the difference between the bank's CDS spread and the panel banks' mean CDS spread. Dr. Seyhun then calculates "artificiality" during the Suppression Period as the difference between a bank's actual submission and the bank's but-for submission estimated using his five-variable regression. As in his initial report, Dr. Seyhun also tests the statistical significance of his measured artificiality.

Rabobank contends that Dr. Seyhun's models, and his opinions based on these models, are unreliable because (1) the four models yield directionally inconsistent results; (2) the four models produce implausible findings of artificiality, **[**119]** including substantial artificiality during purported "clean" periods; (3) the ICAP-Ask models and Rebuttal Period 0 models produce estimates of artificiality inconsistent with Dr. Netz's opinions and Exchange plaintiffs' allegations; and (4) his Relative Artificiality and CDS Spread models of but-for LIBOR submissions are reliant on unreliable estimates of but-for LIBOR improperly estimated using 2013 as part of the clean period. We consider each argument in turn.

1.1.1.1. Internal Inconsistencies

Rabobank, relying on Dr. Hubbard's opinions, contends that Dr. Seyhun's methodologies are internally inconsistent. According to Rabobank and Dr. Hubbard, across Dr. Seyhun's four models of but-for **[*477]** LIBOR (the two ICAP-Ask based models presented in the initial report, the Rebuttal Period 0 model, and the Rebuttal Suppression model), at least one model finds upward manipulation on 65% of days in Period 0 and at least one model finds downward manipulation of LIBOR on 89% of days in Period 0. Similarly, across Dr. Seyhun's four models of but-for LIBOR submissions (the Relative Artificiality and CDS Spread models based on the first ICAP-Ask-based model of

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[19] Generally, the nth "lagged" value of explanatory variable refers to that variable's value n time periods prior. In Dr. Seyhun's models, which are daily, the third lag of an explanatory variable, for example, would refer to that variable's value three days earlier.

[20] The text of Dr. Seyhun's report indicates that his clean period is "January 1, 2004 to August 7, 2007 and May 18, 2010-Dec. 31, 2013." (Seyhun Rebuttal Report ¶ 497.) However, in a footnote, he states that "[t]he end of my estimation period is December 31, 2012," acknowledging Dr. Hubbard's observation that ICAP-Ask remains constant for an eight-month period in 2013. (Seyhun Rebuttal Report ¶ 497 n.301.) We accordingly assume that the clean period for this regression ended in 2012 as Dr. Seyhun states in a footnote rather than in 2013 as Dr. Seyhun states in the text of his report.

but-for LIBOR, the Rebuttal Period 0 model, **[**120]** and the Rebuttal Suppression model), at least one model finds upward manipulation of Rabobank's LIBOR submission on 95% of days in Period 0 and at least one model finds downward manipulation on 84% of days in Period 0.

Because the sum of each set of figures is greater than 100%, Rabobank asserts that this "mathematical impossibility" establishes the unreliability of Dr. Seyhun's models. (Rabobank Seyhun Mem. 8; Hubbard Rebuttal Report ¶ 17 & n.54.) Exchange plaintiffs do not dispute Rabobank's cited statistics, but contend that those statistics are meaningless because Dr. Seyhun's models are presented as alternatives and their results therefore "are not meant to be combined." (Exch. Pls.' Seyhun Opp'n 11.)

Rabobank's "mathematical impossibility" argument is not necessarily persuasive, as the 100% threshold on which the argument relies is of little significance here. An expert's models are not necessarily questionable if that percentage exceeds 100%; the extent to which the models disagree matters more than the mathematical sum of certain results that they produce. For example, if an expert presented two models, one of which found upward manipulation on days amounting to 51 days of a **[**121]** 100-day class period and the other of which found downward manipulation on the remaining 49 days but also one day in which the first model found upward manipulation, that one day of conflicting results does not necessarily call into question the entirety of the models. Conversely, an expert's models may be questionable even if the relevant percentages did not exceed 100%.[21] Further, Dr. Seyhun's models are structured differently -- at least in part -- in order to reflect differences between Period 0 and the Suppression Period. (Seyhun Initial Report ¶¶ 81-102; Seyhun Rebuttal Report ¶¶ 487-500.)

Nonetheless, in this case, the inconsistencies in the results produced by Dr. Seyhun's models do call into question the models' reliability. Even when intended to measure artificiality during the same period of time, Dr. Seyhun's models produce directionally inconsistent results a substantial portion of the time. Even though all three models are intended to estimate artificiality in Rabobank's LIBOR submissions during Period 0, the Rebuttal Period 0 model produces results directionally inconsistent[22] from those produced by and the CDS Spread and Relative Artificiality models on 49% and 40% of days **[**122]** in Period 0, respectively. (Hubbard Rebuttal Report ¶ 20, tbl.1.) Similarly, the Rebuttal Period 0 model produces directionally inconsistent estimates of artificiality in LIBOR from the two ICAP-Ask-based models of but-for LIBOR on 44% and 42% of the days in **[*478]** Period 0. (Hubbard Rebuttal Report ¶ 24, tbl.2.)

Accordingly, Exchange plaintiffs cannot seriously dispute that Dr. Seyhun's models produce meaningfully different estimates of artificiality, in directionally inconsistent ways. (Hubbard Rebuttal Report exs. 21A-21Q, 22.) Rabobank has not "manipulated" Dr. Seyhun's models as Exchange plaintiffs suggest by comparing the results produced by one model to those produced by other models; rather, Rabobank identified pervasive inconsistencies. Even if the models are formally designated "alternatives," each is nonetheless intended to estimate the same measures: the amount of artificiality in LIBOR and each panel bank's LIBOR submissions. Some minor disagreement between the models would naturally be expected, but Dr. Seyhun's models produce internally inconsistent results on more than half of days. Inconsistencies of this magnitude indicate a lack of reliability. See *Lippe, 99 F. App'x at 279* ("[The expert] failed **[**123]** to explain why her [two] analyses did not yield similar results -- after admitting that they should."); *In re Fed. Home Loan Mortg. Corp. (Freddie Mac) Secs, 281 F.R.D. 174, 181 (S.D.N.Y. 2012)* ("[The expert's] analysis changed so many times in important ways and was so internally inconsistent that I found it unreliable and unpersuasive."). Dr. Seyhun has not made a similar concession, but his models are, at bottom, intended to measure the same things -- artificiality in LIBOR and LIBOR submissions.

Exchange plaintiffs argue that we should reject Lippe and In re Freddie Mac, contending that we should instead follow *U.S. Information Systems, Inc. v. IBEW Local Union No. 3, 313 F. Supp. 2d 213, 236 (S.D.N.Y. 2004)*, ***HN37***[] which held that "purported inconsistencies in [an expert's] methodology go to the weight, not the admissibility of

[21] For example, if an expert presented two models, one of which found upward manipulation on days amounting to 49% of the class period and the other of which found downward manipulation on exactly the same days, we would have serious doubts as to the reliability of those models even though the sum of the percentages -- 49% plus 49% -- is less than 100%.

[22] That is, where one model finds positive artificiality and another model finds negative artificiality.

his testimony." (Exch. Pls.' Seyhun Opp'n 10 n.9.). However, these cases establish a distinction between inconsistencies within an expert's application of a single methodology on the one hand and inconsistencies across an expert's multiple methodologies on the other. U.S. Information Systems establishes at most that the former was not a basis for exclusion in that case, see *313 F. Supp. 2d at 235-36* (addressing an expert's "inconsistent application of methodology").[23] By contrast, Lippe, Freddie Mac, and Dr. Seyhun's multitude of models all present the latter issue. See **[**124]** *Lippe, 99 F. App'x at 279* (identifying an expert's failure "to explain why her [two alternative] analyses did not yield similar results"); *Freddie Mac, 281 F.R.D. at 179-81* (finding an expert's two event studies "internally inconsistent"). In sum, we conclude that the internally inconsistent nature of Dr. Seyhun's models seriously undermine their reliability.

1.1.1.2. Implausible Artificiality Findings

Next, Rabobank argues that Dr. Seyhun's ICAP-Ask-based models of but-for LIBOR and his Rebuttal Period 0 model are unreliable because the three models identify artificiality in published LIBOR on a substantial percentage of days during the models' respective clean periods. Specifically, the first ICAP-Ask-based model identifies artificiality on 57% of days between 2000 and 2004, the second ICAP-Ask-based model identifies artificiality on 39% of days between 2000 and 2002, and the Rebuttal Period 0 model identifies artificiality on every single day in Period 0. (Rabobank Seyhun Mem. 9.)

Rabobank's statistics are not entirely fairly presented, as they represent percentages of only certain portions of the clean periods underlying the three models **[*479]** rather than the entireties of the clean periods. Nonetheless, restating those percentages slightly to **[**125]** represent percentages of the entire clean periods, Dr. Seyhun's models continue to find significant artificiality during clean periods. The first ICAP-Ask-based model identifies artificiality on 50% of clean-period days,[24] the second ICAP-Ask-based model identifies artificiality on 29% of clean-period days,[25] and the Rebuttal Period 0 identifies artificiality on at least 58% of clean-period days.[26]

As to the ICAP-Ask-based models of but-for LIBOR, Exchange plaintiffs again do not dispute Rabobank's statistics, but contend that the clean periods in those models "were not 100% clean periods," "merely cleaner periods." (Exch. Pls.' Seyhun Opp'n 12 n.11.) Accordingly, they reassure us, the ICAP-Ask-based models retain validity because they find comparatively more artificiality during the Class Period than during the clean periods.

We seriously question whether a period with artificiality on half of days, or even 29% of days, may be fairly characterized as a "clean" period. As an initial matter, this defense is plainly inconsistent with Exchange plaintiffs' theory of the case, which does not extensively allege manipulation between 2000 and 2004. But even had Exchange plaintiffs done so, the reliability **[**126]** of Dr. Seyhun's regressions -- ultimately intended to gauge the relationship between LIBOR and ICAP-Ask absent the defendants' challenged conduct -- would be seriously undermined by their incorporation of data pervasively affected by that very conduct. Cf. *Fogarazzo v. Lehman Bros., Inc., 263 F.R.D. 90, 105 & n.124 (S.D.N.Y. 2009)* (expressing skepticism regarding an expert's use of control periods that had been affected by the defendants' challenged conduct). Moreover, this belated rationalization is belied by Dr. Seyhun's opinions. In offering his ICAP-Ask-based models of but-for LIBOR in his initial report, Dr.

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[23] We also question whether a single methodology, if applied inconsistently by an expert, could be properly termed a "methodology" at all, let alone a reliable one.

[24] Rabobank's 57% figure is calculated as 700 days with identified artificiality in 2000 through 2004, divided by 1225 trading days in that period. In the 251 trading days in 2013, the first ICAP-Ask based model identifies 31 days with artificiality; 50% is calculated as the sum of 700 and 31 divided by the sum of 1225 and 251. (Hubbard Initial Report ex. 9.1.)

[25] Rabobank's 39% figure is calculated as 284 days with identified artificiality in 2000 through 2002, divided by 732 trading days in that period. Because the second ICAP-Ask-based model does not identify any artificiality in 2013, 29% is calculated as 284 divided by the sum of 732 and 251, the total number of trading days in the entire clean period. (Hubbard Initial Report ex. 9.2.)

[26] Even assuming the Rebuttal Period 0 model identifies no artificiality whatsoever in the second part of its clean period, Period 0 accounts for 58% of trading days in the Rebuttal Period 0 model's aggregate clean period.

Seyhun specifically opined that "[b]y definition, the estimation period should be free from manipulation" and suggested that a clean period incorporating the period between May 18, 2010 and December 31, 2012 was inappropriate because "there is some evidence that suggests that some manipulation may have continued into 2012 after the Class Period." (Seyhun Initial Report ¶ 72, n.32 (emphasis added).)[27]

Our confidence in the first ICAP-Ask-based model is further undermined by the fact that in addition to finding substantial artificiality between 2000 and 2004, it apparently finds no significant artificiality **[**127]** during Period 0. (Hubbard Initial Report **[*480]** ¶ 125, ex. 10.2.). That is, this model identifies significant LIBOR artificiality when Exchange plaintiffs have not alleged manipulation, and no significant LIBOR artificiality when they have so alleged. While sporadic findings of artificiality in clean periods may be attributable to statistical noise, this exactly-backwards relationship suggests either an unreliable model or a deeper flaw in Exchange plaintiffs' theory of the case. Because the Relative Artificiality and CDS Spread models of but-for LIBOR submissions are reliant on the first ICAP-Ask-based model's estimates of but-for LIBOR, the reliability of those models is necessarily called into question as well.

As to the Rebuttal Period 0 model, Exchange plaintiffs respond first that Dr. Seyhun's Rebuttal Period 0 model "predicts artificiality [only] on days where there exists documented evidence that is consistent in direction with the model's prediction" (Exch. Pls.' Seyhun Opp'n 11), and second that the Rebuttal Period 0 Model "breaks up Period 0 into separate control and treatment periods" based on "documented evidence of TBM," (Exch. Pls.' Seyhun Opp'n 16).

Exchange plaintiffs' first **[**128]** response is little more than definitional sleight-of-hand. Rabobank's contention is that the Rebuttal Period 0 model finds mathematical artificiality on 100% of days in Period 0 -- that is, the Rebuttal Period 0 model calculates a but-for LIBOR that is different from actual published LIBOR. By contrast, Exchange plaintiffs' response defines "artificiality" to mean mathematical artificiality supported by "corroborating evidence" based on Dr. Seyhun's assessment of documents.

This terminological slipperiness is unavailing. In contending that Dr. Seyhun's models are in fact capable of identifying trader-based manipulation, Exchange plaintiffs argue that "on days that documents do not show evidence of manipulation, the TBM Model finds positive artificiality only 51% of the time" and "negative artificiality only 49% of the time." (Exch. Pls.' Seyhun Opp'n 17 n.18 (emphasis added) (citing Seyhun Rebuttal Report ¶ 493).) But this statement is wholly irreconcilable with their contention now that the Rebuttal Period 0 "predicts artificiality [only] on days where there exists documented evidence that is consistent in direction with the model's prediction." (Exch. Pls.' Seyhun Opp'n 11.) Accepting **[**129]** this latter statement as true, then on days where no documents show evidence of manipulation, the TBM Model should find positive artificiality 0% of the time and negative artificiality 0% of the time. But it does not.

Ultimately, Dr. Seyhun's Rebuttal Period 0 Model finds mathematical artificiality on 100% of days in Period 0, and we conclude that this implausible finding of (mathematical) artificiality undermines the reliability of the Rebuttal Period 0 Model. Exchange plaintiffs' attempt to obfuscate this reality by shifting the definition of "artificiality" to include a requirement of documentary corroboration does not affect our conclusion regarding the unreliability of Dr. Seyhun's methodology. Indeed, accepting this revised definition of "artificiality," Dr. Seyhun's models would be wholly incapable of identifying instances of TBM-caused artificiality. The documentary corroboration requirement becomes the only filter separating true "artificiality" from the mathematical artificiality identified by the Rebuttal Period 0 Model on 100% of days in Period 0, even though the days may otherwise be difficult to distinguish.[28] Exchange plaintiffs' dual contentions -- that **[*481]** the Rebuttal Period **[**130]** 0 model is capable of identifying

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[27] Similarly, in describing Dr. Seyhun's analyses, Dr. Netz explains that "Dr. Seyhun proposed to model the relationship between LIBOR and a benchmark interest rate during a time period that was not subject to manipulation." (Netz Rebuttal Report 5 (emphasis added).)

[28] This reliance would be especially troubling in light of Exchange plaintiffs' contentions, and Mr. Beevers's opinions, that many instances of trader-based manipulation would have occurred verbally and are not documented. (Beevers Initial Report ¶¶ 118-24.)

trader-based manipulation independent of documentary evidence on the one hand (based on its findings of mathematical artificiality) but that the Rebuttal Period 0 model does not identify artificiality on 100% of days in Period 0 (because it requires documentary evidence) -- cannot be reconciled.

Nor do we find much comfort in Exchange plaintiffs' assurances that Dr. Seyhun's Rebuttal Period 0 model finds positive (mathematical) artificiality on 71% of days with documentary evidence of upward manipulation and finds negative (mathematical) artificiality on 75% of days with documentary evidence of downward manipulation. (Exch. Pls.' Seyhun Opp'n 17 n.18.) Rephrasing slightly, this contention acknowledges that even on days for which Dr. Seyhun has already identified documentary evidence of manipulation, the Rebuttal Period 0 model has an error rate between 25% and 29%.

Exchange plaintiffs' second response, that the Rebuttal Period 0 model in fact divides Period 0 into a control period and a treatment period, is difficult to evaluate based on Dr. Seyhun's report, and Rabobank disputes whether Dr. Seyhun based his regressions only on days without evidence **[**131]** of trader-based manipulation. If Dr. Seyhun did in fact separate days in Period 0 with documentary evidence of trader-based manipulation from days without such evidence and used only the latter as a control period as plaintiffs assert, his report is conspicuously devoid of any indication to that effect. (Seyhun Rebuttal Report ¶¶ 487-94.) Nonetheless, we accept counsel's representation at oral argument that Dr. Seyhun did so separate (Hr'g Tr. 5:2-6:8), and conclude that this second defense is also unpersuasive. Regressions relying on piecemeal clean periods have been described as "unorthodox," and at least one court has noted that the selection of a clean period wholly independent of periods involving challenged conduct is recommended practice. See *Fogarazzo, 263 F.R.D. at 105*. Indeed, this choice of clean period becomes especially difficult to justify given that Exchange plaintiffs assert that there likely exist additional instances of trader-based manipulation in Period 0 that could be identified through additional discovery, which would taint days in the clean period -- a point acknowledged by counsel at oral argument. (Hr'g Tr. 6:3-9; Exch. Pls.' Seyhun Opp'n 13.)

1.1.1.3. Inconsistencies with Dr. Netz

Rabobank **[**132]** casts further doubt on the reliability of Dr. Seyhun's methodologies by identifying substantial inconsistency between Dr. Seyhun's findings and Dr. Netz's findings on the existence and direction of manipulation. Rabobank notes that, when compared to Dr. Netz's findings of manipulation of Rabobank's LIBOR submissions in a particular direction, Dr. Seyhun identifies LIBOR artificiality in the opposite direction 52% of the time using his first ICAP-Ask-based model of but-for LIBOR and 56% of the time using his Rebuttal Period 0 Model. (Hubbard Initial Report ¶¶ 84-86, ex. 1.1; Hubbard Rebuttal Report ¶¶ 46-47.)

Exchange plaintiffs again do not deny the existence of these inconsistencies, but relying on *In re Vitamin C Antitrust Litigation, No. 06 MD 1738 (BMC)(JO), 2012 U.S. Dist. LEXIS 181158, 2012 WL 6675117, at *4 (E.D.N.Y. Dec. 21, 2012)*, suggest that any disagreement between Dr. Seyhun and Dr. Netz is merely a "battle of the experts" that need not be resolved now. However, we are unpersuaded that fundamental disagreements between a party's own experts can be considered a mere "battle of the experts." See, e.g., *Deutsch v. Novartis Pharms. Corp., 768 F. Supp. 2d 420, 469 (E.D.N.Y. 2011)* **[*482]** (identifying inconsistencies between two of the same party's experts as a basis for exclusion).

Further, Dr. Netz's opinions regarding specific instances of **[**133]** trader-based manipulation largely overlap with the allegations of trader-based manipulation set forth in the Exchange plaintiffs' operative complaint. (Compare Netz Initial Report ex. 1, with, e.g., Corrected 4AC ¶¶ 157-79 (Barclays allegations); *id. ¶¶ 194-97* (Rabobank allegations); *id. ¶ 227* (Deutsche Bank allegations).) Consequently, to the extent Dr. Seyhun's opinions contradict Dr. Netz's opinions regarding specific instances of trader-based manipulation and the direction of that manipulation, they contradict Exchange plaintiffs' allegations as well. Such a misfit also indicates a lack of reliability.

Exchange plaintiffs further assure us that any inconsistencies between Dr. Seyhun's opinions and Dr. Netz's opinions (and, by extension, the allegations in the complaint) are of no concern because "where documentary evidence is limited, an initial review of that evidence may yield a result that is directionally inconsistent with the results of a statistical analysis." (Exch. Pls.' Seyhun Opp'n 12-13.) For instance, they suggest, if on a given day, one bank manipulated its submission downward and two banks manipulated their submissions upward, but only documentary evidence of the first **[**134]** bank's manipulation were available, Dr. Seyhun's models could correctly show upward manipulation in LIBOR even though such a result would be seemingly inconsistent with the available documentary evidence (of only the first bank's downward manipulation). (Exch. Pls.' Seyhun Opp'n 13 n.13.)

The possibility of undiscovered instances of manipulation explains away little of the inconsistency between Dr. Seyhun and Dr. Netz, as further documentary evidence of manipulation by additional banks cannot explain away directional inconsistency between documentary evidence of trader-based manipulation by one bank as identified by Dr. Netz (and as alleged by Exchange plaintiffs) and artificiality in that bank's LIBOR submissions as calculated by Dr. Seyhun's models. Accordingly, to the extent artificiality in LIBOR as calculated by Dr. Seyhun's models shares the same direction as artificiality in LIBOR submissions, inconsistency between Dr. Netz's findings (and Exchange plaintiffs' allegations) and the former implies inconsistency between Dr. Netz's findings and the latter as well.

Under Dr. Seyhun's Relative Artificiality model, the direction of artificiality in each bank's LIBOR submissions will **[**135]** generally be the same as the direction of artificiality in overall published LIBOR. Indeed, when a bank's LIBOR submission is within the interquartile range and is therefore retained in calculating LIBOR, Dr. Seyhun's Relative Artificiality model will find artificiality in the bank's LIBOR submission identical in both direction and magnitude to artificiality in LIBOR. Similarly, under the CDS Spread Model of Rabobank's but-for LIBOR submissions, Dr. Seyhun generally finds that Rabobank manipulated its submissions upward throughout Period 0. Figure 1F13 in the Seyhun Initial Report, displaying the CDS Spread Model's results for Rabobank, generally shows Rabobank's actual LIBOR submissions to be above Rabobank's but-for LIBOR submissions during Period 0. By contrast, of the 32 instances of TBM identified by Dr. Netz associated with Rabobank, she finds that only 17 (or 53%) involved upward manipulation.[29] (Netz Initial **[*483]** Report ex. 1; Netz Rebuttal Report ex. 26.) That is, Dr. Netz reaches an inconsistent conclusion on 47% of days. Further, Dr. Seyhun acknowledges inconsistency between the direction of artificiality in a bank's LIBOR submissions suggested by documentary evidence -- also the **[**136]** basis for Dr. Netz's opinions -- and the direction of artificiality calculated by the Rebuttal Period 0 Model: two of the exhibits in the Seyhun Rebuttal Report identify only "Documented Trader Manipulation Events Consistent with [the Rebuttal] Period 0 Model," suggesting the exclusion of inconsistent events. (Seyhun Rebuttal Report ¶ 493, exs. 1-2.)

In sum, none of these inconsistencies between Dr. Seyhun's various models of but-for LIBOR submissions and Dr. Netz's document-based identification of manipulation can be explained away by the specter of additional documentary evidence of manipulation by additional panel banks. Accordingly, these inconsistencies further erode our confidence in the reliability of Dr. Seyhun's models.

1.1.1.4. Inclusion of 2013 in Clean Periods

Rabobank argues that Dr. Seyhun's inclusion of 2013 in his clean periods is improper cherry-picking, as the ICAP-Ask-based models of but-for LIBOR show no statistically significant artificiality during Period 0 when 2013 is removed from the clean period. The inclusion of 2013 is problematic, Rabobank argues, because the relationship between published LIBOR and ICAP-Ask differs between the two discontinuous pieces of **[**137]** Dr. Seyhun's clean periods -- the spread averages 2.7 basis points between 2000 and 2004, but averages negative 1.4 basis points in 2013 (Rabobank Seyhun Mem. 13; Hubbard Initial Report ¶ 115, ex. 7.1) -- and because the ICAP-Ask rate in 2013 exhibits data-quality problems in that it remains entirely unchanged for more than eight consecutive months. (Rabobank Seyhun Reply 3 n.8; Hubbard Initial Report ¶ 116, ex. 8.1.)

Exchange plaintiffs admit that the spread between LIBOR and the ICAP-Ask rate in 2000-2004 (and 2000-2002) differs from the spread in 2013, do not dispute the ICAP-Ask data-quality issue, and do not appear to dispute Dr. Hubbard's findings that the Initial ICAP-Ask models identify no statistically significant artificiality when 2013 is

[29] Of the remaining 15 instances, Dr. Netz finds that 10 involved downward manipulation and five instances in which the LIBOR submission was unchanged.

removed from the respective clean periods. (Exch. Pls.' Seyhun Opp'n 14-15). Rather, they argue that the difference in spread is "inconsequential" because the spread is "absorbed" into the intercept term of Dr. Seyhun's regressions. (Exch. Pls.' Seyhun Opp'n 15; Seyhun Rebuttal Report ¶ 463.)

This contention is unavailing. In assessing the relationship of LIBOR and the 3-month ICAP-Ask rate, Dr. Seyhun conducts an Ordinary Least Squares (OLS) **[**138]** regression[30] specified as follows:

LIBOR = $\alpha + \beta$.(ICAP-Ask) + ε

(Seyhun Report tbl.2.2.) In an OLS regression of this form, α represents the intercept, β represents the coefficient capturing the relationship between ICAP-Ask and LIBOR, and ε represents the error term. In turn, β is calculated as (1) the covariance of dependent variable (LIBOR) and the single explanatory variable (ICAP-Ask), divided by (2) the variance of the explanatory variable (ICAP-Ask). The intercept term, α, is then calculated as the mean of the dependent variable (LIBOR) minus the product of the coefficient β and the mean of explanatory variable (ICAP-Ask). The different absolute relationship between LIBOR and ICAP-Ask in 2000-2004 and in 2013 will affect the covariance of the two series, which in turn impacts the calculated beta. Exchange plaintiffs **[*484]** are correct in that α is also impacted by this difference in spread, since α is, in part, a function of β. Nonetheless, unless β equals exactly 1, the spread between LIBOR and ICAP-Ask will never be differenced out in its entirety. That is, not only is the changing spread not entirely accounted for by the intercept term, the reason it is not so "absorbed" is **[**139]** because the changing spread impacts β, the estimate of how much but-for LIBOR should change given a change in the ICAP-Ask rate.

That is, we know that the inclusion of 2013 in Dr. Seyhun's clean periods is a significant driver of his results, even though the inclusion of 2013 in the clean periods not only introduces a significant data-quality issue but also introduces a qualitatively different relationship between ICAP-Ask and published LIBOR, a difference that is only partially absorbed into the intercept term. Absent an affirmative justification for adding 2013 to the clean periods and a more robust explanation for why such an addition does not skew the results, we conclude that Dr. Seyhun's inclusion of 2013 strongly suggests cherry-picking and renders the ICAP-Ask-based models of but-for LIBOR (and the Relative Artificiality and CDS Spread models of but-for LIBOR submissions) unreliable.[31]

1.1.2 Effect of Changes in LIBOR on EDF Prices

Dr. Seyhun opines that "statistical regression or other mathematical analyses" are available to show that "artificial LIBOR caused Eurodollar futures (and options) contract prices to be artificial," and that further analyses are available to "estimate **[**140]** the approximate amounts of such artificiality." (Seyhun Initial Report ¶ 12.b (emphasis added).) Dr. Seyhun bases this opinion on numerous regression models, from which he derives a number of "impact factors" that purport to measure, on a daily basis, how a change in LIBOR would have been reflected in EDF prices.

Across his two reports, Dr. Seyhun calculates 31 different values representing the "impact" of a change in 3-month LIBOR on each of the 44 Eurodollar contracts traded on the Chicago Mercantile Exchange: 10 in his initial report and 21 in his rebuttal report. (Seyhun Initial Report tbls.5, 10.2; Seyhun Rebuttal Report tbls.3, 6, 9, 12.) Dr. Seyhun also calculates corresponding sets of impact factors for changes in 1-month LIBOR and 6-month LIBOR. (E.g., Seyhun Rebuttal Report tbls.2, 4.) However, because Dr. Seyhun focuses his opinions on measuring the effect of changes in 3-month LIBOR, we so focus as well.

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[30] For a description of OLS regressions, see supra note 13.

[31] To the extent that Exchange plaintiffs suggest that a regression's high coefficient of determination, which is commonly referred to as "R-squared" and measures the percentage of variation in the dependent variable that is explained by the selected explanatory variables, necessarily implies that regression's reliability and admissibility, (Exch. Pls.' Seyhun Opp'n 15 & n.17), we disagree. A regression may be unreliable, and therefore excludable, despite having a high R-squared, for being misspecified (including by failing to account for significant explanatory variables), among other reasons.

Broadly speaking, these 31 models vary in three primary ways: (1) whether the 3-month LIBOR series is contemporaneous or shifted backwards by one day (i.e., for each day, using the change in LIBOR between the day in question and the day after, rather than the change in LIBOR **[**141]** from the day before to the day in question); (2) whether changes in the implied 3-month forward rate are included as explanatory variables; (3) whether, and how many, lags of explanatory variables are used.[32]

[*485] Initial Report Table 5 presents the results of three models, each using shifted LIBOR and omitting as an explanatory variable changes in the implied 3-month forward rate.[33] The first model regresses changes in EDF prices on changes in LIBOR, with no lags. The second model regresses changes in EDF prices on lagged changes in EDF prices and changes and lagged changes in LIBOR, using the number of lags suggested by the Bayesian information criterion. The third model is like the second model, but uses the number of lags suggested by the Akaike information criterion.[34] Initial Report Table 10.2 presents the results of seven models, each using next-day LIBOR and including as an explanatory variable changes in the implied 3-month forward rate. Each model regresses changes in EDF prices on lagged changes in EDF prices, changes and lagged changes in 3-month LIBOR, and changes and lagged changes in the implied 3-month forward rate. The number of lags varies from 0 to 6, with one model for each **[**142]** number.

Dr. Seyhun's rebuttal report introduces 21 models intended to supersede, at least in part, the 10 models presented in his initial report. Rebuttal Report Table 3 presents the results of four models, three of which use the same regression specification as the three models presented in Initial Report Table 5. However, the results here differ from those presented in the Initial Report Table 5 because Dr. Seyhun has corrected the data processing error attributable to "rollover" days made in his initial report. By contrast, the fourth model regresses changes in EDF prices on changes in today's LIBOR and changes in next-day LIBOR. Dr. Seyhun uses the impact factors produced by one of these models for his damages estimates, though he does not specify which one. (Seyhun Rebuttal Report ¶ 86.) Rebuttal Report Table 6 presents the results of seven models, specified exactly as the seven models reported in Initial Report Table 10.2 (including the use of next-day LIBOR). As with the relationship between Rebuttal Report Table 3 and Initial Report Table 5, the results here differ from those presented in the corresponding Initial Report Table 10.2 because Dr. Seyhun has corrected the data processing **[**143]** error attributable to "rollover" days. Rebuttal Report Table 9 presents the results of three models, specified identically to Initial Report Table 5, but using contemporaneous LIBOR rather than next-day LIBOR and correcting the data-processing error. Similarly, Rebuttal Report Table 12 presents the results of seven models, specified identically to Initial Report Table 10.2 (and Rebuttal Report Table 6), but also using contemporaneous LIBOR and correcting the data-processing error.

Rabobank offers several criticisms of these models: (1) that they cannot be properly interpreted to support causation; (2) that they fail to account for intraday movements in EDF prices; (3) that they fail to account minimum price increments in **[*486]** EDF prices; and (4) that they are contradicted by Dr. Culp's findings that EDF prices exhibit little reaction when LIBOR is published.[35]

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32 In his initial report, Dr. Seyhun also makes a data processing error in assembling his EDF price series involving "rollover" dates, as Dr. Culp documents. (Culp Initial Report app. D ¶¶ 388-400.) Dr. Seyhun's rebuttal report acknowledges and corrects this error. (Seyhun Rebuttal Report ¶¶ 184-87.)

33 Dr. Seyhun's initial report bears no indication that he uses the shifted (next-day) 3-month LIBOR series rather than a contemporaneous series for the analyses contained in that report. However, in response to Dr. Culp's and Dr. Ordover's identification of the issue, Dr. Seyhun acknowledges in his rebuttal report that he did so, and explicitly indicates whether each model presented in his rebuttal report uses contemporaneous or next-day LIBOR. (Seyhun Rebuttal Report ¶¶ 84, 86.)

34 These criteria each offer a method of determining how many lags of a given variable to use in a regression.

35 Rabobank also criticizes Dr. Seyhun for having conducted these regressions using data from the full class period, January 1, 2005 to May 17, 2010, rather than from only Period 0. (Rabobank Seyhun Mem. 20.) This argument is not necessarily persuasive, as Dr. Seyhun's opinions regarding the relationship between changes in LIBOR and changes in EDF prices apply equally to changes in LIBOR caused by trader-based manipulation in Period 0 and changes in LIBOR caused by persistent suppression in the later part of the Class Period. Dr. Culp finds meaningfully different results when Dr. Seyhun's analyses are

1.1.2.1. Correlation, Not Causation

Rabobank and Exchange plaintiffs primarily dispute whether Dr. Seyhun's models can be properly interpreted to suggest that changes in LIBOR cause determinable changes in EDF prices[36] -- Dr. Seyhun's ultimate opinion for which he relies on these models.

As to the 11 models relying on shifted (next-day) LIBOR, **[**144]** which, according to Dr. Seyhun, establishes that changes in tomorrow's LIBOR cause changes in EDF prices today, we reject them as unreliable at the threshold. The causal relationship purportedly supported by these regressions defies common sense: needless to say, a phenomenon must precede any effects that it causes, and Exchange plaintiffs offer no remotely cogent theory as to how changes in LIBOR manage to travel backward in time in order to affect EDF prices in the past.[37] Dr. Seyhun acknowledges this feature of his models, but contends that his methodology is proper because next-day LIBOR better incorporates "any economic event that happens during most of the U.S. business hours" and "U.S. business developments." (Seyhun Rebuttal Report ¶ 84; Exch. Pls.' Seyhun Opp'n ¶ 20.) That is, Dr. Seyhun asserts, using next-day LIBOR "captures the fact that Eurodollar futures prices can at times react earlier to interest-rate sensitive information before LIBOR actually changes." (Seyhun Rebuttal Report ¶ 87.) In offering these defenses of Dr. Seyhun's models, Exchange plaintiffs have apparently lost sight of the ultimate proposition that Dr. Seyhun set out to prove: that changes in LIBOR cause **[**145]** determinable changes in EDF prices. Exchange plaintiffs' references to "economic events," "business developments," and "interest-rate sensitive information" admit only one fair interpretation: namely, as a concession that those events, those developments, and that information confound the relationship between LIBOR and EDF prices presented in Dr. Seyhun's models, which offer no means of distinguishing changes in EDF prices caused by changes in LIBOR from other conditions causing changes in both EDF prices and LIBOR.

These confounding variables loom large, too, over Dr. Seyhun's remaining models relying on contemporaneous LIBOR. The **[*487]** fact that these models do not rely on the assumption that changes in LIBOR have retrospective effect does not remedy the more glaring error that Rabobank has identified and that Exchange plaintiffs have conceded. Because Dr. Seyhun's models offer no means of controlling for the effects of economic events and business developments, we conclude that they cannot reliably support Dr. Seyhun's causation opinion. See *Bickerstaff v. Vassar Coll., 196 F.3d 435, 449-50 (2d Cir. 1999)*; *Reed Constr. Data Inc. v. McGraw-Hill Cos., 49 F. Supp. 3d 385, 400 (S.D.N.Y. 2014)*; *Bonton v. City of New York, No. 03 Civ. 2833 (SAS), 2004 U.S. Dist. LEXIS 22105, 2004 WL 2453603, at *3 n.32 (S.D.N.Y. Nov. 3, 2004)*.

In sum, "[t]he argument post hoc, ergo propter hoc, is not always a strong one; but the argument ante hoc, ergo propter hoc, must be a good deal **[**146]** weake[r]." 7 May 1861, 162 Parl Deb HC (3d ser.) 1677, 1679. Dr. Seyhun's contemporaneous LIBOR models cannot support his opinions regarding causation, as Exchange plaintiffs concede (and, curiously, emphasize) that LIBOR and EDF prices are each driven by business developments and economic events (Exch. Pls.' Seyhun Opp'n 20; Seyhun Rebuttal Report ¶ 84), and Dr. Seyhun's models offer no means of separating changes in EDF prices caused by those events rather than by changes in LIBOR. Dr. Seyhun's next-day LIBOR models fare even worse, not only suffering from the same confounding variable problem

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conducted separately only over Period 0 and not the Suppression Period (Culp Initial Report ¶ 216, tbl.6), which lends support for the theory that macroeconomic factors -- which differed substantially between Period 0 and the Suppression Period -- heavily influence the "impact factors" that Dr. Seyhun calculates.

We are similarly skeptical of Rabobank's arguments relying on inconsistency between Dr. Seyhun's findings and Dr. Culp's findings, as any such inconsistency would not call into question the reliability of Dr. Seyhun's methodologies. (Rabobank Seyhun Mem. 17-18; Exch. Pls.' Seyhun Opp'n 17-19.)

[36] The parties do not dispute that an EDF contract settles at the price of 100 minus LIBOR on the settlement date.

[37] Dr. Seyhun suggests at one point that panel banks may have engaged in insider trading (Seyhun Rebuttal Report ¶¶ 133, 137), but Exchange plaintiffs do not rely on this argument in their opposition to Rabobank's motion.

but also relying on the unfounded assumption that a change in LIBOR one day can effect changes in EDF prices in the past.

1.1.2.2. Intraday Variations in Price

Rabobank next argues that Dr. Seyhun's models fail to analyze intraday EDF data, opting instead to rely on the daily settlement prices calculated each day at 2:00 p.m. Chicago time. This method is unreliable, Rabobank contends, because it relies upon the unfounded assumption that any artificiality in LIBOR has an impact of constant magnitude over the 23 hours per day during which EDFs are traded. (Rabobank Seyhun Mem. 21-22.) Exchange **[**147]** plaintiffs respond that no analysis of intraday EDF data is necessary "because there is a single LIBOR fix per day and a single LIBOR artificiality per day," and consideration of intraday measurements would be "futile for purposes of demonstrating the impact of LIBOR on EDF prices." (Exch. Pls.' Seyhun Opp'n 22.)

Notably, Exchange plaintiffs do not dispute that Rabobank's assertion that Dr. Seyhun's decision to conduct his analysis at a daily level incorporates the assumption that LIBOR artificiality has a single, constant amount of impact on EDF prices over a given trading day. But this assumption is inconsistent with Dr. Seyhun's assertions that EDFs "trade in efficient markets and react to all relevant information in a timely and complete manner," (Seyhun Rebuttal Report ¶ 124), and Exchange plaintiffs' assertion that "EDF prices continually incorporate all fundamental information" (Exch. Pls.' Seyhun Opp'n 22). And indeed, intraday variations in EDF pricing are of particular relevance to this action. Unlike, for example, the OTC or Lender plaintiffs, whose LIBOR-based instruments are pegged to LIBOR and reset on a periodic basis using published LIBOR on a given day, EDF traders' **[**148]** exposure to changes in LIBOR, even under Exchange plaintiffs' theory, was less periodic and less consistent. The record establishes that named plaintiffs actively opened and closed EDF positions within a single day (Ordover Initial Report sec. VIII), and Exchange plaintiffs themselves have acknowledged that these "in-and-out" traders make up a large proportion of the putative class (Nov. 1, 2017 Hr'g Tr., 12:24-13:11, ECF No. 2341).

[*488] Given the importance of intraday trading in assessing the impact of LIBOR artificiality on EDF traders, Dr. Seyhun's failure to account for intraday variation in EDF prices further undermines the reliability of his ultimate opinion that statistical methods are available to determine that impact.

1.1.2.3. Minimum Price Increments ("Tick" Size)

Rabobank further criticizes Dr. Seyhun's model for failing to incorporate "ticks," or the minimum price increments in which EDF contracts trade. Under Rabobank's theory, the impact of trader-based manipulation on published LIBOR was often less than one tick in magnitude, and such a small extent of impact will not move EDF prices by one "tick" even assuming some causal relationship flowing from LIBOR to EDF prices. Therefore, **[**149]** Rabobank argues, Dr. Seyhun's model is further flawed for this failure to incorporate minimum tick sizes. (Rabobank Seyhun Mem. 22-23.) Exchange plaintiffs respond that Dr. Seyhun has in fact offered a formula to account for minimum price increments, and that Dr. Seyhun's failure to incorporate that formula into his models is of "no consequence" because "it involves a logical rather than an empirical argument." (Exch. Pls.' Seyhun Opp'n 22-23.)

Exchange plaintiffs are correct to the limited extent that Dr. Seyhun has indeed offered a formula regarding tick sizes. This formula is, however, wholly unhelpful: Dr. Seyhun opines that the <u>probability</u> that LIBOR artificiality affected EDF prices is equal to the amount of LIBOR artificiality divided by the tick size for the EDF contract in question. (Seyhun Rebuttal Report ¶ 216.) But knowing that EDF prices will be affected, on average, a certain percentage of the time is insufficient; the operative question for class certification purposes is determining which prices were affected and which prices were not. That is, we are ultimately interested in the <u>empirical</u> question of how much EDF prices were affected by artificiality in LIBOR; knowing **[**150]** that EDF prices may or may not, as a matter of logic, have been impacted a certain percentage of the time is not responsive.

Exchange plaintiffs attempt to minimize the importance of tick sizes, reasoning that "[t]he minimum tick size will either nullify the effect of LIBOR artificiality on that day, or amplify it, based on the tipping point of the minimum tick size." (Exch. Pls.' Seyhun Opp'n 23.) We agree with this analysis of the impact of minimum tick sizes; indeed, it is the root of our concern regarding Dr. Seyhun's failure to consider tick sizes: the difference between amplification or nullification of LIBOR artificiality, i.e., some impact or no impact whatsoever, is difficult to overstate. Knowing which of the two will occur is of critical importance in assessing the impact of LIBOR manipulation on EDF prices, and Dr. Seyhun's models offer no aid in making that assessment. While we could conceive of an additional rounding step that could be incorporated into Dr. Seyhun's models, it is Exchange plaintiffs' responsibility, and not ours, to provide models that are sufficiently complete so as to be reliable and helpful to the factfinder. Dr. Seyhun's failure to do so further supports **[**151]** the exclusion of his opinions.

1.1.3. Conclusion

Rabobank's motion to exclude Dr. Seyhun's opinions is granted. Dr. Seyhun's ultimate opinions, that classwide methods are available to determine the existence and extent of LIBOR manipulation and to determine the impact of that manipulation on EDF prices, are unreliable. The numerous models that Dr. Seyhun proposes are inadequate to support this conclusion, as Exchange plaintiffs have not established that those models are themselves reliable. **[*489]** Because Dr. Seyhun's opinions regarding damages rely on his opinions regarding the determination of LIBOR manipulation and resulting impact on EDF prices, we conclude that those opinions should be excluded as well.

Dr. Seyhun's multitude of models of artificiality in LIBOR and LIBOR submissions are rife with inconsistencies: they are internally inconsistent, they are inconsistent with Dr. Netz's opinions, and they are inconsistent with Exchange plaintiffs' own allegations of trader-based manipulation. Dr. Seyhun's models of changes in EDF prices caused by changes in LIBOR, though greater in number, are no more reliable, as they are not only incapable of separating the effect of macroeconomic events **[**152]** but also incapable of actually determining when EDF prices would have changed in light of minimum price increments. We have previously questioned whether plaintiffs would "be able to show that LIBOR suppression of a particular amount would have caused a corresponding, determinable change in [EDF] trading prices," *LIBOR VI, 2016 U.S. Dist. LEXIS 175929 at 63, 2016 WL 7378980*, and nothing in Dr. Seyhun's reports causes us to reconsider that skepticism.

1.2. Dr. Netz

Exchange plaintiffs present two reports from Dr. Janet Netz: (1) an initial report dated February 2, 2017 (Decl. of Thomas Elrod ex. 1, July 21, 2017, ECF No. 2121); and (2) a rebuttal report dated May 3, 2017 (Decl. of Thomas Elrod ex. 2, July 21, 2017, ECF No. 2121). We refer to these as the Netz Initial Report and the Netz Rebuttal Report. In her reports, Dr. Netz offers: (1) a number of opinions derived from her review of communications between traders; (2) the opinion that manipulation in LIBOR submissions impacted published LIBOR; (3) the opinion that changes in LIBOR cause calculable changes in prices of EDF contracts and options; and (4) a number of opinions regarding the calculation of damages. Based on Dr. Netz's credentials,[38] we conclude that she is generally qualified to offer **[**153]** opinions of this type. We accordingly reject Rabobank's challenges to Dr. Netz's expert qualifications, but address them specifically in assessing Dr. Netz's specific opinions.

1.2.1. Opinions Based on Trader Communications

Dr. Netz devotes a substantial portion of her reports to analyzing documentary evidence of communications between traders, LIBOR submitters, and other individuals affiliated with panel banks. Relying on her interpretation

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[38] Dr. Netz is a founder and partner of ApplEcon, an economics consulting firm, and was formerly a professor of economics at Purdue University. She holds a Ph.D. and M.A. in economics from the University of Michigan and a B.A. in economics from the University of California, Berkeley, has written a number of papers on antitrust economics, and has served as an expert witness in numerous antitrust cases. (Netz Initial Report app. A.)

of these documents, Dr. Netz opines that (1) panel banks manipulated their LIBOR submissions; (2) these manipulated LIBOR submissions impacted published LIBOR; (3) panel banks believed that LIBOR manipulation would affect EDF prices. In reaching these opinions, Dr. Netz also concludes that review of documentary evidence "is a common, class-wide method using common evidence that can prove liability." (Netz Rebuttal Report 10.)

At the outset, we note that Exchange plaintiffs and Rabobank dispute the scope of Dr. Netz's opinions. Rabobank asserts that Dr. Netz concludes that certain challenged conduct in fact occurred, and Exchange **[*490]** plaintiffs respond that Dr. Netz "does not opine that Defendants engaged in trader-based conduct or colluded in doing so," **[**154]** but rather opines only that "documents consistent with those allegations are available, and are common to the class." (Exch. Pls.' Netz Opp'n 8 (emphasis omitted).)

Dr. Netz's opinions simply are not limited in the way Exchange plaintiffs suggest. The Netz Initial Report contains numerous conclusions that, based on her review of trader communications, certain challenged conduct in fact occurred and Exchange plaintiffs were in fact impacted. For example, Dr. Netz opines that "[t]he discovery record shows that Defendants manipulated their LIBOR submissions in ways that were inconsistent with the reporting rules established by the BBA," that "Defendants engaged in coordinated trader-based manipulation," and that "Defendants engaged in suppression manipulation." (Netz Initial Report 13, 18, 20.) While Dr. Netz later opines on the availability and applicability of common evidence, for example that "[l]iability can be proven using common, class-wide methods based on common evidence," (Netz Rebuttal Report 4), these subsequent opinions do not supersede her earlier opinions. We consider different aspects of Dr. Netz's opinions in turn.

To the extent Dr. Netz offers her interpretation of trader **[**155]** communications to conclude that manipulation in fact occurred, these opinions are not based on Dr. Netz's "scientific, technical, or other specialized knowledge" as required by *Rule 702(a)*. While Exchange plaintiffs correctly suggest that an expert's testimony may be permissible, for example, "to translate esoteric terminology," *United States v. Mejia, 545 F.3d 179, 190 (2d Cir. 2008)*, the trader communications that Dr. Netz interprets are clear on their face and "address issues of fact that [the trier of fact] is capable of understanding without the aid of expert testimony," *In re Longtop Fin. Techs. Ltd. Sec. Litig., 32 F. Supp. 3d 453, 460 (S.D.N.Y. 2014)*.[39] Exchange plaintiffs fail to explain what specialized knowledge Dr. Netz drew upon to conduct her review of trader communications, and ***HN38***[] "[a]cting simply as a narrator of the facts does not convey opinions based on an expert's knowledge and expertise." *Tourre, 950 F. Supp. 2d at 675*. Our concern is heightened here, as Dr. Netz offers no explanation of how the communications that she reviewed were selected.

Similarly, to the extent Dr. Netz interprets trader communications to opine on the traders' actual motives and states of mind, these opinions are impermissible. See, e.g., *Highland Capital Mgmt., L.P. v. Schneider, 379 F. Supp. 2d 461, 469-70 (S.D.N.Y. 2005)*; *In re Rezulin, 309 F. Supp. 2d at 547*. While she may opine on traders and LIBOR submitters' economic incentives as a general matter, those opinions may not extend to the **[**156]** traders and submitters' specific states of mind.

Finally, to the extent that Dr. Netz opines on the existence of documents, these opinions are also excluded. The general proposition that some documents may pertain to all class members is obvious and not insightful, and Exchange plaintiffs offer no explanation why someone with Dr. Netz's expertise and qualifications is needed to offer it. At class certification, the operative question is whether LIBOR manipulation, once established through documents or other evidence, will pertain to all class members; the issue at this stage is not whether those documents exist. Indeed, Exchange plaintiffs offer no authority **[*491]** supporting their position that the "existence [of documents and data regarding defendants' conduct] is an appropriate topic for the opinion of Plaintiffs' expert on class certification," (Exch. Pls.' Netz Opp'n 7), and we find none.

Dr. Netz's opinions that documents exist establishing certain elements of liability, when properly understood, are opinions on the merits that are irrelevant at the class certification stage. An economic expert at class certification may permissibly opine that event *x* -- as established through documents **[**157]** or otherwise -- has an economic

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[39] Additionally, even if the trader communications interpreted by Dr. Netz required expert knowledge, we would question whether Dr. Netz's expertise in antitrust economics extends so far as to include terminology used by EDF traders.

effect that is common to all class members. But she may not opine that event *x* in fact occurred, which remains for the trier of fact to determine. Even when such an opinion is formulated as "evidence exists establishing that event *x* occurred," it is no more relevant at class certification and is no more admissible than a direct opinion on the merits.

Further, even if these opinions were offered at the merits stage, the latter formulation would be no less invasive of the province of the trier of fact. And as a corollary, it would be no more admissible at that stage, either. See *Tourre, 950 F. Supp. 2d at 675* ("Expert testimony may not usurp the province of the judge to instruct on the law, or of the jury to make factual determinations.").[40] Therefore, even accepting Exchange plaintiffs' characterization that Dr. Netz "opine[s] on whether documents exist that could prove [their] allegation[s] on a common basis," (Exch. Pls.' Netz Opp'n 12), her opinions to that effect remain inadmissible.

In sum, we conclude that Dr. Netz's opinions interpreting documents and commenting on their existence are not admissible. Of course, this holding regarding Dr. Netz's opinions derived from **[**158]** her review of trader communications does not, by itself, preclude her from opining that manipulation of LIBOR submissions impacted LIBOR in a way common to all class members, or from opining that changes in LIBOR impacted EDF prices in a way common to all class members. We next consider whether those opinions are inadmissible for other reasons.

1.2.2. Effect of Manipulation on LIBOR

Dr. Netz subsequently opines that "manipulated LIBOR submissions affected published LIBOR." (Netz Initial Report 29.) As to trader-based manipulation, Dr. Netz first identifies, by reviewing documentary evidence, 163 instances of alleged trader-based manipulation. Dr. Netz determines that in 111 of those instances, the manipulated submission could have affected published LIBOR once the BBA's trimming methodology is considered. In turn, for each of those 111 instances, Dr. Netz assumes that, in the absence of manipulation, the panel bank in question would have made as its LIBOR submission the median submission reported by all panel banks on that day, and concludes that the replacement of a manipulated submission with the median submission would have affected published LIBOR on 65 of those days. Dr. Netz then **[**159]** highlights three specific examples (from the 65 days identified through her documentary analysis), examines the range of LIBOR submissions made on those dates, and explains how the alleged manipulation could have impacted published LIBOR. (Netz Initial Report 29-31.)

Rabobank contends that these opinions are inadmissible because they are not reliable **[*492]** and not helpful to the trier of fact. Specifically, Rabobank asserts that Dr. Netz's analysis is unreliable because it is based on the "arbitrary and speculative assumption" that a panel bank would have submitted the median of all banks' submissions absent trader-based manipulation. (Rabobank Netz Mem. 12.) In opposition, Exchange plaintiffs respond that Dr. Netz's analysis is probative of the "hotly contested" question of whether trader-based manipulation of one bank's submission could have affected published LIBOR, given the trimming of submissions outside the interquartile range. (Exch. Pls.' Netz Opp'n 13-14.) Rabobank implicitly concedes that whether a single bank's LIBOR submissions could have impacted published LIBOR is a germane question, but disputes Exchange plaintiffs' characterization of the issue as "hotly contested" based **[**160]** on the consistency between Dr. Netz's and Dr. Hubbard's opinions on the issue. (Rabobank Netz Reply 4-5.)

We cannot conclude, as Rabobank urges, that Dr. Netz's opinions in this realm are entirely unhelpful. The ability to impact the market, the existence of artificial prices, and the defendant's causation of those prices are elements of a CEA claim, see, e.g., *LIBOR I, 935 F. Supp. 2d at 713, slip op. at *94-95*; *In re Platinum & Palladium Commodities Litig., 828 F. Supp. 2d 588, 598 (S.D.N.Y. 2011)*, and the question of whether its submissions could impact published LIBOR is therefore "a fact in issue," *Fed. R. Evid. 702(a)*.

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[40] To the extent that Dr. Netz's "evidence exists" opinions address the admissibility of evidence, those opinions are inadmissible for yet another reason: opining on a legal question, the resolution of which is left to the Court. See *Foreman, 950 F. Supp. 2d at 975*; see also *Fed. R. Evid. 104(a)*.

We find little merit in Rabobank's contention that Dr. Netz's opinion here is irrelevant because she and Dr. Hubbard reach the same conclusion: that Rabobank could have impacted 3-month LIBOR on 46% of days in Period 0. The parties' agreement means that the issue is not as "hotly contested" as Exchange plaintiffs suggest, but does not render evidence directed to that fact irrelevant. See *Old Chief v. United States, 519 U.S. 172, 179, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)* ("The fact to which the evidence is directed need not be in dispute." (quoting *Fed. R. Evid. 401* advisory committee's note)). Indeed, Rabobank's argument here is somewhat circular in that it relies on Dr. Netz's opinion, which it seeks to have excluded, to establish agreement on the point. The trimming methodology applied to LIBOR submissions in order **[**161]** to calculate published LIBOR introduces sufficient complexity such that Dr. Netz's analysis is at least somewhat helpful.

We also reject Rabobank's argument that Dr. Netz's opinion is unreliable because her median-replacement methodology relies on unsupported assumptions. As Dr. Netz disclosed in her initial report, she "do[es] not claim that the median LIBOR submission is necessarily the correct proxy for the but-for LIBOR submissions or that the LIBORs in Exhibit 2 are accurate measures of but-for LIBOR." (Netz Initial Report 29.) Rather, Dr. Netz opines that Rabobank's submissions could have impacted published LIBOR, which her median-replacement methodology is in fact capable of demonstrating.[41] In the absence of any suggestion that she has implemented her methodology in an unreliable manner, we conclude that Dr. Netz's methodology is sufficiently reliable to support her opinion that Rabobank's submissions could impact published LIBOR.

[*493] 1.2.3. Effect of Changes in LIBOR on EDF Prices

Dr. Netz, like Dr. Seyhun, opines that changes in LIBOR would have affected the prices of EDF contracts and options in a determinable way, basing this opinion on an arbitrage theory, her interpretation of **[**162]** several communications between traders and LIBOR submitters, and a correlation analysis. (Netz Initial Report 32-38.)

Rabobank contends at the threshold that Dr. Netz is unqualified to opine on the relationship between LIBOR and EDFs because her experience in economics broadly does not extend to the specific subject of EDFs and EDF trading. (Rabobank Netz Mem. 13-15.) Exchange plaintiffs' appeals to Dr. Netz's extensive experience in antitrust cases more broadly are not persuasive because the substance of the arbitrage theory that Dr. Netz propounds hardly resembles the issues of "supply, demand, pricing, etc." at play in a more typical antitrust case (Exch. Pls.' Netz Opp'n 15); indeed, no antitrust claims remain in the Exchange plaintiffs' action at all. Nonetheless, we conclude that Dr. Netz's prior research into arbitrage -- albeit in physical commodities markets -- is sufficient to allow her to opine on the subject in her reports. Indeed, as an economist, Dr. Netz has sufficient training and experience in econometrics in order to conduct statistical testing of correlation and causation and to interpret the results of those tests.[42]

Turning to reliability, we consider the bases for **[**163]** Dr. Netz's causation opinion: interpretations of certain trader communications, an analysis of correlations between published LIBOR and EDF prices, Dr. Seyhun's analyses, and two academic papers analyzing the relationship between LIBOR and EDF prices.

First, Dr. Netz interprets several communications between traders and LIBOR submitters to opine that "traders and submitters understood that any changes to LIBOR would immediately and directly impact Eurodollar futures prices." (Netz Initial Report 36.) These opinions impermissibly go to the beliefs and states of mind of those traders and

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[41] Dr. Netz's median-replacement methodology maximizes the frequency with which Rabobank's submission impacts but-for LIBOR, though not the magnitude of that impact. A but-for LIBOR submission by Rabobank equal to the median of actual submissions ensures that the but-for submission will fall within the interquartile range and therefore will not be excluded by the trimming methodology.

[42] Additionally, as we have already held, the various documents that Dr. Netz purports to interpret are understandable on their face and do not require particular expertise to interpret. It naturally follows that her resulting opinions should not be excluded based on a lack of qualifications (though they may be inadmissible for other reasons).

submitters, and are inadmissible.[43] See *Highland Capital, 379 F. Supp. 2d at 469-70*; *In re Rezulin, 309 F. Supp. 2d at 547*.

Second, Dr. Netz calculates the correlations between EDF prices and various tenors of LIBOR. (Netz Initial Report 36-37, ex. 3). From these correlations, her review of Dr. Seyhun's report, and two academic articles, Dr. Netz concludes that changes in LIBOR cause calculable changes in EDF prices. While correlations may be probative of causation in other circumstances, we conclude that they are not in this case: any correlation is confounded by the presence of macroeconomic events. See supra section III.1.1.2.1. Exchange **[*494]** plaintiffs argue that the presence of other **[**164]** factors impacting EDF prices "does not mean that LIBOR's effect disappears in the wake of these other factors," (Exch. Pls.' Netz Opp'n 20), but Exchange plaintiffs have not sufficiently established that LIBOR has an effect as an initial matter and they offer no means of separating the effect of changes in LIBOR (if any) from that of other factors.

Weaker still is Exchange plaintiffs' argument that parsing out "macroeconomic factors affecting interest rates" is unnecessary because they "exist in both the real world and in the but-for world." (Exch. Pls.' Netz Opp'n 20.) As Dr. Netz and Dr. Seyhun both concede, those factors confound a relationship between LIBOR and EDF prices, and the failure to parse them out in assessing the difference between the real world and the but-for world is therefore likely to construct a but-for world that differs from the actual world in ways other than the absence of alleged LIBOR manipulation.

Dr. Seyhun's causation opinions do not, as Exchange plaintiffs suggest, bolster Dr. Netz's causation opinions. (Exch. Pls.' Netz Opp'n 20.) To be sure, ***HN39***[] an expert may rely on the admissible opinions of another expert, see *Gussack Realty Co. v. Xerox Corp., 224 F.3d 85, 94-95 (2d Cir. 2000)*; see also *Fed. R. Evid. 703*, but Dr. Netz is not entitled **[**165]** to rely on Dr. Seyhun's unreliable opinions for support. Indeed, Dr. Netz's opinions suffer from the same tick-size flaw in Dr. Seyhun's opinions: she similarly opines that she is able to determine the probability that EDF contract prices were impacted by changes in LIBOR, an opinion that is unhelpful.[44] See supra section III.1.1.2.3.

Nor do the two academic articles cited by Dr. Netz[45] support her causation opinion. We are dubious that Grinblatt and Jegadeesh's analysis of weekly changes in LIBOR and EDF prices supports Dr. Netz's opinions regarding daily causation given the specific timing issues discussed at length in Dr. Seyhun's and Dr. Culp's reports. See Grinblatt & Jegadeesh at 1516-19. Similarly, Fung and Leung's analysis examines actual Eurodollar rates observed in the market, not LIBOR, see Fung & Leung at 119 n.6 (referring to Eurodollar rate quotes corresponding to the end of the trading day in London), which has different implications for the viability of any arbitrage strategy and, by extension, the relationship between changes in LIBOR and changes in EDF prices (e.g., Culp Initial Report ¶¶ 353-61, Culp Rebuttal Report ¶ 26).

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[43] Further, the documents bear little indication that the traders were referring to EDFs as opposed to other futures contracts or other LIBOR-based instruments, and Dr. Netz appears to assume so without justifying that assumption. Additionally, Dr. Netz's final example, regarding LIBOR manipulation on a settlement date, does not establish that traders believed changes in LIBOR caused changes in EDF prices generally. The proposition that the settlement price of an EDF is dependent on the settlement date's published LIBOR is uncontroverted. (E.g., Culp Initial Report ¶ 92).

[44] Her further opinion that the impact of alleged LIBOR manipulation on EDF prices was "frequent and common" is additionally unsupported; it is unclear how she reaches that opinion based on the probabilities stated in her initial report. (Netz Rebuttal Report 20.) If on a given day the impact of manipulation on published LIBOR is less than half the minimum price increment, the probability that that manipulation impacted EDF prices would be less than 50% under Dr. Netz's formula and she would therefore be unable to conclude that the manipulation more likely than not impacted EDF prices.

[45] Mark Grinblatt & Narasimhan Jegadeesh, Relative Pricing of Eurodollar Futures and Forward Contracts, 51 J. Fin. 1499 (1996) ("Grinblatt & Jegadeesh"); Hung-Gay Fung & Wai K. Leung, The Pricing Relationship of Eurodollar Futures **[**166]** and Eurodollar Deposit Rates, 13 J. Futures Markets 115 (1993) ("Fung & Leung").

Absent further support, Dr. Netz's correlation analysis can show only that -- correlation. Because Dr. Netz fails to bridge the analytical gulf between correlation and causation, her opinions that changes in LIBOR caused changes in EDF prices are excluded.

[*495] 1.2.4. Damages

Finally, Dr. Netz offers several opinions regarding the calculation of damages: (1) that published LIBOR being lower than but-for LIBOR harmed class members who initiated or closed certain positions during different periods (Netz Initial Report 38-44); (2) that all class members were harmed because it is "statistically improbable" that EDF traders are unlikely to have "benefited from or been unharmed by every single act of Defendants' LIBOR manipulation" (Netz Initial Report 44-46); (3) that class members also suffered common harm in the form of the time-value of money in their margin accounts (Netz Initial Report 46-47), and that (4) damages can be calculated on a formulaic basis (Netz Initial Report 48).

As a general matter, these opinions rely on Dr. Netz's earlier opinion that changes in LIBOR cause determinable changes in EDF prices and Dr. Seyhun's opinions to the same effect. Because **[**167]** we determine those opinions to be unreliable, Dr. Netz's derivative damages opinions are therefore insufficiently supported and are therefore inadmissible as well.

We also make three further specific observations. First, the parties' dispute over Dr. Netz's opinion that almost all traders were "harmed" as a result of LIBOR manipulation is, in essence, a dispute over the proper interpretation of the term "harmed." Exchange plaintiffs and Dr. Netz interpret "harmed" to mean "have been negatively impacted at least once" (i.e., the trader paid too much money or received not enough money from a single EDF transaction), even if the trader benefited overall from alleged LIBOR manipulation. (Exch. Pls.' Netz Opp'n 22-23). Rabobank interprets "harmed" to mean a negative impact overall once all impacts of LIBOR manipulation have been taken into account. (Rabobank Netz Mem. 20-21). Given our conclusion that Dr. Netz's damages opinions are unreliable, we need not definitively resolve this question here.[46]

Second, Exchange plaintiffs' reliance on Mr. Miller's opinions to support Dr. Netz's statement that "data could be obtained from traders themselves, their brokers (FCMs), or the Chicago Mercantile **[**168]** Exchange" is unavailing. (Exch. Pls.' Netz Opp'n 24-25.) Dr. Netz did not rely on Mr. Miller's opinions and instead based her opinion on her "understanding that Eurodollar futures and options are transparent, public markets in which common practice and exchange and federal requirement[s] provide that customers for each transaction be identifiable." (Netz Initial Report 47 n.172.) We question whether Dr. Netz's expertise extends to a subject like the availability of trading records, and Mr. Miller's opinions provide no support because they are inadmissible as we discuss below.

Third, we do not share Rabobank's certainty that Dr. Netz's opinions regarding time-value damages are entirely irrelevant. Compare *Helena Assocs., LLC v. EFCO Corp., No. 06 Civ. 861 (PKL), 2009 U.S. Dist. LEXIS 65582, 2009 WL 2355811, at *4 (S.D.N.Y. July 29, 2009)* (allowing a plaintiff to claim additional damages that were "more properly considered an extension of [its] original damages theory rather than a new theory of liability"), with *Point Prods. A.G. v. Sony Music Entm't, Inc., No. 93 Civ. 4001 (NRB), 2002 U.S. Dist. LEXIS 24450, 2002 WL 31856951, at *5 (S.D.N.Y. Dec. 19, 2002)* (precluding a plaintiff "from changing its damage theory nine years into this litigation"). To the extent these damages may be taken into account, Dr. Netz's **[*496]** opinions regarding time-value damages on the one hand and formulaic calculation on the other are in considerable tension: Dr. Netz does not opine that **[**169]** all EDF traders were subject to the same margin requirements, or that they all shared the same time-value of money. (Netz Initial Report 46-47.) Indeed, an assessment of each trader's margin requirements and personal discount rates appears to necessitate individualized inquiry and does not appear susceptible to formulaic calculation.

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[46] Under the CEA, "a plaintiff has standing to bring a commodities manipulation action only if he has suffered 'actual damages' as a result of defendant's manipulation." *LIBOR II, 962 F. Supp. 2d at 620* (quoting *7 U.S.C. § 25(a)(1)*). Establishing "actual damages" requires some notion of netting. See id.

1.2.5. Conclusion

Rabobank's motion to exclude Dr. Netz's opinions is granted in part and denied in part. Dr. Netz's opinions derived from her review of trader communications are excluded, regardless of whether she opines that manipulation actually occurred or whether she opines that documents establishing manipulation are available. Dr. Netz's opinions that changes in LIBOR cause calculable changes in EDF prices are excluded based on the reasons discussed at length in our consideration of Dr. Seyhun's opinions, and her opinions regarding damages are excluded as well because they are reliant on her causation opinions. Dr. Netz's opinions regarding the impact of LIBOR submissions on published LIBOR, which address facts in issue, remain admissible.

1.3. Mr. Beevers

Exchange plaintiffs submit two reports from Mr. Craig Beevers: (1) an initial report dated February **[**170]** 2, 2017 (Decl. of David Kovel ex. A, July 10, 2017, ECF No. 2071); and (2) a rebuttal report dated May 3, 2017 (Decl. of David Kovel ex. B, July 10, 2017, ECF No. 2071). We refer to these as the Beevers Initial Report and the Beevers Rebuttal Report. In these two reports, Mr. Beevers offers several opinions across a number of subjects: (1) the adequacy of Rabobank's data productions; (2) a methodology for identifying trader-based manipulation; (3) a Monte Carlo analysis suggesting that panel banks engaged in collusive behavior; and (4) the frequency of alleged manipulation. We conclude that Mr. Beevers is generally qualified to offer these opinions based on his extensive experience in the financial industry.[47]

1.3.1. Data Adequacy

Mr. Beevers first offers a number of opinions regarding Rabobank's data productions. After providing an overview of trade reporting and risk reporting systems both generally and at Rabobank specifically (Beevers Initial Report ¶¶ 24-39), Mr. Beevers opines that Rabobank's data productions have been deficient in certain ways, (Beevers Initial Report ¶¶ 46-63), and that trader-level records should be produced because they are necessary to his methodology for identifying **[**171]** trader-based manipulation and the burden to defendants is low. (Beevers Initial Report ¶¶ 40-45, 64-72).

1.3.1.1. Discussion of Trade Reporting and Risk Reporting Systems

Mr. Beevers may address trade reporting and risk reporting in the financial industry generally. We agree with Exchange plaintiffs that his experience provides him with the requisite knowledge and qualifies him to so opine. He may not, however, interpolate these general opinions regarding the financial industry as a whole to Rabobank specifically. Mr. Beevers lacks knowledge as to what data Rabobank in fact possesses, a point that he **[*497]** concedes and Exchange plaintiffs cannot seriously dispute. (Beevers Dep. 408:3-4, Decl. of Robert Lindholm ex. 73, July 7, 2017, ECF No. 2061). While we would view these Rabobank-specific opinions differently had they been anchored in specific legal or regulatory requirements, the fact that other banks possess certain data as a general matter says little about either (1) whether Rabobank ever had this data or (2) Rabobank has maintained this data until now. Therefore, Mr. Beevers's opinions are excluded to the extent they suggest that Rabobank in fact maintains certain reporting systems **[**172]** or possesses certain data.

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[47] Specifically, Mr. Beevers has worked at various financial institutions for more than 20 years, including as a trader and in certain risk management positions. (Beevers Initial Report app. A.) More recently, as counsel informed us at oral argument, Mr. Beevers was appointed by the Governor of Bank of England to the working group studying replacements for LIBOR. (Hr'g Tr. 16:24-17:3.)

1.3.1.2. Specific Data Deficiencies

Mr. Beevers next opines that Rabobank's productions are deficient in four specific ways: (1) certain risk management reports are missing; (2) data files contain inconsistent formatting for date information; (3) inconsistent mapping information was provided; and (4) certain datasets appear to be incomplete and contain duplicates.

Mr. Beevers's opinion that certain risk management reports are missing is not admissible for the reasons discussed above: Mr. Beevers lacks knowledge as to what data Rabobank in fact possesses (or possessed) and is forced to speculate as to the existence of those reports. This speculation is plain on the face of his opinions, suggesting, for example, that certain reports "are routinely emailed to desk-wide or division-wide distribution lists on a periodic basis," and that he therefore "believe[s] such reports may exist in Rabobank's email archive." (Beevers Initial Report ¶¶ 46-47 (emphasis added).) We find similarly speculative Mr. Beevers's contention that Rabobank did not produce all of its trade data because the number of trades appears "to be too low by a factor of approximately two" based solely **[**173]** on the opinion of unidentified "experienced money market traders." (Beevers Initial Report ¶ 58.)

As to Mr. Beevers's remaining criticisms, each relies on the implicit assumption that Rabobank possessed immediately tractable data and should have produced it. Mr. Beevers identifies no basis for this assumption, and we find no authority for such a proposition.[48] Rather, the process of data cleansing and ensuring that data are tractable is not only a topic addressed extensively in the literature, see, e.g., Jonathan I. Maletic & Andrian Marcus, Data Cleansing: A Prelude to Knowledge Discovery, in Data Mining and Knowledge Discovery Handbook, (Oded Maimon & Lior Rokach, eds. 2005) ("Data entry and acquisition is inherently prone to errors, both simple and complex."), but is also a task performed by experts with regularity (including by Dr. Willig in this case (Willig Initial Report app. 4), see, e.g., *DL v. District of Columbia, 194 F. Supp. 3d 30, 40 (D.D.C. 2016)* ("Although the primary focus of [the expert's] testimony in those cases has been statistical analysis, he would not have been able to perform that analysis if he had not initially performed the programming and required data cleaning."); *Callahan v. City of Chicago, 78 F. Supp. 3d 791, 815 (N.D. Ill. 2015)* ("[The expert] 'cleaned' the data set before using it **[**174]** . . . ."); *In re Polyurethane Foam Antitrust Litig., 314 F.R.D. 226, 278 (N.D. Ohio 2014)* (referencing an expert's discussion of "the extent of each Defendant's **[*498]** transactional data and the 'cleaning' steps [the expert] took to make the data usable"). Indeed, Mr. Beevers's expectation appears particularly unrealistic here given the breadth of the data that he seeks and Rabobank's scale as an entity.

We therefore conclude that Mr. Beevers's opinions purporting to identify specific deficiencies in Rabobank's data productions are speculative, and therefore inadmissible.

1.3.1.3. Production

Finally, Mr. Beevers offers a number of opinions addressing whether certain trader-level data must be produced. He opines that trader-level records are "required" in order "to analyze the impact of trader-based manipulation," (Beevers Initial Report ¶ 64), and that this necessity outweighs the burden on defendants of making this production, (Beevers Initial Report ¶¶ 40-41). Therefore, Mr. Beevers concludes, "data quality issues presented by Rabobank not only limit the depth and quality of analysis available to civil litigants, but likely substantially impeded regulatory investigations" and that this poor quality "dictates that Defendants should be required to remediate and **[**175]** supplement the productions to date." (Beevers Initial Report ¶¶ 41, 72.) These opinions are inadmissible both because they are irrelevant and because they offer legal conclusions (including on issues that we have already considered and adjudicated).

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[48] Mr. Beevers's specific criticism of "nonsensical" date information in certain records is also not supported by the example he identifies at paragraphs 52 and 53 of his initial report. He asserts that "the maturity date is nonsensical insofar as the maturity date is before the trade date," but the identified maturity date of September 22, 2015 is obviously well after the trade date of June 10, 2005. (Beevers Initial Report ¶¶ 52-53.)

These opinions are irrelevant because Exchange plaintiffs need not identify all instances of trader-based manipulation at this stage. Exchange plaintiffs' defense of their relevance is incoherent: they simultaneously contend that Mr. Beevers must explain why he "has not thus far been able to identify all instances of trader-based manipulation at Rabobank during Period 0" on the one hand (Exch. Pls.' Beevers Opp'n 8), and that "Plaintiffs (through Mr. Beevers) are not required to identify all instances of trader-based manipulation at this stage" on the other (Exch. Pls.' Beevers Opp'n 11). Of course, if all instances of manipulation need not be identified at class certification, Mr. Beevers need not explain his failure to do so. Indeed, we highlight here Exchange plaintiffs' assertion that "Mr. Beevers takes no position on" the question of whether "production of Defendants' trade data was necessary for purposes of Plaintiffs' class certification **[**176]** motion." (Exch. Pls.' Beevers Opp'n 11 (emphasis omitted).) Accepting this concession, Mr. Beevers's opinions are plainly irrelevant.

Further, these opinions amount to legal conclusions regarding the scope of discovery, one that impinges on our responsibility to assess whether the discovery being sought is "proportional to the needs of the case." *Fed. R. Civ. P. 26(b)(1)*. To the extent Mr. Beevers's opinions regarding additional production overlap with Exchange plaintiffs' prior motion to compel the production of certain trading records (Letter from Christopher Lovell & David Kovel to the Court, Nov. 4, 2016, ECF No. 1636), those issues have already been resolved by our order denying that motion, see Dec. 6, 2016 Order, ECF No. 1667, and Mr. Beevers's opinions are squarely precluded by that order. To the extent that Exchange plaintiffs rely on Mr. Beevers's opinions to request reconsideration of our order denying Exchange plaintiffs' motion to compel certain trading data, we reaffirm our conclusion that the burden of making available Exchange plaintiffs' requested production -- data sufficient to establish trader positions for every single trader at Rabobank over the class period -- is not proportional to **[**177]** the relevance and importance of that data, see *Fed. R. Civ. P. 26(b)(1)*.[49]

[*499] But even if these opinions extend to data not previously sought as Exchange plaintiffs suggest (Exch. Pls.' Beevers Opp'n 11), that breadth does not change their fundamentally legal nature or their inadmissibility. To the extent that they rely on Mr. Beevers's opinions to so argue, we conclude that such a request is remarkably untimely. The class certification schedule for this case was established in February 2016, see Scheduling Order, Feb. 23, 2016, ECF No. 1327, and Exchange plaintiffs offer no explanation for why this information could not have been requested earlier. Rather, they have had more than ample time to seek additional discovery necessary for class-certification purposes, and cannot now complain of any insufficiency.[50]

Ultimately, this initial portion of Mr. Beevers's opinions reduces to the proposition that the data Rabobank has produced is not as tractable as he and Exchange plaintiffs would desire for class certification purposes. But Mr. Beevers is not permitted to offer a definition of completeness that is untethered from any concrete requirements (beyond his personal definition of what is "necessary") and then opine **[**178]** that Rabobank's productions fail to meet that wholly subjective standard. Even if these opinions are correct -- and the record strongly suggests that at least some are not -- they are irrelevant to our consideration of the Exchange plaintiffs' class certification motion. To the extent Exchange plaintiffs assert, relying on Mr. Beevers's expert opinions, that they were afforded insufficient class certification discovery, we reaffirm our decision to deny Exchange plaintiffs' motion to compel and further conclude that the time to litigate class-certification discovery issues has long ago passed.

1.3.2. Identification of Trader-Based Manipulation

Next, Mr. Beevers offers a process for identifying trader-based manipulation, consisting of three different techniques: (1) identifying "anomalous" submissions based on certain mathematical criteria; (2) interpreting trader communications for "corroborating evidence" of manipulation; and (3) analyzing trader positions to see if LIBOR

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[49] Our skepticism is confirmed by the amorphousness of the correlation analysis proposed by Mr. Beevers, which we address fully below.

[50] Again, Mr. Beevers's opinions regarding the "necessity" of trader-level records in establishing trader-based manipulation directly conflict with those of Dr. Seyhun, who opines that TBM can be identified using various methodologies, none of which rely on the trader-level records sought by Mr. Beevers.

manipulation benefited particular traders. (Beevers Initial Report ¶¶ 73-87; Beevers Rebuttal Report ¶¶ 40-62.) Rabobank and Exchange plaintiffs dispute whether these three components of Mr. Beevers's methodology should **[**179]** be analyzed individually or together; Exchange plaintiffs contend that "Rabobank improperly breaks up Mr. Beevers' methodology into three steps" and suggest that the three components should not be analyzed separately. (Exch. Pls.' Beevers Opp'n 12.)

Mr. Beevers apparently disagrees with Exchange plaintiffs' argument. In responding to Dr. Hubbard's criticism that his methodology is dependent on review of trader communications, Mr. Beevers asserts that his "anomalous submission" criteria are sufficient to identify trader-based manipulation standing alone, as the subsequent steps merely "corroborate" the initial findings of anomalies. (Beevers Rebuttal Report ¶ 57.) But even if Mr. Beevers's methodology were to consist of three steps to be considered together, Daubert requires as a matter of law that "an expert's analysis be reliable at every step." *Amorgianos, 303 F.3d at 267*. Because "any step that renders the analysis unreliable under **[*500]** the Daubert factors renders the expert's testimony inadmissible," id. (emphasis omitted) (quoting *In re Paoli, 35 F.3d at 745*), we analyze Mr. Beevers's three techniques individually.

1.3.2.1. Anomalous Submissions

First, Mr. Beevers offers a two-part definition for what constitutes an "anomalous" submission. **[**180]** Under the first part, for a given bank and given tenor, a submission is considered anomalously high (or low) if three conditions are met: (1) the bank made a submission greater (or less) than published LIBOR; (2) the bank's submission is higher (or lower) than the submission made the prior day; and (3) compared to the prior day, the increase (or decrease) in the bank's submission was greater in magnitude than the corresponding change in published LIBOR. (Beevers Rebuttal Report ¶ 47.) Under the second part, for a given bank and any two tenors, one or both submissions[51] are considered anomalous if two conditions are satisfied: (1) the bank increased its submission in one tenor compared to the day before and decreased the submission in the other tenor, and (2) such directionally dissimilar changes are observed for fewer than 25% of panel banks on the day in question. (Beevers Rebuttal Report ¶ 50.)

We agree with Exchange plaintiffs to the limited extent they contend that ***HN40***[] an expert opinion need not have been peer reviewed and need not be generally accepted in the community in order to be admissible. See *Daubert, 509 U.S. at 593* (holding that "peer review" is "relevant, though not dispositive" and rejecting the **[**181]** general acceptance standard set forth in *Frye v. United States, 293 F. 1013 (D.C. Cir. 1923))*. We agree with Rabobank, however, that Mr. Beevers's methodology for identifying anomalous submissions is insufficiently reliable.

As an initial matter, Mr. Beevers provides scant explanation for how this two-part definition for anomalous submissions was developed. Mr. Beevers's initial report simply defines "anomalous" in a footnote without further explanation. (Beevers Initial Report ¶ 76 n.7.) Standing alone, this definition would be little more than Mr. Beevers's inadmissible ipse dixit that the submissions in question were anomalous. Mr. Beevers's rebuttal report is slightly more detailed, explaining that his criteria are designed to capture instances where one bank "has raised its submission from one day to the next by an inexplicably large amount" and where changes across tenors cannot be explained by "a general [yield] curve steepening or flattening," but the jump from this explanation to the specific mathematical criteria applied appears to be supported only by his ipse dixit, which is insufficient. (Beevers Rebuttal Report ¶¶ 45-54, n.16.)

Indeed, it appears that the first part of the two-part definition would tend to find, for banks **[**182]** whose submissions were consistently above (or below) published LIBOR, anomalous submissions over periods when interest rates were consistently increasing (or decreasing), as the first two criteria would generally be satisfied. As

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[51] Mr. Beevers's reports leave ambiguous whether this second criterion identifies one submission or both submissions as anomalous. At oral argument, counsel clarified that whether one submission is considered anomalous or both submissions are "depends on the circumstances and requires a little bit more facts." (Hr'g Tr. 16:18-19.) This response is hardly illuminating, though as we explain below, the ambiguity left in Mr. Beevers's opinion here does not affect our conclusion as to its admissibility.

to the second, Mr. Beevers does not explain whether one or both submissions are considered anomalous if the two criteria are satisfied. Accepting counsel's representation at oral argument that the determination of whether one or both submissions **[*501]** are considered anomalous depends on further inquiry into the circumstances (Hr'g Tr. 16:15-19), Mr. Beevers's reports do not explain when both submissions are considered anomalous, when only one submission is considered anomalous, and if only one submission, which one of the two. Absent some explanation as to how these additional "circumstances" and "facts" are analyzed, and given the implementation error that Mr. Beevers has made in applying these criteria (Hubbard Rebuttal Report ¶ 53 n.111), we cannot conclude this part of Mr. Beevers's methodology is sufficiently reliable such that it is admissible.

Our hesitation is confirmed by the nonsensical results produced by these criteria when they are applied to actual **[**183]** LIBOR submissions made outside of Period 0 and the but-for LIBOR submissions calculated by Dr. Seyhun. Specifically, Mr. Beevers's methodology characterizes as anomalous 27 percent of Rabobank's 3-month LIBOR submissions made between 2000 and 2002, and 19 percent of Rabobank's 3-month LIBOR submissions made in 2003 and 2004,[52] both of which are greater than the 17 percent identified during Period 0. (Hubbard Rebuttal Report ¶ 58, ex. 29.) Exchange plaintiffs do not dispute these statistics, but assert that an evaluation of the results produced by Mr. Beevers's criteria is "impermissible under Daubert," and that these results are not implausible because some evidence suggests that trader-based manipulation occurred as early as 2000. (Exch. Pls.' Beevers Opp'n 13-14.)

But as we have discussed, ***HN41***[] methodology and results "are not entirely distinct from one another," *Amorgianos, 303 F.3d at 266* (quoting *Joiner, 522 U.S. at 146*), and indeed, Rabobank's robustness testing of Mr. Beevers's methodology relates directly to two of the reliability factors identified by the Supreme Court: whether a methodology "can be (and has been) tested" and a methodology's "known or potential rate of error," *Daubert, 509 U.S. at 593-94*. In this case, the high rates of anomalous submissions **[**184]** between 2000 and 2004 identified by Mr. Beevers's methodology suggests that it was not well-tested and that it has a high potential rate of error.

Exchange plaintiffs additionally respond that Rabobank engaged in trader-based manipulation as early as 2003 and that there is therefore no reason to expect Mr. Beevers's methodology to show zero instances of anomalous submissions during this time. But even assuming that Rabobank engaged in trader-based manipulation as early as 2003, Exchange plaintiffs offer no explanation for why, considering the three periods 2000-2002, 2003-2004, and Period 0, Mr. Beevers's analysis identifies the lowest rate of anomalous submissions in the third (17%) and the highest rate of anomalous submissions in the first (27%) when Exchange plaintiffs' allegations and proffered evidence of trader-based manipulation is strongest in the third and concededly nonexistent in the first. While sporadic findings of anomalous submissions prior to Period 0 might be considered indicia of only a minor flaw in Mr. Beevers's criteria, the substantial rates of anomalous submissions found prior to Period 0 and the exactly-backwards relationship between Mr. Beevers's findings of **[**185]** manipulation and Exchange plaintiffs' allegations suggest that Mr. Beevers's methodology has a high rate of error and is insufficiently reliable.[53]

[*502] Similarly, Mr. Beevers's criteria characterize as anomalous a substantial percentage of the but-for LIBOR submissions calculated by Dr. Seyhun -- that is, the submissions Dr. Seyhun contends that panel banks would have made in the absence of LIBOR manipulation.[54] Specifically, Mr. Beevers's methodology identifies as anomalous 5% to 35% of Rabobank's "but-for" LIBOR submissions calculated by Dr. Seyhun, depending on which of Dr. Seyhun's models is considered. Indeed, for two of Dr. Seyhun's models, Mr. Beevers's methodology finds more anomalies in

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52 This statistic is calculated by differencing the figures presented in Exhibit 29 of the Hubbard Rebuttal Report.

53 Mr. Beevers's criteria apparently also identify high rates of anomalous submissions in 2015 and 2016, periods in which Exchange plaintiffs have not alleged, and cannot credibly allege, manipulation. (Hubbard Rebuttal Report ¶ 58 n.120.)

54 Mr. Beevers's and Dr. Seyhun's methodologies also frequently yield directionally inconsistent results. Dr. Seyhun's models identify artificiality in the opposite direction from artificiality identified by Mr. Beevers's methodology on 23% to 43% of the days in Period 0 on which Mr. Beevers identifies anomalous 3-month LIBOR submissions by Rabobank. (Hubbard Rebuttal Report ¶ 63, tbl.3, ex. 30.)

Rabobank's but-for LIBOR submissions than in Rabobank's actual (allegedly manipulated) submissions. (Hubbard Rebuttal Report ¶¶ 70-72, ex. 31.)

In response, Exchange plaintiffs assure us that any inconsistency does not bear on the reliability of Mr. Beevers's opinions because (1) the anomalous-submission definition is only the first step of Mr. Beevers's overall methodology and (2) any disagreement between Mr. Beevers and Dr. Seyhun need not be resolved now. (Exch. Pls.' Beevers Opp'n 14-15). Though **[**186]** Exchange plaintiffs accuse Rabobank of making an "illogical, apples-to-oranges comparison" by comparing Mr. Beevers's "anomalous submissions" analysis to the results of Dr. Seyhun's methodology (Exch. Pls.' Beevers Opp'n 15), Mr. Beevers himself asserts that his analysis is not necessarily reliant on subsequent steps, (Beevers Rebuttal Report ¶ 57). And based on our previously expressed skepticism that the concept of a "battle of the experts" can extend to this extent of disagreement between a party's own experts, we conclude that poor performance of Mr. Beevers's anomalous-submission definition when applied to Dr. Seyhun's findings strongly suggests an untested methodology with an unacceptably high rate of error.

1.3.2.2. Trader Communications

Having identified submissions of interest based on his two two-part definition of "anomalous submissions," Mr. Beevers next proposes to review various trader communications, including "emails, instant message conversations, and recorded conversations." (Beevers Rebuttal Report ¶¶ 11, 57.) We conclude this step is unreliable because it amounts to no methodology at all.

Exchange plaintiffs assert that Mr. Beevers has in fact offered a methodology, **[**187]** "part of which involves applying Mr. Beevers' vast experience and knowledge gained through his work in the dealing rooms of financial institutions." (Exch. Pls.' Beevers Opp'n 15.) Such a vague methodology is not a methodology at all, and it is certainly not a methodology that can or has been tested or one with a known or potential rate of error. In the absence of some recognizable, describable methodology beyond an appeal to Mr. Beevers's qualifications, his opinions that certain documents "clearly show" manipulation whereas others do not (Beevers Rebuttal Report ¶ 58) would be "the essence of unverifiable subjectivity, amounting to the sort of ipse dixit connection between methodology and conclusion" that is properly excluded, *Nimely, 414 F.3d at 399*.[55]

[*503] 1.3.2.3. Individual Trader Positions

At step three, Mr. Beevers proposes to "consider the positions of individual traders on [each day with an anomalous submission] to see if there was a relationship between the profit motive (trader position such that a trader or group of traders would benefit from the anomalous submission) and the submission." (Beevers Rebuttal Report ¶ 42.) Specifically, Mr. Beevers intends to undertake "a comparison of which traders were **[**188]** long or short on each particular day with unusually high or low LIBOR submissions," with a "high correlation" between trader positions and anomalous LIBOR submissions serving as "strong corroboration for manipulation." (Beevers Rebuttal Report ¶ 55.) Mr. Beevers does not actually undertake such an analysis, asserting that "the lack of reliable trader-level position data limits [his] ability" to conduct it, but opines that doing so would be feasible once "Defendants produce a complete set of accurate historical trading data for each day during the Class Period that identifies the relevant trader for each position." (Beevers Initial Report ¶ 75.)

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[55] Additionally, we would question whether opinions based on the interpretation of trader communications are products of Mr. Beevers's expertise. Contrary to Exchange plaintiffs' suggestion that the interpretation of the communications between traders in question involves "parsing through the technical jargon and terminology" found in those communications and "requires experience and familiarity with the practices and customs of dealing rooms," (Exch. Pls.' Beevers Opp'n 16), Dr. Netz -- did not claim any such experience -- was able to undertake a similar exercise interpreting trader communications (Netz Initial Report 13, 18, 20). Indeed, Exchange plaintiffs identify no instances in which the communications that Mr. Beevers canvasses for indicia of trader-based manipulation contains "technical jargon and terminology" obscuring their meaning; their attempt to recast a reading comprehension exercise as something more is unavailing.

Rabobank contends that this step of Mr. Beevers's analysis is governed only by arbitrary criteria susceptible to cherry-picking, especially in light of Mr. Beevers's opinions that different traders within a single bank will often have different exposures to LIBOR (and therefore different profit motives) and in light of Mr. Beevers's failure to explain what he means by a "relationship" between traders' profit motive and a bank's LIBOR submission or what constitutes a "high correlation." (Rabobank Beevers Mem. 11-12.) Exchange plaintiffs respond **[**189]** that Mr. Beevers intends to "perform statistical analysis that would detect those traders who systematically benefit from Rabobank's LIBOR submissions over time," namely, significance testing of the relationship between a trader's positions and Rabobank's LIBOR submissions. (Exch. Pls.' Beevers Opp'n 17.)

As an initial matter, we share Rabobank's skepticism as to whether Mr. Beevers's reports can be fairly interpreted to propose statistical testing. (Rabobank Beevers Reply 8.) The closest Mr. Beevers comes to setting forth any statistical test (which he would perform once he receives all the data he desires) is referencing a "high correlation" serving as "strong corroboration for manipulation." (Beevers Rebuttal Report ¶ 55.)

This lack of detail renders unpersuasive plaintiffs' defense of Mr. Beevers's opinions, even accepting plaintiffs' post hoc exegesis of his methodology. Mr. Beevers could have selected certain statistical tests to perform, discussed the data series to which he would have applied his selected tests (even if the series themselves have not yet been generated), identified what his null hypothesis would have been, and determined the level of statistical significance **[**190]** he would have demanded in order to reject the null hypothesis.[56] But he has **[*504]** done none of those things, and his failure to do so makes examining the reliability of his methodology essentially impossible. While incomplete data may, understandably, impair an expert's ability to fully conduct the analyses that he proposes, it does not excuse the failure to construct an analytical framework under which the data is to be analyzed. The flaw in Mr. Beevers's opinion is the latter, not the former, and we therefore conclude that his opinion is inadmissible.

Of course, even if Mr. Beevers's correlation methodology had been more fully developed, we would conclude that any opinions resulting from the application of that methodology would be inadmissible for lack of reliability. The first step of Mr. Beevers's analysis is unreliable for the reasons discussed above, and any correlation analysis between trader positions and Rabobank's LIBOR submissions to be performed at the third step will rely on those "anomalous subimssions" identified at that first step as an input. (Beevers Rebuttal Report ¶¶ 42, 55.) Because Mr. Beevers would not be conducting this correlation analysis using reliable data, any **[**191]** results that it produced would be similarly unreliable. See *Nimely, 414 F.3d at 397* (requiring both "reliable data and methodology"); see also *Fed. R. Evid. 702(a)*.

In sum, we conclude that Mr. Beevers's proposed three-step method for identifying trader-based communications is inadmissible. Each step is unreliable as we have explained, and three unreliable steps does not an admissible methodology make.

1.3.3. Monte Carlo Analysis

Next, Mr. Beevers conducts a statistical "Monte Carlo" analysis. "Monte Carlo simulation involves repeated random sampling of various potential scenarios to compute an average result [and is] a technique which obtains a probabilistic approximation to the solution of a problem by using statistical sampling techniques." *Advanced Analytics, Inc. v. Citigroup Glob. Markets, Inc., No. 04 Civ. 3531 (LTS)(HBP), 2009 U.S. Dist. LEXIS 130133, 2009 WL 7133660, at *1 n.5 (S.D.N.Y. Aug. 5, 2009)*, report and recommendation adopted in part and rejected in part,

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[56] "In conducting a formal significance test, researchers start from the hypothesis they are seeking to disprove, called the 'null hypothesis' or 'null.' They then ask: Assuming the null hypothesis is true, what is the probability of observing data that conflict with the null hypothesis to at least as great an extent as do the data actually observed? . . . If the answer falls below a predetermined significance threshold (often 5%), then the null hypothesis is sufficiently inconsistent with the data that it is deemed 'rejected,' and the result is deemed 'statistically significant.'" *Nat. Res. Def. Council, Inc. v. Rauch, 244 F. Supp. 3d 66, 89-90 (D.D.C. 2017)* (citations omitted).

2010 U.S. Dist. LEXIS 123476, 2010 WL 4780772 (S.D.N.Y. Nov. 22, 2010). Based on this analysis, Mr. Beevers opines that further merits discovery will allow plaintiffs to discover more instances of trader-based manipulation, as he concludes that "submissions are not independent and are thus consistent with collusion." (Beevers Initial Report ¶¶ 88, 100.)

As with Dr. Seyhun and Dr. Netz's probabilistic opinions, we conclude that Mr. Beevers's opinion here is irrelevant at class certification and **[**192]** not helpful to the trier of fact. Even assuming that Mr. Beevers's Monte Carlo analysis is reliably implemented, it cannot prove that any trader-based manipulation actually occurred, let alone on which days, by which banks, the extent to which it actually impacted LIBOR submissions, or whether those findings pertain to all class members or only certain class members. Indeed, Mr. Beevers's Monte Carlo analysis, by construction, yields results for an aggregated period and across pairs of banks at its most detailed level. Therefore, contrary to Exchange plaintiffs' contentions, Mr. Beevers's Monte Carlo analysis neither "serve[s] to show Rabobank's anomalous submissions" nor "identif[ies] collusive behavior between panel banks" with any specificity. (Exch. Pls.' Beevers Opp'n 19.)

But even if Mr. Beevers's analysis were helpful to the trier of fact, it would founder on reliability grounds. Mr. Beevers's Monte Carlo simulation analyzes the relationship between a pair of banks' LIBOR submissions for every pair of panel banks, and analyzes the probability that the submissions **[*505]** are both above or both below a reference rate (that is, the submissions have the same "directionality" compared to **[**193]** the reference rate). (Beevers Initial Report ¶¶ 88-110.) Mr. Beevers considers two different reference rates: published LIBOR and the mode of the panel banks' LIBOR submissions (i.e., the most frequent submission on a given day).[57]

Mr. Beevers then calculates, through random simulation, the expected probability that, conditional on one bank's submission having one directionality, that each other bank's submission has the same directionality. In performing this calculation, Mr. Beevers first determines the percentage of time each bank's submission is above, equal to, or below the reference rate. (Beevers Initial Report tbls.1-2.) With these directionality distributions calculated, Mr. Beevers then runs a large number of simulations.[58] In each simulation, using those distributions calculated at the first step, Mr. Beevers randomly determines, for each bank, whether that bank's submission was above, at, or below the reference rate. Mr. Beevers then aggregates the results of these numerous simulations in order to calculate the "expected" probabilities of one bank's submissions having a certain directionality given another bank submissions having the same directionality, under the assumption **[**194]** that the directionality of one bank's LIBOR submission is independent of the directionalities of all other banks' LIBOR submissions.

Mr. Beevers then compares these "expected" directionality probabilities to the actual probabilities observed, and concludes that the deviation of the actual probabilities from the expected probabilities are generally statistically significant. (Beevers Initial Report ¶ 101.) From this result, Mr. Beevers opines that "submissions are not independent and are thus consistent with collusion." (Beevers Initial Report ¶ 100.)

At the outset, we note that randomness is a deliberate feature of Monte Carlo simulation and reject Rabobank's arguments to the extent they suggest that this randomness by itself is a flaw rendering this analysis unreliable. (Rabobank Beevers Mem. 15.) Under Mr. Beevers's framework, each bank's submission on a given day can fall into one of three categories, meaning that for 16 banks, there are three to the 16th power, or more than 43 million, permutations of the relationships of each bank's submission to the reference rate. The "expected" probabilities that Mr. Beevers calculates would, most rigorously, be calculated based on all 43 million **[**195]** permutations. But given the computational difficulties involved in so calculating, Monte Carlo simulation is helpful in arriving at a reasonable approximation for the "expected" probabilities that Mr. Beevers presents.

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[57] In one instance, Mr. Beevers refers to the "median" value (Beevers Initial Report ¶ 93), though he more often refers to the second reference rate as the "mode" or the "modal value" (Beevers Initial Report ¶¶ 95, 98, 99, tbl.2). Assuming that Mr. Beevers did in fact use the mode as his second reference rate, Mr. Beevers does not explain his methodology when two different submissions were equally frequent on a given day.

[58] Mr. Beevers does not specify how many simulations are incorporated into the results presented in his report beyond "many thousands." (Beevers Initial Report ¶ 94.)

HN42[] While Monte Carlo simulation is a generally accepted technique, general acceptance does not end the reliability inquiry.[59] Problems in implementing the technique **[*506]** may nonetheless render it unreliable as applied, Mr. Beevers's Monte Carlo simulation includes at least two flaws undermining its reliability. First, the Monte Carlo simulation relies on probability distributions of each bank's LIBOR submissions being above, equal to, or below, the reference rate calculated based on Period 0; and second, Mr. Beevers's assumption that each bank's directionality must be independent of all other banks' directionalities is not only unsupported, but demonstrably false.

Mr. Beevers does not identify the time period over which he draws his initial distribution of each bank's submissions compared to the reference rate. However, counsel at oral argument clarified that Mr. Beevers conducted his analysis over Period 0 (Hr'g Tr. 17:9-13), and this representation is consistent with Mr. Beevers's **[**196]** use, for almost all banks and tenors analyzed, of 666 daily observations.[60] Mr. Beevers's reliance on Period 0 -- a period in which Exchange plaintiffs allege trader-based manipulation to be especially prevalent -- as a benchmark period for his distributions undermines the reliability of the analysis. In the same way that regressions relying on clean periods overlapping with challenged conduct may be unreliable because the relationships between variables measured during the "clean" period will be tainted by the challenged conduct, the distributions underlying Mr. Beevers's calculations are not in fact "clean."

Additionally, Mr. Beevers's central assumption in running his Monte Carlo analysis -- the statistical independence of each bank's directionality -- is untenable. First, macroeconomic effects are likely to affect different subsets of panel banks differently. Mr. Beevers asserts that macroeconomic factors "impact all banks equally," but this assertion is difficult to accept given geographic differences between panel banks, among other distinctions. (Beevers Rebuttal Report ¶ 112.) The contention, for example, that European monetary policy would affect Rabobank, Bank of America, and **[**197]** Bank of Tokyo-Mitsubishi to the same extent is simply not credible. To the extent Mr. Beevers tautologically defines "macroeconomic" factors to be those that impact all banks equally and all other factors are "micro economic effects," (Beevers Rebuttal Report ¶ 112), this definition undermines Mr. Beevers's decision to account only for credit risk in his submission analysis (Beevers Initial Report ¶¶ 103-10).

But even disregarding macroeconomic effects, Mr. Beevers's independence assumption is false as a matter of mathematical logic because each of his reference rates is itself a function of each bank's LIBOR submissions. That is, one bank's directionality is necessarily related to all other bank's directionalities through the reference rate itself, and therefore cannot be independent to the extent Mr. Beevers assumes.

When published LIBOR is the reference rate, the directionalities cannot be completely independent because they are constrained by the method by which published LIBOR is calculated. To take an extreme example, a result that all 16 banks' submissions were below published LIBOR (i.e., had negative directionality) is impossible in actuality but a possible result under Mr. **[**198]** Beevers's independence assumption. Nor must all impossible results be so extreme: for example, a result that 4 banks had positive directionality and 12 banks had negative directionality is also impossible, because those four banks with the highest submissions would be "trimmed" as being outside the interquartile **[*507]** range and the remaining 12 banks cannot all have made LIBOR submissions below published LIBOR. Similarly, when the modal submission is the reference rate, the directionalities cannot be completely independent because they are constrained by the fact that the mode must have been generated by a certain number of bank's submissions being the same. To take another example, a result that fewer than two banks' submissions was equal to the modal submission (i.e., had no directionality) is impossible, as that value could not be the reference rate because it would not be the mode.

In sum, even assuming that Mr. Beevers's Monte Carlo analysis can overcome a fundamental relevance problem at this stage, we are unpersuaded that Mr. Beevers has implemented his Monte Carlo analysis in a robust way that supports his conclusion of collusion.

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[59] We reject out of hand Exchange plaintiffs' suggestion that a model or statistical technique that is accepted and reliable in one context should be considered reliable and admissible in all contexts. (Exch. Pls.' Beevers Opp'n 21.)

[60] Based on a year having approximately 252 trading days, 666 days corresponds roughly to the 2.64-year length of Period 0.

1.3.4. Continuity of Manipulation

Finally, Mr. Beevers **[**199]** opines that "it will feasible to prepare a matrix of a chronological listing of each day of trader based manipulation by each Defendant," and that such a matrix will "potentially likely contain thousands of instances of trader based manipulation by many of the Defendants." (Beevers Initial Report ¶ 117.) This compound opinion encompasses two distinct opinions: (1) that a "matrix" listing instances of trader-based manipulation can be assembled, and (2) that panel banks "potentially likely" engaged in thousands of instances of trader-based manipulation.

We agree with plaintiffs that the first part of this opinion is "straightforward" (Exch. Pls.' Beevers Opp'n 21-22), a quality that weighs not in favor of, but against, admissibility. Mr. Beevers's opinion here appears to be that once discovered (through review of trader communications, statistical analysis, or some other method), all instances of trader-based manipulation can be compiled into a single table with one direction corresponding to each panel bank and the other corresponding to days. The rather obvious statement is not helpful to the trier of fact and is not the product of Mr. Beevers's expertise.

The second part of this opinion **[**200]** is more substantive. Mr. Beevers opines that panel banks "potentially likely" engaged in thousands of instances of trader-based manipulation, basing this opinion on allegations in Exchange plaintiffs' complaint quoting statements of facts incorporated into certain settlements between panel banks and regulatory authorities, his interpretation of the trial testimony of Rabobank trader Lee Stewart, and an analysis of Deutsche Bank's trading positions. (Beevers Initial Report ¶¶ 118-30.) As a general matter, these opinions are irrelevant and unhelpful to the trier of fact at this stage. The operative question at class certification is not how many times defendants engaged in trader-based manipulation in total -- a point that Exchange plaintiffs have repeatedly stressed, and Mr. Beevers's attempt to quantify, however imprecisely, an upper bound on trader-based liability simply has no bearing on the class certification analysis.

Further, Mr. Beevers's recitation of complaint allegations and interpretation of trial testimony and trader communications is not based on his specialized knowledge. Much of this section is devoted to canvassing the documentary evidence for words suggesting frequency, **[**201]** such as "weekly," "regularly," and "common." (Beevers Initial Report ¶¶ 118-19, 124.) Absent some suggestion that these words have special or coded meaning in this context of trader communications, this exercise is readily performable by the trier of fact and does not require Mr. Beevers's expertise. Mr. Beevers also reviews two settlements between panel banks and regulatory authorities for evidence that trader-based manipulation **[*508]** sometimes occurred orally and would not be documented, a task that is again performable by the factfinder.

Next, Mr. Beevers opines that the "steepness" of the yield curve implied by Deutsche Bank's 1-month and 3-month LIBOR submissions suggests that "Deutsche Bank was intentionally misreporting its LIBOR during this period" in order to systematically benefit its trading positions between January 2008 and September 2008, and that this manipulation is unlikely to be corroborated with documentary evidence.[61] (Beevers Initial report ¶¶ 125-29.) Mr. Beevers, however, does not articulate the relevance of this analysis of "steepness" in Deutsche Bank's submissions outside of Period 0 to trader-based manipulation by Rabobank.

1.3.5. Conclusion

Rabobank's motion to **[**202]** exclude Mr. Beevers's opinions is granted in part and denied in part. Though Mr. Beevers may opine on trade reporting and risk reporting systems in the financial industry as a general matter, he may not offer opinions regarding what specific data Rabobank possesses or opinions as to whether certain data

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[61] Mr. Beevers's opinion here, that many instances of trader-based manipulation would not be reflected in a written record because they involved in-person requests, significantly undermines Dr. Seyhun's reliance on documentary evidence of trader-based manipulation in his Rebuttal Period 0 Model. (E.g., Seyhun Initial Report ¶ 89; Exch. Pls.' Seyhun Opp'n 12-13, 17-18.)

should have been produced. Mr. Beevers lacks a basis on which to opine on Rabobank-specific data issues. His related opinions, regarding whether Rabobank's data productions meet his standards for completeness, are speculative and infringe on our role in establishing the scope of necessary discovery.

Further, his methodology for identifying trader-based manipulation is not reliable: it proceeds from an unreliable first step, as demonstrated by the implausible results it produces when applied to other time periods and data series, and compounds any unreliability with further unreliable steps. His Monte Carlo analysis is both unhelpful, as it is incapable of identifying trader-based manipulation with any specificity, and unreliable, as it depends on several assumptions that range between questionable and demonstrably false. And finally, his opinion regarding continuity of manipulation is **[**203]** not a product of his expertise and irrelevant as to Rabobank.

1.4. Mr. Miller

Exchange plaintiffs offer a declaration from Mr. Eric Miller (the "Miller Declaration") dated May 2, 2017 (Decl. of Thomas Elrod ex. 13, July 21, 2017, ECF No. 2121), setting forth Mr. Miller's opinions "regarding what information is available to identify members of the putative Exchange-Based class in this action and how the identification process could work." (Miller Decl. ¶ 2.) In particular, Mr. Miller opines: (1) that EDF traders who transacted during the Class Period could be efficiently notified through a certain process; (2) that the Chicago Mercantile Exchange (CME) maintains a "street book" of transaction data that could be used to fill gaps in data from other sources; (3) that his class action administration firm, A.B. Data, Ltd., has the capacity to process claims forms and perform damages calculations pursuant to a methodology to be ordered by the Court; and (4) that named plaintiff Atlantic Trading held certain trading positions on EDF contracts settling in December 2007. Based on Mr. Miller's experience in the administration of class action settlements,[62] we conclude that he is generally qualified **[**204]** to offer these opinions.

[*509] Mr. Miller first opines that class members could be identified through a notice program involving (1) the collection of "the names and addresses of all 'Large Traders' that cleared trades" in EDFs; (2) the collection of "the names and addresses of all clearing Futures Commission Merchants" (FCMs); (3) the collection of "additional names and addresses of potential settlement class members from banks, brokers, and other nominees"; (4) the conducting of a print and electronic media campaign; and (5) the establishment of a website and telephone hotline. (Miller Decl. ¶¶ 5-14 (footnotes omitted).) Potential class members identified by name and address would be sent a "Notice Packet" consisting of "the Court-Approved Notice of Class Action, Claim Form, and other documents." (Miller Decl. ¶ 6.)

Implicitly assuming that the individuals and entities identified through this process -- Large Traders, FCMs, and class members otherwise receiving notice -- maintained some records, Mr. Miller suggests that the CME retains records in the form of a "Street Book" sufficient to "fill[] gaps" in those records. (Miller Decl. ¶ 15.) Mr. Miller concludes that, to the extent that potential **[**205]** class members have not "retained the records necessary to perfect a claim," the CME's Street Book contains "records of the historical daily activity of all transactions for futures and options contracts" that could be used to determine each class member's transactions. (Miller Decl. ¶¶ 15-16.)

Mr. Miller's opinion regarding the gap-filling "Street Book" rests on a speculative assumption and is inadmissible. Mr. Miller does not claim to have personal experience with data produced by the CME, but bases his opinions on his "experience in past and current cases," including *In re Amaranth Natural Gas Commodities Litigation, 587 F. Supp. 2d 513 (S.D.N.Y.)* and In re Optiver Commodities Litigation, No. 08 Civ. 6842 (LAP) (S.D.N.Y.). But Amaranth and Optiver each involved records maintained by the New York Mercantile Exchange and not the CME, see *In re Amaranth Nat'l Gas Commodities Litig., 587 F. Supp. 2d 513, 519 (S.D.N.Y. 2008)*, aff'd, *730 F.3d 170, 172 (2d Cir. 2013)*; Compl. ¶ 1, In re Optiver Commodities Litig., (S.D.N.Y. filed July 30, 2008), No. 08 Civ. 6842 ECF No. 1, a distinction that Mr. Miller ultimately acknowledged at his deposition, (Miller Dep. 122:21-128:20, Decl.

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[62] Mr. Miller is a vice president of A.B. Data has participated in the administration of numerous class-action settlements. (Miller Decl. ¶¶ 1, 3.)

of Robert Lindholm ex. 74, July 7, 2017, ECF No. 2061). In the absence of additional support for his opinion regarding a CME "Street Book," this opinion in unreliable.

Exchange plaintiffs attempt to bolster Mr. Miller's opinion by asserting that they had served **[**206]** a subpoena on the CME to produce street book data, but CME was "instructed not to produce street book data" at the class certification stage. (Exch. Pls.' Miller Opp'n 17.) Implicit in this argument is the suggestion that the CME might very well have street book data, and whether that data exists is simply unknown at the moment because the CME has not been required to respond to the subpoena. We find this argument unpersuasive: Mr. Miller is not entitled to base his affirmative opinion, that CME in fact maintains street book data, on mere uncertainty as to whether such data exists.

Further, the gap-filling purpose of "street book" data is implicated only if some base of (gap-containing) data exists in the first place. While Mr. Miller opines that identified EDF traders could "provide historical transaction data in hard copy and/or electronically," he never states whether the EDF traders identified through the various methods of notice have maintained records at all.[63] Without **[*510]** that critical link, Mr. Miller's opinions on how best to provide notice to EDF traders -- necessary after certification of a class (particularly in the settlement context[64]), see *Fed. R. Civ. P. 23(c)(2)(B)*, *(e)(1)*, are irrelevant.

While the parties **[**207]** dispute the import of the Second Circuit's decision in In re Petrobras, the availability of trading records is an issue relevant to our consideration of the predominance of common questions and the superiority of class-action status. Mr. Miller's notice opinions do not address whether EDF traders, having received notice, actually possess relevant records. The subject that his notice opinions do address -- the mechanics of the notice process -- are of minimal relevance and do not help us determine a fact in issue. Nor can Mr. Miller's street book opinions salvage his notice opinions, given the speculative nature of the former.

Mr. Miller additionally opines A.B. Data has the capability to process claims "precisely in accordance with the court-approved plan of allocation and settlement stipulation," describes certain features of A.B. Data's proprietary software, and concludes that A.B. Data can handle "large volumes of complex damage calculations." (Miller Decl. ¶¶ 19-26.) We have no particular reason to doubt that A.B. Data has the technological capability to process trading records and perform damages calculations on those records as a general matter. But in order for A.B. Data to do **[**208]** so, those trading records must exist as an initial matter, and Mr. Miller does not reliably opine that they do.[65]

Finally, Mr. Miller provides several statistics regarding named plaintiff Atlantic Trading's positions on the EDF contract expiring in December 2007. (Miller Decl. ¶ 27.) However, Mr. Miller does not explain the data that he analyzed, the method he applied, or the assumptions that he made in making those calculations. This opinion is therefore also inadmissible.[66]

Accordingly, Rabobank's motion to exclude Mr. Miller's declaration is granted. Mr. Miller's opinions regarding the availability of a CME "street book" are not only speculative, but also concededly incorrect. His opinions regarding the provision of notice to EDF traders are of minimal relevance and do not help us "determine a fact in issue." *Fed.*

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[63] Indeed, as counsel conceded at oral argument, Exchange plaintiffs have served 89 subpoenas on various FCMs, and have received no data in response. (Hr'g Tr. 9:22-25; 11:14-24.)

[64] Mr. Miller's declaration refers to "settlement" several times. (Miller Decl. ¶¶ 5, 9, 19.) We are, of course, considering whether a litigation class should be certified.

[65] Mr. Miller also lacks personal knowledge as to the existence and retention of these trading records.

[66] Additionally, following Bank of America and JPMorgan Chase's settlements with Exchange plaintiffs, no live antitrust claims remain in this action. Though Mr. Miller offers this opinion divorced from context, it appears to be offered to support Atlantic Trading's standing to assert antitrust claims corresponding to subpart A of the class definition. Because no antitrust claims remain, this opinion has likely been rendered irrelevant.

R. Evid. 702(a). Given the lack of context for his trading-position calculations, we also cannot conclude that those statistics are sufficiently reliable to be admissible.

2. Exchange Plaintiffs' Daubert Motions

2.1 Dr. Culp

Rabobank submitted two expert reports from Dr. Christopher L. Culp: (1) an initial report dated April 3, 2017 (Decl. of Robert Lindholm ex. 67, June 30, 2017, ECF No. 2027); and **[**209]** (2) a surrebuttal report dated June 30, 2017 (Decl. of Robert Lindholm **[*511]** ex. 68, June 30, 2017, ECF No. 2027). We refer to these as the Culp Initial Report and the Culp Rebuttal Report. Exchange plaintiffs seek to exclude the portions of Dr. Culp's reports in which he opines that changes in LIBOR do not necessarily cause changes in EDF prices.[67] (Exch. Pls.' Culp Mem. 1) They do not challenge Dr. Culp's qualifications to offer those opinions and we conclude that Dr. Culp is amply qualified to offer them.[68]

Exchange plaintiffs contend that Dr. Culp's opinions should be excluded for five reasons: (1) they are allegedly contradicted by a document published by the Chicago Mercantile Exchange; (2) they are allegedly contradicted by statements made by Robert Wise, counsel for defendant Bank of America, during a March 2013 oral argument; (3) they fail to address the "overlap" theory briefly discussed in the Seyhun Rebuttal Report and more fully developed in Exchange plaintiffs' motion papers; (4) they are contradicted by certain trader communications; and (5) they are based on unreliable empirical analyses.[69]

Before analyzing these specific challenges, we first consider the proper interpretation of **[**210]** Dr. Culp's opinions. Exchange plaintiffs assert that Dr. Culp opines that there is "no mathematical relationship between spot LIBOR and expected future spot LIBOR," (Exch. Pls.' Culp Mem. 7), but this is a mischaracterization. Rather, Dr. Culp explains that changes in LIBOR do not necessarily cause changes in EDF prices. (Culp Initial Report ¶ 19 (criticizing Dr. Seyhun's and Dr. Netz's assumption that "changes in current 3mLIBOR impact Eurodollar futures prices . . . on days before futures contracts expire"); ¶ 21 ("[C]hanges in LIBOR do not have an independent causal effect on Eurodollar futures prices."); ¶ 24 ("[Dr. Seyhun and Dr. Netz] do not have a reliable theoretical basis for their assumption that changes in LIBOR on a given day cause changes in Eurodollar futures prices."). This difference parallels the distinction between correlation and causation: correlation between LIBOR and EDF prices is sufficient to establish a "mathematical relationship" between the two, but the operative question is whether changes in LIBOR cause determinable changes in EDF prices. With this understanding in mind, we consider Exchange plaintiffs' specific arguments.

First, Exchange plaintiffs contend **[**211]** that Dr. Culp's opinion is "patently incorrect" because it is contradicted by a CME publication[70] discussing implied forward rates and providing a formula for the calculation of implied forward

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[67] Specifically, Exchange plaintiffs seek to exclude the following paragraphs of Dr. Culp's reports: paragraphs 16 through 37, 40, 92 through 111, 187 through 222, 271 through 278, 349, and 352 through 364 of the Culp Initial Report and paragraphs 5, 6, 8 through 12, 20 through 22, 25 through 28, and 51 through 56 of the Culp Rebuttal Report. (Exch. Pls.' Culp Mem. 1.)

[68] Dr. Culp serves as an adjunct professor at both the Swiss Finance Institute and the University of Bern and holds a Ph.D. in financial economics from the University of Chicago Booth School of Business and a B.A. in economics from the Johns Hopkins University. He has also conducted extensive research and written numerous papers on various finance topics. (Culp Initial Report app. F.)

[69] The first four of these critiques can also be rejected at the threshold as critiques going to the weight of Dr. Culp's opinions rather than their admissibility. These critiques do not seriously challenge Dr. Culp's theoretical reasoning or empirical methodology; they at most offer competing evidence to be weighed in the Rule 23 analysis.

[70] John W. Labuszewski, Understanding Eurodollar Futures, CME Group Inc. (2013).

rates. (Exch. Pls.' Culp Mem. 7-8). We reject at the start Exchange plaintiffs' arguments to the extent they suggest that Dr. Culp ignored this **[*512]** publication, as he explicitly considered this publication in his evaluation of Dr. Netz's report. (Culp Initial Report ¶ 41 n.103). Further, based on our review of the publication, it discusses the relationship between "Eurodollar (Euro) futures and cash markets" rather than EDFs and LIBOR, which is not itself a cash market. This publication does not render Dr. Culp's causation opinion fatally flawed.

Second, Exchange plaintiffs assert that counsel for defendant Bank of America stated at oral argument in 2013 that "[e]ssentially what people are doing there is making bets, if you will. . . . [B]ut they're taking a position with respect to where LIBOR is going, up or down." (Exch. Pls.' Culp Mem. 8 & n.4 (citing Mar. 5, 2013 Hr'g Tr. 25:25-26:4, ECF No. 325)). We reject the notion that this remark from counsel made during oral **[**212]** argument almost five years ago seriously calls into the question of a qualified expert witness. Indeed, counsel prefaced his statement with the remark that "I'm not an expert in futures contracts and the Chicago Exchange." (Mar. 5, 2013 Hr'g Tr. 25:24-25.) And even if we did not reject the notion, counsel's statement was immediately preceded by plaintiffs' counsel's statement that EDF contracts settled at a price of 100 minus LIBOR (Mar. 5, 2013 Hr'g Tr. 25:16-20); nothing in the statement by counsel for Bank of America supports the notion that changes in LIBOR cause changes in EDF prices before the settlement date.

Third, Exchange plaintiffs argue that Dr. Culp failed to take into account their "overlap" theory. Under this theory, on a given day, the relationship between spot LIBOR and expected spot LIBOR at settlement is a function of the "overlap" between the three-month period following that day and the three-month period following the settlement date. (Exch. Pls.' Culp Mem. 10-13; Exch. Pls.' Culp Reply 3-5.) Using the specific example of March 14, 2008 and an EDF contract settling on March 18, 2008, Exchange plaintiffs assert that expected 3-month LIBOR on March 18, 2008 must **[**213]** be a function of spot 3-month LIBOR on March 14, 2008, because the former 3-month rate covers a period between March 18, 2008 and June 17, 2008 and the latter 3-month rate covers a period between March 14, 2008 and June 12, 2008 -- an overlap of 87 days out of 91 days in the period. Therefore, they contend, the March 14, 2008 expectation of 3-month LIBOR on March 18, 2008 can be calculated as the weighted average of 3-month spot LIBOR on March 14, 2008 (with 95.6% weight, calculated as 87 divided by 91) and the 3-month implied forward rate calculated from spot 3-month LIBOR and spot 6-month LIBOR on March 14, 2008 (with 4.4% weight, calculated as 4 divided by 91). According to Exchange plaintiffs, Dr. Culp's failure to consider this "mathematical fact" renders his challenged opinions inadmissible. (Exch. Pls.' Culp Mem. 12.)

As a threshold matter, the criticism that Dr. Culp did not consider the weighted-average formula presented for the first time in Exchange plaintiffs' motions papers (Exch. Pls.' Culp Reply 5) -- but not in Dr. Seyhun's reports -- is mystifying. Exchange plaintiffs cannot credibly fault Dr. Culp for failing to address a novel formula never presented until after his **[**214]** reports were written: Exchange plaintiffs' motion was filed on July 10, 2017, more than three months after Dr. Culp's initial report (dated April 3, 2017) and ten days after his sur-rebuttal report (dated June 30, 2017).

In any event, Exchange plaintiffs' "overlap" formula fares no better on the merits. While the validity of the implied forward rate formula incorporated as an input into the weighted-average formula is not questioned,[71] they appear to have conjured the **[*513]** weighted-average formula from absolutely nothing.[72] Indeed, as we will explain, it rests on the unfounded assumption that a market participant attaches equal significance to each day over a given three-month period and maintains an unchanging expectation of relevant conditions during that three-month period.

Taking Exchange plaintiffs' 2008 exemplar dates, the period supposedly reflected in spot 3-month LIBOR on March 14 covers the period between March 14 and June 12, and this period is divisible into two periods: (1) the four days

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[71] For any two times in the future, *t1* and *t2*, the implied forward rate formula calculates the spot rate expected at time *t1* covering the time period between time *t1* and time *t2*. Taking three months and six months as an example, the three-month spot rate expected in three months may be derived from the currently observed three-month rate spot and currently observed six-month spot rate.

[72] While Dr. Seyhun offers the overlap theory in his rebuttal report (Seyhun Rebuttal Report ¶¶ 38-50), he never reduces the overlap theory into the weighted-average formula offered by Exchange plaintiffs in their challenge to Dr. Culp.

between March 14 and March 17 (which do not overlap with the three-month period reflected in spot 3-month LIBOR on March 18), and (2) the 87 days between March 18 and June 12 (which do **[**215]** overlap with the three-month period reflected in spot 3-month LIBOR on March 18). Exchange plaintiffs appear to acknowledge that the first, non-overlapping period captured in spot 3-month LIBOR on March 14 should be excluded from the determination of expected 3-month spot LIBOR on March 18, but the formula's means of excluding those dates is to reduce the weight attributable to spot 3-month LIBOR on March 14 proportionally by the number of days. But this proportional reduction is appropriate only if the expectations for the first, non-overlapping period and expectations for the second, overlapping period are themselves proportional to the number of days. Because Exchange plaintiffs similarly rely on a proportional reduction of the 3-month implied forward rate (calculated from 3-month and 6-month spot LIBOR) to exclude the non-overlapping portion of the latter period, the same proportionality and uniformity are required of the 3-month period covered by the implied forward rate.

This March 14 and March 18 example establishes Exchange plaintiffs' reliance on proportionality for dates that are four days apart, but this principle generalizes to any combination of days. For example, Exchange **[**216]** plaintiffs' formula for spot 3-month LIBOR on March 18 expected as of March 13 would apply a 94.5% weighting (86 divided by 91) to spot 3-month LIBOR on March 13, which assumes that expectations for the five-day non-overlapping period are proportional to those for the 86-day overlapping period. Similarly, the 5.5% weighting applied to the 3-month implied forward rate assumes that expectations for the five-day overlapping period are proportional to those for the 86-day nonoverlapping period. And more generally, for all *n* between 0 and 91, Exchange plaintiffs' weighted-average formula requires proportionality between the first *n* days and the remaining 91 minus *n* days; the formula therefore assumes "uniformity" across all days in the 3-month period because each additional day in the overlapping period must account for 1/91 of expectations. This assumption is dubious at best, given that some days are more likely to have significant macroeconomic information impacting LIBOR (as Dr. Seyhun, Dr. Netz, and Exchange plaintiffs concede occurs): the Federal Reserve could announce a rate change, or certain government statistical releases regarding the state of the economy could be published, among **[**217]** many other events of significance.

[*514] In sum, Exchange plaintiffs' casual empiricism is entirely unavailing. We have significant doubts regarding the weighted-average formula proposed for the first time in Exchange plaintiffs' motion papers, and it certainly does not offer a basis on which to exclude Dr. Culp's opinions.

Fourth, plaintiffs assert that three communications between traders establish that changes in LIBOR caused changes in EDF prices, contradicting Dr. Culp's causation opinion. In particular, they rely on communications in which traders stated (1) "higher libor caused Sep09 and Dec09 ED to sell-off"; (2) "libors appear only relevant for futures"; and (3) "[t]he front 2 contracts in Eurodollars which most closely track the LIBOR settings have gotten killed this morning[] as the expectation is libors will set higher out of fear." (Exch. Pls.' Culp Mem. 8 n.3, Exch. Pls.' Culp Reply 6-7.) For one, these communications reflect only the beliefs of those traders, rather than the behavior of the market as a whole, and as Rabobank correctly notes, other traders (including several of the named plaintiffs in this action) viewed LIBOR as irrelevant in their trading considerations. Exchange **[**218]** plaintiffs offer no reason why, in assessing the reliability of Dr. Culp's opinions, we should give more weight to these three identified statements as compared to the named plaintiffs' sworn deposition testimony. The fact that some traders considered LIBOR in making their trading decisions does not establish that changes in LIBOR cause determinable changes in EDF prices, a distinction that Exchange plaintiffs attempt to elide. (Exch. Pls.' Culp Reply 7.)[73]

Finally, in their reply brief, Exchange plaintiffs offer two critiques of Dr. Culp's empirical methodology: (1) that he improperly analyzed changes in EDF prices in a one-hour window surrounding publication of LIBOR, from 11:30 a.m. to 12:30 p.m. London time, and (2) that his analysis of the relationship between LIBOR-derived implied forward

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[73] Further, these documents are susceptible to interpretation at best. For example, the third communication appears to reference EDF trading based on <u>expectations</u> of LIBOR in advance of its publication. This interpretation would be consistent with Rabobank's argument -- and Dr. Seyhun, Dr. Netz, and Exchange plaintiffs' concessions -- that EDF prices incorporate significant macroeconomic information that is also incorporated into LIBOR, as that information guides "expectations" of LIBOR.

rates and EDF-implied rates is irrelevant. (Exch. Pls.' Culp Reply 8-10.) Because Exchange plaintiffs do not seek exclusion of these analyses,[74] we discuss them and Exchange plaintiffs' criticisms only briefly.[75]

In his analysis of changes in EDF prices surrounding the publication of LIBOR, Dr. Culp finds that EDF trading prices respond quickly to significant macroeconomic events. (E.g., **[**219]** Culp Initial Report ¶ 121.) Dr. Culp's focus on the publication of LIBOR itself, as a means of isolating changes **[*515]** in EDF prices attributable to LIBOR apart from changes in EDF prices attributable to macroeconomic events would therefore appear to be a feature, not a flaw, of his analysis. Exchange plaintiffs' reliance on Dr. Seyhun's speculative "insider trading" theory is unpersuasive, and their suggestion that the EDF market may not be sufficiently liquid around 11:30am London time (or 5:30am Chicago time) is difficult to reconcile with their (and Dr. Seyhun's) contrary suggestions that EDFs "trade on an efficient market." (Exch. Pls.' Culp Reply 8; Seyhun Rebuttal Report ¶ 126.)

In his analysis of the relationship between LIBOR-derived implied forward rates and EDF-implied rates, Dr. Culp concludes that the two rates substantially differ over the Class Period. (E.g., Culp Rebuttal Report ¶ 49.) Because the spread between the two rates ranges between negative 157.56 and 21.79 basis points over the class period, Dr. Culp concludes that these differences are substantially greater in magnitude than the maximum 0.125 basis point change in LIBOR attributable to Rabobank's alleged manipulation **[**220]** of LIBOR.[76] (Culp Rebuttal Report ¶¶ 48-50.) Exchange plaintiffs complain that Dr. Culp fails to take into account the fact that banks other than Rabobank may have engaged in manipulation, and the collective impact of manipulation by multiple banks could be "more than ten-fold" greater than the 0.125 bp maximum change attributable to Rabobank. (Exch. Pls.' Culp Reply 10.) But even accepting that manipulation by more than one bank will have a greater impact on published LIBOR, Dr. Culp's point still stands: the large spreads between LIBOR-derived implied forward rates and EDF-implied rates often could not be explained by alleged LIBOR manipulation even by more than one bank. For example, the most extreme positive and negative spreads, at 21.79 bp and negative 157.56 bp, are 174 times and 1,260 times greater than the maximum Rabobank impact of 0.125 bp, respectively.

Exchange plaintiffs' motion to exclude certain of Dr. Culp's opinions is therefore denied. Even accepting that Exchange plaintiffs' criticisms are anything more than attacks on Dr. Culp's conclusions premised on a mischaracterization of his reports, none of those critiques call into question the reliability of Dr. Culp's opinions. **[**221]** Dr. Culp's opinions are not contradicted by a CME publication discussing Eurodollar cash markets, a statement made by counsel for Bank of America during oral argument, or certain trader communications. Nor are they excludable for having failed to consider the "overlap" formula that Exchange plaintiffs alchemize from nothing and present for the first time in their motions papers. And ultimately, we reject Exchange plaintiffs' overarching theory that a logical or theoretical argument is not susceptible to rebuttal or disproof through empirical evidence. We would assume that empirical evidence running counter to a logical or theoretical argument would spur one to ensure that the argument is free of logical fallacies and reevaluate the theoretical basis for the argument. But even if not, Exchange plaintiffs' attempted distinction of "logical" and "theoretical" arguments on the one hand and "empirical" arguments on the other simply does not offer a basis for excluding Dr. Culp's opinions under Daubert.

2.2 Dr. Hubbard

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[74] The analysis of changes in EDF prices surrounding the publication of LIBOR is presented at paragraphs 116 through 169 of the Culp Initial Report and the analysis of the relationship between LIBOR-derived implied forward rates and EDF-implied rates is presented at paragraphs 45 through 51 of the Culp Rebuttal Report. Exchange plaintiffs do not include these paragraphs in the list of sections they seek to exclude. (Exch. Pls.' Culp Mem. 1.)

[75] Exchange plaintiffs also contend that these analyses are "ultimately irrelevant." (Exch. Pls.' Culp Reply 10.) This suggestion is baffling, given that Exchange plaintiffs' experts -- and Exchange plaintiffs themselves -- expound extensively on the significance of implied forward rates and arbitrage in establishing a causal relationship between LIBOR and EDF prices. (Seyhun Initial Report ¶¶ 108-09; Netz Initial Report 32-33; Netz Rebuttal Report 15-16; Exch. Pls.' Culp Mem. 7-9; Exch. Pls.' Culp Reply 3-4.)

[76] Dr. Culp relies on Dr. Hubbard's calculations that Rabobank's alleged manipulation of LIBOR had a maximum impact of 0.125 basis points. (Culp Initial Report ¶¶ 221-22; Hubbard Initial Report ¶ 216.)

Rabobank offers two reports from Dr. R. Glenn Hubbard: (1) an initial report dated April 3, 2017 (Decl. of Robert Lindholm **[*516]** ex. 65, June 30, 2017, ECF No. 2027); and (2) a sur-rebuttal **[**222]** report dated June 30, 2017 (Decl. of Robert Lindholm ex. 66, June 30, 2017, ECF No. 2027). We refer to these as the Hubbard Initial Report and the Hubbard Rebuttal Report. Exchange plaintiffs seek to exclude only certain portions of Dr. Hubbard's opinions, those in which he addresses Mr. Beevers's opinions regarding certain data produced by Rabobank and the sufficiency of that data.[77]

Specifically, Dr. Hubbard opines that Mr. Beevers's data-sufficiency critiques are misguided because: (1) Mr. Beevers constructed a dataset with duplicate entries (Hubbard Initial Report ¶¶ 174-76); (2) the date-coding issues identified by Mr. Beevers are illusory (Hubbard Initial Report ¶¶ 177-80); (3) information attributing trading "folders" to the individual trader with responsibility for that "folder" was made available for each of the traders identified over the course of Mr. Beevers's review of trader communications; and (4) Mr. Beevers did not consider certain risk reports produced by Rabobank (Hubbard Initial Report ¶¶ 181-85).

Dr. Hubbard is qualified to offer the challenged opinions.[78] Dr. Hubbard, in the challenged sections of his report, does not opine that Rabobank's data productions were complete **[**223]** and contain all information necessary to identify trader-based manipulation, but rather that they are not deficient in the various ways suggested by Mr. Beevers. Accordingly, Dr. Hubbard does not need an "understanding of, and experience with, the day-to-day conduct and reporting in dealing rooms of financial services organizations" to offer these opinions (Exch. Pls.' Hubbard Mem. 8); rather, Dr. Hubbard's formal training in economics and his extensive experience working with economic and financial data qualify him to do so. Exchange plaintiffs' suggestions to the contrary mischaracterize the opinions in question and are unpersuasive.

First, citing Dr. Hubbard's statement that "Mr. Beevers' own errors -- not deficient data -- are the cause of many of the data deficiencies he mistakenly claims exist in the Rabobank data" (Hubbard Initial Report ¶ 17b), Exchange plaintiffs claim that "[i]t is hard to imagine how this statement could mean anything other than what it says; namely, that it is Dr. Hubbard's opinion that Rabobank's data productions are 'not deficient,' and that Mr. Beevers' opinion that they are deficient, is 'mistaken[].'" (Exch. Pls.' Hubbard Reply 4.)

We have no such difficulty. **[**224]** Dr. Hubbard's statement is clear: he opines that many of the data deficiencies identified by Mr. Beevers are attributable to Mr. Beevers's own errors and not deficiencies in Rabobank's data. Exchange plaintiffs' interpretation overreads Dr. Hubbard's opinion, which pertains to the deficiencies identified by Mr. Beevers and is not a representation regarding the quality of Rabobank's data generally. Indeed, such an interpretation is expressly contradicted by Dr. Hubbard's qualification that "many of" the deficiencies identified by Mr. Beevers are not deficiencies in actuality.[79]

[*517] Exchange plaintiffs also identify subsequent portions of Dr. Hubbard's report and deposition testimony regarding the presence of inconsistent date formats, the availability of "folder mapping" information[80] for specific traders identified in Mr. Beevers's report, and the sufficiency of certain risk reports. Again, Dr. Hubbard limits each of these statements to be a response to Mr. Beevers's opinions, and these statements cannot reasonably be read

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[77] Exchange plaintiffs seek the exclusion of paragraphs 17(b), 32 through 34, 164, 171, and 174 through 185 of the Hubbard Initial Report and Appendix D of that report. (Exch. Pls.' Hubbard Mem. 1.)

[78] Dr. Hubbard serves as Dean and Russell L. Carson Professor of Economics and Finance at the Columbia Graduate School of Business and on the Federal Reserve Bank of New York's Panel of Economic Advisors. Dr. Hubbard holds a Ph.D. and an A.M. in Economics from Harvard University, and has written extensively on various topics in finance and economics. (Hubbard Initial Report app. A.)

[79] For the same reasons, Exchange plaintiffs' reliance on paragraph 174 of the Hubbard Initial Report, where Dr. Hubbard opines that "most of" the data deficiencies identified by Mr. Beevers are not actually deficiencies, is unavailing. (Hubbard Initial Report ¶ 174.)

[80] Broadly speaking, "folder mapping" refers to the ability to identify the individual trader responsible for specific trading positions and transactions.

to offer an opinion regarding the overall completeness of Rabobank's production. For instance, Exchange plaintiffs identify Dr. Hubbard's opinion that inconsistent date formats **[**225]** "should not have contributed to [Mr. Beevers's] inability to construct trader-level LIBOR-related positions." (Exch. Pls.' Hubbard Reply 5 (quoting Hubbard Initial Report ¶ 179).) This opinion is limited, on its face, to one specific difficulty that Mr. Beevers identified in his report. Similarly, Exchange plaintiffs identify Dr. Hubbard's statement that folder mapping information is available "for every Rabobank trader that . . . Mr. Beevers identified as being involved in trader communications." (Exch. Pls.' Hubbard Reply 5 (quoting Hubbard Initial Report ¶ 177 n.302).) But again, this statement is on its face limited to a certain group of traders specifically identified by Mr. Beevers and does not extend to the availability of folder mapping information for all traders more broadly. Finally, Exchange plaintiffs identify Dr. Hubbard's opinion that Rabobank produced "most of the risk reports" that Mr. Beevers asserts are missing, "namely, 'risk positions by trading book on a daily basis,' and reports of 'which activities or individuals are taking significant risk positions.'" (Exch. Pls.' Hubbard Reply 5 (quoting Hubbard Initial Report ¶ 185 and Beevers Initial Report ¶¶ 48-49).) **[**226]** This selective quotation mischaracterizes the scope of Dr. Hubbard's opinion, which refers only to Mr. Beevers's description of "routine periodic reports, sometimes called 'dashboards', for use in internal and regulatory reporting,'" (Hubbard Initial Report ¶ 184 (quoting Beevers Initial Report ¶ 31)), and not to trader-by-trader positions more broadly.

When the challenged opinions are characterized accurately, Dr. Hubbard is qualified to offer them. Dr. Hubbard's opinions are primarily directed to how Mr. Beevers analyzed the data, rather than what specific data Mr. Beevers analyzed. Accordingly, Dr. Hubbard's extensive training and experience in the fields of economics and finance renders him qualified to work with spreadsheets and data, and therefore qualifies him to opine that Mr. Beevers made certain errors in analyzing the data produced by Rabobank.[81]

Nor are Dr. Hubbard's opinions excludable on account of incorrectness or speculativeness. Exchange plaintiffs suggest that Dr. Hubbard's opinions are not based on sufficient facts because Rabobank's data production contains "significant deficiencies . . . that are easily ascertained upon review," and Dr. Hubbard conceded that his opinions **[**227]** were incorrect. (Exch. Pls.' Hubbard Mem. 11-12). As a threshold matter, ***HN43***[] our role at the Daubert stage is not to conclusively assess the correctness of an expert's opinions, see *Amorgianos, 303 F.3d at 266* (holding that we **[*518]** undertake a Daubert analysis "without regard to the conclusions the expert has reached or [our] belief as to the correctness of those conclusions"), a point that plaintiffs have repeatedly emphasized (e.g., Exch. Pls.' Seyhun Opp'n 10). Exchange plaintiffs' focus on the correctness of Dr. Hubbard's conclusions is therefore an analytic nonstarter. Further, we have already rejected the premise of the assertion that Dr. Hubbard's opinions are incorrect because Rabobank's data productions are in fact incomplete -- Dr. Hubbard does not opine on the overall completeness of Rabobank's data productions, but rather only certain deficiencies identified by Mr. Beevers.

Second, Dr. Hubbard's opinions are not speculative. Dr. Hubbard undertook a review of the work product supporting Mr. Beevers's report and of the data produced by Rabobank, (Hubbard Report app. C), and one can trace a direct analytical path from that review to the conclusions that Dr. Hubbard reaches: namely, that Mr. Beevers made certain **[**228]** errors in analyzing the data produced by Rabobank and failed to consider certain risk reports in formulating his opinions. Indeed, the Delta reports, the MRE reports, and the Daily Revenue and Risk reports identified at paragraph 185 of the Hubbard Initial Report[82] are not cited in the appendices listing the materials relied upon in Mr. Beevers's reports. (Beevers Initial Report app. A; Beevers Rebuttal Report app. A.). Proceeding from that fact to the conclusion that Mr. Beevers failed to take those reports into account is a natural inference, not an analytical leap suggesting a lack of reliability.

In sum, Exchange plaintiffs' motion to exclude certain of Dr. Hubbard's opinions is denied. The motion is premised on a mischaracterization of Dr. Hubbard's opinions: the disputed sections of his report do not offer, and cannot

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[81] This conclusion is consistent with our prior holding that Dr. Netz is qualified to opine on the relationship between LIBOR and EDF prices based on her training and experience in economics and econometrics, her lack of specific experience with EDFs and EDF trading notwithstanding.

[82] Dr. Hubbard identifies specifically the documents located at Bates ranges RABO_METZLER_ 0188130-0189842, 0189843-0190724, and 0190725-0193254. (Hubbard Initial Report app. C.)

reasonably be read to offer, the opinion that Rabobank's data productions were "complete" in some platonic sense. Based on his extensive training and experience in economics and finance, Dr. Hubbard is qualified to offer his opinions regarding Mr. Beevers's data analysis and any errors that Mr. Beevers may have made.

2.3. Dr. Willig

UBS submits two reports from Dr. Robert **[**229]** Willig: (1) an initial report dated April 3, 2017 (Decl. of Jamie Heine ex. 5, July 1, 2017, ECF No. 2031); and (2) a sur-rebuttal report dated June 30, 2017 (Decl. of Jamie Heine ex. 7, July 1, 2017, ECF No. 2031). In the context of the Exchange plaintiffs' action, we refer to these as the Willig Initial Report and the Willig Rebuttal Report. Exchange plaintiffs do not challenge Dr. Willig's qualifications, and we conclude that he is qualified to offer the opinions presented in his reports.[83]

In these reports, Dr. Willig offers several opinions as to "whether Plaintiffs can demonstrate using common proof on a class-wide basis that panel banks, either individually or jointly, systematically suppressed their LIBOR submissions and the resulting published LIBOR rates during the Suppression Class Period." (Willig Initial **[*519]** Report ¶ 5 (footnote omitted).) Central to these opinions is an analysis of interbank lending transactions into which the panel banks actually entered, which Dr. Willig characterizes as "the most informative data for evaluating the accuracy of their LIBOR submissions." (Willig Initial Report ¶ 18.) Dr. Willig compiles a dataset of transactions from data files produced by **[**230]** the panel banks, and from this dataset identifies transactions between banks occurring in London, and matches each transaction in this dataset to a LIBOR submission by panel bank, tenor, and date. (Willig Initial Report ¶¶ 21-22, 30; app. 4.) Using this dataset, he concludes that "[c]ommon evidence cannot show that the panel banks' LIBOR submissions during the Suppression Class Period were systematically 'Low'," defining "Low" to mean below the "actual borrowing costs of the panel bank that made the submission" (Willig Initial Report ¶ 6(a)); that "[c]ommon evidence cannot show that any LIBOR suppression alleged by Plaintiffs was the result of the panel banks acting jointly" (Willig Initial Report ¶ 6(b)); and that "[c]ommon evidence cannot show that alleged suppression of LIBOR submissions caused LIBOR rates to be lower than they otherwise would have been" (Willig Initial Report ¶ 6(c)).

Exchange plaintiffs seek the exclusion of Dr. Willig's reports, though they focus their challenges on opinions based on Dr. Willig's analysis of transaction data.[84] They contend that Dr. Willig's analysis runs counter to the proper interpretation of the "LIBOR question" -- the question posed by the BBA **[**231]** that a panel bank is supposed to answer in making its LIBOR submission as well as certain guidance published by the BBA and certain panel banks' internal documents, among other authorities. They also assert that Dr. Willig's analysis is inadmissible because it relies on insufficient data, and because it offers an opinion on the merits.

2.3.1. Interpretation of the LIBOR Question

Exchange plaintiffs first argue that because Dr. Willig's analysis focuses on the rates observed in actual interbank lending transactions and not offered rates, his analysis contradicts the LIBOR question and is therefore unreliable and irrelevant. (Exch. Pls.' Willig Mem. 9-10.) They further assert that Dr. Willig's methodology is "guaranteed to produce Defendant-favorable false negatives," which "gives rise to a reasonable inference that Dr. Willig's first calculation set out to find only one Defendant-favorable result: no systematic suppression," and that Dr. Willig's methodology "completes Defendants' highly unusual and parallel violation of the BBA requirement of 'accountability' which was the original purpose of the offered rates." (Exch. Pls.' Willig Mem. 11-12.)

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[83] Dr. Willig is a Professor Emeritus of Economics and Public Affairs at Princeton University, having served as a professor from July 1978 through June 2016. He holds a Ph.D. in Economics and an M.S. in Operations Research from Stanford University, and an A.B. in Mathematics from Harvard University, and his written extensively on topics in economics and finance. (Willig Initial Report app. 1.)

[84] Exchange plaintiffs do not specify that they challenge only certain parts of Dr. Willig's reports, but also offer no argument as to Dr. Willig's opinions that are not dependent on his analysis of transaction data.

2.3.1.1. Exchange Plaintiffs' "Borrowing [232] Cost" Allegations**

This line of argument is readily refuted by Exchange plaintiffs' repeated references to panel banks' "borrowing costs" throughout the course of this litigation -- or least up until interbank lending data was produced and analyzed by the parties' experts. Though Exchange plaintiffs have now amended their complaints to omit certain references to "borrowing costs," the Second Circuit has made clear that ***HN44***[] "[t]he amendment of a pleading does not make it any less an admission of the party," *Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 707 (2d Cir. 1989)*. "[T]he facts alleged in a complaint . . . can be **[*520]** self-defeating." *TufAmerica, Inc. v. Diamond, 968 F. Supp. 2d 588, 600 (S.D.N.Y. 2013)*, and in this case, Exchange plaintiffs' repeated allegations regarding "borrowing costs" is indeed self-defeating of their motion to exclude Dr. Willig's reports.

For example, in the first consolidated amended complaint, filed in April 2012, Exchange plaintiffs alleged that "Defendants conspired to suppress LIBOR below the levels it would have been set had Defendants accurately reported their borrowing costs to the BBA" and addressed "the striking discrepancy between Defendants' submissions to the BBA and their actual borrowing costs." (Consolidated Am. Compl. ¶¶ 45, 122, Apr. 30, 2012, ECF No. 134.) In a subsequent complaint, **[**233]** the corrected second amended consolidated class action complaint, Exchange plaintiffs asserted that "Defendants understated their borrowing costs to the British Bankers' Association," that "[b]y acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be set at artificial levels," and that "Defendants' LIBOR quotes during the Class Period did not appropriately reflect those banks' actual borrowing costs at that time." (Corrected Second Am. Consolidated Class Action Compl. ¶¶ 5, 13, 162, Sept. 30, 2013, ECF No. 438.) The proposed third amended complaint contains similar allegations, (Proposed Third Am. Consolidated Class Action Compl. ¶¶ 5, 13, 130, June 29, 2015, ECF No. 1159), as does the proposed fourth amended complaint (Proposed Fourth Am. Consolidated Class Action Compl. ¶¶ 5, 13, 131, Jan. 14, 2017, ECF No. 1726).

Exchange plaintiffs cannot now assert that Dr. Willig's analysis -- which performs a comparison that plaintiffs themselves have repeatedly alleged in their complaints and otherwise referenced -- is irrelevant or unreliable by changing their interpretation of the LIBOR question post hoc. As a corollary, the related **[**234]** insinuation that Dr. Willig's methodology is "guaranteed" to produce only defendant-favorable results borders on the frivolous.

Indeed, Exchange plaintiffs' attempt to evade the effect of their "borrowing costs" allegations is especially unpersuasive once the timing of Dr. Willig's reports is considered. In November 2016, in document requests made as part of class-certification discovery, Exchange plaintiffs defined "LIBOR Suppression" as "making LIBOR Submissions below the LIBOR Panel Bank's actual cost of borrowing in the London Interbank Market." (Decl. of Paul Mishkin ex. 12, July 21, 2017, ECF No. 2112 ("Mishkin Willig Decl.").) In April 2017, when Dr. Willig's initial report was produced, both the operative complaint and the proposed fourth amended complaint submitted by Exchange plaintiffs in January 2017 contained numerous allegations regarding Defendants' "borrowing costs." (Corrected Second Am. Consolidated Class Action Compl. ¶¶ 5, 13, 162; Proposed Fourth Am. Consolidated Class Action Compl. ¶¶ 5, 13, 131.)

Only after we granted further leave to amend in April 2017 and Exchange plaintiffs in fact filed their corrected fourth amended complaint in December 2017 -- after the **[**235]** class certification motions and Daubert motions had been fully briefed -- did Exchange plaintiffs replace certain references to "borrowing costs" with "offered rates." For instance, the proposed fourth amended complaint alleges that the panel banks "conspired to suppress LIBOR below the levels it would have been set had Defendants accurately reported their competitive borrowing costs" and that "Defendants' LIBOR quotes during the Class Period did not appropriately reflect those banks' actual borrowing costs." (Proposed Fourth Am. Consolidated Class Action **[*521]** Compl. ¶¶ 124, 131 (emphasis added).) By contrast, in the corrected fourth amended complaint, Exchange plaintiffs changed these allegations, which now assert that the panel banks "conspired to suppress LIBOR below the levels it would have been set had Defendants accurately reported their competitive offered rates" and that "Defendants' LIBOR quotes during the Class Period did not appropriately reflect those banks' actual offered rates." (Corrected Fourth Amended Complaint ¶¶ 115, 122, Dec. 11, 2017, ECF No. 2363 (emphasis added).)[85]

By asserting that "Dr. Willig concluded that LIBOR supposedly was not 'systematically' suppressed" **[**236]** (Exch. Pls.' Willig Mem. 6 (citing Willig Initial Report ¶¶ 6, 75, 192)), Exchange plaintiffs have either continued to define LIBOR suppression as the making of submissions below actual borrowing costs or mischaracterized Dr. Willig's opinions deliberately. In each of Dr. Willig's opinions identified by Exchange plaintiffs, Dr. Willig opines that panel banks' LIBOR submissions were not systematically below their average borrowing costs as observed in interbank transaction data; he does not opine that there was no systematically suppression of LIBOR. (Willig Initial Report ¶ 6(a) ("Common evidence cannot show that the panel banks' LIBOR submissions during the Suppression Class Period were systematically 'Low,'" with "Low" defined as being below "the actual borrowing costs of the panel bank that made the submission"); *id. ¶ 75* ("Plaintiffs cannot establish using common evidence that panel banks systematically made LIBOR submissions below their borrowing costs." (emphasis added)); *id. ¶ 192* ("[A]vailable data on banks['] borrowing costs do not indicate that banks systematically made submissions below their borrowing costs . . . ." (emphasis added)).) Exchange plaintiffs' characterization **[**237]** of Dr. Willig's opinion is valid only if "suppression" is defined to be the making of submissions below actual borrowing costs -- a position that is difficult to reconcile with Exchange plaintiffs' criticisms of Dr. Willig's opinions premised on the notion that borrowing costs observed in actual transactions are irrelevant to the LIBOR question.

In one section of his report, Dr. Willig does conduct an analysis in which panel banks' actual LIBOR submissions are replaced with the corresponding average rate observed in the transaction data. (Willig Initial Report ¶¶ 89-101.) However, this analysis is intended to be illustrative of the principle that changes in LIBOR submissions may not always impact published LIBOR, as Dr. Willig explicitly disclaims: his "re-calculations of the LIBOR rates after substituting banks' average London Interbank Borrowing costs for their submissions are not intended to be estimates of but-for rates." (Willig Initial Report ¶ 96 n.82.) This analysis is comparable to Dr. Netz's median-replacement analysis, which is similarly intended to show that changes in LIBOR submissions impact published **[*522]** LIBOR only some of the time, which is also not intended to be a calculation **[**238]** of but-for LIBOR, and which is also admissible. See supra section III.1.2.2.

2.3.1.2. The Text of the LIBOR Question

Exchange plaintiffs' extensive allegations regarding "borrowing costs" and reliance on a mischaracterization of Dr. Willig's opinions warrant denial of their motion standing alone, but we nonetheless proceed to consider the various sources on which Exchange plaintiffs rely to bolster their recently adopted interpretation of the LIBOR question.

As an initial matter, despite their repeated invocation of "offer rates" and "offered rates," Exchange plaintiffs never define with precision what exactly they mean by those terms: it remains unclear whether, under their interpretation, whether an "offer rate" or "offered rate" refers to the first rate floated by a lending bank (regardless of how high or how serious that number might be), the first rate offered by a lending bank that is sufficiently reasonable such that it serves as a starting point for negotiations, or some other number entirely. Regardless, to render Dr. Willig's analyses inadmissible, the LIBOR question must preclude consideration of actual transaction rates altogether. None of the myriad sources relied upon by **[**239]** Exchange plaintiffs comes close to establishing such a proposition,

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[85] Exchange plaintiffs did not initially disclose these changes, which we discovered after we directed the filing of a redline comparing the proposed fourth amended complaint and the corrected fourth amended complaint. (Letter from Christopher Lovell & David Kovel to the Court, Dec. 13, 2017, ECF No. 2370.) Even setting aside the question of whether the scope of Exchange plaintiffs' leave to amend extends to changes like these, see *Apr. 20, 2017 Order, 2017 U.S. Dist. LEXIS 118230 at *113-114*, ECF No. 1859 (granting "plaintiffs leave to supplement their complaint in [a] single regard," "the issue of speculative damages in the context of the efficient enforcer analysis"), they have only removed some of the "borrowing costs" allegations in the operative complaint. (e.g., Corrected 4AC ¶ 13 ("By acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be set at artificial levels.")).

i.e., that consideration of actual transaction rates is irrelevant to considering whether LIBOR submissions were suppressed.

We follow the parties' lead and begin with the text of the LIBOR question, which asks: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am" London time? Exchange plaintiffs cite the phrase "by asking for and accepting inter-bank offers" to emphasize that the LIBOR question asks about offered rates, (Exch. Pls.' Willig Mem. 9.); UBS counters that the words "accepting" and "offers" indicate that the LIBOR question refers to "final offers that would result in transactions," as "[t]he offer a bank would accept is the final offer, not any initial offer it might have received." (UBS Willig Opp'n 6, 8.)

We conclude that the text of the LIBOR question is at least somewhat ambiguous. We agree with UBS that the LIBOR question cannot refer to any initial "offer" that is made, as doing so would render superfluous the LIBOR question's language "and accepting." An offer could be sufficiently high such that **[**240]** the panel bank would not "accept" the offer, even as a starting point for negotiations. On the other hand, we do not share UBS's confidence that the LIBOR question refers to only final "offers" that are "accepted" (akin to how those terms are used in contract law) and become consummated transaction rates. UBS's argument would eliminate entirely the distinction between offered rates and transaction rates, and LIBOR remains an offered rate.

We need not resolve definitively this ambiguity now, as it does not render Dr. Willig's analysis of actual transaction rates inadmissible. Dr. Willig acknowledges that LIBOR represents an "offered" rate (Willig Initial Report ¶ 66), and does not suggest that panel banks' actual transaction rates should be substituted as but-for estimates of panel banks' LIBOR submissions (Willig Initial Report ¶ 96 n.82). Rather, Dr. Willig opines that consummated transaction rates are relevant in the determination of a panel bank's LIBOR submissions; nothing in the wording of the LIBOR question suggests that this assumption is an unreliable one.

[*523] 2.3.1.3. BBA Publications

This understanding of the LIBOR question is confirmed by several BBA publications identified by **[**241]** the parties. None of these sources precludes the consideration of actual transaction rates.

The first BBA publication addressed by the parties is the October 2010 version of a BBA webpage titled The Basics, which according to Exchange plaintiffs (Exch. Pls.' Willig Reply 3), states that LIBOR rates "are not based on actual transaction[s]" and that "[t]he key concept is that [LIBOR] is based on the offered rate, and not the bid rate." (Decl. of Victor Stewart ex. 2, Aug. 4, 2017, ECF No. 2188 ("Stewart Willig Decl.").) In so arguing, Exchange plaintiffs conspicuously omit the first quoted sentence's full context. In full, that sentence reads: "The rates are not necessarily based on actual transaction[s], indeed it would not be possible to create the suite of [LIBOR] rates if this was a requirement, as not all banks will require funds in marketable size each day in each of the currencies and maturities they quote." (Stewart Willig Decl. ex. 2 (emphasis added).) The use of "necessarily" implies that actual transaction rates do form a basis for a bank's LIBOR submissions, an implication confirmed by the subsequent reference to potential data availability issues as the reason why a basis **[**242]** in actual transaction rates is not a "requirement" of panel bank's LIBOR submissions. The second quoted sentence is irrelevant to our analysis, as Dr. Willig's analysis of actual transaction rates is not an analysis of bid rates. Exchange plaintiffs also cite similar language in a May 2008 supplementary memorandum, which uses language largely identical to the The Basics webpage cited by Exchange plaintiffs. (Stewart Willig Decl. ex. 3.) The lone difference is that it omits the word "necessarily" that Exchange plaintiffs also omitted in their discussion of the The Basics webpage, and we find plaintiffs' reliance similarly unavailing.

Exchange plaintiffs also misattribute the first sentence to an October 2009 BBA document entitled "Guidelines for [C]ontributing BBA LIBOR Rates," (Decl. of Fred Isquith ex. 5, July 10, 2017, ECF No. 2074 ("Isquith Willig Decl.")), which turns out to provide interpretive guidance. This document states that "[u]nder certain circumstances, contributor banks will take funds at levels above or below LIBOR" and that such an occurrence "does not necessarily mean that they should raise or drop their rates to these levels" (emphasis added), and also explains that **[**243]** "the rates submitted into the process are a bank's own view of its cost of funds, based on the totality of the information available to a bank from both internal and external sources." (Isquith Willig Decl. ex. 5.) This document strongly suggests that a panel bank's submission should be informed by actual transaction rates, which unquestionably form part of the "totality of information available to [the] bank."

A second BBA webpage, titled Definitions, is a second point of contention.[86] Here, the BBA states that "[c]ontributions must represent rates at which a bank would be offered funds in the London interbank market," and that "[t]he rate at which each bank submits must be formed from that bank's perception of its cost of unsecured funds in the London interbank market." (Mishkin Willig Decl. ex. 8; Isquith Willig Decl. ex. 8.) Again, we interpret this page to mean that while LIBOR represents an offered rate, actual transaction rates retain relevance in a bank's determination **[*524]** of its LIBOR submission. The rate at which the bank is actually receiving funding is plainly relevant to how the bank forms its "perception of its cost of unsecured funds."

Exchange plaintiffs also attribute to this **[**244]** webpage the BBA's statement that the 1998 revision to the LIBOR question "enables accountability for the rates."[87] (Exch. Pls.' Willig Mem. 12.) According to Exchange plaintiffs, "[s]uch 'accountability' could be achieved only if each Defendant preserved the 'offers' on which it based its daily submissions" (emphasis added), and that "all Defendants have engaged in the highly unusual, parallel conduct of refusing to maintain such offers or otherwise supply an 'accountable' offer as was promised by the BBA." (Exch. Pls.' Willig Mem. 11-12.)

Contrary to Exchange plaintiffs' assertion, the quoted statement actually appears in a May 2008 BBA memorandum. (Stewart Willig Decl. ex. 3). But regardless of source, this argument is rank speculation. Exchange plaintiffs provide no cogent explanation for why the BBA's remark about "accountability" made in the process of changing the focus of the LIBOR question from a hypothetical prime bank to the specific panel bank making a submission bears on the distinction between transaction rates and offered rates and whether Dr. Willig properly analyzed actual transaction data. Rather, changing the scope of the LIBOR question to be panel bank-specific is consistent **[**245]** with one notion of "accountability" in that it requires the panel bank to focus on its own circumstances and not those of a hypothetical bank, a focus consistent with Dr. Willig's approach of examining the transactions in which a panel bank actually engaged.

Third, Exchange plaintiffs rely on a June 2008 BBA "consultative paper" titled "Understanding the Construction and Operation of BBA LIBOR -- Strengthening for the Future," (Stewart Willig Decl. ex. 8), and what appear to be two earlier drafts from May 6, 2008 and May 13, 2008 (Stewart Willig Decl. ex. 4; Isquith Willig Decl. ex. 11).[88] Exchange plaintiffs quote the BBA's statement in the final paper that "[t]here is confusion amongst market commentators about what BBA LIBOR is for, and how it is constructed,"[89] but the final paper also explains that "[t]he rate at which each bank submits must be formed from that bank's perception of its cost of funds in the interbank market." (Stewart Willig Decl. ex. 8.) As we have discussed, a panel bank's perception unquestionably includes the rates at which it is actually obtaining funding.

The two earlier drafts discuss one potential change to LIBOR and the LIBOR question, "[l]oosen[ing] the definition **[**246]** of what is 'offered.'" (Stewart Willig Decl. ex. 4; Isquith Willig Decl. ex. 11.) Specifically, the drafts propose that "[a] change could be made [from the current "offer" definition] to the rate at which a bank can obtain unsecured funds." (Stewart Willig Decl. ex. 4; Isquith Willig Decl. ex. 11.) This statement also supports the contention that LIBOR is an offered rate, but again says nothing to undermine the propriety of considering actual transaction rates in a bank's determination of its LIBOR submission.

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[86] Exchange plaintiffs rely on the July 10, 2017 version of the webpage and UBS relies on the July 20, 2017 version, but the two versions are identical. (Isquith Willig Decl. ex. 8; Mishkin Willig Decl. ex. 8.)

[87] Prior to this revision, the LIBOR question read: "At what rate do you think interbank term deposits will be offered by one prime bank to another prime bank [in a] reasonable market size today at 11.00 am?"

[88] These two earlier versions appear to be identical.

[89] This statement also bolsters our earlier conclusion that the text of the LIBOR question is ambiguous.

[*525] 2.3.1.4. Additional Authorities

Next, Exchange plaintiffs rely on a JPMorgan Chase internal document from 2010 that purports to set forth JPMorgan Chase's LIBOR-submission policy. According to Exchange plaintiffs, JPMorgan Chase's policy establishes that LIBOR submissions are "not based on actual transaction[s]" and that LIBOR is to be "based upon the offered rate, and not the bid rate." (Exch. Pls.' Willig Mem. 10 (emphasis omitted).) As an initial matter, the characterization of this document as a JPMorgan Chase internal document is at least somewhat misleading, as Exchange plaintiffs do not acknowledge that the document quotes a significant portion of the BBA's Definitions page **[**247]** that Exchange plaintiffs have already cited. (Isquith Willig Decl. ex. 6; Mishkin Willig Decl. ex. 9.) Further, it is unpersuasive for the same reasons we find Exchange plaintiffs' reliance on the BBA's Definitions page unpersuasive: the first statement that "rates are not based on actual transaction[s]," when read in its proper context, refers to the fact that actual transactions may not occur in all currencies and all tenors, and the second statement that LIBOR is "based upon the offered rate, and not the bid rate" is irrelevant because Dr. Willig analyzes observed transaction rates, which are neither bid rates nor (as Exchange plaintiffs strenuously contend) offered rates.[90]

Exchange plaintiffs also contend that "academic papers have repeatedly followed" the description of LIBOR as an offer rate, citing only A Comparison of LIBOR to Other Measures of Bank Borrowing Costs, a 2012 working paper coauthored by Dennis Kuo, a then-PhD student at the University of California, Los Angeles, and two economists at the Federal Reserve Bank, David Skeie and James Vickery. (Stewart Willig Decl. ex. 5 ("Kuo, Skeie & Vickery")). They identify specifically the authors' statement that "Libor is an offer **[**248]** rate" and that "Libor measures the rate at which banks estimate they would be offered unsecured funds, not the rate at which they would accept those offers." (Kuo, Skeie & Vickery at 7 (emphasis omitted).) Setting aside the question of the weight to which the paper is entitled given its unpublished nature, we find nothing in this paper that undercuts Dr. Willig's reliance on observed transaction rates. Indeed, we find Exchange plaintiffs' reliance on this paper somewhat curious, as the authors devote a substantial portion of the paper to comparing LIBOR submissions to actual interbank loan rates calculated from a payment dataset published by the Federal Reserve. (Kuo, Skeie & Vickery fig.5, tbl.2.).[91]

In reply, Exchange plaintiffs also cite a February 2010 Credit Suisse Fixed Income Research report titled A Guide to **[*526]** the Front-End and Basis Swap Markets, and in particular, the report's statement that "[t]he fixed LIBOR rate is not precisely linked to the rate a contributing bank would bid for funding, nor it is directly tied to the rate at which a given contributor would offer funding." (Stewart Willig Decl. ex. 6. (emphasis added)). But this statement diminishes, rather than heightens, the importance of the initial **[**249]** rates "offered" by a lending bank, as it provides on its face that a panel bank's LIBOR submission is "not directly tied" to any specific offers. Rather, the report continues: "Instead, it reflects where a given bank deems it could borrow funds in reasonable size should it seek to do so. In essence, the banks are being asked to disclose the rate at which they believe the market would be willing to offer cash to them should they desire funding. It is the contributing bank's perception of where others would offer them funding. Sentiment is, therefore, critical for the direction of LIBOR." (Stewart Willig Decl. ex. 6.). This discussion again suggests that a panel bank's submission should be based on its "perception" of the rate at which it could receive funding. Though we have already so held, it bears repeating that the rate at which the bank is actually receiving funding is relevant to the bank's belief regarding the rate at which the market would be willing to offer it funding.

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[90] Given that we find unpersuasive Exchange plaintiffs' reliance on this JPMorgan Chase document, we also reject the notion that JPMorgan Chase should be "estopped" from offering Dr. Willig's opinions. (Exch. Pls.' Willig Mot. 10.) This questionable conception of "estoppel" has no basis in law, but if we were to apply it, we would conclude that certain named plaintiffs' testimony that LIBOR is based on actual transaction rates would preclude Exchange plaintiffs from offering many of the arguments supporting their challenge to Dr. Willig's opinions. For example, Atlantic Trading's 30(b)(6) representative testified, in response to the question "when a LIBOR submitter is making their decision about what to submit, could they consider their actual borrowing costs that day," that he "would think that's the sole thing they're basing it on." (Mishkin Willig Decl. ex. 3.)

[91] Indeed, the paper makes clear that the relationship between actual transaction rates and offered rates is a function of the bid-ask spread. (Kuo, Skeie & Vickery at 7.) The existence of such a relationship, which suggests that the difference between actual transaction rates and offered rates can be controlled for, bolsters Dr. Willig's analysis.

2.3.1.5. Conclusion

In sum, the text of the LIBOR question and various documentary sources make clear that while LIBOR represents an offer rate and is not itself a transaction rate, rates observed in actual, consummated **[**250]** transactions are nonetheless properly considered in a panel bank's determination of its LIBOR submissions. In turn, because actual transaction rates are properly considered in a panel bank's determination of its LIBOR submissions, they are properly considered in our assessment of whether a bank's LIBOR submissions were suppressed and whether such suppression can be established through common evidence. Exchange plaintiffs' argument to the contrary -- the necessary implication of their argument here -- is simply unavailing.

Exchange plaintiffs' criticism of Dr. Willig's secondary analysis, in which he analyzes "the 95th percentile spread above the weighted average rate for each bank-tenor-day" as a "conservative measure of the ask rate," (Willig Initial Report ¶ 67 & n.68), is unpersuasive for the same reasons. Exchange plaintiffs cannot dispute that the Dr. Willig's 95th percentile measure is higher than, and therefore conservative as compared to, the weighted-average transaction rates examined in his primary analysis.[92]

2.3.2. Data Sufficiency

Exchange plaintiffs next argue that Dr. Willig's opinions are based on insufficient data. In particular, they contend that "Dr. Willig states that **[**251]** 'Bank of America had Low LIBOR submissions on only 2 percent of tenor-days and JPMorgan on 4 percent of tenor-days' during the Suppression Period' [sic]", and that for the 3-month tenor, this assessment is based on only 15 days and 4 days of data for Bank of America and JPMorgan Chase, respectively. (Exch. Pls.' Willig Mem. 19.) In support of this argument, Exchange plaintiffs cite two authorities identifying problems posed by small sample sizes in the statistical context.

First, Exchange plaintiffs offer no explanation why an assessment of Dr. Willig's **[*527]** sample size should be based on only one specific tenor. Rather, we expect more interbank lending activity in certain tenors than others, an expectation confirmed by the BBA's statement that "not all banks will require funds in marketable size each day in each of the currencies and maturities they quote" (e.g., Stewart Willig Decl. ex. 2), and through a review of Appendix 5 to the Willig Initial Report (which indicates substantially more activity in the overnight, one week, and one-month tenors).

Indeed, Exchange plaintiffs have alleged persistent suppression of LIBOR based on the panel banks' reputational concerns, and offer no reason **[**252]** why those concerns would be reflected in only one tenor. They cite allegations that traders sought "to profit from the widening of the spread between the 1-month, 3-month and 6-month LIBOR tenors" (Proposed Third Am. Consolidated Class Action Compl. ¶¶ 19, 226-27), and argue that "[t]his spread trading strategy could not have been successful if all LIBOR tenors were manipulated in the same direction at the same time." (Exch. Pls.' Willig Reply 10.) However, this argument fails to consider the fact that the spread-trading strategy so alleged could be successful if all LIBOR tenors were manipulated in the same direction, but to different extents.

Nor are Exchange plaintiffs' sample-size authorities persuasive in this context. *Pollis v. New School for Social Research, 132 F.3d 115 (2d Cir. 1997)*, considered a statistical analysis on the merits, not whether that analysis was admissible under Daubert. Further, it referenced sample sizes far smaller than the datasets on which Dr. Willig bases his opinions. See *id. at 120-22*. The Reference Manual on Scientific Evidence identifies certain concerns regarding the application of statistical testing to small samples, but also states that "[h]owever, a meaningful statistical analysis yielding a significant result can be based **[**253]** on a small sample, and reliability does not depend on sample size alone." David H. Kaye & David A. Freedman, Reference Guide on Statistics, in Reference

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[92] Exchange plaintiffs additionally argue that Dr. Willig's selection of the 95th percentile is unsupported and speculative. This assumption is not troubling given that this analysis is conservative compared to Dr. Willig's primary analysis based on weighted-average transaction rates; the line must be drawn somewhere.

Manual on Scientific Evidence 211, 255 n.108 (3d ed. 2011). Exchange plaintiffs do not explain which statistical tests conducted by Dr. Willig are rendered flawed by small sample sizes, and we decline to speculate.

2.3.3. Opinion on the Merits

Finally, Exchange plaintiffs argue that we should construe Dr. Willig's opinions as his "final merits opinion on the ultimate issues" because "Dr. Willig does not state that his work is ongoing, that his opinions are not final, and that he is waiting for a full record to be developed before determining the appropriate, data-driven methods of analysis." (Exch. Pls.' Willig Mem. 6.)

This argument is patently absurd. First, the assertion that Dr. Willig offers ultimate opinions on the merits of whether LIBOR was in fact suppressed plainly mischaracterizes Dr. Willig's opinions and is an argument that we have already considered and readily rejected. Second, to the extent Dr. Willig's class certification opinions overlap with the merits question of whether LIBOR was in fact persistently suppressed, the **[**254]** "rigorous analysis" to be undertaken at class certification often "will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes, 564 U.S. at 351*.

Ultimately, Exchange plaintiffs identify no authority for this "gotcha" argument that Dr. Willig did not expressly reserve the right to supplement his opinions if new information were made available to him. ***HN45***[] It seems safe to assume that an expert, as a practitioner of the scientific method, would consider relevant additional information and incorporate that information into his opinions. We see little reason why experts **[*528]** should be required to explicitly disclaim as much.

2.3.4. Conclusion

Exchange plaintiffs' motion to exclude Dr. Willig's opinions is denied. Even if Exchange plaintiffs were not bound by the extensive history of their allegations that panel banks suppressed LIBOR by understating their actual "borrowing costs," the motion is premised on a mischaracterization of Dr. Willig's report and Dr. Willig's analysis of rates observed in consummated transactions. Rather, we conclude from our review of the text of the LIBOR question and other interpretive sources that a panel bank's LIBOR submission should be based on its perception of the **[**255]** rates it would be offered and the "totality of the information" available to it. Rates observed in consummated transactions are, almost axiomatically, part of that "totality of the information."

3. Trader-Based Manipulation Class

Having resolved the parties' Daubert motions, we now address the Exchange plaintiffs' motion for class certification itself. Though the Exchange plaintiffs seek certification of a single class of EDF traders who "were harmed" by trader-based manipulation, persistent suppression, or both, we conclude that the class should be analyzed as two separate subclasses: (1) class members advancing claims under a trader-based manipulation theory and (2) those advancing claims under a persistent suppression theory. See *Fed. R. Civ. P. 23(c)(5)* ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule."). As we have discussed extensively, claims grounded in allegations of trader-based manipulation are considerably different from claims rooted in allegations of persistent manipulation, see, e.g., *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *14, 2016 WL 7378980, at *5 & n.8* ("Profit-motivated trader-based manipulation, which was sporadic and would result in both the inflation and deflation of LIBOR submissions, **[**256]** has nothing to do with the persistent suppression conspiracy that is at issue in the antitrust claims." (citations omitted)), and indeed, the parties' briefing reflects such a distinction.

A trader-based manipulation class, to the extent one is certified, would consist of (1) EDF traders holding certain EDF positions on the dates specified in subparts B.1 and B.2 of the class definition, and (2) traders "that were harmed" as a result of trader-based manipulation during the Class Period, as captured by the prefatory language in the class definition as well as subpart B.3. The prefatory language corresponds to the entire class period, January 1, 2005 to May 17, 2010, whereas subpart B.3 corresponds only to Period 0 (as Exchange plaintiffs have defined it), the period between January 1, 2005 to August 6, 2007.[93]

We first consider whether Exchange plaintiffs' proposed trader-based class relies on an impermissible "fail-safe" class definition as well as preliminary issues of standing, before turning to implied requirement ascertainability and the express requirements of *Rule 23(a)* and *Rule 23(b)(3)*.

3.1. "Fail-Safe" Class Definition

HN46[] Courts have taken varying approaches to the propriety of certifying a "fail-safe" class, **[**257]** or one that begs the liability question and is defined circularly in terms of legal injury. For instance, we have previously suggested that a fail-safe class raises predominance issues under *Rule 23(b)(3)*, reasoning that "[s]uch a class necessarily raises individual questions, as the factfinder must determine whether an individual has a claim in order to determine whether **[*529]** he or she belongs in the class." May 13, *2016 Order, 2016 U.S. Dist. LEXIS 63745, at *76-77, 2016 WL 2851333 at *2*. Courts have also concluded that fail-safe classes create manageability problems bearing on superiority under *Rule 23(b)(3)*, are fundamentally unfair, or render the proposed class unascertainable. See *Mazzei, 288 F.R.D. at 55*; *Ruiz v. Citibank, N.A., No. 10 Civ. 5950 (KPF), 2015 U.S. Dist. LEXIS 101777, 2015 WL 4629444, at *7 (S.D.N.Y. Aug. 4, 2015)*; see also 1 William B. Rubenstein, Newberg on Class Actions § 3:6 (5th ed.) (Westlaw 2017). Other courts have rejected these concerns, often reasoning that potentially fail-safe language such as "and were damaged thereby" is superfluous and does not substantively alter the class definition's scope. See, e.g., *Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co., No. 14 Civ. 4394 (AJN), 2017 U.S. Dist. LEXIS 55881, 2017 WL 1331288, at *11 (S.D.N.Y. Apr. 4, 2017)* (citing, inter alia, *Fort Worth, 301 F.R.D. at 143-44*); *see also* *In re Initial Pub. Offering Sec. Litig. ("In re IPO II"), 671 F. Supp. 2d 467, 491-92 (S.D.N.Y. 2009)*; 1 William B. Rubenstein, Newberg on Class Actions § 3:6 (5th ed.) (Westlaw 2017) (collecting cases).

Exchange plaintiffs left ambiguous in their briefing whether the use of "harmed" refers to the concept of injury **[**258]** as articulated in Denney, which would be established as long as a trader was required to pay more money or received less money from a single EDF trade, see *443 F.3d at 264-65*, or to the concept of "damages" (which requires a net harm once any harm from the alleged conduct are properly netted against any benefits resulting from that same conduct). The various decisions that certified a class that had been criticized for being impermissibly fail-safe -- In re Petrobras,[94] *Royal Park*, *Fort Worth*, and *In re IPO II* -- each used the term "damaged" rather than "harmed," thereby suggesting that Exchange plaintiffs meant the latter, but counsel at oral argument clarified that they meant the former. Hr'g Tr. 22:16-23:5.

Interpreted this way, the proposed class definition's use of "and were harmed" in this context is not mere surplusage, unlike the use of "and were damaged" deemed inoffensive in the cases upon which Exchange plaintiffs rely. In each instance, the fact of "damage" to any class member could be imputed from other parts of the class definition. For example, Royal Park considered the impairment of certain residential mortgage-backed securities (RMBS) resulting from the trustee's **[**259]** alleged failure to fulfill certain contractual obligations and considered a proposed class encompassing "[a]ll persons and entities who held Certificates in [certain RMBS trusts] and were damaged thereby." *2017 U.S. Dist. LEXIS 55881, 2017 WL 1331288, at *1-2*. The fact of damage could be implied from having held the RMBS certificates in question, since those certificates ultimately became impaired. Fort Worth considered an analogous factual circumstance (the issuance of RMBS certificates) and an analogous class definition ("persons or entities who, prior to March 23, 2009, purchased or otherwise acquired any Certificates [in specified offerings] and were damaged thereby"). *301 F.R.D. at 124-25*. Similarly, in a typical securities fraud class

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[93] Subpart B.3 is, therefore, wholly redundant of the prefatory language.

[94] Contrary to Exchange plaintiffs' contention (Exch. Pls.' TBM Reply 7), the Second Circuit in In re Petrobras considered the certification of classes whose definitions included the criteria "and were damaged thereby," *862 F.3d at 259* (emphasis added), not "and were harmed thereby."

action brought under *Rule 10b-5* -- where the class period corresponds to the period during which the price of the security in question is inflated due to a defendant's material misrepresentations or omissions, and where the class definition refers to purchasers of securities during those periods -- language such as "and were damaged" also becomes superfluous. **[*530]** The fact of damage follows from the fact of price inflation and the limitation of the class to purchasers, who by definition will have overpaid for the security in question. **[**260]** Cf. *In re Petrobras, 862 F.3d at 259-60*.

Not so here. The mere fact that a person or entity traded in EDFs during the class period does not mean that the trader was damaged, unlike the holder of an impaired RMBS certificate or the buyer of a security who purchased at an inflated price. Indeed, by arguing that Rabobank's "fail-safe" argument seeks "to limit the Class prematurely to presently-known TBM dates," (Exch. Pls.' TBM Reply 8), Exchange plaintiffs implicitly concede that the inclusion of "and were harmed" in the proposed class definition serves to incorporate traders "harmed" by currently unidentified instances of trader-based manipulation -- instances that are, by definition, not otherwise captured in the class definition.

However, we need not determine finally the impact of the class definition's use of "and were harmed" on whether the class may be certified, as ***HN47***[] *Rule 23* does not explicitly preclude certification of fail-safe classes. Rather, the contention that a class is "fail-safe" often serves as shorthand for defects in the requirements explicitly set forth in *Rule 23*, including predominance in particular. Cf. *Mazzei, 288 F.R.D. at 55* ("The fail-safe appellation is simply a way of labeling the obvious problems that exist." (quoting *Kamar v. Radio Shack Corp., 375 F. App'x 734, 736 (9th Cir. 2010))*. Accordingly, **[**261]** we will undertake the "rigorous analysis" of each *Rule 23* requirement as directed by the Supreme Court, *Dukes, 564 U.S. at 351*, and in doing so take into account the considerations supporting the assertion that the proposed class is improperly "fail-safe." These considerations, of course, include our previously expressed concern that plaintiffs' use of "were harmed" raises predominance issues because individual inquiry will be necessary to determine who is even a class member. *May 13, 2016 Order, 2016 U.S. Dist. LEXIS 63745, at *76, 2016 WL 2851333 at *2*.

3.2. Standing

The parties next dispute issues of "standing" as they relate to the class representatives and the proposed class. Rabobank's arguments appear to pertain to class standing, whereas Exchange plaintiffs respond with arguments regarding Article III standing. We consider both.

3.2.1. Article III Standing

To reiterate, any class must "be defined in such a way that anyone within it would have [Article III] standing." *Denney, 443 F.3d at 264*. Though Denney's requirement that all class members have Article III standing is stringent, its definition of what constitutes "injury" is relaxed: "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate [Article III] standing." *Id. at 265*.[95]

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[95] Exchange plaintiffs' reliance on the Seventh Circuit's decision in *Kohen v. Pacific Investment Management Co. ("Kohen II"), 571 F.3d 672 (7th Cir. 2009)*, **[**262]** is not persuasive. Though Kohen II held that "as long as one member of a certified class has a plausible claim to have suffered damages, the requirement of standing is satisfied" in the Seventh Circuit, *id. at 676*, and accepted the probability that "a class will often include persons who have not been injured by the defendant's conduct," *id. at 677*, the Second Circuit takes a different approach in requiring at least some analysis of absent class members' Article III standing, see *Denney, 443 F.3d at 264-65*. See generally *In re Deepwater Horizon, 739 F.3d 790, 800-02 (5th Cir. 2014)* (comparing the Seventh Circuit's approach to Article III standing in Kohen II and the Second Circuit's approach in Denney). Kohen II and Denney may ultimately yield the same result, cf. *id. at 802-04* (reaching the same result applying both tests), but we are nonetheless bound to apply *Denney*.

HN48[] **[*531]** "Since [the elements of Article III standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Lujan, 504 U.S. at 561*. Accordingly, Article III standing is assessed based on the plaintiff's allegations at the pleading stage. Id.; see, e.g., *Spokeo, 136 S. Ct. at 1547*. "In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" that are taken as true. *Lujan, 504 U.S. at 561* (quoting *Fed. R. Civ. P. 56(e)*).

Class certification does not always fit neatly into this framework. For example, when the consideration of class certification occurs at the pleading stage and precedes motions to dismiss, see, e.g., 1 William B. Rubenstein, Newberg on Class Actions § 2:2 (5th ed.) (Westlaw 2017), allegations as to the named plaintiffs' standing would appear to suffice under Lujan and its progeny. Here, however, we have proceeded beyond the pleading stage, but have not yet reached summary judgment. The Lujan framework accordingly **[**263]** does not directly address whether standing should be assessed at this point based on allegations or evidence. Cf. *In re Deepwater Horizon, 739 F.3d at 800* ("[This framework] does not explain, in particular, how courts are to evaluate standing for the purposes of class certification . . . .") The Second Circuit in Denney held that "[w]e do not require that each member of a class submit evidence of personal standing," *443 F.3d at 263* (emphasis added), but also referenced standing in terms of allegations, see id. ("For purposes of determining standing, we 'must accept as true all material allegations of the complaint.'" (quoting *Warth v. Seldin, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975))*, and further held that "[p]assive members need not make any individual showing of standing," *id. at 264* (emphasis added) (quoting 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 2:7 (4th ed. 2002)).

HN49[] Though the law remains somewhat unsettled, we nonetheless distill the following principles to guide our analysis. First, the class must "be defined in such a way that anyone within it would have [Article III] standing." *Id. at 264*. Second, because absent class members need not "submit evidence of personal standing," *id. at 263*, we consider absent class members' Article III standing solely based on plaintiffs' allegations and the class definition. **[**264]** Third, we interpret the same holding in Denney to require, by negative implication, evidence of named plaintiffs' standing at this juncture. Though the record may not be as well-developed as at summary judgment, the class certification process in this case has nonetheless entailed extensive discovery (including the production of documents pertaining more to the merits than to class certification), and evidence establishing a named plaintiff's standing should be well within that plaintiff's control in any event.[96]

Applying *Denney*'s stringent requirement that every class member have Article III standing coupled with its relaxed standard for what constitutes Article III "injury," we conclude that the proposed trader-based class satisfies Article III's standing **[*532]** requirements. For the thirteen instances of trader-based manipulation specifically identified by date in subparts B.1 and B.2 of the class definition, the direction of manipulation alleged and the trading position specified in the class definition are sufficient to ensure that each class member captured by these subparts has experienced some injury-in-fact. As to the catch-all for undiscovered instances of trader-based manipulation, **[**265]** the class definition's use of "were harmed" necessarily limits the prefatory language and subpart B.3 to individuals and entities that were injured.

Additionally, Exchange plaintiffs have presented evidence of named plaintiff Atlantic Trading's standing to assert trader-based claims in response to our January 9, 2018 order directing the submission of data regarding the named plaintiffs' trading positions on the 13 days identified in subparts B.1 and B.2 of the class definition. (Decl. of Thomas Elrod, Jan. 16, 2018, ECF No. 2405.) While this submission also indicates certain named plaintiffs had no net trading position on the 13 identified days (or engaged in no trading at all), and Rabobank identifies significant issues as to named plaintiff 303030 Trading's ability to assert claims,[97] these issues do not defeat the class's Article III

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[96] Further, even if we were to assess the named plaintiffs' Article III standing based only on allegations, any evidentiary deficiencies would likely present typicality and adequacy of representation issues at the *Rule 23* stage. See *In re IPO, 471 F.3d at 41-42*.

[97] We revisit these issues in our analysis of typicality.

standing. For purposes of the trader-based manipulation class, these named plaintiffs could be considered merely "absent" class members whose standing would be assessed on allegations and the class definition rather than on evidence, since we have already concluded that the proposed class definition satisfies Denney's requirements as to absent class members. **[**266]** [98]

3.2.2. Class Standing

Finally, turning to class standing, we reiterate that a named plaintiff must have a net trading position that would have been adversely affected by the manipulation on a given day in order to have class standing to represent absent class members with claims based on manipulation on that date. See *Apr. 15, 2016 Order, 2016 U.S. Dist. LEXIS 51190, at *108, 2016 WL 1558504, at *9*, ECF No. 1380. Comparing the Second Circuit's decisions in NECA and RBPA, both of which involved suits by RMBS certificate holders against the issuers and underwriters of those certificates, we noted that "[u]nlike the violations alleged in NECA, which involved 'the same misstatements across multiple offerings,' the claims in [RBPA] 'must be proved loan-by-loan and trust-by-trust.'" *2016 U.S. Dist. LEXIS 51190, at *110, [WL] at *8* quoting *RBPA, 775 F.3d at 162*). Reasoning that because "[t]rader-based claims are 'day-to-day' and 'episodic,' and plaintiffs must prove the substantive elements of each claim," we concluded that "named plaintiffs do not have class standing to bring claims on days on which they did not hold a relevant net position." *2016 U.S. Dist. LEXIS 51190, at *110, [WL] at *9*. Exchange plaintiffs' arguments, directed towards Article III standing, offer no reason to revisit **[**267]** this class standing analysis, see *LIBOR III, 27 F. Supp. 3d at 481* ("[T]he Second Circuit considers the **[*533]** questions of Article III, statutory, and class standing as distinct."), and we again conclude that a named plaintiff must have a net trading position on a given day in order to have class standing to assert trader-based claims on behalf of absent class members.

3.3. Ascertainability

Rabobank, in its brief in opposition to class certification, contended that the proposed class was not ascertainable. Citing a lack of available trading records and Exchange plaintiffs' apparent difficulty in obtaining such records, Rabobank argued that the class was not ascertainable because it was not administratively feasible. (Rabobank TBM Opp'n 7-14.) Following the Second Circuit's decision in In re Petrobras, Rabobank has generally recast its administrative feasibility arguments as predominance arguments, limiting its ascertainability argument to the critique that Exchange plaintiffs' use of "were harmed" in the class definition is insufficiently definite or objective. (Letter from David Gelfand to the Court, July 21, 2017, ECF No. 2098.)

Rabobank's administrative feasibility arguments now present predominance issues; they do not **[**268]** raise a serious ascertainability challenge. See *In re Petrobras, 862 F.3d at 269* ("Ascertainability does not directly concern itself with the plaintiffs' ability to offer proof of membership, an issue that is already accounted for in *Rule 23*." (emphasis omitted)). To the extent that Rabobank continues to contest ascertainability, we conclude that the criteria Exchange plaintiffs have used, which define class members based on the timing of their trades, are sufficiently objective and definite to satisfy the "modest" ascertainability requirement. ***HN50***[] Though the class definition's use of "and were harmed" in the class definition is perhaps not as definite as would be ideal, it remains clear "who is suing about what," which is all that ascertainability requires. Id.

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[98] For this reason, *Denney* and *Kohen II* are likely to produce the same substantive result in most cases. Provided there is at least one named plaintiff providing sufficient evidence of its personal Article III standing, additional named plaintiffs failing to meet the (higher) evidentiary threshold would simply be considered absent class members subject to the (lower) pleading standard. As Waller v. Hewlett-Packard Co. observed in the context of the Ninth Circuit's intra-circuit Denney/Kohen II split: "Stearns [the Ninth Circuit's application of Kohen II] says absent class members don't need standing and Mazza [the Ninth Circuit's application of Denney] says they do, but Mazza . . . seems to set a rather low bar for standing anyway." *295 F.R.D. 472, 476 (S.D. Cal. 2013)* (citing *Mazza v. Am. Honda Motor Co., 666 F.3d 581 (9th Cir. 2012)*; *Stearns v. Ticketmaster Corp., 655 F.3d 1013 (9th Cir. 2011))*.

3.4. *Rule 23(a)*

3.4.1. Numerosity

We find it more likely than not that the proposed class definition encompasses more than 40 individuals and entities. We base this conclusion on the sheer number of "large traders" transacting in the EDF market, who themselves form only a portion of the total population of EDF traders in the market. See *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *48, 2016 WL 7378980, at *17 & n.27* (noting evidence establishing a "total population of over 2,900 large traders" in the EDF market between October 2008 through December **[**269]** 2010). Though this statistic does not correspond to Period 0 (as Rabobank correctly identifies), we nonetheless find that the number of large traders in Period 0 is unlikely to be so much smaller than the number of large traders identified by the CME from 2008 through 2010 such that numerosity would be called into question. Given this high starting point, the class definition more likely than not encompasses 40 members even if limited to class members with net positions on days with trader-based manipulation, thereby satisfying *Rule 23(a)(1)*'s numerosity requirement. See *Pa. Pub. Sch. Emps., 772 F.3d at 120*.

3.4.2. Commonality

HN51[] "*Rule 23(a)(2)* simply requires that there be issues whose resolution will affect all or a significant number of the putative class members." *Nextel, 780 F.3d at 137*. Under this standard, we find that the question of the days on which manipulation of Rabobank's 3-month LIBOR submission could have impacted published LIBOR is one common to the class. The inputs to this determination -- Rabobank's LIBOR submissions, the submissions **[*534]** made by the other panel banks, and the interquartile trimming methodology applied by the BBA -- are sufficient to yield an answer for all class members.

Rabobank asserts that the answer to the question of whether its 3-month **[**270]** LIBOR submissions could have impacted published LIBOR will vary day-to-day and, by extension, from class member to class member. The point is well-taken, but Rabobank poses the wrong question: the same evidence -- data series of each panel bank's LIBOR submissions -- suffices to determine whether Rabobank's submission could have affected LIBOR on each day in the class period. There is no reason to conduct this analysis at the daily level (as Rabobank implicitly suggests) when historical LIBOR submissions data are available as a single data series for the entire Class Period -- data on which Dr. Hubbard, Rabobank's own expert, relied. We accordingly conclude that this question is a common one, as "the same evidence will suffice for each member to make a prima facie showing." *Tyson Foods, 136 S. Ct. at 1045* (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)).

3.4.3. Typicality

As an initial matter, a named plaintiff must have a trading position that would have been negatively impacted by alleged LIBOR manipulation in order to have a claim that is typical.[99] Rabobank accordingly contends that the named plaintiffs' claims are not typical because none of the three named plaintiffs asserting TBM claims **[**271]** -- 303030 Trading, Atlantic Trading, and Metzler Investment -- have provided evidence of their net trading positions.[100] (Rabobank TBM Opp'n 19-21.) This issue is mitigated, but not resolved entirely, by Exchange

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[99] We are unpersuaded by Exchange plaintiffs' reliance on *In re Amaranth Natural Gas Litigation, 269 F.R.D. 366, 371 n.9 (S.D.N.Y. 2010)*, for the proposition that class certification (including a finding of typicality) is proper even when named plaintiffs "may have received a net benefit as a result of the alleged manipulation." (Exch. Pls.' TBM Reply 9.) Amaranth cited Kohen v. Pacific Investment Management Co. ("Kohen I"), for this proposition, but Kohen I referenced net benefit to absent class members swept into an allegedly overbroad class definition, not to named plaintiffs. See *Kohen I, 244 F.R.D. 469, 475 (N.D. Ill. 2007)*.

plaintiffs' submission regarding their trading positions (Decl. of Thomas Elrod, Jan. 16, 2018, ECF No. 2405), made pursuant to our January 9, 2018 order, see Jan. 9, 2018 Order, ECF No. 2400.[101] We consider each named plaintiff in turn.

First, we find that Atlantic Trading's claims are typical of the class's claims as to the 13 days specified in subparts B.1 and B.2 of the class definition. Exchange plaintiffs' **[*535]** submission shows that Atlantic Trading, for each of those 13 days, held a net trading position that would have been harmed by the direction of manipulation alleged: it took a long net position on EDFs on the four days identified in subpart B.1 and a short net position on EDFs on the nine days identified in subpart B.2.

Second, we conclude that 303030 Trading's claims are not typical because 303030 Trading is subject to the unique defense that its claims were invalidly assigned to it from its principal, **[**272]** Bradley Belden. A report from the Illinois Secretary of State establishes that 303030 Trading was not formed until November 29, 2007, (Decl. of Robert Lindholm ex. 61, June 30, 2017, ECF No. 2027), and therefore could not have engaged in trading during Period 0, which ended in August 2007. After Rabobank identified in its opposition brief that Belden had not assigned any of his claims to 303030 Trading, (Rabobank TBM Opp'n 19 n.15), Belden executed an assignment of claims to 303030 Trading on August 4, 2017 -- the date on which Exchange plaintiffs' reply briefs in support of class certification were due. (Decl. of Thomas Elrod ex. 33, Aug. 4, 2017, ECF No. 2176.) We previously reserved judgment on the validity of this assignment. Sept. 7, 2017 Order, ECF No. 2255, slip op. at *1 n.1.

We now conclude that Belden's assignment is invalid. ***HN52***[] As a general matter, the assignee of a claim "possess[es] the same interest" as the assignor "and thus may continue to assert a claim for the same injury shared by all members of the class." *Cordes & Co., 502 F.3d at 101*. As the Second Circuit has recognized, "[i]t is indeed commonplace for an assignee to institute or continue an action of his or her assignor on an assigned claim even though he or **[**273]** she, apart from the assignment, is without standing." *Id. at 102*. However, the analysis in this case is complicated by the fact that 303030 Trading was voluntarily dissolved on October 25, 2011, as evidenced by the same report from the Illinois Secretary of State. (Decl. of Robert Lindholm ex. 61, June 30, 2017, ECF No. 2027.) Under Illinois law, "a limited liability company continues after dissolution only for the purpose of winding up its business," subject to limited exceptions. *805 Ill. Comp. Stat § 180/35-3(a)*. As relevant here, "[a] person winding up a limited liability company's business (1) may . . . prosecute and defend actions and proceedings, whether civil, criminal, or administrative." Id. *§ 180/35-4(c)*. But Belden's eleventh-hour assignment to 303030 Trading of claims -- based at least in part on trades occurring prior to 303030 Trading's formation -- can hardly be characterized as "for the purpose of winding up [303030 Trading's] business." Id. *§ 180/35-3(a)*. Rather, the assignment appears wholly unrelated to the business in which 303030 Trading may have engaged during its entirely post-Period 0 existence. 303030 Trading's claims were therefore not validly assigned and are, by extension, atypical.

But of course, we need not have concluded **[**274]** that Belden's assignment to 303030 Trading was in fact invalid under Illinois law to hold that 303030 Trading's claims are not typical. Rather, the mere fact that 303030 Trading's claims are subject to a unique defense involving this question of Illinois law, which does not appear to have been extensively addressed by Illinois courts, is sufficient to render them atypical. See, e.g., *In re Digital Music, 321*

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[100] Rabobank frames these arguments as challenges to the named plaintiffs' standing, but we conclude they are equally applicable to typicality.

[101] At oral argument, Rabobank questioned whether the data presented in Exchange plaintiffs' January 16, 2018 submission are accurate, asserting that several of the critical assumptions underlying those calculations were not disclosed. (Hr'g Tr. 72:22-74:24.) Though we have previously emphasized the importance of making clear the bases for any calculation of trading positions and question why Exchange plaintiffs did not proffer evidence establishing the named plaintiffs' standing after we struck Dr. Seyhun's August 2017 declaration, see Jan. 9, 2018 Order, ECF No. 2400; Sept. 7, 2017 Order, ECF No. 2255, we nonetheless afford Exchange plaintiffs the benefit of the doubt and accept the data presented in the January 16, 2018 Elrod declaration. Absent the information contained in that declaration, Exchange plaintiffs would have scant evidence supporting the typicality of their claims or the adequacy of their representation. Exchange plaintiffs' representations that they engaged in extensive trading throughout the class period (e.g., Exch. Pls.' TBM Reply 10-11), absent some supporting evidence, are simply insufficient.

F.R.D. at 97-98 ("[T]he defendant need not show at the certification stage that [a] unique defense will prevail." (second alteration in original) (quoting Lapin, 254 F.R.D. at 179)).

Third, we also have serious doubts as to the typicality of Metzler's claims. Some ambiguity arises as to whether Metzler's **[*536]** constituent funds are legally distinct entities with the capacity to sue and be sued. Counsel suggested at oral argument that they were legally distinct and that only certain of Metzler's funds had assigned their claims to Metzler Investment, the named plaintiff. (Hr'g Tr. 75:22-25.) However, Metzler's 30(b)(6) representative had previously testified that the funds were not separate legal entities (Neuman Dep. 92:19-93:4, Decl. of Robert Lindholm ex. 63, June 30, 2017, ECF No. 2027), and Exchange plaintiffs had previously represented that "[n]one **[**275]** of Metzler's funds have authority to bring legal claims themselves, and therefore all claims must instead be brought by Metzler as the funds' investment management company." (Letter from Christopher Lovell & David Kovel to the Court, July 5, 2017, ECF No. 2044.)[102]

To the extent Metzler's funds are not separate legal entities, netting of EDF trading positions would need to occur across all of Metzler's funds. ***HN53***[] "[A] plaintiff both injured and enriched by illegal activity cannot choose to recover for his injuries yet retain his windfall" where "both result from a single wrong." *Minpeco, S.A. v. Conticommodity Servs., Inc., 676 F. Supp. 486, 488 (S.D.N.Y. 1987)* (emphasis omitted) (citing *Abrahamson v. Fleschner, 568 F.2d 862, 878 (2d Cir. 1977))*. That is, Metzler "cannot claim damages where the same fraud alleged to be the cause of a loss" to certain funds "also permitted a countervailing gain" to other funds. *Gordon v. Sonar Capital Mgmt. LLC, 92 F. Supp. 3d 193, 201-02 (S.D.N.Y. 2015)* (quoting *In re Refco Inc. Sec. Litig., No. 07 MD 1902 (JSR), 2013 U.S. Dist. LEXIS 116700, 2013 WL 4078410, at *2 (S.D.N.Y. July 31, 2013))*. At minimum, the fact that any ambiguity persists at this point as to Metzler's status weighs against a finding of typicality.

But even accepting counsel's representation that Exchange plaintiffs' supplemental submission corresponds to each of Metzler's funds "that was relevant" to Period 0 or subpart C.2 of the class definition (Hr'g Tr. 75:10), we nonetheless conclude **[**276]** that Metzler's claims are not typical as to any of the 13 days identified in subparts B.1 and B.2 of the class definition. Rather, the only day on which any of the identified funds held a net trading position was July 30, 2007, when one of the funds held +89 EDF contracts. This trading position does not fit subpart B.2, which refers to traders having "sold Eurodollar futures contracts or purchased put options on Eurodollar futures" on July 30, 2007. Accordingly, Metzler's claims are not typical.

Fourth, a similar problem befalls the typicality of FTC Futures Fund PCC's claims. The only days in which it held net trading positions are September 1, 2006, and August 6, 2007, when it held +152 EDF contracts and +338 EDF contracts, respectively. As with Metzler on July 30, 2007, both of these trading positions are inconsistent with subpart B.2's description of class members having sold EDF contracts (or purchased put options on EDF contracts) on those two days. This problem extends, too, to FTC Futures Fund SICAV and September 1, 2006, when it held +405 EDF contracts. FTC Futures Fund SICAV did hold a net trading position of -479 EDF contracts on September 29, 2005, which is the only instance **[**277]** of either FTC entity holding a net trading position consistent with subparts B.1 and B.2 of the class definition.

Accordingly, once the named plaintiffs' trading positions are taken into account and the possibility of any unique defenses considered, we conclude that, as to the 13 **[*537]** days identified specifically in subparts B.1 and B.2 of the class definition, Atlantic Trading holds claims typical of the class's as to each of the 13 days and FTC Futures Fund SICAV holds claims typical of the class's claims only as to September 29, 2005.

But even if Atlantic Trading's and FTC Futures Fund SICAV's claims are typical of claims arising out of the 13 dates identified in subparts B.1 and B.2 of the class definition, their claims still would not be typical of those of the class when the class is defined to include any EDF trader that was "harmed" over Period 0. Just as we concluded that "the named plaintiffs do not have class standing to bring claims on days on which they did not hold a relevant net position" because such claims "do not involve 'the same set of concerns' as the claims brought on behalf of named

[102] In light of this prior representation regarding the legal capacity of Metzler's constituent funds, counsel's reference to the assignment of certain claims to Metzler as fund manager is somewhat puzzling.

plaintiffs," *April 15, 2016 Order, 2016 U.S. Dist. LEXIS 51190, at *110, 2016 WL 1558504, at *9* (quoting *NECA, 693 F.3d at 162*), such claims would not "arise[] from the same course **[**278]** of events," *In re Flag Telecom, 574 F.3d at 35* (quoting *Robidoux, 987 F.2d at 936*), such that the pertinent issues of fact underlying the named plaintiffs' claims would not "occupy essentially the same degree of centrality" as these additional claims, *Mazzei, 829 F.3d at 272* (quoting *Caridad, 191 F.3d at 293*).[103]

Accordingly, our analysis of typicality more broadly follows from our class standing analysis. Exchange plaintiffs' attempt to cast trader-based manipulation at a high level of generality as a "unitary course of conduct" is unavailing (Exch. Pls.' TBM Reply 11), in light of our holdings that trader-based claims are by nature "day-to-day" and "episodic," *Apr. 15, 2016 Order, 2016 U.S. Dist. LEXIS 51190, at *110, 2016 WL 1558504, at *9*.[104] Rather than arising from the "same events and conduct," we find that the claims here arise from distinct and discrete instances of alleged manipulation by individual traders. Indeed, the bulk of the evidence that Exchange plaintiffs present as to manipulation -- including trader communications suggesting manipulation -- pertain to only a single panel bank on one or two days, which not only confirms our earlier conclusion as to class standing but also bolsters our conclusion now about typicality.

3.4.4. Adequacy of Representation

Exchange plaintiffs assert, conclusorily, **[**279]** that Rabobank has not identified any antagonistic interests between members of the class and suggest that several cases, including *In re Amaranth, 587 F. Supp. 2d 513*; *Kohen I, 244 F.R.D. 469*; and *In re* ***[*538]*** *Sumitomo Copper Litigation, 182 F.R.D. 85 (S.D.N.Y. 1998)*, support a finding of adequacy of representation here. (Exch. Pls.' Class Mem. 11-14; Exch. Pls.' TBM Reply 11-12.) However, the record strongly supports a finding of conflicts between class members in the context of this action, as a named plaintiff has incentive to establish trader-based manipulation only on days when it held trading positions that would have been harmed by that manipulation.

The classes in the three cases cited by Exchange plaintiffs, unlike the proposed class in this case, were defined to include only traders who transacted in a single direction and alleged manipulation in defined directions over the class period. For instance, the plaintiffs in In re Amaranth alleged that defendants "artificially inflat[ed] the spread between [certain] contracts" and "artificially depress[ed] settlement prices" and limited their proposed class to purchasers of natural gas futures contracts who did so for certain trading purposes. See *In re Amaranth, 269 F.R.D at 373-74*. Similarly, the plaintiffs in Kohen I alleged that defendants sought to "profit from artificially high prices" **[**280]** of a certain futures contract and defined the proposed class to include only traders who purchased "a [specific] Treasury note futures contract in order to liquidate a short position." *Kohen I, 244 F.R.D. at 473, 475*. And in In re Sumitomo Copper, the plaintiffs alleged that "copper futures contract prices rose to artificially high levels by reason of conspiratorial misconduct of defendants" and created sub-classes for plaintiffs with long positions and plaintiffs with short positions. *182 F.R.D. at 87*; see *id. at 88* (defining subclasses).

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[103] The class standing analysis is distinct from the analysis of typicality under *Rule 23(a)(3)*, see *NECA, 693 F.3d at 158 n.9*, but the second prong of NECA's class standing test -- whether the challenged conduct "implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class," *RBPA, 775 F.3d at 161*, parallels typicality's requirements that "each class member's claim arises from the same course of events," *In re Flag Telecom, 574 F.3d at 35* (quoting *Robidoux, 987 F.2d at 936*), and that disputed issues "occupy essentially the same degree of centrality to the named plaintiff's claim as to that of other members of the proposed class," *Mazzei, 829 F.3d at 272* (quoting *Caridad, 191 F.3d at 293*). See generally 1 William B. Rubenstein, Newberg on Class Actions § 2:6 (5th ed.) (Westlaw 2017) (considering the overlap between class standing requirements and *Rule 23(a)*). Of course, class standing may be established based on allegations alone, see *RBPA, 775 F.3d at 161*, but typicality must be established based on evidence presented at class certification and a preponderance of that evidence, see *Bombardier, 546 F.3d at 202*.

[104] And though we exclude this portion of Mr. Beevers's opinions, we observe that the argument that Rabobank pursued a "unitary course of conduct" is difficult to reconcile with Mr. Beevers's opinion that competing trading desks within a single financial institution are akin to "warring factions." (Beevers Initial Report ¶ 68.)

The proposed class here remains far more open-ended. The class definition is indeterminate not only as to the days on which trader-based manipulation occurred, but also the direction of manipulation on those days. This indeterminancy presents far more opportunity for conflicting incentives between class members than existed in In re Amaranth, Kohen I, and In re Sumitomo Copper.[105]

An examination of the trading records produced by named plaintiff Atlantic Trading, the named plaintiff FTC Futures Fund entities, and Bradley Belden (who assigned his claims to named plaintiff 303030 Trading), confirms that these conflicts are concrete and hardly hypothetical.[106] Consider, for example, the trading **[**281]** position data presented in Exchange plaintiffs' January 16, 2018 submission. (Decl. of Thomas Elrod, Jan. 16, 2018, ECF No. 2405.) Again accepting as valid the underlying calculations, these data show conflicts between named plaintiffs on several of the 13 days specifically identified in the class definition. For instance, on September 1, 2006, while Atlantic Trading had a net trading position of -205.92 EDF contracts, FTC Futures Fund PCC had a net trading position of +152 EDF contracts and FTC Futures Fund SICAV had a net trading position of +405 EDF contracts. Similarly, on July 30, 2007, while Atlantic Trading had a net trading position of -2,162.68 EDF contracts, Metzler had a net trading position of +89 contracts. And finally, on August 6, 2007, while Atlantic Trading had a net trading position of -387.52 **[*539]** EDF contracts, FTC Futures Fund PCC had a net trading position of +338 EDF contracts. On those days, the named plaintiffs with opposite net trading positions will have directly conflicting incentives to establish not only the existence but also the magnitude of any manipulation that occurred on those dates.

Further, if Dr. Seyhun's various models of suppression were admissible, **[**282]** the estimates of suppression that they produce -- differing in both direction and magnitude -- would further undermine the adequacy of named plaintiffs' representation by heightening conflicts between class members' interests. Directional differences are particularly corrosive of adequacy in that they create directly conflicting incentives, but differences in the magnitude of suppression will similarly cause different class members to advocate for different models.

We therefore conclude that the proposed class fails to meet *Rule 23(a)(4)*'s adequacy of representation requirement. We find that class members' differing exposures to EDFs on different trading days creates differences between class members (both named plaintiffs and absent members) that undermine the class representatives' incentive to fully pursue the class's claims. See, e.g., *In re Payment Card Interchange Fee, 827 F.3d at 231*. To reiterate, a named plaintiff has an incentive to establish trader-based manipulation only on days when it held trading positions that would have been harmed by that manipulation. That is, phrased in the negative, a named plaintiff has no incentive to establish trader-based manipulation on a day on which it had no exposure to EDFs and has active disincentive **[**283]** to establish trader-based manipulation when the direction of that manipulation benefited its trading positions -- even if that manipulation harmed more class members or harmed class members in the aggregate. Exchange plaintiffs' own analysis of trading positions belies the contention that "all class members . . . have the same interest in proving price artificiality" (Exch. Pls.' TBM Reply 16), and they ultimately offer no reason to believe that conflicts of this type do not exist within named plaintiffs and between named plaintiffs and absent class members throughout the class period, especially in light of the active, two-sided nature of the EDF trading market.

3.5. Predominance

Exchange plaintiffs' trader-based claims are based solely on the CEA, and we begin our analysis "with the elements of the underlying cause of action." *Halliburton I, 563 U.S. at 809*. To reiterate, ***HN54***[] a plaintiff asserting a direct

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[105] We accordingly find Exchange plaintiffs' reliance on *In re Natural Gas Commodities Litigation, 231 F.R.D. 171 (S.D.N.Y. 2005)*, which relied on Sumitomo Copper to certify a class of both "purchasers and sellers" alleging manipulation in both directions, unpersuasive. See *In re Nat. Gas, 231 F.R.D. at 182-83* (citing *In re Sumitomo Copper, 182 F.R.D. at 92*).

[106] These conflicts are between named plaintiffs, but we fully expect that similar conflicts would arise between named plaintiffs and absent class members.

CEA claim must establish "(1) that the [defendant] had the ability to influence market prices; (2) that [he] specifically intended to do so; (3) that artificial prices existed; and (4) that the [defendant] caused the artificial prices." *LIBOR I, 935 F. Supp. 2d at 713* (alterations in original) (quoting *DiPlacido v. CFTC, 364 F. App'x 657, 661 (2d Cir. 2009)* (applying the four-part test applied by **[**284]** the CFTC)); see also, e.g., *In re Platinum & Palladium, 828 F. Supp. 2d at 598*. In analyzing these elements, we adhere to our earlier conclusion that EDFs, not published LIBOR, are the commodity in question. See *LIBOR II, 962 F. Supp. 2d at 612*; *LIBOR I, 935 F. Supp. 2d at 721*.

The parties do not distinguish between Exchange plaintiffs' direct CEA claims on the one hand and their vicarious liability and aiding-and-abetting claims on the other. Neither do we. ***HN55***[] Vicarious liability "may be imposed where (1) the agent participated in the alleged unlawful activity and (2) his actions were within the scope of his employment or office" and requires a primary violation of the CEA in the first **[*540]** instance. *In re Platinum & Palladium, 828 F. Supp. 2d at 599*; see also *Guttman v. CFTC, 197 F.3d 33, 39 (2d Cir. 1999)*. Therefore, to the extent common questions do not predominate the analysis of direct CEA claims, they also do not predominate the analysis of CEA vicarious liability claims.[107]

Additionally, regardless of whether plaintiffs may assert aiding-and-abetting claims against Rabobank, see *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *120, 2015 WL 6243526, at *49*, our predominance analysis does not meaningfully differ between direct liability and aiding-and-abetting. Aiding-and-abetting claims, to the extent properly asserted, are also contingent on a primary CEA violation. See *In re Platinum & Palladium, 828 F. Supp. 2d at 599* ("In order to recover damages from a secondary party in an action for 'aiding and abetting' liability **[**285]** under the *Commodities Exchange Act*, a plaintiff must first prove that a primary party committed a commodities violation." (quoting *Tatum v. Legg Mason Wood Walker, Inc., 83 F.3d 121, 123 (5th Cir. 1996)* (per curiam)); see also *In re Commodity Exch., Inc. Silver Futures & Options Trading Litig., 560 F. App'x 84, 87 (2d Cir. 2014)* ("As plaintiffs failed to allege a CEA violation, their aiding and abetting claim was properly dismissed as well.").

3.5.1. Ability to Influence EDF Prices

The first element in this case, "the ability to influence market prices" presents a two-part question: whether a panel bank has the ability to impact published LIBOR and whether a panel bank has the ability to impact EDF prices. As we concluded in our analysis of commonality under *Rule 23(a)(2)*, the former is a common question. It is of limited significance, however, as the calculation is rather straightforward and not particularly intensive.[108] The ability to impact EDF prices, however, is an individual question. We view this issue as closely related to the third and fourth elements of a CEA claim (existence and causation of an artificial price, respectively), and we analyze them below.

3.5.2. Intent to Influence EDF Prices

We find intent to be an individual question. Because trader-based manipulation occurs on a day-by-day basis and is inherently episodic, evidence of a trader's intent on **[**286]** one day will not be "central to the validity of each one of the claims" asserted by the class when those claims arise from manipulation on different dates. *Dukes, 564 U.S. at 350*. That is, evidence of a trader's intent on one day, standing alone, would not "suffice for each [class] member to make a prima facie showing" of intent on other dates; more will be required. *Tyson Foods, 136 S. Ct. at 1045* (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)). Therefore, even assuming that intent is properly determined based on "a person's actions and the totality of the circumstances" as Exchange

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[107] Rather, analyzing vicarious liability will likely introduce further individual questions, such as the agent's scope of employment, which are likely to differ from trader to trader and from bank to bank.

[108] We note that the parties agree as to the days on which Rabobank's LIBOR submission could have affected published LIBOR, though the fact of agreement does not figure into the predominance analysis. Cf. *In re Nassau Cty, 461 F.3d at 227* ("[A] concession does not eliminate a common issue from the predominance calculus.").

plaintiffs suggest, *In re DiPlacido, CFTC No. 01-23, 2008 CFTC LEXIS 101, 2008 WL 4831204, at *27 (Nov. 5, 2008)*, evidence of intent on one day will be only minimally probative of intent on other days.

In arguing that intent is a common question, Exchange plaintiffs cite our prior **[*541]** holding that "[b]ecause plaintiffs may be able to make such a showing through common proof, intent does not present an inherently individual issue, much less one that necessarily predominates over common issues." (Exch. Pls.' TBM Reply 14-15 (citing *May 13, 2016 Order, 2016 U.S. Dist. LEXIS 63745, at *81, 2016 WL 2851333, at *3*).) This argument distorts our prior holding, and Exchange plaintiffs' reliance is misplaced. We reasoned -- in the context of OTC plaintiffs' suppression claims -- that intent was not "an **[**287]** inherently individual issue" because OTC plaintiffs "may prove intent by focusing on the alleged manipulation of LIBOR." *May 13, 2016 Order, 2016 U.S. Dist. LEXIS 63745, at *81, 2016 WL 2851333, at *3* (emphasis added). In so holding, we relied on LIBOR III's articulation of pleading standards for the OTC plaintiffs' contract claims. See *LIBOR III, 27 F. Supp. 3d at 482-83* (discussing OTC plaintiffs' claims based on the implied covenant of good faith and unjust enrichment). These differences are meaningful, as Exchange plaintiffs not only must establish intent to manipulate market prices of EDFs and not LIBOR, but also assert trader-based claims considerably different in nature from OTC plaintiffs' claims (and their own claims) of persistent suppression.[109]

3.5.3. Existence and Causation of Artificial EDF Prices

In order for the existence of artificial EDF prices and Rabobank's causation of those artificial prices to be common questions, Exchange plaintiffs must establish that classwide methodologies are available to determine (1) what LIBOR submissions panel banks would have made (and by extension, what LIBOR would have been) absent trader-based manipulation and (2) what impact a change from actual published LIBOR to but-for published LIBOR would have had on EDF prices. They have done neither. **[**288]**

To satisfy the first requirement, Exchange plaintiffs rely on Dr. Seyhun's Rebuttal Period 0 model, which they assert produces "estimate[s] of what LIBOR submissions would have been absent TBM -- for each panel bank on the dates during Period 0 for which there exists documented evidence of TBM." (Exch. Pls.' TBM Reply 15.)

For the reasons articulated in our exclusion of Dr. Seyhun's opinions under *Daubert*, this model is insufficient to meet Exchange plaintiffs' burden. See supra section III.1.1.1. Dr. Seyhun's Rebuttal Period 0 Model does not reliably identify the magnitude of trader-based manipulation and frequently contradicts Exchange plaintiffs' allegations regarding the direction of manipulation.[110] But even if we had not deemed the Rebuttal Period 0 model inadmissible, we would conclude that its heavy reliance on documentary corroboration defeats any suggestion that it is a classwide **[*542]** methodology. A detailed examination of trader communications, which necessarily pertain to a single date or a limited number of days, will in turn relate only to class members with net trading positions on those days and not all class members. Indeed, we note that in a summary table identifying documentary **[**289]** evidence of trader-based manipulation that Exchange plaintiffs submitted in support of class certification, no document appears to pertain to manipulation by more than one bank or by the same bank on more than five days. (Decl. of Thomas Elrod ¶ 203, May 2, 2017, ECF No. 1890.)

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[109] Our conclusion that intent is an individual question implies that Rabobank's asserted personal jurisdiction defense similarly poses an individualized question. See *LIBOR V, 2015 U.S. Dist. LEXIS 149629, 2015 WL 6696407, at *19-20* (discussing the significance of intent in assessing personal jurisdiction).

[110] We also reject Exchange plaintiffs' assertion that "[t]o the extent Rabobank challenges the models as insufficient, its defense applies to the Class as a whole." (Exch. Pls.' TBM Reply 16). Dr. Seyhun's models form part of Exchange plaintiffs' affirmative case, and they must carry the burden of establishing a classwide methodologies to calculate but-for LIBOR submissions and but-for published LIBOR. Rabobank's assertion that Dr. Seyhun's models are flawed is therefore not an affirmative defense, but a failure in Exchange plaintiffs' prima facie case. Indeed, taken to its natural conclusion, Exchange plaintiffs' argument would return us to the days when "an expert's report will sustain a plaintiff's burden so long as it is not 'fatally flawed,'" a notion the Second Circuit disavowed in In re IPO. See *471 F.3d at 40*.

To satisfy the second requirement, Exchange plaintiffs rely on Dr. Seyhun's "impact factor" models, which purport to estimate "the impact of TBM on EDF prices." (Exch. Pls.' TBM Reply 17.) Again, our exclusion of those models under *Daubert* dictates the conclusion that Exchange plaintiffs have not established that impact of changes in LIBOR on EDF prices is a common question. Macroeconomic events impact both LIBOR and EDF prices (as Exchange plaintiffs have conceded), and Dr. Seyhun's model is incapable of parsing the effects of those events from the effect of changes in LIBOR itself. But even if this flaw were insufficient to render Dr. Seyhun's impact factor models inadmissible under Daubert, a mismatch would remain between Exchange plaintiffs' theory of harm and impact on EDF prices (and by extension, damages), as measured by Dr. Seyhun's models.[111] Exchange plaintiffs have never alleged an entitlement **[**290]** to recover for damages incurred as a result of macroeconomic events (nor could they plausibly do so), and Dr. Seyhun's impact factor models therefore "fail[] to measure damages resulting from the particular . . . injury on which [plaintiffs'] liability in this action is premised." *Comcast, 569 U.S. at 36*.

Further, even assuming that any change in EDF prices caused by a change in LIBOR may be isolated and measured, the issue of the minimum price increments in which EDFs trade (or "tick sizes") precludes the conclusion that the existence and causation of artificial prices are common questions. Exchange plaintiffs have offered no methodology to determine when a particular trade would have been impacted by changes in LIBOR: rather, Dr. Seyhun and Dr. Netz each offer probabilistic opinions that are incapable of making such a determination. (Seyhun Rebuttal Report ¶ 216; Netz Initial Report 38.) Contrary to the suggestion that Dr. Seyhun's probabilistic formula (which divides artificiality on a given day by the minimum price increment)[112] is "a methodology to determine when [a change in LIBOR] in fact affected EDF prices" (Exch. Pls.' TBM Reply 19 n.33), the output of this formula is a probability, not a concrete **[**291]** yes-or-no answer (Seyhun Rebuttal Report ¶ 216).

Indeed, Exchange plaintiffs' subsequent argument, that this formula establishes that tick size "will either nullify the effect of LIBOR artificiality on the day in question, or amplify it," demonstrates the formula's very weakness. (Exch. Pls.' TBM Reply 19 n.33.) Of course, if the tick size "nullif[ies] the effect of LIBOR artificiality" on a given day (which will occur with a certain probability per Dr. Seyhun and Dr. Netz), Exchange plaintiffs will have failed to establish both the existence of artificial prices and Rabobank's causation of those prices on that day. Exchange plaintiffs' argument, therefore, is tantamount to a **[*543]** concession that Dr. Seyhun's models cannot (even setting aside the causation question) methodically separate instances when artificial EDF prices existed as a result of LIBOR manipulation and when they did not.

3.5.4. Damages

Finally, we consider the issue of damages. ***HN56***[] The question of damages, to some extent, is necessarily individual in every securities case, because damages will almost always be a function of the specific transactions undertaken by each class member and the prices and quantities involved in those **[**292]** transactions. Accordingly, "individualized damages determinations alone cannot preclude certification under *Rule 23(b)(3)*," *Roach, 778 F.3d at 409*, though "the fact that damages may have to be ascertained on an individual basis is . . . a factor that we must consider" in the predominance analysis, *id. at 408* (omission in original) (quoting *McLaughlin, 522 F.3d at 231*).

In analyzing damages, we first consider the netting principles to be applied and whether they introduce individual issues. Though we may set forth at class certification the netting principles to be applied, see, e.g., *In re Vivendi Universal, S.A. Sec. Litig., 284 F.R.D. 144, 159 (S.D.N.Y. 2012)* (prescribing, at class certification, "the netting methodology to be employed"),[113] we need not finalize any netting principles in order to find that they do. Exchange

[111] We would also find more compelling Dr. Culp's extensive findings that changes in LIBOR do not cause determinable changes in EDF prices.

[112] Dr. Netz offers the same formula. (Netz Initial Report 38.)

plaintiffs appear to reject any netting requirement, but we conclude that some degree of netting will be appropriate here. As we have discussed, "a plaintiff both injured and enriched by illegal activity cannot choose to recover for his injuries yet retain his windfall." *Minpeco, 676 F. Supp. at 488*. We acknowledge that "netting of gains and losses is not a hard-and-fast rule," as "[c]ourts decline to net where doing so would 'unjustly enrich' the defendant, 'shelter it from any appreciable liability,' or 'undermine the goal of deterrence.'" **[**293]** *Gordon, 92 F. Supp. 3d at 202* (citing *Apex Oil, 744 F. Supp. at 55*); cf. *Randall v. Loftsgaarden, 478 U.S. 647, 663-64, 106 S. Ct. 3143, 92 L. Ed. 2d 525 (1986)* (rejecting, in a securities fraud case, the netting of tax benefits received by investors against their losses). Nonetheless, "[t]here is no unjust enrichment where a claimant has actually benefited from the alleged wrongdoing of another," *Apex Oil, 744 F. Supp. at 55*, and undeserved windfalls to plaintiffs may also be inappropriate, cf. *Randall, 478 U.S. at 663*.

In this case, netting across EDF trades will be required, at minimum.[114] Assuming that LIBOR manipulation had measurable price impact on EDFs, any EDF trading losses experienced by a class member resulting from that manipulation over the class period must be netted against any gains resulting from that manipulation **[*544]** over the class period. Those transactions were all undertaken as part of the same type of trading in LIBOR-based instruments undertaken by the class member, and unlike the unnetted tax benefits in Randall that "emerge[d] more as a function of the operation of the Internal Revenue Code's complex provisions" than the defendants' conduct at issue, *478 U.S. at 664*, any nettable gains to a class member result from the "single wrong" of LIBOR manipulation.

Given this understanding of netting, we readily conclude that **[**294]** the damages inquiry in this case will be a highly individualized one. Indeed, each class member "will need to present evidence that varies from member to member" -- all of the EDF trades they undertook -- in order to determine whether it has suffered any damages. *Tyson Foods, 136 S. Ct. at 1045* (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)). And unlike CEA cases in which centralized trading records may be reasonably attainable, see, e.g., *In re Amaranth, 269 F.R.D. at 372* (concerning manipulation of futures on NYMEX); *In re Sumitomo Copper, 182 F.R.D. at 87* (same), no such records appear to exist in this case. We find Exchange plaintiffs' difficulties in obtaining centralized records to be informative, as they have subpoenaed the CME and 89 FCMs, all to little avail. The possibility that certain FCMs (panel bank affiliates or otherwise) may have retained some records, as suggested by counsel at oral argument (Hr'g Tr. 11:3-8; 12:12-13:2), is insufficient. Accordingly, even to the extent a common formula to calculate damages is available, the question of the data to which that formula will be applied remains. The latter will require evidence that varies from class member to class member, even if the formula is the same.[115] Damages are accordingly an individual **[**295]** question.

3.5.5. Conclusion

In this action, common questions do not predominate over individual ones. While the proposed trader-based class certainly raises a common question as to Rabobank's ability to impact LIBOR, this common question is outnumbered and substantially outweighed by individual questions relating to whether Rabobank (or its traders) had

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[113] Exchange plaintiffs' contentions to the contrary are simply incorrect. Neither *Apex Oil Co. v. DiMauro, 744 F. Supp. 53 (S.D.N.Y. 1990)*, nor *Minpeco, 676 F. Supp. 486*, were class actions, and *In re Lidoderm Antitrust Litigation, No. 14-md-2521-WHO, 2017 U.S. Dist. LEXIS 24097, 2017 WL 679367, at *17-18 (N.D. Cal. Feb. 21, 2017)*, held at most that the selection of but-for price and the final damages calculation are reserved for the trier of fact. Here, we consider how to interpret as a matter of law the "actual damages" language found in the text of the CEA, *7 U.S.C. § 25(a)*, see also *In re Vivendi Universal, 284 F.R.D. at 159* (noting, in the securities fraud context, that "this Court has considerable discretion in determining how best to calculate compensable losses"), and whether that interpretation introduces individualized questions into the predominance analysis.

[114] We reserve judgment here as to whether more extensive forms of netting, such as cross-instrument netting (across different types of LIBOR-based instruments), will be necessary.

[115] To the extent Exchange plaintiffs claim that damages should be defined to include the time-value of money in their margin accounts (Netz Initial Report 46-47), doing so would introduce additional individualized questions as to each class member's margin requirements and cost of capital.

intent to manipulate EDF prices, by how much LIBOR was manipulated (if at all), what impact that manipulation ultimately had on EDF prices, and by how much each individual class member was damaged. The proposed class therefore does not satisfy, and does not come close to satisfying, *Rule 23(b)(3)*'s predominance requirement.

3.6. Superiority

Rule 23(b)(3)'s superiority inquiry asks whether class status would be superior to the maintenance of individual actions. Our analysis is guided by the four factors set forth in *Rule 23(b)(3)*, see *Sykes, 780 F.3d at 81*, though the factors are not exclusive.

First, we find that class members have a strong interest in controlling the prosecution of separate actions, given the extent of conflicting interests we have identified. See *Fed. R. Civ. P. 23(b)(3)(A)*. Though this case unquestionably presents complex issues, we find that individual actions would allow individual plaintiffs to better **[**296]** tailor the necessary inquiries into potential trader-based manipulation to the days on which they had net trading positions and **[*545]** would not require them to assert that certain instances of trader-based manipulation occurred when those instances either do not pertain to them at all or would actively reduce their recovery.

Exchange plaintiffs' point that many class members may have "negative value" claims (where the cost of prosecuting an individual action would greatly outweigh any recovery) has some force, and we agree that class members may lack incentive to pursue individual actions to at least some extent. Nonetheless, we view this case as easily distinguishable from cases such as consumer class actions, in which class members allege harm that is small in magnitude but generally certain in existence. By contrast, the two-sided, zero-sum nature of the EDF trading market involved in this case likely results in many EDF traders not having been harmed (or having benefited outright) from any EDF price impact caused by LIBOR manipulation.

That is, ***HN57***[] we should distinguish "negative" value claims -- those in which the cost of prosecution exceeds recovery -- from truly negative value claims -- **[**297]** those in which the class member actually benefited from the conduct in question. To the extent a putative class includes a substantial number of members who were not ultimately damaged, the "negative" value rationale for superiority advanced by Exchange plaintiffs is properly evaluated against a concern regarding the in terrorem effect that a certified class may have. Cf. *Kohen II, 571 F.3d at 677-78* ("A related point is that a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant, if only because of the in terrorem character of a class action." (citations omitted)); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 190 192 (3d Cir. 2001)* (observing, in a case where "at least some of the plaintiffs have not suffered economic injury," that "class certification would place hydraulic pressure on defendants to settle which weighs in the superiority analysis"). That appears to be the case here, and we accordingly conclude the first *Rule 23(b)(3)* factor weighs against superiority.

Second, we find that the extent and nature of any litigation already begun by class members weighs in favor of superiority. See *Fed. R. Civ. P. 23(b)(3)(B)*. We base this finding on the fact that this case is rapidly approaching its seventh birthday, having journeyed **[**298]** up and down the appellate ladder in the process. See, e.g., *Gelboim v. Bank of Am. Corp., 135 S. Ct. 897, 190 L. Ed. 2d 789 (2015)*; *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541*; *Gelboim, 823 F.3d 759*.

Third, we find that "the desirability . . . of concentrating the litigation of claims" in this forum tips in neither direction. *Fed. R. Civ. P. 23(b)(3)(C)*. On the one hand, for the reasons identified by the Judicial Panel on Multidistrict Litigation (JPML) in creating the multidistrict litigation in this district, concentrating litigation in this district may be desirable. See *In re LIBOR-Based Fin. Instruments Antitrust Litig., 802 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011)*. Further, though individual actions advancing theories similar to those offered by Exchange plaintiffs here would likely be transferred to this forum given this case's multidistrict litigation status, this transfer would be limited to pretrial proceedings and we would be required to return any individual actions not initially filed in this district to the transferor court for trial. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998)*.

On the other hand, the res judicata issues identified by Rabobank do counsel against concentrating litigation in this district. See *In re Vivendi, 838 F.3d at 264* **[*546]** (***HN58***[] "Concerns about foreign recognition of our judgments are reasonably related to superiority."); see also *Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 996-97 (2d Cir. 1975)* (Friendly, J.) (identifying foreign non-recognition of a class action's preclusive effect as a concern), abrogated on other grounds by *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*. Indeed, named **[**299]** plaintiffs FTC Futures Fund PCC and FTC Futures Fund SICAV are also foreign entities, being based in Gibraltar and Luxembourg, respectively. (Corrected 4AC ¶¶ 26-27.) These named plaintiffs and Metzler's status as foreign entities does not preclude them from serving as class representatives, but the presence of a significant number of foreign putative class members gives us pause on whether concentration here is desirable.

Finally, our manageability conclusion follows largely from our findings on predominance. See 2 William B. Rubenstein, Newberg on Class Actions § 4:74 (5th ed.) (Westlaw 2017) ("[A] finding of non-predominance is easily paired with a finding that a class action is unmanageable and hence not a superior form of litigation."). We find that a class action would be unmanageable given the extent of conflict between class members and the substantial individual questions of intent, causation, and damages.

In sum, we find that Exchange plaintiffs have not established that a class action would be superior to the maintenance of individual actions. While the second *Rule 23(b)(3)* supports a finding of superiority, the remaining factors are neutral or weigh against such a finding.

3.7. Modification [**300] of the Class Definition

Perhaps recognizing certain weaknesses in the class definition as proposed, Exchange plaintiffs suggest that two modifications to the class definition may be appropriate to salvage a class in some form: the removal of "were harmed" and the creation of day-by-day subclasses. We consider each suggestion in turn.

3.7.1. Removal of "Were Harmed"

Exchange plaintiffs suggest that any defects resulting from the inclusion of "were harmed" in the class definition could be resolved by our sua sponte modification of the class definition to exclude "were harmed." Such modification, however, would be without prejudice to subsequent modification in order to include instances of trader-based manipulation on additional days once discovered.[116] (Exch. Pls.' TBM Reply 8.)

We decline to exercise our discretion to modify the class definition here. First, Exchange plaintiffs have been on notice of the potential fail-safe class definition issue presented by their proposed definition for more than a year, when we expressed concern that "[s]uch a class necessarily raises individual questions, as the factfinder must determine whether an individual has a claim in order to determine whether **[**301]** he or she belongs in the class." *May 13, 2016 Order, 2016 U.S. Dist. LEXIS 63745, at *76-77, 2016 WL 2851333, at *2*. Though we explicitly held that "[Exchange] plaintiffs will bear the burden of articulating a class definition that meets the requirements of *Rule 23*" at class certification, *2016 U.S. Dist. LEXIS 63745, at *75, [WL] at *1*, they have insisted on offering the same class definition. We are accordingly disinclined **[*547]** to afford Exchange plaintiffs any potential benefit that would result from modification.

Second, when we contemplated the possibility of modifying the class definition, we reasoned that "[t]he precise scope of [Exchange] plaintiffs' claims will presumably be clarified by the completion of class discovery." Id. Class discovery has been completed, but the scope of Exchange plaintiffs' claims has not been significantly clarified.

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[116] Of course, based on the class standing requirements that we have previously set forth, some showing that at least one named plaintiff held a net trading position adversely impacted by trader-based manipulation would be required before the class definition could be so modified.

Exchange plaintiffs continue to suggest that an unknown number of unknown instances of TBM have yet to be uncovered.

Finally, and most significantly, modification of the class definition would be futile. Because Exchange plaintiffs suggest modification without prejudice to the inclusion of additional instances of trader-based manipulation, the adequacy of representation issues identified above remain: class members, based on their trading positions, have conflicting **[**302]** incentives as to the discovery of those additional instances and to their inclusion in subsequent modifications of the class definition. And even if the class definition were ultimately limited to the 13 dates specified in the current definition, such a modification would not meaningfully alter the predominance analysis such that we would conclude that common questions predominate.[117]

3.7.2. Day-by-Day Subclasses

In a footnote in reply, Exchange plaintiffs assert that the creation of "single-day subclasses would meet *Rule 23(b)(3)*'s requirements" if a broad class corresponding to the entire class period were not certified. (Exch. Pls.' TBM Reply 13-14 n.26.) The creation of day-by-day subclasses may address some of the typicality and adequacy of representation issues that we have identified, but would not sufficiently alter the predominance calculus such that common questions would predominate.

Further, under *Rule 23(b)(3)*'s superiority prong, day-by-day subclasses are likely to become sufficiently numerous to render a class action utterly unmanageable. Even based on the current proposed class definition, day-by-day subclasses would require the creation of thirteen subclasses within the trader-based class, and the **[**303]** possibility that additional instances of trader-based manipulation beyond those currently identified (a point that Exchange plaintiffs have repeatedly emphasized) necessarily entails the likely creation of even more subclasses. For example, one declaration submitted by Exchange plaintiffs lists 62 dates in its "Timeline of Panel Bank Defendants' Trader-Based Manipulation of LIBOR," (Decl. of Thomas Elrod ¶ 203, May 2, 2017, ECF No. 1890), and Dr. Netz considers evidence of 163 instances of trader-based manipulation (Netz Initial Report 29-31).[118]

While *Rule 23(c)(5)* unquestionably allows for the creation of subclasses "[w]hen appropriate," we find little appropriate about the establishment of dozens, if not hundreds, of subclasses. Cf. Manual for Complex Litigation § 21.23 (4th ed. 2004) ("The creation of a number of subclasses . . . may make the case unmanageable [and] may defeat the superiority requirement."). As the Second Circuit remarked about the possibility of seven separate subclasses, **[*548]** "[t]hat is surely beyond the point at which [subclassing] must end." *In re Literary Works, 654 F.3d at 257*. So too here.

3.8. Conclusion

Exchange plaintiffs' motion for certification of a trader-based class is denied. We find that the proposed class meets the numerosity and commonality **[**304]** requirements of *Rule 23(a)* and the implied requirement of ascertainability, but fails to meet the typicality and adequacy requirements of *Rule 23(a)* and the predominance and superiority requirements of *Rule 23(b)(3)*. We decline Exchange plaintiffs' invitations to exercise our discretion to modify the class definition. Omitting "were harmed" from the class definition would do little to ameliorate the predominance and superiority problems from which the proposed class suffers, and even to the extent that day-by-day subclasses

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117 For this reason, we would also reject any suggestion that issue certification under *Rule 23(c)(4)* would be appropriate in this case: issue certification "would not materially advance the litigation because it would not dispose of [these] larger issues." *McLaughlin, 522 F.3d at 234*.

118 Mr. Beevers also opines that there are "potentially likely" thousands of instances of trader-based manipulation. (Beevers Initial Report ¶ 117.)

would resolve the typicality and adequacy of representation problems that we identify above, they would not tip the predominance balance and would additionally create intractable management problems.

4. Suppression Class

A suppression class, to the extent one is certified, would consist of (1) traders purchasing EDF contracts with less than 365 days to expiration between April 15, 2009 and May 17, 2010 (Period 3) as specified in subpart C.2 of the class definition and (2) traders who transacted in EDF contracts or options during Period 3 and "were harmed" as a result of LIBOR suppression, which corresponds to subpart C.1 of the class definition.[119] Because antitrust claims are no longer at issue in **[**305]** this action, subpart A and the pre-Period 3 claims it encompasses are no longer figure into the class certification analysis -- a point the parties acknowledged at oral argument. (Hr'g Tr. 25:10-21.) Accordingly, in the remainder of our analysis of the proposed suppression class, we will consider only Period 3 CEA claims.

Before proceeding to the analysis of the proposed suppression class, we consider another preliminary issue: the impact of Rabobank's Daubert motions. While Rabobank moved to exclude the opinions offered by Exchange plaintiffs' experts in the trader-based context, UBS did not. Nonetheless, to the extent that we have granted Rabobank's Daubert motions and excluded certain opinions offered by Exchange plaintiffs' experts, we will not consider those opinions as evidence in our analysis of the suppression class's compliance with *Rule 23*. After all, *Rule 702 of the Federal Rules of Evidence* establishes threshold requirements that an expert opinion must satisfy before that opinion may be considered; nothing in the Rule suggests that expert testimony offered for the same purpose that is determined to be insufficiently reliable in one context (or as to one defendant) may somehow become cured of that reliability flaw **[**306]** in another context (or as to another defendant).

4.1. Class Definition

At the outset, UBS criticizes the class definition's use of "were harmed," contending that the proposed class amounts to an impermissible fail-safe class. (UBS Suppr. Opp'n 11-13.) While Exchange plaintiffs' use of "were harmed" is initially ambiguous, they subsequently clarify that a class **[*549]** member is "harmed" by suppression if it: (1) "purchased an EDF contract when prices were artificially inflated"; (2) "sold an EDF contract when prices were artificially depressed"; (3) "purchased an EDF call option or sold an EDF put option when EDF prices were artificially inflated"; or (4) "sold an EDF put or call option when EDF prices were artificially depressed." (Exch. Pls.' Suppr. Reply 29.) This fourth criteria, as currently formulated, directly conflicts with the third criteria; we assume Exchange plaintiffs meant to say "sold an EDF put option or purchased an EDF call option when EDF prices were artificially depressed."

Such clarity would have been helpful at the outset, but we find no reason not to analyze the proposed class using the definition of "harmed" set forth in Exchange plaintiffs' reply. Exchange plaintiffs **[**307]** suggest that criteria (2) and (4) were never triggered during the suppression period as a categorical matter because LIBOR was strictly suppressed, but even Dr. Seyhun finds that actual published LIBOR sometimes exceeded but-for LIBOR. (Seyhun Rebuttal Report figs.14.1-14.17.) Accordingly, we interpret "harmed" to include all four criteria.[120]

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[119] Subpart C.1 is therefore redundant of the class definition's prefatory language, which refers to any individual that transacted in EDFs during the Class Period. Because CEA claims based on trades in Period 1 and Period 2 are untimely, see *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *109, 2015 WL 6243526, at *116-17* (citing *LIBOR III, 27 F. Supp. 3d at 471-77*), subpart C.1 and the prefatory language capture the same set of putative class members once the CEA statute of limitations is considered.

[120] This class definition continues to satisfy Article III standing requirements, given the relaxed definition of Article III "injury-in-fact" established by the Second Circuit in Denney. See *443 F.3d at 263-64*.

4.2. Ascertainability

UBS, in its brief submitted prior to the Second Circuit's decision in In re Petrobras, argued that Exchange plaintiffs' difficulties in obtaining trading records render the proposed class unascertainable on account of administrative infeasibility. (UBS Suppr. Opp'n 13-14.) As with Rabobank's ascertainability arguments, we conclude that In re Petrobras's rejection of an administrative feasibility requirement deprives these arguments of persuasive force. See *862 F.3d at 268-69*. As with the trader-based subclass, we conclude that the suppression-based subclass is ascertainable under In re Petrobras's standard: the proposed class definition incorporates objective and definite criteria that limit the class based on the dates and types of trades in which members engaged. See supra section III.3.3.

4.3. *Rule 23(a)*

UBS does not dispute that the proposed **[**308]** persistent-suppression class satisfies *Rule 23(a)(1)*'s numerosity requirement and *Rule 23(a)(2)*'s commonality requirement. We similarly conclude that these requirements are satisfied. As with the trader-based subclass, we find that the evidence regarding the number of "large traders" who traded on the CME during the suppression period (which includes Period 3) is sufficient to establish that the proposed class more likely than not contains at least 40 members and accordingly satisfies the numerosity requirement. See supra section III.3.4.1. We also conclude that the question of whether panel bank suppressed LIBOR by making artificially low submissions throughout the suppression period is a common question, as evidence sufficient for one class member to establish that the panel bank did so will be sufficient for all other class members.[121]

4.3.1. Typicality

UBS argues that the named plaintiffs' claims are not typical of the class's because class members hold "hopelessly conflicting **[*550]** interests." (UBS Suppr. Opp'n 25.) Under this theory, class members have differing incentives to establish the magnitude of suppression on a given day based on the trading positions they held on that day. In response, Exchange plaintiffs **[**309]** contend that the named plaintiffs and absent class members' claims involve "common questions of law . . . and the same course of conduct." (Exch. Pls.' Suppr. Reply 33-34.)

We conclude, as we do in the trader-based context, that 303030 Trading and Metzler's claims are not typical of the class's. 303030 Trading remains subject to the unique defense that its claims were not validly assigned to it,[122] and the lack of clarity as to the legal status of Metzler's funds renders its claims atypical in this context as well. Additionally, we conclude that named plaintiff Gary Francis's claims are atypical, as the evidence shows that over Period 3, Francis had no net trading position and Dr. Seyhun's methodologies would show that he ultimately benefited from LIBOR suppression.[123] (Ordover Initial Report ¶¶ 144-46, tbl.24.)

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[121] Though no antitrust claims remain in this action, this question is similar to the question of whether a conspiracy to suppress LIBOR existed, and "allegations of the existence of a price-fixing conspiracy" are often "susceptible to common proof." *Cordes & Co., 502 F.3d at 105*.

[122] Additionally, 303030 Trading appeared to have no produced no records corresponding to trades in Period 3. (Ordover Initial Report ¶ 137, tbl.22.)

[123] Based on Dr. Ordover's analysis, we would reach a similar conclusion regarding named plaintiffs FTC Futures Fund PCC and FTC Futures Fund SICAV if all FTC Futures Fund entities were properly considered together. (Ordover Initial Report ¶¶ 132-34, tbl.21.) However, the two FTC Futures Fund named plaintiffs appear to be separate legal entities -- one incorporated in Gibraltar and one incorporated in Luxembourg (Corrected 4AC ¶¶ 26-27) -- and we cannot discern whether either or both actually benefitted from LIBOR suppression.

Accordingly, only Atlantic Trading, the two FTC Futures Fund entities, and Nathanial Haynes remain. As to these named plaintiffs, we conclude that their claims are typical of the class's. Their claims, along with the absent class members' claims, arise generally from the same course of events: the alleged pattern of suppressing LIBOR submissions motivated by reputational concerns. **[**310]** Unlike the episodic nature of trader-based manipulation alleged in the trader-based class that animated our concerns as to class standing and typicality, the LIBOR suppression alleged here is inherently persistent and can be reasonably characterized as a single course of conduct by each panel bank. We therefore conclude, for this subset of named plaintiffs, that their claims are typical of the class's claims.

4.3.2. Adequacy of Representation

In challenging adequacy of representation, UBS relies on the same conflicting-interest argument supporting its typicality challenge. (UBS Suppr. Opp'n 25.) Exchange plaintiffs respond that "[a]ll Plaintiffs have an interest in proving the maximum claim against Defendants," and that conflicts, to the extent they exist, are therefore not sufficiently serious to justify a finding of inadequacy of representation. (Exch. Pls.' Suppr. Reply 34-35.)

UBS correctly asserts that because Exchange plaintiffs not only held different trading positions over the class period but have also offered multiple models yielding different estimates of suppression, conflicts between class members will arise because different class members will prefer different models that **[**311]** maximize their recovery. Exchange plaintiffs' suggestion that "[n]o Plaintiff controls, or wants to control, the price artificiality in the expert reports," (Exch. Pls.' Suppr. Reply 35), is simply incorrect, in light of the numerous models they have offered. Each plaintiff certainly has in interest in maximizing its claim against defendants, but Exchange **[*551]** plaintiffs' response ignores entirely the difficulty that UBS correctly identifies.

Nonetheless, in the suppression context, we find that the conflicts created by class members' conflicting trading positions and disparate preferences for one but-for LIBOR model over others do not rise to the level of "fundamental" conflicts that preclude a finding of adequacy of representation. A comparison to the trader-based class, and the fundamental conflict that we identified there, is again illustrative. Unlike that class, where Exchange plaintiffs have left open the possibility of additional instances of trader-based manipulation of unknown direction and magnitude, the contours of Exchange plaintiffs' suppression claims are far more clearly defined. See supra section III.3.4.4. The open-ended nature of the trader-based claims significantly amplified **[**312]** the conflicts generated by disparate trading positions and competing models in that context; those enhancements are not present here. We accordingly conclude that adequacy of representation is satisfied.

4.4. Predominance

We analyze predominance with respect to plaintiffs' suppression-based CEA claims using the same four elements that we considered with respect to Exchange plaintiffs' trader-based claims: "(1) that defendant had the ability to influence market prices; (2) that he specifically intended to do so; (3) that artificial prices existed; and (4) that defendant caused the artificial prices." *LIBOR I, 935 F. Supp. 2d at 713* (alterations incorporated).[124] As before, EDFs remain the commodity in question. See *LIBOR II, 962 F. Supp. 2d at 612*; *LIBOR I, 935 F. Supp. 2d at 721*.

4.4.1. Intent to Influence EDF Prices

Exchange plaintiffs must establish specific intent to influence market prices, which in this action requires a showing of intent to manipulate EDF prices. Because EDFs are the commodity in question and not LIBOR, we again conclude that the question of intent to manipulate EDF prices is an individual question.

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[124] We again subsume our consideration of the first element, panel banks' ability to influence market prices, into the third and fourth elements, the existence of and panel banks' causation of artificial prices.

Evidence going towards panel banks' intent to manipulate LIBOR will generally apply throughout the suppression period and therefore pertain to all class members. **[**313]** A panel bank suppressing its LIBOR submission on one day based on reputational concerns is likely to have done so the day before and is likely to have done so the day after, as its reputational concerns are unlikely to materialize and disappear entirely from day to day over the financial crisis and suppression period. Accordingly, evidence showing that a panel bank possessed or lacked a reputation-based intent to suppress LIBOR on one day will be highly probative of that bank's intent (or lack thereof) throughout the suppression period. Indeed, if the critical inquiry were whether panel banks had intent to manipulate LIBOR, we would conclude that it is a common question weighing in favor of a finding of predominance.

But it is not, and the common nature of the question of intent to manipulate LIBOR does not translate to the EDF context. Establishing intent to manipulate EDF prices through reputation-motivated suppression of LIBOR is at least somewhat paradoxical, and we have considerable difficulty imagining what evidence tending to show (or disprove) such intent would even look like, let alone whether that evidence would pertain to all class members or only a few. To the extent we **[**314]** **[*552]** can even conceive of any such evidence, that evidence would more closely resemble the individualized, day-specific, panel bank-specific evidence that Exchange plaintiffs rely on in the trader-based context than the broadly scoped evidence pertaining to a panel bank's suppression of LIBOR submissions based on an intent to protect its reputation. We accordingly conclude that the question of specific intent to influence EDF prices through reputation-driven suppression of LIBOR is an individual question.[125]

4.4.2. Existence and Causation of EDF Prices

As in the context of trader-based manipulation, Exchange plaintiffs must establish by a preponderance of the evidence that classwide methodologies are available to determine both but-for LIBOR and how the difference between but-for LIBOR and actual LIBOR would have impacted EDF prices.[126] They again have done neither.

Exchange plaintiffs rely on Dr. Seyhun's ICAP-Ask-based models and his Rebuttal Suppression Model to meet this burden. (Exch. Pls.' Suppr. Reply 3-10.) This question is closer than in the trader-based context because the suppression class considers across-the-board suppression during the later portions of the class period, which by construction **[**315]** is one-directional. Nonetheless, given that we have excluded Dr. Seyhun's opinions to this effect under Daubert, they are insufficient. See *Laumann v. Nat'l Hockey League, 105 F. Supp. 3d 384, 398-99 (S.D.N.Y. 2015)* ("Here, [the expert's] model was the common evidence -- and the model has been excluded. Therefore, no [*Rule 23](b)(3)* class may be certified."). Nonetheless, we discuss here two further criticisms of Dr. Seyhun's Rebuttal Suppression Model offered by UBS.

First, UBS asserts that Dr. Seyhun's reliance on the ICAP-Ask data series in his Rebuttal Suppression model fails to account for differences in credit risk between the broader category of prime banks underlying the ICAP-Ask data and LIBOR panel banks. (Defs.' Upstream Opp'n 19-20.) Exchange plaintiffs' rejoinder -- that Dr. Seyhun "does adjust his analysis to take account of each Defendant's credit worthiness" -- is entirely nonresponsive. (Exch. Pls.' Suppr. Reply 8.) UBS argues that the ICAP-Ask series on which Dr. Seyhun relies in his Initial ICAP-Ask Models and Rebuttal Suppression Models fails to account for differences in credit risk between panel banks and other prime non-panel banks, not differences in credit risk within panel banks.

[125] Further, even if LIBOR suppression were motivated by financial incentives like trading profits, intent to manipulate EDF prices would still need to be distinguished from intent to manipulate prices of other LIBOR-based instruments not at issue in this action.

[126] In asserting that they have met these requirements, Exchange plaintiffs criticize Dr. Willig's opinions and assert, mystifyingly, that "Defendant-friendly interpretations of emails or documents is inappropriate on the class motion as well as on summary judgment," citing cases in the summary judgment and directed verdict context. (Exch. Pls.' Suppr. Reply 4 & n.4.) In so contending, they have apparently forgotten that we are tasked with "assess[ing] all of the relevant evidence admitted at the class certification stage" and "resolv[ing] factual disputes relevant to each *Rule 23* requirement." *In re IPO, 471 F.3d at 41-42*. Indeed, this objection is particularly difficult to understand in light of Exchange plaintiffs' subsequent argument that we should disregard Dr. Willig's opinions regarding the extent of suppression because they "[c]ontradict independent evidence." (Exch. Pls.' Suppr. Reply 7.)

Second, UBS contends that Dr. Seyhun's analysis of the relationship **[**316]** between CDS spreads and LIBOR submissions is flawed. (UBS Suppr. Opp'n 34-35.) Since, within the Rebuttal Suppression model, **[*553]** CDS spreads serve as an input to the Rebuttal Suppression model that Dr. Seyhun uses to control for differences in panel banks' LIBOR submissions attributable to differences in credit risk, the absence of a relationship between CDS spreads and LIBOR submissions suggests that the Rebuttal Suppression Model does not sufficiently control for differences in credit risk across panel banks.

According to UBS, Dr. Seyhun's regressions are based on an improper benchmark period that incorporates pre-Class Period CDS spread data, even though Dr. Seyhun himself suggests that inclusion of pre-Class Period CDS spread data is inappropriate. (Seyhun Rebuttal Report ¶¶ 416-17.) Dr. Willig, in turn, determines that Dr. Seyhun's methodology would show no statistically significant relationship between a bank's LIBOR submission and its CDS spread when the pre-Class Period CDS spread data is omitted from Dr. Seyhun's regressions (Willig Rebuttal Report ¶¶ 6-12). Exchange plaintiffs respond that this critique is not "passably scientific" because Dr. Willig has not offered a justification **[**317]** for excluding pre-Class Period ICAP-Ask data from his analysis in addition to excluding the pre-Class Period CDS spread data disavowed by Dr. Seyhun. (Exch. Pls.' Suppr. Reply 8-9.)

This "passably scientific" critique demonstrates a failure to properly interpret Dr. Willig's report or a failure to understand econometrics. To the extent Exchange plaintiffs challenge Dr. Willig's analysis of the LIBOR submission-CDS spread relationship presented in the Seyhun Initial Report, that analysis did not rely on ICAP-Ask data. (Seyhun Initial Report tbl.2.5.) To the extent Exchange plaintiffs challenge Dr. Willig's discussion of the LIBOR submission-CDS spread analysis presented in the Seyhun Rebuttal Report, they fail to understand how regressions are conducted. In order to exclude the pre-Class Period CDS spread data (which Dr. Seyhun acknowledges are uninformative), Dr. Willig changed the benchmark period, a change that necessarily applies to every time-series explanatory variable included in the regression. Here, that necessarily includes both the ICAP-Ask series and the multiple CDS spread series (corresponding to each panel bank) on which Dr. Seyhun relied. By construction, a regression **[**318]** does not incorporate time-series data from outside the benchmark period in order to estimate the relationship between the variables in question.

In sum, we conclude that Exchange plaintiffs have not established that the determination of what submissions each panel bank would have made in the absence of suppression is a common question. Each of the models relied upon by Exchange plaintiffs is insufficiently reliable, as we have concluded above, and their further defenses of Dr. Seyhun's Rebuttal Suppression Model are incoherent.

As to the second question, what impact changes in LIBOR would have had on EDF prices, we again conclude that the question is an individual one. Dr. Seyhun's and Dr. Netz's opinions remain inadmissible at the threshold under *Daubert*, but they would do little more to meet Exchange plaintiffs' burden even if they were admissible. Dr. Seyhun's "impact factor" models remain confounded by macroeconomic variables, again resulting in a mismatch between Exchange plaintiffs' theory of harm and the impact on EDF prices that it calculates, a disparity that is impermissible under Comcast. See *569 U.S. at 36*. This flaw is no less fatal here than in the trader-based context. Further, Dr. **[**319]** Seyhun and Dr. Netz's probabilistic "tick size" opinions equally establish that Exchange plaintiffs cannot determine with any certainty which trades were in fact impacted by LIBOR manipulation, **[*554]** whether in the context of trader-based manipulation or in the context of suppression.

This conclusion as to the relationship between changes in LIBOR and changes in EDF prices is bolstered by evidence that while LIBOR is published only once each day, EDF prices fluctuate significantly within a trading day in magnitudes greater than day-to-day changes in LIBOR, and by evidence that EDF prices and LIBOR move in inconsistent directions.[127] (Ordover Initial Report ¶¶ 65-75.) We also find noteworthy Exchange plaintiffs' experts' acknowledgement that LIBOR and EDFs have a two-way causal relationship, an acknowledgement confirmed by at

[127] By "inconsistent," we mean in a direction inconsistent with Exchange plaintiffs' theory. Under their theory, a decrease in LIBOR should cause an increase in EDF prices, since EDF contracts ultimately settle at a price of 100 minus 3-month LIBOR published on the settlement date. We find, relying on Dr. Ordover's analysis, that changes in LIBOR are often observed together with corresponding changes in EDF prices in the same direction, which is inconsistent with Exchange plaintiffs' theory.

least one academic paper (cited by Dr. Seyhun and Dr. Netz) that measures information transfer in both directions from LIBOR to EDF prices and from EDF prices to LIBOR. Indeed, we interpret Dr. Seyhun's cointegration findings to be consistent with such a two-way causal relationship.

Exchange plaintiffs advance numerous additional arguments and identify further pieces of evidence **[**320]** in their attempt to establish that changes in LIBOR cause changes in EDF prices. We find them unpersuasive taken together, but discuss several specific arguments below. First, Exchange plaintiffs assert that "the EDF market's expectation today of what 3-month LIBOR will be at the EDF expiration is based upon today's LIBOR." (Exch. Pls.' Suppr. Reply 12.) This statement is true, but only to a limited extent: the evidence establishes that far more relevant than today's LIBOR is the market's expectations regarding macroeconomic conditions at expiration. Though LIBOR may capture some of those conditions and events, LIBOR does not itself form the basis of those expectations.

Second, Exchange plaintiffs' attempt to portray the lack of immediate response in EDF trading prices to the publication of LIBOR as a strength of their case rather than a weakness is incomprehensible. (Exch. Pls.' Suppr. Reply 12). Rather, the lack of response in EDF trading prices is more consistent with the proposition that changes in LIBOR do not necessarily cause measurable changes in EDF prices.

Equally unpersuasive are Exchange plaintiffs' arbitrage and "overlap" theories of causation. (Exch. Pls.' Suppr. Reply **[**321]** 14-15.) Dr. Seyhun and Dr. Netz do not articulate workable arbitrage strategies, as LIBOR is not a tradable asset. (Ordover Initial Report ¶¶ 60-63.) And as we discussed in the context of Exchange plaintiffs' motion to exclude Dr. Culp's opinions, the overlap theory is nonsensical; this finding is confirmed by Dr. Ordover's analysis showing a lack of convergence between spot LIBOR and expected LIBOR at settlement implied by EDF prices as Dr. Seyhun's theory would require, despite increasing overlap between the time periods in question. (Ordover Rebuttal Report ¶¶ 5-15, figs.1-2.)

Finally, we are unpersuaded by Exchange plaintiffs' reliance on the "chronological sequence of events on April 16-18, 2008," (Exch. Pls.' Suppr. Reply 13), and evidence that some EDF traders took LIBOR into account when trading (Exch. Pls.' Suppr. Reply 13-14, 16). We previously found unpersuasive the April 16-18, 2008 example, see *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *62, 2016 WL* ***[*555]*** *7378980, at *22*, and Exchange plaintiffs' additional gloss on that example does not cause us to reassess that conclusion. Again, EDF prices appeared to react to the announcement (that LIBOR appeared to have been suppressed) before LIBOR itself increased in response to this announcement.

But even **[**322]** assuming we were to find this example at least somewhat persuasive, we are skeptical that a single example corresponding to three days of the class period -- days that we have identified as having particular significance -- that are likely less than representative of the broader class period. See, e.g., *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *347, 2015 WL 6243526, at *114-15*. Similarly, evidence that some plaintiffs considered LIBOR in making their EDF trading decisions establish that changes in LIBOR would cause changes in EDF trading prices; such behavior is equally consistent with LIBOR serving as a proxy for the macroeconomic conditions and business events that Exchange plaintiffs concede drive both LIBOR and EDF prices.

4.4.3. Damages

We find, as we do for the trader-based class, that the question of damages is an individual question of significant magnitude, given the extensive difficulties plaintiffs have experienced in obtaining trading records and the netting requirements that will be imposed. See supra section III.3.5.4.

4.4.4. Conclusion

We ultimately conclude that Exchange plaintiffs have not established that common questions predominate over individual ones. The limited number of common questions are substantially outweighed by individualized **[**323]** questions of specific intent to manipulate EDF prices through reputation-motivated suppression of LIBOR, existence and causation of artificial EDF prices, and damages.

4.5 Superiority

We again analyze superiority using the *Rule 23(b)(3)* factors and again find a lack of superiority. First, favoring superiority, we find that class members lack a strong interest in controlling the prosecution of separate actions, even though we remain unmoved by the "negative value" argument advanced by plaintiffs for the reasons articulated in our analysis of this factor in the trader-based context and based on evidence showing that at least several of the named plaintiffs were not harmed by LIBOR suppression. See supra section III.3.6. The conflicts within the class, limited in significance by the one-directional nature of Exchange plaintiffs' allegations of suppression here, and the presence of only one separate action concerning LIBOR manipulation in the context of EDF trading persuades us that this factor tips in favor of superiority. Next, our analysis of the second and third factors remains unchanged from our analysis in the trader-based context. The extent and nature of litigation already begun weighs in favor **[**324]** of superiority; the desirability of concentrating litigation in this forum is neutral given the limitations on an MDL court's power and concerns about foreign non-recognition of a class action's preclusive effects. And finally, though we view predominance as a somewhat closer question in this context than in the trader-based context, we again conclude that a class action would be unmanageable given our predominance findings. In sum, though the first and second *Rule 23(b)(3)* factors weigh in favor of superiority, we again conclude that a class action would be unmanageable in light of the predominance issues we identify, and this manageability issue is sufficient to defeat superiority.

4.6. Conclusion

Exchange plaintiffs' motion for certification of a suppression class is denied. While Exchange plaintiffs have established the **[*556]** four *Rule 23(a)* requirements, the proposed class stumbles at *Rule 23(b)(3)*'s predominance and superiority hurdles. While the common-question side of the scale is weightier here than for the proposed trader-based class, Exchange plaintiffs nonetheless have not carried their burden of demonstrating preponderance by establishing that but-for LIBOR may be calculated on a classwide basis, that changes in **[**325]** LIBOR would have been reflected in EDF prices in a classwide manner, or that damages may be calculated for all class members relying on the same evidence. Exchange plaintiffs' pro forma suggestion that we "modify the Class or certify [a] remaining portion" (Exch. Pls.' Suppr. Reply 35), unaccompanied by any serious analysis, does not offer a basis on which to modify the class definition.[128]

IV. LENDER ACTION

Berkshire Bank, the sole named Lender plaintiff remaining,[129] seeks certification of a class defined as follows:

> All lending institutions headquartered in the United States, including its fifty (50) states and United States territories, that originated loans, held loans, purchased whole loans, purchased interests in loans or sold loans with interest rates tied to USD LIBOR, which rates adjusted at any time between August 1, 2007 and May 31, 2010.

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[128] Issue certification under *Rule 23(c)(4)* is also inappropriate, as it "would not materially advance the litigation because it would not dispose of larger issues" remaining in the action. *McLaughlin, 522 F.3d at 234*.

[129] The operative complaint lists the Government Development Bank for Puerto Rico and Directors Financial Group as named plaintiffs. (SAC ¶¶ 22-23.) We previously dismissed the Government Development Bank's claims for being untimely under Puerto Rico law, *LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *76, 2015 WL 6694607, at *12-13*, and Directors Financial Group withdrew its claims, (Stipulation of Dismissal with Prejudice, Feb. 2, 2017, ECF No. 1758).

The operative Second Amended Consolidated Class Action Complaint identified all 16 panel banks (and certain affiliates) as defendants along with the BBA. (Second Am. Consol. Class Action Compl. ("SAC") ¶¶ 24-41, Apr. 18, 2016, ECF No. 1383.) In LIBOR V, we reaffirmed the personal jurisdiction conclusions initially set forth in LIBOR IV, see *LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *68, 2015 WL 6696407, at *8-9* (citing **[**326]** *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *452, 2015 WL 6243526, at *30, *37-38)*, ultimately dismissing the BBA and a number of panel bank defendants. Additionally, Berkshire has reached a settlement with Citi and has moved for preliminary approval of that settlement.[130] (Letter from Jeremy Lieberman to the Court, Jan. 16, 2018, ECF No. 2403.) Accordingly, to the extent a class is certified in this action, it would be certified against only Bank of America, JPMorgan Chase, and UBS (collectively, "Lender defendants"). The SAC asserts two causes of action, one for fraud and the other for civil conspiracy to commit fraud, both under state law. (SAC ¶¶ 362-81.)

1. Daubert Motions

In litigating the class certification motion, Berkshire has offered expert testimony from Dr. Robert Webb and Lender defendants have offered expert testimony from Dr. Robert Willig, Dr. Janusz Ordover, and Mr. Brian Kelley. Defendants have moved to exclude certain portions of Dr. Webb's testimony, and Berkshire has moved to exclude certain portions of Dr. Willig's testimony.[131] We again consider **[*557]** the Daubert motions before proceeding to the class certification motion.

1.1. Dr. Webb

Berkshire offers two reports from Dr. Robert Webb: (1) an initial report dated February 2, 2017 (Decl. of Jeremy Lieberman **[**327]** ex. 5, May 2, 2017, ECF No. 1889); and (2) a rebuttal report dated May 3, 2017 (Decl. of Paul Mishkin ex. 5, June 30, 2017, ECF No. 2025). We refer to these as the Webb Initial Report and the Webb Rebuttal Report, respectively. Across these two reports, Dr. Webb's opinions relate primarily to: (1) calculating the extent to which LIBOR was suppressed during the class period; and (2) calculating damages to putative class members as a result of LIBOR manipulation. Lender defendants do not challenge Dr. Webb's qualifications to offer these opinions; we agree that Dr. Webb is so qualified.[132]

As to suppression, Dr. Webb first compares published LIBOR to a number of "potential measures" of suppression, including a "Bank Funding Rate" calculated based on "the actual rates paid by Defendants in their issuance of funding instruments linked to USD LIBOR with a six months maturity" (Webb Initial Report ¶ 41 (footnote omitted)) and the ICAP-Ask rate,[133] which Dr. Webb refers to as the "ICAP EDDR" rate (Webb Initial Report ¶ 46), among others. To ultimately estimate what LIBOR would have been in the absence of suppression, Dr. Webb uses a Eurodollar deposit rate published by **[**328]** Bloomberg, the "Bloomberg CMPL" rate. (Webb Initial Report ¶ 45.) Dr. Webb calculates but-for LIBOR by regressing actual published LIBOR against the Bloomberg CMPL over an

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[130] Though we dismissed HSBC as a defendant in this action, HSBC has also settled with Berkshire. (Letter from Jeremy Lieberman to the Court, Jan. 16, 2018, ECF No. 2403.)

[131] Berkshire does not challenge the admissibility of Mr. Kelley's report (Decl. of Paul Mishkin ex. 1, June 30, 2017, ECF No. 2025) or Dr. Ordover's report (Decl. of Paul Mishkin ex. 2, June 30, 2017, ECF No. 2025). We refer to these reports, which are both dated April 3, 2017, as the Kelley Report and the Ordover Report, respectively.

[132] Dr. Webb is the Martin J. Pastel, Jr. Research Professor at the University of Virginia McIntire School of Commerce and is the Editor-in-Chief of the Journal of Futures Markets. He holds a Ph.D. and M.B.A. in Finance from the University of Chicago Graduate School of Business and has written extensively on various economic and finance subjects. (Webb Initial Report app. A.)

[133] For a description of the ICAP-Ask rate, see supra note 15.

unspecified clean period[134] and then using the results of that regression to estimate but-for LIBOR during the class period. (Webb Initial Report ¶ 72). Lender defendants do not seek exclusion of these opinions under Daubert.

As to damages, Dr. Webb opines that "[t]he calculation of damages to the Class is susceptible to common proof on a formulaic basis," reasoning that "[t]he amount of damage suffered by the Class member on [each reset date] is equal to the amount of suppression of USD LIBOR multiplied by the outstanding nominal loan amount(s) owed to that Class member" for the reset period. (Webb Initial Report ¶ 26.) Dr. Webb supports this opinion by taking his Bloomberg CMPL-based but-for LIBOR series and calculating damages to be the difference between the actual interest received on certain loans (calculated based on published LIBOR) and the interest that would have been received on those loans (calculated based on his but-for LIBOR series). (Webb Initial Report ¶¶ 77-83.) In his rebuttal report, **[**329]** Dr. Webb expands on these analyses to incorporate damages on **[*558]** LIBOR-based instruments other than loans, the issues of absorption that we identified in LIBOR VI, and the effect of interest-rate floors. (Webb Rebuttal Report ¶¶ 114-33.)

Lender defendants do seek exclusion of these opinions. They contend first that Dr. Webb's methodology does not assess damages under the out-of-pocket loss rule that we concluded applied to Berkshire's claims in LIBOR V, a mismatch that is fatal to class certification under Comcast. Second, Lender defendants assert that Dr. Webb's damages methodology is unreliable because it fails to account for certain significant aspects of the but-for world, including (1) "what demand and default rates for their LIBOR-linked loans would have been"; (2) "how alleged LIBOR suppression would have affected the price and other terms of their LIBOR-linked loans"; and (3) "how lenders' LIBOR-linked borrowings, hedges, and other transactions would have been impacted." (Lender Defs.' Class Opp'n 18-19.) We consider each argument in turn.

1.1.1. Assessment of Damages

Berkshire first responds that Dr. Webb's analysis is consistent with its liability case because some class members **[**330]** will be subject to a benefit-of-the-bargain rule (under which but-for LIBOR is relevant) and because calculation of damages using alternative rates (which is required under New York's out-of-pocket damages rule) could be performed applying "only grade-school arithmetic" once the alternative rate is determined. (Berkshire Webb Opp'n 13-14.) Citing In re Scotts EZ Seed's holding that "Nothing in Comcast requires an expert to perform his analyses at the class certification stage," *304 F.R.D. at 414*, Berkshire contends that the operative question is "whether plaintiffs have established a workable damages model, not whether the model actually works." (Berkshire Webb Opp'n 14-15.)

This response is unpersuasive. Though we agree that the substitution of an alternative rate, once determined, in place of but-for LIBOR would not be an analytically intensive exercise, but Dr. Webb never opines that determining the alternative rate may be done formulaically, which is necessary to support his opinion regarding the calculation of damages. Further, Dr. Webb's failure to actually perform an alternative rate is not excused by the straightforward nature of the calculation. As Dr. Webb does not claim that he lacks necessary **[**331]** data, his failure to do so is particularly inexcusable in light of that ease.

At bottom, Dr. Webb's model does not calculate, and does not purport to calculate, "damages" to Berkshire or any other putative class member under the out-of-pocket damages rule that we set forth in LIBOR V, and the out-of-pocket damages rule is of particular significance here because Berkshire is the only named plaintiff remaining.[135]

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[134] Dr. Webb explains that the R-squared of his Bloomberg CMPL regression is 99.99% over the period from January 1, 2004 to July 31, 2007, and his but-for LIBOR regression is presumably based on such a clean period. (Webb Initial Report ¶ 49 n.17.) R-squared refers to the coefficient of determination, which measures the amount of variation in the dependent variable that can be explained by variation in the explanatory variables. See supra note 31.

[135] Perhaps acknowledging this shortcoming of Dr. Webb's opinion, Berkshire belatedly suggests that we should revisit this analysis in LIBOR V. For the reasons we explain fully below, we decline this invitation.

Unlike the expert's models in In re Scotts EZ Seed, Dr. Webb's models simply do not "match plaintiffs' theories of liability" under New York law. *304 F.R.D. at 414*.

1.1.2. Construction of the But-For World

Berkshire offers three responses to Lender defendants' second argument. First, Berkshire argues that regressions are considered the "gold standard" in antitrust actions. (Berkshire Webb Opp'n 16, 18-19.) Second, Berkshire contends that the issues that Lender defendants accuse Dr. Webb of having failed to consider are speculative as a factual matter. (Berkshire **[*559]** Webb Opp'n 17.) Third, Berkshire asserts that, as a matter of law, Dr. Webb was not required to take into account these aspects of the but-for world because defendants must bear the consequences of any uncertainty resulting from their **[**332]** wrongdoing. (Berkshire Webb Opp'n 17-20.)

First, Berkshire's invocation of general case law about regressions in antitrust actions is not responsive on multiple levels. For one, this action raises fraud claims, not antitrust claims. Second, while Dr. Webb conducts regressions in order to calculate one of the inputs to his damages model -- but-for LIBOR -- Lender defendants' motion challenges how Dr. Webb subsequently applies the results of that regression, not the regression itself. Indeed, a regression, even if conducted in a reliable manner consistent with econometric principles, may still be applied in an unreliable way.[136]

Second, Berkshire's suggestion that "[n]either Professor Ordover nor Mr. Kelley identify a single term from any class member loan that would have definitely been different" is simply unpersuasive. (Berkshire Webb Opp'n 17.) As to demand, Berkshire's attempt to escape the laws of supply and demand fail. Consider, for example, a would-be homeowner seeking a mortgage loan: a higher interest rate means that the borrower will have higher monthly mortgage payments for a given loan amount; a borrower who wishes to keep his monthly payment **[**333]** constant will seek a smaller loan amount. Cf. *Robinson v. Tex. Auto Dealers Ass'n, 387 F.3d 416, 423 (5th Cir. 2004)* (describing "[b]ottom-line purchasers"). More broadly, in making loans, lenders sell a good -- capital -- to borrowers at a given price -- the interest rate. Therefore, it is wholly unsurprising that (absent shifts in the demand curve) a higher interest rate will decrease demand, resulting in a lower volume of loans being made. Dr. Webb concedes the point himself, (Webb Dep. 276:13-18, Decl. of Paul Mishkin ex. 6, June 30, 2017, ECF No. 2025), and as the Second Circuit summarized: "[i]ncreased mortgage interest rates led to a spike in prices that made many homes too expensive for potential buyers, decreasing demand." *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc., 873 F.3d 85, 108 (2d Cir. 2017)*. As to default rate, resets to higher interest rates over the life of a loan will increase defaults. Dr. Webb again concedes the point, (Webb Dep. 278:16-279:6), and as the Second Circuit recognized, "[d]efaulting on mortgage loans became an attractive option for homeowners" as a result of rising interest rates and decreased home values leading to the financial crisis. *Nomura, 873 F.3d at 107*. And as to spread, Berkshire does not meaningfully rebut Dr. Ordover's testimony that spreads on floating-rate loans are subject to negotiation or, for that **[**334]** matter, its own representative's testimony that its loans were in fact negotiated and that its spreads were sensitive to underlying interest rates.[137] (Ordover Report ¶¶ 39-40; Lukens Dep. 36:5-7, 240:4-6, 271:4-6, **[*560]** Decl. of Paul Mishkin ex. 7, June 30, 2017, ECF No. 2025 ("Lukens Dep.").)

Third, Berkshire's reliance on In re Electronic Books, which held that an expert was not required to model various "features of a but-for world" because "the but-for world does not exist" is unavailing in this context. *In re Elec. Books Antitrust Litig., No. 11 MD 2293 (DLC), 2014 U.S. Dist. LEXIS 42537, 2014 WL 1282293, at *27 (S.D.N.Y. Mar. 28,*

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[136] It also bears repeating that the acceptance of regressions as a statistical method generally does not imply that all regressions will be admissible under Daubert. Questions remain in each case as to whether the regression takes reliable data as inputs, see *Fed. R. Evid. 702(b)*, whether the regression is properly specified, see, e.g., *Bickerstaff, 196 F.3d at 449-50*, and whether the expert properly interprets the regression to support any conclusions ultimately reached, see, e.g., *Amorgianos, 303 F.3d at 267*.

[137] The interest rate associated with a floating rate loan consists of two components: the benchmark rate and a spread above or below that benchmark. For example, a floating rate loan might have an interest rate of 3-month LIBOR plus 50 basis points. The benchmark rate is 3-month LIBOR, and the spread is +50 basis points.

2014). In re Electronic Books concluded that certain features of the but-for world "lost all relevance once the conspirators raised the prices for e-books," 2014 U.S. Dist. LEXIS 42537, [WL] at *28, but we are hesitant to read these statement too broadly. The but-for world, by construction, does not exist, but it still must be constructed in a reasonable way such that a reasonable approximation of damages may be made. An oversimplification that fails to consider important aspects of the but-for world will fail to yield such a reasonable approximation, and indeed, In re Electronic Books acknowledged that demand for e-books remained relevant to the damages analysis. Id. (referencing **[**335]** "the frequency with which a consumer may have purchased e-books"). Demand is relevant here, too.

We recognize that ***HN59***[] a defendant must bear the risk of uncertainty from its wrongdoing, see, e.g., *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)* ("[T]he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party."), but also adhere to the principle that a plaintiff first "bears the burden of showing that the claimed damages are the 'certain result of the wrong,'" *Anderson Grp., LLC v. City of Saratoga Springs, 805 F.3d 34, 52-53 (2d Cir. 2015)* (quoting *Story Parchment, 282 U.S. at 563*)). The question, therefore, is whether Berkshire has carried this burden. It has not.

1.1.3. Conclusion

Lender defendants' motion to exclude Dr. Webb's damages opinions is therefore granted. By calculating only the difference between actual published LIBOR and but-for LIBOR and failing to take into account not only the applicable legal standard that we set forth in LIBOR V but also other relevant aspects of the but-for world, Dr. Webb's methodology cannot be fairly said to calculate "damages."[138]

1.2. Dr. Willig

Lender defendants offer an expert report from Dr. Robert Willig dated April 3, 2017, which we refer to in the context of this action as the Willig Report. (Decl. of Paul Mishkin ex. 3, June 30, 2017, ECF No. 2025.) As in the Exchange-based **[**336]** action, the Willig Report includes several opinions based on an analysis of interbank lending transactions into which panel banks actually entered. (Willig Report ¶ 14.) Berkshire moves to exclude Dr. Willig's opinions to the extent they are based on this analysis, specifically, sections IV through VI of the Willig Report. (Berkshire Willig Mem. 1.)

Berkshire contends that these opinions are excludable under Daubert for three primary reasons: (1) Dr. Willig's comparison of observed interbank transaction rates contradicts the LIBOR question's focus on "offered rates" and is therefore unreliable and irrelevant (Berkshire Willig Mem. 16-22); (2) Dr. Willig's opinions are dependent on an unreliable dataset that does not distinguish offer-initiated transactions from bid-initiated transactions (Berkshire Willig Mem. 22-23); and (3) Dr. Willig's results are contradicted by certain **[*561]** bank documents and resulted from Dr. Willig's "bad faith" (Berkshire Willig Mem. 23-24).[139]

1.2.1. The LIBOR Question

Berkshire's first argument challenges Dr. Willig's assumption that "panel banks' borrowing transactions provide the most informative data for evaluating the accuracy of their LIBOR submissions" **[**337]** and his analysis's subsequent reliance on observed interbank transaction rates. (Willig Report ¶ 16.) Like Exchange plaintiffs, Berkshire bases this challenge on the LIBOR question itself, BBA documents, and certain other sources.

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[138] Of course, the "upstream" aspects of Dr. Webb's analysis were not challenged by Lender defendants and remain admissible, our misgivings about certain aspects of that analysis notwithstanding.

[139] Berkshire does not challenge Dr. Willig's qualifications. We conclude here, as we do in the Exchange-based action, that Dr. Willig is well qualified to offer the opinions presented in his report. See supra note 83.

As in the Exchange-based action, Berkshire's repeated reliance on panel banks' "borrowing costs" in its allegations is sufficient to warrant denial of this motion. See *Andrews, 882 F.2d at 707*; *TufAmerica, Inc., 968 F. Supp. 2d at 600*. For example, in the operative complaint, Berkshire alleges that Defendants manipulated LIBOR by making submissions that "did not honestly reflect the submitting banks' actual borrowing costs on the interbank market" and conspired to make LIBOR submissions "below their actual borrowing costs." (SAC ¶¶ 261, 377.) Further, Berkshire repeatedly asserted that interbank transaction data were necessary to assess the true extent of suppression. For instance, Berkshire alleged that "[t]he Panel Bank Defendants' actual borrowing costs were not publicly disclosed, rendering it impossible to discern without internal documents and sophisticated expert analysis the full extent of their fraud," (SAC ¶ 284 (emphasis added)), and that the public unavailability of data on "the rates at which panel banks could **[**338]** borrow" served as a basis for tolling statutes of limitations, (e.g., SAC ¶ 333).

Berkshire's earlier complaints contain materially similar allegations. (E.g., First Am. Consolidated Class Action Compl. ¶¶ 252, 368, Nov. 17, 2015, ECF No. 1238; Am. Class Action Compl., ECF No. 242, ¶¶ 40, 88, Nov. 21, 2012, ECF No. 242.) Berkshire, in reply, accuses Lender defendants of "elevat[ing] form above substance," and now contends that its repeated references to "borrowing costs" were merely "short-hand wording in the Complaint" intended to refer only to offered rates. (Berkshire Willig Reply 3.) Even if we were to accept this revisionist history, which is truly difficult to reconcile with Berkshire's own understanding that LIBOR represents the rate at which a panel bank "actually borrowed in the market" (Krausz Dep. 19:2-7, Decl. of Paul Mishkin ex. 10, June 30, 2017, ECF No. 2025 ("Krausz Dep.")), Berkshire's argument would still fail. Berkshire relies largely on the same sources relied upon by Exchange plaintiffs: the text of the LIBOR question; the BBA "definitions" page; the Kuo, Skeie, and Vickery working paper; the Credit Suisse Fixed Income Research Report; and the JPMorgan Chase internal **[**339]** document purporting to set forth the bank's LIBOR submission policy. (Berkshire Willig Mem. 5-8.)

We have already analyzed these sources and have already concluded that they establish that while LIBOR represents an offered rate and is not itself a transaction rate, rates observed in actual transactions are, at minimum, properly considered in a bank's determination of its LIBOR submissions. See supra section III.2.3.1. Given that actual transaction rates are properly considered in a panel bank's determination of its LIBOR submissions, they may similarly be properly considered in determining whether a bank's LIBOR submissions were suppressed **[*562]** and whether such suppression can be established through common evidence. Indeed, Berkshire's argument here is particularly surprising given that Dr. Webb constructs a "Bank Funding Rate" series using actual interest rates paid by panel banks in issuing certain funding instruments and compares that rate to LIBOR submissions (Webb Initial Report ¶¶ 41-42), and further given Dr. Webb's concession that "unsecured borrowing transaction[s] by a panel member in the London interbank market [is] are relevant to the LIBOR question (Webb Dep. 24:21-25, Decl. **[**340]** of Jamie Heine ex. 6, July 21, 2017, ECF No. 2105). To conclude, we reaffirm our conclusion that actual transactions are relevant in analyzing whether a panel bank made suppressed LIBOR submissions.

1.2.2. Bid-Initiated and Offer-Initiated Transactions

Second, Berkshire asserts that Dr. Willig did not distinguish transactions initiated by offers from transactions initiated by bids in conducting his analysis, and that this oversight undermines the reliability of his opinions because "'[b]ids' and bid [-initiated] transactions are irrelevant to the LIBOR Question." (Berkshire Willig Mem. 22.)

We are unpersuaded that the distinction between bid-initiated transactions and offer-initiated transactions is a meaningful one. While bids are unquestionably different from offers (or asks), Berkshire provides no credible authority for why bid-initiated transactions would be different from offer-initiated transactions, particularly in the LIBOR context where the parties to interbank transactions are banks, and generally large ones, by definition. Notably, the sources on which the parties rely in advancing their interpretations of the LIBOR question refer to "transaction[s]," with no distinction made **[**341]** between whether the transactions were initiated by a bid or an offer.

Indeed, the price (which in this case is an interest rate) at which a transaction actually occurs will generally represent some compromise between the parties' initial positions after negotiation. Berkshire's primary argument rests on the proposition that the seller's initial position -- the offer -- is a pre-negotiation position distinct from the ultimate transaction rate produced through the negotiation process, which in turn is distinct from the buyer's initial position, the bid. (E.g., Berkshire Willig Reply 4.)

But bid-initiated transaction rates and offer-initiated transaction rates are first and foremost (post-negotiation) transaction rates. That is, bids are distinct from offers, and both are distinct from transaction rates. Berkshire has not established that, within the broader category of transactions, rates will differ post-negotiation based on whether the seller approached the buyer or vice versa.[140]

1.2.3. Contradiction by Bank Documents

Finally, Berkshire contends that the reliability of Dr. Willig's analysis is undermined by "the Panel Banks' own Class Period admissions as to where their LIBOR submissions **[**342]** should be," relying on communications between panel bank employees speculating as to what a panel bank's LIBOR submission should have been. (Berkshire Willig Mem. 24.) Berkshire also suggests that Dr. Willig's reliance on data that is "so unreliable and irrelevant" "can only be explained by . . . **[*563]** 'bad faith.'" (Berkshire Willig Mem. 24.) Neither argument is remotely persuasive.

The comparison of Dr. Willig's interbank transaction rates to but-for LIBOR (and but-for LIBOR submissions) as contemplated by certain panel bank employees is inapt. Berkshire's attempted direct comparison mischaracterizes Dr. Willig's opinions, as it ignores Dr. Willig's statement that his "re-calculations of the LIBOR rates after substituting banks' average London Interbank Borrowing costs for their submissions are not intended to be estimates of but-for rates." (Willig Report ¶ 93 n.80.) Indeed, Dr. Webb comes comparably close to using transaction rates to calculate but-for LIBOR, constructing a "Bank Funding Rate Implied LIBOR" series. (Webb Initial Report ¶ 66.)

Berkshire's additional suggestion that Dr. Willig's decision to analyze interbank transaction data instead of alternative data sources can be explained **[**343]** only by "bad faith" is simply not credible. Berkshire has repeatedly relied on such a comparison over the course of this case, as we have recounted above. Further, Dr. Willig explains -- in portions of his report that Berkshire does not seek to exclude -- why the alternative data sources for which Berkshire advocates (and on which Dr. Webb relies) are inferior choices compared to his analysis of transaction rates. (Willig Report ¶¶ 118-43.) We need not decide whether these explanations are ultimately persuasive in order to conclude that Berkshire's "bad faith" aspersion is wholly miscast.

1.2.4. Conclusion

Berkshire's motion to exclude sections IV through VI of the Willig Report is denied. Even if Berkshire were not bound by the history of its allegations that panel banks suppressed LIBOR by making submissions below their "actual borrowing costs," our review of the LIBOR question itself and other interpretive sources confirms that while LIBOR represents an offered rate, a bank's LIBOR submission should be based on its perception of the rates it would be offered and the "totality of the information" available to it. Berkshire's attempted distinction of bid-initiated transactions and offer-initiated **[**344]** transactions is illusory and does not render Dr. Willig's analysis unreliable; its attempt to paint Dr. Willig's transaction analysis as a calculation of but-for LIBOR is a mischaracterization and fares even worse.

2. Class Certification

Turning to Berkshire's motion for class certification, we consider whether the proposed class complies with the four *Rule 23(a)* requirements, the implied requirement of ascertainability, and the *Rule 23(b)(3)* requirements of predominance and superiority.

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[140] Berkshire's references to the bid-ask spread are accordingly unavailing. The bid-ask (or bid-offer) spread -- as its name suggests -- refers to bids and asks (or offers) themselves as opposed to bid-initiated transactions and offer-initiated transactions.

2.1. *Rule 23(a)*

Lender defendants do not appear to dispute that the requirements of numerosity and commonality are satisfied, though they do dispute typicality and adequacy of representation. We consider *Rule 23(a)*'s requirements in order.

2.1.1. Numerosity

Berkshire contends that LIBOR-based loans were made "by thousands of financial institutions" such that the numerosity requirement is satisfied. (Berkshire Class Mem. 7) Though Berkshire provides no evidence in support of this assertion, we nonetheless conclude that it is more likely than not that more than 40 institutional lenders made LIBOR-based loans that reset during the class period and that numerosity is therefore satisfied. See *Pa. Pub. Sch. Emps., 772 F.3d at 120*.

2.1.2. Commonality

We also conclude that the proposed class **[**345]** raises at least one common **[*564]** question. ***HN60***[] In the context of "fraud claims based on uniform misrepresentations made to all members of the class," misrepresentation is a common question because "the standardized misrepresentations may be established by generalized proof." *Moore, 306 F.3d at 1253*. Here, Berkshire alleges that panel banks made misrepresentations by making inaccurate LIBOR submissions, and those submissions, which form the basis of published LIBOR, necessarily pertain to all class members.

While Lender defendants correctly point out that proof of misrepresentation, knowledge of falsity, and intent will differ across panel banks and days, these differences do not render these issues individual in nature. Each bank's submission serves as an input into published LIBOR, and published LIBOR is the means through which each class member was impacted by the alleged misrepresentations. And while different class members' LIBOR-based loans are likely to have different reset schedules such that different specific dates are of relevance to different class members, this day-to-day variation is of limited significance in the context of Berkshire's claims of persistent suppression and does not preclude a finding of **[**346]** commonality.

2.1.3. Typicality

Next, Lender defendants contend that Berkshire's claims are not typical because Berkshire in fact has no claim at all. They rely, in particular, on evidence that Berkshire had issued $22 million in LIBOR-based debt, which is greater in face value than the six LIBOR-based loans alleged in the complaint. (Lender Defs.' Class Opp'n 17.) Berkshire responds that the $22 million in "debt"[141] was issued by its holding company, and that Berkshire also held more than $100 million in LIBOR-based auction rate securities. (Berkshire Class Reply 19.)

If an entity had no exposure to LIBOR (or negative exposure such that it benefited from alleged suppression), we would agree that that entity's claim is atypical of the class's claims. Here, however, the factual record on this point remains underdeveloped and makes an assessment of Berkshire's overall exposure to LIBOR difficult. In its complaint, Berkshire alleges that it issued six LIBOR-based loans: (1) a $1.389 million amortizing mortgage; (2) a $2 million amortizing mortgage; (3) a $1.352 million amortizing real estate loan; (4) a $7.364 million commercial revolver; (5) a $5 million revolver; and (6) a $440,000 **[**347]** amortizing loan. (SAC ¶ 20.) These loans total

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[141] At oral argument, counsel for Berkshire rejected the characterization of the $22 million as "debt" and referred to the instrument in question instead as a "security" and a "securitization." (Hr'g Tr. 61:5-6; 62:9.) We are unsure what exactly counsel meant (as debt would still be a "security"), but counsel did not appear to dispute that the instrument in question resulted in Berkshire's receipt of funds in exchange for payments by Berkshire at an interest rate based on LIBOR.

approximately $18 million in face value (though Berkshire's total LIBOR exposure at any given point in time would be less because many of the loans are amortizing), which is less than the $22 million of LIBOR-based securities issued by Berkshire's holding company. However, neither Berkshire nor Lender defendants have submitted comprehensive evidence of other LIBOR-based instruments that were held by Berkshire or its corporate affiliates during the class period. We ultimately know little about the $22 million "debt," and we know even less about the $100 million in auction-rate securities.

On this record, we conclude that Berkshire's claims are typical of the class's claims. We accept counsel's representation that the $22 million debt issuance was made by Berkshire's holding company and **[*565]** not Berkshire itself (Hr'g Tr. 61:5-7), and by extension the proposition that Berkshire had some positive exposure to LIBOR. In the absence of a full record and assuming Berkshire was a lender with net LIBOR exposure, we agree that the alleged conspiracy to suppress LIBOR is sufficiently central to all class members' claims such that typicality is satisfied. **[**348]**

2.1.4. Adequacy of Representation

HN61[] Adequacy of representation is called into question when "some difference between the class representative and some class members might undermine [the class representative's] incentive" to pursue the class's claims. *In re Payment Card Interchange Fee, 827 F.3d at 231*. "A key element in the determination of whether a plaintiff's interests are antagonistic to those of other members of the class is the relationship between the class representative and class counsel." *In re IMAX Sec. Litig., 272 F.R.D. 138, 155 (S.D.N.Y. 2010)*; see 5 *Moore's Federal Practice § 23.25[2][b][vi]* (3d ed. 2017) ("[I]f a class representative is closely affiliated with class counsel, courts usually consider this to be a disqualifying conflict of interest."); 1 William B. Rubenstein, Newberg on Class Actions § 3:70 (5th ed.) (Westlaw 2017) ("[A] few courts have held class representatives inadequate when they have a close familial or business relationship or friendship with class counsel."); see also *Susman v. Lincoln Am. Corp., 561 F.2d 86, 90 (7th Cir. 1977)* ("[A] majority of courts . . . have refused to permit class attorneys, their relatives, or business associates from acting as the class representative." (footnotes omitted)). This concern arises because "when a class representative is closely associated with class counsel, he or she may permit a settlement less favorable to the interests **[**349]** of absent class members." *In re IMAX, 272 F.R.D. at 155-56* (quoting *In re Discovery Zone Sec. Litig., 169 F.R.D. 104, 108 (N.D. Ill. 1996))*. However, a relationship between a class representative and class counsel "is not inevitably disabling," 1 William B. Rubenstein, Newberg on Class Actions § 3:70 (5th ed.) (Westlaw 2017), and "there is no per se rule against relatives of class counsel serving as class representatives," *Gross v. GFI Grp., Inc., No. 14 Civ. 9438 (WHP), 2017 U.S. Dist. LEXIS 134908, 2017 WL 3668844, at *2 (S.D.N.Y. Aug. 23, 2017)* (quoting *Dupler v. Costco Wholesale Corp., 249 F.R.D. 29, 42 (E.D.N.Y. 2008))*.

Rather, ***HN62***[] whether a close relationship with class counsel renders a named plaintiff inadequate is a fact-intensive inquiry. Cf. *Malchman v. Davis, 761 F.2d 893, 900 n.2 (2d Cir. 1985)* ("[T]he question whether named plaintiffs are adequate class representatives is one committed to the sound discretion of the district court."), abrogated on other grounds by *Amchem, 521 U.S. 591, 117 S. Ct. 2231, 138 L. Ed. 2d 689*. In making this assessment, courts have considered numerous factors such as: (1) the closeness and extent of the relationship, see *Gross, 2017 U.S. Dist. LEXIS 134908, 2017 WL 3668844, at *3*; *In re IMAX, 272 F.R.D. at 156*; (2) whether the related attorney's relationship and role in the litigation have been disclosed, see *Gordon, 92 F. Supp. 3d at 199*; *In re IMAX, 272 F.R.D. at 156*; (3) whether "attorneys' fees will greatly exceed the class representative's recovery," *Spagnola v. Chubb Corp., 264 F.R.D. 76, 96 (S.D.N.Y. 2010)* (quoting *Martz v. PNC Bank, N.A., No. 06-1075, 2007 WL 2343800, at *5 (W.D. Pa. Aug. 15, 2007))*; see also *Gross, 2017 U.S. Dist. LEXIS 134908, 2017 WL 3668844, at *1*; *Gordon, 92 F. Supp. 3d at 200*; and (4) the extent of the related attorney's involvement in the litigation, see *Gross, 2017 U.S. Dist. LEXIS 134908, 2017 WL 3668844, at *1*; *Gordon, 92 F. Supp. 3d at 199*. A "potential conflict of interest" is sufficient to render a named plaintiff an inadequate class representative, *Hale v. Citibank, N.A., 198 F.R.D. 606, 607 (S.D.N.Y. 2001)*; see also *Gordon, 92 F. Supp. 3d at 199* (referring **[**350]** to "the appearance of impropriety"); *In re IMAX, 272 F.R.D. at 157* (same); cf. *Malchman, 761* ***[*566]*** *F.2d at 900 n.2* (observing, in the adequacy of representation context, that "the notion that the appearance of conduct is as important as the conduct itself is a predicate for the Code of Professional Responsibility" (quoting Susman, 561 F.2d at 93)), and a conflict need not violate state law or professional responsibility rules in order to render a named plaintiff inadequate, see Hale, 198 F.R.D. at 607 ("Whether these problematic arrangements violate New York State law or ethics is not before this Court.").

Defendants' class certification papers revealed for the first time that Mordchai Krausz, whom interim class counsel Pomerantz LLP has agreed to pay "15% of the net fees that [Pomerantz] receives for [his] participating in the work and responsibility in connection with [this] litigation," is the son of Berkshire's CEO Moses Krausz (Mishkin Decl. ex. 16), and Mordchai Krausz's extensive history with Berkshire is a newer revelation still (Hr'g Tr. 29:13-14). Applying the factors outlined above, we conclude that Mordchai Krausz's 15% interest in attorneys' fees earned by class counsel is sufficient to create the "appearance of impropriety" and renders Berkshire an inadequate class representative. **[**351]**

First, the relationship between Berkshire, with Moses Krausz as Berkshire's CEO, and Mordchai Krausz is sufficiently close to raise at least some appearance of impropriety. Berkshire correctly identifies that this case is unique in that the named plaintiff is a corporate entity with a board of directors rather than an individual plaintiff, but a close relationship need not be familial in order to raise adequacy issues: "a close familial or business relationship or friendship with class counsel" is enough to do so. 1 William B. Rubenstein, Newberg on Class Actions § 3:70 (5th ed.) (Westlaw 2017) (emphasis added); see also, e.g., Susman, 561 F.2d at 90 ("[C]ourts . . . have refused to permit class attorneys, their relatives, or business associates from acting as the class representative." (emphasis added)). Berkshire's acknowledgement of an extensive business relationship with Mordchai Krausz beyond the context of this litigation (Hr'g Tr. 30:5-9) does not lessen this concern.

This concern is confirmed by the remaining factors that are frequently analyzed in assessing whether a close personal or business relationship precludes a finding of adequacy of representation. Mordchai Krausz's role in this case -- let alone **[**352]** his entitlement to fees -- was not disclosed until recently, and then only by Lender defendants. Further, Mordchai Krausz has not entered a notice of appearance nor has he signed any of the pleadings. See In re IMAX, 272 F.R.D. at 156 ("Even to this day, [the related attorney] has not filed a notice of appearance.").

Further, the amount of attorneys' fees to Pomerantz -- and Mordchai Krausz's 15% share thereof -- is likely to greatly exceed any recovery by Berkshire. Berkshire's complaint alleges a total of $45,861 in damages under its "but-for LIBOR" theory of damages. (SAC ¶ 20.) Mordchai Krausz would stand to receive more than this amount if Pomerantz's fee award were to exceed $305,740; given that this action has been extensively litigated for more than five years and that Berkshire has settled with Citi and HSBC for a combined $27 million, any fee award to Pomerantz is likely to greatly exceed this amount.[142]

[*567] And finally, we find that the record suggests that Mordchai Krausz's role in the litigation has been limited such that a 15% cut of Pomerantz's fees -- potentially 4.5% of the total recovery -- would be disproportionate. Berkshire contends that Mordchai Krausz is experienced and "has assisted substantially **[**353]** in the prosecution of this claim including the review of filings and providing comments to Pomerantz." (Berkshire Class Reply 29.) Even assuming Mordchai Krausz's experience and qualifications, Berkshire's description of his role in this litigation -- having reviewed the pleadings and provided comments to class counsel -- nonetheless suggests a limited role, not an extensive one.

Resisting this conclusion, Berkshire suggests that our power to review proposed settlements for fairness is sufficient to protect the class despite any potential impropriety. (Berkshire Class Reply 30.) Berkshire also identifies four cases in which a class representative was found to provide adequate representation despite a close personal relationship with class counsel: Judge Pauley's recent decision in Gross, 2017 U.S. Dist. LEXIS 134908, 2017 WL

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[142] If Pomerantz were to seek attorneys' fees equal to 30% of the recovery produced by these settlements (the maximum it may seek), its fee award would be $8.1 million and Mordchai Krausz's share would be $1.22 million. We, of course, reserve judgment on the propriety of these settlements and any attendant application for attorneys' fees that might be made.

3668844, as well as Elias v. Ungar's Food Prods., Inc., 252 F.R.D. 233 (D.N.J. 2007); In re Cardizem CD Antitrust Litig., 200 F.R.D. 326 (E.D. Mich. 2001); and Zakaria v. Gerber Prods. Co., No. LA CV15-00200 JAK, 2016 U.S. Dist. LEXIS 184861, 2016 WL 6662723 (C.D. Cal. Mar. 23, 2016).

Berkshire's first argument cannot be reconciled with Rule 23 or Supreme Court and Second Circuit precedent. **HN63**[] Rule 23(a)(4) requires us to ask whether "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), not whether we believe the interests of absent class members are being fairly treated, cf. Fed. R. Civ. P. 23(e)(2) ("[T]he court may approve [a settlement] **[**354]** only after a hearing and on finding that it is fair, reasonable, and adequate."). Consistent with this distinction set forth in the structure of Rule 23, the Supreme Court and Second Circuit have made clear that the adequacy of a named plaintiff's representation and the fairness of a subsequent settlement are wholly distinct inquiries. See Amchem, 521 U.S. at 622 ("Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted -- that if a settlement is 'fair,' then certification is proper."); Denney, 443 F.3d at 268 ("Adequacy must be determined independently of the general fairness review of the settlement."). Indeed, as courts have recognized, "[t]he adequacy of the proposed class representative is widely considered the most important of the Rule 23(a) factors because it directly implicates the due process rights of absent class members who will be bound by the judgment." Gordon, 92 F. Supp. 3d at 198; see also Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) (concluding, following the 1966 enactment of Rule 23 and its allowance of class actions with preclusive effect, that "a court must now carefully scrutinize the adequacy of representation in all class actions").[143]

Berkshire's reliance on Gross fares no better. Contrary to Berkshire's characterization (Letter from Jeremy **[**355]** Lieberman to the Court, Aug. 25, 2017, ECF No. 2240), the related lawyer's role in Gross had **[*568]** been disclosed: the related lawyer had been named as class counsel, Gross, 2017 U.S. Dist. LEXIS 134908, 2017 WL 3668844, at *1, and a review of the docket shows that not only had the related lawyer entered a notice of appearance well before class certification, but the related lawyer had also been actively involved in litigating the case. He signed a number of the pleadings and motions papers filed by the plaintiff and made a number of court appearances on the putative class's behalf -- including presenting oral argument in opposition to defendants' motion to dismiss. (Gross, No. 14 Civ. 9438, ECF Nos. 1, 37, 44.) Accordingly, Gross's facts are simply not comparable to the facts here. Rather, under the factors identified in Gross which we analyze above, Mordchai Krausz's relationship with Berkshire and his father the CEO -- and his previously undisclosed 15% interest in any attorneys' fees awarded to Pomerantz -- suggests that Berkshire is not an adequate representative. The existence of a "large pool of disinterested investors who could serve as class representatives," In re IMAX, 272 F.R.D. at 157, which we presume to exist based on Berkshire's contention that there are "thousands **[**356]** of financial institutions" meeting the class definition (Berkshire Class Mem. 7), weighs further in favor of such a finding.

We are no more persuaded by Berkshire's additional authorities. In Elias and In re Cardizem, a named plaintiff had a parent-child relationship with a lawyer employed by one of the firms representing the putative class. *Elias, 252 F.R.D. at 244*; In re Cardizem, 200 F.R.D. at 337. Unlike those courts, our concern is not that "named plaintiffs would receive a benefit not available to other class members," *Elias, 252 F.R.D. at 244*, but rather that the class representative "might sacrifice the interests of the class for the benefit of class counsel." 5 Moore's Federal Practice § 23.25[2][b][vi] (3d ed. 2017); see also In re IMAX, 272 F.R.D. at 155-56. Further, there was no indication in those cases that the related lawyers were actively involved in litigating the case in which their relative was serving as named plaintiff, unlike Mordchai Krausz. See *Elias, 252 F.R.D. at 244-45*; In re Cardizem, 200 F.R.D. at 338. The firms in those cases also had a defined role, whereas Mordchai Krausz's role here remains unclear and limited at best. Additionally, the presence of multiple class representatives in those cases reduces the likelihood that a single named plaintiff -- like Berkshire here -- may conduct the litigation in an individually beneficial but class-detrimental

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143 At oral argument, counsel for Berkshire suggested that we have jurisdiction to preclude Mordchai Krausz from receiving any attorneys' fees that are ultimately awarded to Pomerantz. (Hr'g Tr. 29:7-10.) We are skeptical that our jurisdiction extends to what is ultimately a private contractual agreement between class counsel and an attorney who still has not entered a notice of appearance in this case. But even if our jurisdiction does so extend, such a post hoc remedy would be no more effective than post-settlement fairness review in curing a first-order adequacy problem.

way.[144] Finally, **[**357]** the court in Zakaria explicitly acknowledged that "a relationship between the named plaintiff and class counsel can defeat adequacy of representation," but reasoned that "in general, more than such a relationship must be shown." *2016 U.S. Dist. LEXIS 184861, 2016 WL 6662723, at *6*. Here, Mordchai Krausz's 15% interest in class counsel's attorneys' fees provides that additional factor.

In sum, we conclude that Berkshire is not an adequate representative given the previously undisclosed relationship between Moses Krausz and Berkshire on the one hand and Mordchai Krausz on the other. "We do not suggest that [Berkshire's] representation would in fact be inadequate -- but the possibility of inadequacy and the appearance of impropriety are sufficient for us to deny certification of a class with [Berkshire] as [the only] representative." *In re IMAX, 272 F.R.D. at 157*.

[*569] 2.2. Ascertainability

Lender defendants offer no challenge to the proposed class's ascertainability. Berkshire makes no reference to the implied requirement of ascertainability in its papers, but we nonetheless conclude that the proposed class is ascertainable. The proposed class definition's reference to certain transactions into which a putative class member must have entered serves as the "objective **[**358]** criteria that establish a membership with definite boundaries." *In re Petrobras, 862 F.3d at 269*. Though what exactly constitutes a "lending institution" is not entirely clear, the class definition is nonetheless not "indeterminate in some fundamental way" warranting a finding that the class is not ascertainable. Id.

2.3. Predominance

Because Berkshire is domiciled in New York, we analyze its claims under New York law.[145] See *LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *69, 2015 WL 6696407, at *9-11*. ***HN64***[] "Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff." *Wynn v. AC Rochester, 273 F.3d 153, 156 (2d Cir. 2001)* (citing *Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421, 668 N.E.2d 1370, 646 N.Y.S.2d 76 (1996))*. Lender defendants argue that individual questions predominate because the proposed class raises "individualized issues of reliance, notice, and mitigation." (Lender Defs.' Class Opp'n 19.) We analyze these elements in turn.[146]

2.3.1. Misrepresentation, Knowledge of Falsity, and Intent

As we discuss in our analysis of commonality, the issue of misrepresentation and related issues of knowledge of falsity and intent are common questions: evidence establishing **[**359]** these elements will not differ substantially from class member to class member. See supra section IV.2.1.2.

2.3.2. Reliance

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[144] Additionally, to the extent Berkshire relies on *In re Cardizem* to suggest that review of settlements for fairness under *Rule 23(e)(2)* may stand in for adequacy of representation under *Rule 23(a)(4)*, we have rejected that contention.

[145] We consider the issue of variations in state substantive law below.

[146] The parties do not address Berkshire's second claim, conspiracy to commit fraud. We accordingly do not consider that claim separately in analyzing predominance.

HN65[] Though misrepresentation is a common question when "fraud claims [are] based on uniform misrepresentations to all members of the class," *Moore, 306 F.3d at 1253*, "[p]roof of misrepresentation -- even widespread and uniform misrepresentation -- only satisfies half of the equation," *McLaughlin, 522 F.3d at 223*.[147] The answer to "the other half, reliance on the misrepresentation" is not dictated by the first half. Id.; see also *Hart v. BHH, LLC, No. 15 Civ. 4804 (WHP), 2017 U.S. Dist. LEXIS 105187, 2017 WL 2912519, at *8 (S.D.N.Y. July 7, 2017)*. In denying Lender defendants' motion to strike Berkshire's class action allegations, we contemplated that "Lender plaintiffs may [be able to] use circumstantial evidence to show that they relied on LIBOR." *Sept. 20, 2016 Order, 2016 U.S. Dist. LEXIS 185766at *69*, ECF **[*570]** No. 1574. However, we also reasoned that "such evidence may be insufficient in the face of, for instance, a showing that the Lender plaintiffs knew about or were indifferent to LIBOR suppression." Id.

We now conclude that reliance in this case is an individual question. "Reliance" on LIBOR (by issuing or holding a LIBORbased loan) is distinct from (legal) reliance on LIBOR's accuracy. As we held in LIBOR IV, the reasonableness of a class member's **[**360]** reliance on LIBOR's accuracy "depends on each particular plaintiff's reasons for investing in LIBOR-based instruments, the alternatives available to each particular plaintiff, each particular plaintiff's ability to investigate the possibility of LIBOR manipulation, and how much credence a reasonable investor would have lent to news articles criticizing LIBOR." *2015 U.S. Dist. LEXIS 147561, at *272, 2015 WL 6243526, at *67*. Answering these questions will require the assessment of plaintiff-specific evidence.

First, different lenders had varying exposures to LIBOR, as some lenders often obtained funding at LIBOR-based interest rates in order to issue LIBOR-based loans. (Kelley Report ¶¶ 97-100; Ordover Repot ¶¶ 66-74.) The extent of a lender's reliance on LIBOR depends, at least in part, on the lender's exposure to LIBOR -- a lender with no net exposure to LIBOR is far more likely to have been indifferent to the level at which LIBOR is set, and is far less likely to have relied on LIBOR at all -- and a lender's net exposure to LIBOR cannot be determined without evidence specific to that lender.

Because of LIBOR's dual nature in the lending context, Berkshire's reliance on In re U.S. Foodservice and Osberg v. Foot Locker, Inc. is unavailing. In re **[**361]** U.S. Foodservice reasoned that "payment may constitute circumstantial proof of reliance upon a financial representation," *729 F.3d at 119*, and Osberg extended this reasoning to hold that receipt of payment may similarly constitute circumstantial proof of reliance, see *No. 07 Civ. 1358 (KBF), 2014 U.S. Dist. LEXIS 158329, 2014 WL 5800501, at *6 (S.D.N.Y. Nov. 7, 2014)*. Neither case addresses a circumstance like that of an institutional lender that both makes and receives payments based on LIBOR.

Berkshire's reliance on cases in the federal securities context is similarly unavailing. We are skeptical that the federal securities framework is applicable to Berkshire's common law fraud claims, as the presumption of reliance often available in the securities fraud context is not available here. See *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *264, 2015 WL 6243526, at *65* (*HN66*[] "[T]he common law does not generally recognize a 'fraud on the market' theory of reliance."); see also *Sec. Inv'r Prot. Corp. v. BDO Seidman, LLP, 222 F.3d 63, 73 (2d Cir. 2000)* ("[C]ommon-law fraud claims require a different analysis than those brought under the federal securities regulation scheme.").

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[147] Berkshire's arguments relying solely on Moore accordingly conflate the issues of misrepresentation and reliance. Moore contrasted fraud claims based on uniform misrepresentations with fraud claims based on individualized misrepresentations and reasoned that the former were "appropriate subjects for class certification because the standardized misrepresentations may be established by generalized proof." *306 F.3d at 1253*. That is, Moore addresses whether misrepresentation is a common question, not reliance. In light of *McLaughlin*, Moore cannot be read to suggest that all putative classes asserting fraud claims based on uniform misrepresentations must be certified.

Similarly, lenders had different reasons for issuing LIBOR and had non-LIBOR alternatives for issuing loans.[148] For example, Berkshire's allegations regarding the omnipresence of LIBOR (Berkshire Class Reply 23) suggest that lenders may have relied on LIBOR despite knowledge of its **[**362]** inaccuracy, and Berkshire acknowledged that its selection of benchmark rates were "determined on a case-by-case basis" (Krausz Dep. 14:24-15:4).

Additionally, lenders likely had different understandings of what LIBOR represents, as evidenced by Berkshire's internally **[*571]** inconsistent views of LIBOR. Though Berkshire now advances a conception of LIBOR as strictly an "offered rate," (Berkshire Willig Mem.), its own representative testified that LIBOR represented "a rate at which the banks actually borrowed in the market" (Krausz Dep. 19:2-7). Berkshire's highly qualified expert witness Dr. Webb has advanced similarly inconsistent opinions on the meaning of LIBOR: in his initial report, for example, Dr. Webb refers to LIBOR as "the prevailing unsecured cost of USD denominated funds borrowed in the London interbank Money Market," opines that LIBOR suppression resulted when panel banks "submitt[ed] quotes which were lower than the rate at which they could actually borrow short term funds in the London inter-bank Money Market," and compares LIBOR submissions to "the actual rates paid by [panel banks] in their issuance of funding instruments linked to USD LIBOR." (Webb Initial Report ¶¶ 14-15, **[**363]** 41.) His rebuttal report, by contrast, emphasizes LIBOR's nature as an offered rate. (Webb Rebuttal Report ¶¶ 52-55.) Given Dr. Webb's lack of consistency on this point and our broader conclusion that the text of the LIBOR question is at least somewhat ambiguous, see supra section III.2.3.1.2, we conclude that lenders having different understandings of LIBOR is not a speculative improbability.

Finally, lenders may have had knowledge of alleged LIBOR suppression. As we held in LIBOR IV, "news articles in Spring 2008 revealed a meaningful probability that LIBOR had been, and continued to be, manipulated," *2015 U.S. Dist. LEXIS 147561, at *271, 2015 WL 6243526, at *67*, and our conclusion that certain lenders may have had knowledge is buttressed by Berkshire's and Dr. Webb's comparison of LIBOR to other publicly available interest rates that correlated closely to LIBOR prior to the alleged suppression. (E.g., SAC ¶¶ 81-97.) To the extent that certain lenders monitored comparable interest rates, this exercise of diligence would tend to undermine any claim of reliance. See *McLaughlin, 522 F.3d at 226* ("[D]ifferences in plaintiffs' knowledge and levels of awareness [may] also defeat the presumption of reliance."). The fact that some of the lenders captured in the class definition **[**364]** are sophisticated financial institutions -- including some that participated in the interbank lending market -- suggests that the probability that some class members had knowledge is not as speculative as Berkshire suggests it to be. (Ordover Report ¶¶ 66- 74.)

Accordingly, we conclude that assessing reliance would require extensive consideration of lender-specific evidence and is an individual question. The uncontroverted evidence in the record (and Berkshire's own testimony) hardly resembles the "bald speculation" found insufficient to render reliance an individual question in *In re U.S. Foodservice, 729 F.3d at 122*.

2.3.3. Statutes of Limitations

Lender defendants contend that statutes of limitations introduce additional individual questions. Berkshire responds, citing *In re Baldwin-United Corp. Litigation, 122 F.R.D. 424, 427-28 (S.D.N.Y. 1986)*, that we should not consider the issue in analyzing predominance because, as a threshold matter, the "existence of affirmative defenses regarding statute of limitations is 'outside the scope of *Rule 23*.'" (Berkshire Class Reply 24 n.18).

This contention is erroneous as a matter of law. As a general matter, the Second Circuit has made clear that ***HN67***[] an assessment of predominance requires consideration of the "elements of the claims and defenses to be litigated." *Nextel, 780 F.3d at 138* (emphasis **[**365]** added) (quoting 1 McLaughlin on Class Actions § 5:23 (11th ed. 2014)); see also *In re Visa Check, 280 F.3d at 138* ("[A] court must examine the relevant facts and both the

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[148] Further, we note that contrary to Berkshire's suggestion that a class member would not "have purchased LIBOR-based loans without relying on LIBOR" (Berkshire Class Reply 21), Dr. Webb opines that "the prices for floating rate loans/bonds are not affected" by LIBOR. (Webb Rebuttal Report ¶ 139.)

claims and [*572] defenses in determining whether a putative class meets the requirements of Rule 23(b)(3)." (emphasis added)). Though "the question for purposes of determining predominance is not whether a defense exists, but whether the common issues will predominate over the individual questions raised by that defense," In re Visa Check, 280 F.3d at 138, affirmative defenses may, and must, be considered in the predominance analysis.

Statutes of limitations are no exception to this general rule. In holding that statutes-of-limitations issues were beyond the scope of Rule 23, In re Baldwin-United interpreted the Supreme Court's decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), to forbid the consideration of any merits issues at the class certification stage. See In re Baldwin-United, 122 F.R.D. at 427. That interpretation of Eisen, of course, has since been disavowed by the Second Circuit in In re IPO, see 471 F.3d at 41, and by the Supreme Court in Dukes, see 564 U.S. at 351 & n.6.

In re Community Bank of Northern Virginia & Guaranty National Bank of Tallahassee Second Mortgage Loan Litigation, on which Berkshire mistakenly relies, cogently explains the point. In that case, the Third Circuit questioned (rather than **[**366]** ratified) certain courts' "refus[al] to consider statute-of-limitations issues at the class certification stage," reasoning that Eisen could no longer be read to bifurcate entirely consideration of Rule 23 requirements from consideration of the merits. 622 F.3d 275, 292-93 (3d Cir. 2010). Rather, as the Third Circuit stated, "[s]ituations abound where statute-of-limitations issues overlap with certain of the Rule 23 requirements." Id. at 293. Indeed, "defendants may oppose class certification on the ground that class members with untimely claims must rely on equitable tolling to save their claims, which presents an individual question of law and fact that could predominate over common questions under Rule 23(b)(3), or challenge the predominance requirement in light of the 'presence of idiosyncratic statute-of-limitations issues' among the laws of various states in a nationwide class action." Id. at 293-94 (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 295-96 (1st Cir. 2000)).

Indeed, the timeliness of a class member's claim presents an individual issue in this case. Contrary to Berkshire's suggestion (Berkshire Class Reply 24-25), any statute-of-limitations issues impacting the class here are not reducible simply to a question of inquiry notice. Even assuming inquiry notice operates on a classwide basis,[149] inquiry notice is of **[**367]** course only one form of notice; actual notice is no less effective at starting the limitations clock. See, e.g., N.Y. C.P.L.R. § 213(8). Berkshire fails to explain how evidence of actual notice may be presented on anything other than a class member-specific basis, and we accordingly conclude that statute of limitations also presents an individual question.

HN68[] While an affirmative defense "affect[ing] different class members differently . . . does not compel a finding that individual issues predominate," In re Nassau Cty., 461 F.3d at 225 (quoting In re Visa Check, 280 F.3d at 138), the varying applicability of affirmative defenses indisputably weighs on the individual question side of the scale. None of Berkshire's cited authorities -- many of which, including In **[*573]** re Baldwin-United, have been abrogated by In re IPO and Dukes -- establishes the contrary. Cf. Waste Mgmt., 208 F.3d at 296 (noting that while "variations in the sources and application of statutes of limitations will not automatically foreclose class certification under Rule 23(b)(3)," the "necessity for individualized statute-of-limitations determinations invariably weighs against class certification under Rule 23(b)(3)" (emphasis added)).

2.3.4 Damages

Though damages is necessarily an individual question (at least to some extent) in all cases, we find that it **[**368]** is a question of greater significance in this case than in others. Individual inquiry will be required into, at minimum, four aspects of determining damages: (1) what alternative rate a plaintiff would have used, (2) what spread would have been used (and what other terms of the loan would have been) had LIBOR not been suppressed, (3) the

[149] To the extent the Second Circuit held in Schwab that an assessment of whether a plaintiff relied on the BBA's assurances regarding the accuracy of LIBOR is necessary to the statute of limitations inquiry, this additional consideration would confirm that statute-of-limitations issues are individual in nature.

presence and applicability of interest-rate floors, and (4) netting against benefits received from other LIBOR-based instruments.[150]

First, we held in LIBOR V that New York adheres to an out-of-pocket damages rule, the application of which requires a determination of the alternatives that each plaintiff would have used for each loan.[151] See *2015 U.S. Dist. LEXIS 149629, at *69, 2015 WL 6696407, at *9-11*. The record establishes not only that other benchmark rates are available, (Lukens Dep. 143:9-25, 240:7-14; Decl. of Paul Mishkin ex. 18, July 3, 2017, ECF No. 2025), but also that a given loan may be tied to multiple interest rates and not only LIBOR (Ordover Report ¶ 80).

Second, the evidence shows that a floating-rate loan's spread above or below the benchmark rate is subject to negotiation. (Ordover Report ¶¶ 39-40.) Indeed, Berkshire's **[*574]** representative testified that its loans were "individually **[**369]** negotiated," that spreads may be sensitive to changing interest rates, and that "negotiation could be over what benchmark to use as well as over the spread." (Lukens Dep. 36:5-7, 143:12-16, 240:4-6, 271:4-6.)

Third, the record establishes that lenders -- including Berkshire itself -- frequently use interest-rate floors to guard against fluctuations in interest rates. (Kelley Report ¶¶ 102-14.) The inclusion of an interest-rate floor in a loan will tend to reduce the amount of damages attributable to that loan, as the floor places an upper bound on the impact that LIBOR suppression may have had.

Fourth, consistent with our dismissal of Highlander Realty in *LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *52-53, 2015 WL 6696407, at *22-24*, a lender's net exposure to LIBOR is plainly relevant in considering damages. As we have held, "a plaintiff both injured and enriched by illegal activity cannot choose to recover for his injuries yet retain his windfall" where "both result from a single wrong." *Minpeco, 676 F. Supp. at 488* (emphasis omitted) (citing *Abrahamson, 568 F.2d at 878*). While we are cognizant of "the goal of deterrence" and avoiding unjust enrichment of the defendant, *Gordon, 92 F. Supp. 3d at 202*, an undeserved windfall to a plaintiff would be equally inappropriate, see *Minpeco, 676 F. Supp. at 488*. Netting in this case merely represents the economic reality that financial **[**370]** institutions hold both LIBOR-based assets and LIBOR-based liabilities (Kelley Report ¶¶ 97-100), cf. *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *9, 2016 WL 7378980, at *3* ("Contrary to Shakespeare's advice,

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[150] Mitigation presents an additional individualized damages issue, though Lender defendants present mitigation as an affirmative defense. In New York, "a party who claims to have suffered damage by the tort of another is bound 'to use reasonable and proper efforts to make the damage as small as practicable,' and if an injured party allows the damages to be unnecessarily enhanced, the incurred loss justly falls upon him." *Williams v. Bright, 230 A.D.2d 548, 550, 658 N.Y.S.2d 910 (1st Dep't 1997)* (quoting *Blate v. Third Ave. R.R. Co., 44 A.D. 163, 167, 60 N.Y.S. 732 (1st Dep't 1899))*. This assessment of what mitigation would have been "reasonable and proper" is almost necessarily individualized, since it depends on what "practicable" options were available to each lender in order to minimize its damages. Berkshire may very well be correct that in many instances, a lender would not have been required to mitigate its damages (Berkshire Class Reply 25 n.20), but its argument does not challenge the notion that an assessment of what is reasonable and proper will be plaintiff-specific.

[151] Berkshire did not move for reconsideration of LIBOR V, and none of the authorities on which they rely in advocating for reconsideration represent intervening changes in law. We are thoroughly disinclined to reconsider LIBOR V given this delay, but even if we were inclined to reconsider, we would be unpersuaded that cases addressing fraud damages resulting from the purchase and sale of securities under federal law have bearing on the issuance of loans under New York law. See *BDO Seidman, 222 F.3d at 73* ("[C]ommon-law fraud claims require a different analysis than those brought under the federal securities regulation scheme."). Indeed, we read the Second Circuit's Schwab opinion to be in considerable tension with Berkshire's argument, reliant on federal securities law, that its damages should be calculated only as the difference between interest payments received based on actual LIBOR and interest payments received based on but-for LIBOR. See *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541, at *15* ("[T]o the extent [a plaintiff] seeks to impose liability for false LIBOR submissions that affected the amount of money it received on instruments it had already purchased, its claims fail. . . . Defendants' LIBOR submissions, possibly occurring months after [the plaintiff] purchased a particular security, bore no relation to that original purchase." (emphasis omitted)).

'Neither a borrower nor a lender be,' the defendant banks are both."), with a perfectly hedged entity such as Highlander being a particularly stark example.[152]

Berkshire contends that Dr. Webb's model can be applied to calculate damages regardless of what alternative a lender would have used, adapted to take into account the effect of loan features such as interest-rate floors, and extended to calculate the effect of LIBOR suppression on other LIBOR-based instruments. (Berkshire Class Reply 16-19.) We excluded Dr. Webb's damages opinions under Daubert, but taking these excluded opinions into account would not alter our conclusion. Even accepting that but-for LIBOR is susceptible to class-wide calculation, individual issues remain in determining which alternative rate a plaintiff would have used, what the but-for spread on each loan would have been, what other terms the loan would have contained (including interest-rate floors), and which other instruments should be taken into account in the netting calculation.[153] The problem is not how to perform **[**371]** the numerical calculations once those plaintiff-specific unknowns have been determined, which the subject that Dr. Webb's excluded opinions address.

The more plaintiff-specific information that must be collected from each class member, the more significant the issue of damages becomes as an individual question. See *Megason v. Starjem Restaurant Corp., No. 12 Civ. 1299 (NRB), 2014 U.S. Dist. LEXIS 3910, 2014 WL 113711, at *6 (S.D.N.Y. Jan. 13, 2014)* ("[A] class action may be certified if the plaintiffs present a damages model capable **[*575]** of calculating damages on a class-wide basis, notwithstanding the 'feasibility-related issue [of] the potential need for manual input' of certain limited information." (emphasis added) (second alteration in original) (quoting *In re U.S. Foodservice, 729 F.3d at 130*)); cf. *Tyson Foods, 136 S. Ct. at 1045* ("An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012))). Because damages cannot be calculated here absent considerable inquiry into each loan held by each plaintiff, damages is an individual question of substantial magnitude.

2.3.5. Variations in State Law

As a threshold matter, Berkshire contends that issues of variation in state substantive law are strictly ones of manageability and not predominance. (Berkshire **[**372]** Class Reply 26-29.) The law counsels otherwise. ***HN69***[] "[V]ariations in state law may swamp any common issues and defeat predominance." *In re U.S. Foodservice, 729 F.3d at 127* (quoting *Castano, 84 F.3d at 741*); see also *In re AIG, 689 F.3d at 242* ("[O]ne of the 'matters pertinent' to a finding of predominance is 'the likely difficulties in managing a class action.'" (quoting *Fed. R. Civ. P. 23(b)(3)(D)*). We accordingly consider whether variations in how fraud is defined under substantive state laws introduce additional individual questions tending to defeat predominance.

"When claims in a class action arise under state law -- and the class comprises multiple states -- the court must consider whether different state laws will apply to different members of the class." *Nextel, 780 F.3d at 140*. "[I]f the forum state's choice-of-law rules require the application of only one state's laws to the entire class, then the representation of multiple states within the class does not pose a barrier to class certification." *Id. at 141*. We therefore assess whether New York's choice-of-law rules require the application of the substantive laws of other states, see id. (citing *Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941))*, and conclude (consistent with our prior holdings) that the class's claims are subject to the substantive fraud law of different states, see *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *225, 2015 WL 6243526, at *50* ("For the most part, New York law applies, **[**373]** but the parties agree that California, New Jersey, Pennsylvania, Texas, or Virginia law applies to some cases and plaintiffs.").

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[152] We also find Berkshire's reliance on *Randall, 478 U.S. 647, 106 S. Ct. 3143, 92 L. Ed. 2d 525*, unpersuasive for the reasons we have previously expressed. See supra section III.3.5.4.

[153] Dr. Webb opines that the necessary data may be "extracted in a systematic and comprehensive manner" because lenders tend to be "regulated financial institutions or institutional entities with appropriate bookkeeping and trade capture systems." (Webb Rebuttal Report § 120.) Dr. Webb cites nothing in support of this opinion and we give it correspondingly little weight.

HN70[] Under New York's choice-of-law rules, "the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws." Curley v. AMR Corp., 153 F.3d 5, 12 (2d Cir. 1998) (citing In re Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 223, 613 N.E.2d 936, 597 N.Y.S.2d 904 (1993)). "[I]f there is a conflict of laws, New York courts apply an 'interests analysis,' under which the law of the jurisdiction having the greatest interest in the litigation is applied." Id. (citing, inter alia, Babcock v. Jackson, 12 N.Y.2d 473, 481, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963)).

Applying this test, the Appellate Division and numerous courts in this district have concluded that fraud claims are governed by the law of the state in which the injury occurred, which is where the plaintiff maintains its principal place of business. See, e.g., Tradex Glob. Master Fund SPC LTD v. Titan Capital Grp. III, LP, 95 A.D.3d 586, 587, 944 N.Y.S.2d 527 (1st Dep't 2012) ("[P]laintiffs' fraud claim[] is governed by Connecticut law since plaintiffs' principal place of business is in that state."); Dhir v. Carlyle Grp. Emp. Co., No. 16 Civ. 6378 (RJS), 2017 U.S. Dist. LEXIS 162386, 2017 WL 4402566, at *4 (S.D.N.Y. Sept. 29, 2017); Odyssey Re (London) Ltd. v. Stirling Cooke Brown [*576] Holdings Ltd., 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000), aff'd, 2 F. App'x 109 (2d Cir. 2001). The Second Circuit has also so held in a nonprecedential opinion. Nat'l W. Life Ins. Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 89 F. App'x 287, 288 (2d Cir. 2004) ("Under New York conflict of law principles, fraud claims are governed by the state in which the injury is deemed to have occurred, which is usually where the plaintiff is located."); cf. Geron v. Seyfarth Shaw LLP (In re Thelen LLP), 736 F.3d 213, 220 (2d Cir. 2013) ("[F]or claims **[**374]** based on fraud, the locus of the tort is generally deemed to be the place where the injury was inflicted, rather than where the fraudulent act originated."). Each putative class member's fraud claim is therefore subject to the law of the state of its principal place of business, and we proceed to analyze the substantive differences in fraud causes of action.

HN71[] "[P]utative class actions involving the laws of multiple states are often not properly certified pursuant to Rule 23(b)(3) because variation in the legal issues to be addressed overwhelms the issues common to the class." In re U.S. Foodservice, 729 F.3d at 126-27. Accordingly, "courts routinely deny class certification because plaintiffs' claims would require application of the substantive law of multiple states." In re Currency Conversion Fee Antitrust Litig., 230 F.R.D. 303, 311 (S.D.N.Y. 2004). Nonetheless, "the specter of having to apply different substantive laws does not necessarily warrant refusing to certify a class." Rodriguez v. It's Just Lunch, Int'l, 300 F.R.D. 125, 140 (S.D.N.Y. 2014) (alterations incorporated and internal quotation marks omitted). "[N]ationwide class action movants must creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." In re U.S. Foodservice, 729 F.3d at 127 (alteration in original) (internal quotation marks omitted) (quoting Walsh v. Ford Motor Co., 807 F.2d 1000, 1017, 257 U.S. App. D.C. 85 (D.C. Cir. 1986)). As we previously noted **[**375]** in denying Lender defendants' motion to strike Berkshire's class-action allegations, it appears that "material differences exist between state fraud laws and that proving predominance and superiority will be challenging." Sept. 20, 2016, Order, 2016 U.S. Dist. LEXIS 185766 at *68. In particular, Lender defendants argue that state substantive law varies along three dimensions: reliance, statutes of limitations, and damages.

A first dimension of variation in state substantive law is reliance. As Lender defendants correctly point out, state substantive law varies materially on what suffices to establish reliance and when a would-be plaintiff is charged with a duty to investigate. Berkshire responds that states' substantive standards on reliance fall into only two categories. (Berkshire Class Reply 26-27.)

This response is an oversimplification and is belied by the first appendix to Berkshire's reply brief, which purports to catalog 52 jurisdictions' reliance standards. (Berkshire Class Reply 26 n.21.) We do not canvass Berkshire's state-law appendices for accuracy, but we are skeptical that Berkshire has in fact characterized state law correctly in all instances. For example, Oklahoma appears to impose an absolute duty to investigate, **[**376]** rather than a duty to investigate only if facts make it obvious to the plaintiff that the representation is not true as Berkshire suggests. See Silver v. Slusher, 1988 OK 53, 770 P.2d 878, 882 n.8 (Okla. 1988) ("An action for fraud may not be predicated on false statements when the allegedly defrauded party could have ascertained the truth with reasonable diligence."). Similarly, West Virginia appears to impose a duty to investigate in cases of obvious falsity, rather than possible falsity as Berkshire suggests. See Kidd v. Mull, 215 W. Va. 151, 595 S.E.2d 308, 316 (W. Va. 2004) (describing

[*577] as "consistent" with West Virginia law the formulation of reliance in the Restatement (Second) of Torts: "if [the plaintiff] knows that [the misrepresentation] is false or its falsity is obvious to him").[154]

But even accepting Berkshire's characterization of state substantive law, the first appendix shows three different standards, not two: (1) a "[d]uty to investigate if the plaintiff is aware of facts indicating the representation may be false"; (2) a "[d]uty to investigate only if facts make it obvious to the plaintiff that the representation is not true"; and (3) an unqualified duty to investigate. (Berkshire Class Reply app. I. (emphasis omitted))

Within these broad categories, different states also impose varying standards. **[**377]** For example, within the first broad category (states imposing a duty to investigate if the plaintiff is aware of facts indicating the representation may be false), Iowa, Missouri, South Carolina, and Tennessee appear to consider certain characteristics of the plaintiff while Colorado, Georgia, Illinois, New York, Ohio and Virginia apply a strictly objective standard. Compare, e.g., *Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726, 737 (Iowa 2009)* (considering "the sophistication and expertise of the plaintiff in financial . . . matters" (omission in original)), with, e.g., *Schur v. Sprenkle, 84 Va. Cir. 418 (2012)* (referring to "the ordinary experience of mankind" more broadly (emphasis omitted)). Similarly, within the second broad category (states imposing a duty to investigate only if the facts make it obvious that the representation is not true), California, Kansas, Nevada, North Dakota, and Utah consider obviousness based on a person of comparable "intelligence" or "experience," whereas Rhode Island appears to apply a strictly objective "reasonable person" standard. Compare, e.g., *Collins v. Burns, 103 Nev. 394, 741 P.2d 819, 821 (Nev. 1987)* (referring to "any normal person of his intelligence and experience"), with, e.g., *Boisse v. Miller, No. WC 2003-0281, 2013 R.I. Super. LEXIS 155, 2013 WL 4235342, at *17 (R.I. Super. Aug. 8, 2013)* (referring only to "a reasonable person").

A second dimension of variation in state **[**378]** substantive law is the statute of limitations. In LIBOR IV, we remarked that "[t]he states apply many variations on the 'discovery' theme, so we must analyze the discovery rules of each state separately." *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *417, 2015 WL 6243526, at *126*. Berkshire counters that variations in discovery rules and notice standards present no predominance issue, asserting that we have previously held that in the context of discovery rules, "constructive notice occurred as to all class members (except under California law) on May 29, 2008" (Berkshire Class Reply 27).[155] Berkshire does not explain why such a holding precludes actual notice to a **[*578]** plaintiff prior to May 29, 2008 or why this holding alleviates our concern regarding variations in statutes of limitations and discovery rules (which, as we have held, some states do not apply at all). See *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *417, 2015 WL 6243526, at *126-33, slip op. at *303-17* (analyzing state-by-state variations in statutes of limitations and discovery rules).[156] Further, as Berkshire

[154] Berkshire's extensive reliance on state trial court decisions also does little to reassure us of the accuracy of its state-law appendices, particularly when states' highest courts or intermediate appellate courts have addressed the questions at issue. Cf. *Levin v. Tiber Holding Corp., 277 F.3d 243, 253 (2d Cir. 2002)* ("[T]his Court, sitting in diversity, must follow the holdings of [a state's highest court] and must reject inconsistent rulings from its lower courts."); ***County of Westchester v. Comm'r of Transp., 9 F.3d 242, 245 (2d Cir. 1993)*** ("[T]he highest court of a state has the final word on the meaning of state law." (internal quotation marks omitted)).

[155] Berkshire does not reference a particular holding, but we presume this statement refers either to our holding in LIBOR IV that "exchange-based plaintiffs were on constructive notice of news articles relating to LIBOR by May 29, 2008" under federal law, *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *431, 2015 WL 6243526, at *133* (emphasis added), or to our holding in LIBOR V that "we consider [a now-dismissed Lender plaintiff] to have been on inquiry notice by May 29, 2008" under Puerto Rico law, *LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *77, 2015 WL 6696407, at *12*.

[156] Lender defendants also suggest that the extent to which states recognize class-action tolling, and the extent to which states recognize cross-jurisdictional tolling in particular, introduces another degree of variation under the broad umbrella of statutes of limitations. (Lender Defs.' Class Opp'n 27.) Because we are to apply state class-action tolling law when analyzing claims asserted under state law, see *Casey v. Merck & Co., 653 F.3d 95, 100 (2d Cir. 2011)*, we engaged in an extensive analysis of cross-jurisdictional tolling in LIBOR IV, see *2015 U.S. Dist. LEXIS 147561, at *444-45, 2015 WL 6243526, at *138-47*. But cross-jurisdictional tolling is not implicated in this context: the operative question is whether the filing of this putative class action in this

concedes (Berkshire Class Reply 27), California's treatment of inquiry notice based on news articles is unique, see *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *419, 2015 WL 6243526, at *127*, and the Second Circuit has emphasized that this assessment requires analysis of when "the plaintiff was aware of the reporting in question," *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541, at *19* (emphasis added), which in turn **[**379]** requires plaintiff-specific evidence.

A third dimension of variation in state substantive law is the damages methodology that is to be applied. Lender defendants correctly identify that some states always apply a "benefit of the bargain" rule, some states (like New York) always apply an "out of pocket" rule, and other states allow for either measure of damages depending on the circumstances.[157] (Lender Defs.' Class Opp'n 27.) Berkshire acknowledges the difference between benefit-of-the-bargain damages and out-of-pocket damages, but contends that 48 of 52 jurisdictions apply benefit-of-the-bargain while the remaining four apply out-of-pocket. (Berkshire Class Reply 27.)

This response is again an oversimplification and is again belied by Berkshire's state-law appendices. While the ultimate amount of damages in each state is calculated using two different formulae, complexity nonetheless arises in determining which rule to apply in the states allowing both forms of damages. And indeed, states differ in that decision rule: for example, according to Berkshire's own state-law appendix, Ohio **[**380]** defaults to the out-of-pocket rule while Washington defaults to the benefit-of-the-bargain rule. Compare, e.g., *Northpoint Props. v. Charter One Bank, 2011-Ohio-2512, ¶ 34 (Ct. App. 8th Dist. 2011)* ("The out-of-pocket rule is normally applied to determine the measure of damages for a fraudulent misrepresentation."), with, e.g., *Enger v. Richards, 134 Wash. App. 1068 (1st Div. 2006)* ("Courts generally apply the benefit of the bargain rule when plaintiffs seek recovery for general damages caused by misrepresentation or fraud.").

In sum, we conclude that variations in state substantive law introduce individual **[*579]** questions along at least three dimensions and therefore weigh against a finding of predominance.[158] Berkshire's state law appendices fall short of the "extensive analysis" needed to establish that variations in state law do not present "insuperable obstacles" to certification. *In re U.S. Foodservice, 729 F.3d at 127*.

2.3.6. Conclusion

Common issues do not predominate over individual ones. While the question of misrepresentation is a common issue, this common question is outweighed by the individual questions presented by reliance, damages, affirmative defenses, and variation in state laws. Though the presence of any one of these individual questions may be insufficient to support a finding of no predominance standing alone, see, **[**381]** e.g., *Roach, 778 F.3d at 408*; *In re Nassau Cty., 461 F.3d at 225*; *Hart, 2017 U.S. Dist. LEXIS 105187, 2017 WL 2912519, at *8*, these individual questions, when taken together, significantly outweigh common ones.

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district would, under the law of the 56 jurisdictions, toll the applicable statute of limitations for each absent class member in a suit in this district. Therefore, class-action tolling is implicated only to the extent a state does not recognize class-action tolling at all.

[157] Lender defendants additionally suggest that the substantive law of mitigation also differs across states, though they do not identify any specific conflicts. (Lender Defs.' Class Opp'n 24.) Berkshire does not respond to this contention, but suggests instead that mitigation is irrelevant. (Berkshire Class Reply 25 n.20.) We reject the notion that mitigation is irrelevant to the damages analysis and conclude that to the extent state laws in fact differ on the issue of mitigation, such variation would introduce a further layer of complexity into the state-by-state damages analysis.

[158] In analyzing variations in state law, we have generally set aside the question of whether "[d]ifferent legal standards are masquerading behind similar legal labels." 18 Charles A. Wright et al., Federal Practice & Procedure § 4417 (3d ed.) (Westlaw 2017). As the Supreme Court has recognized in analyzing preclusion, courts in different jurisdictions may apply identically worded provisions differently, see *Smith v. Bayer Corp., 564 U.S. 299, 309, 131 S. Ct. 2368, 180 L. Ed. 2d 341 (2011)*, and these differences would amplify the variations we have already identified. While this concern is somewhat alleviated in this context because state substantive law need not be exactly identical to permit grouping, the likelihood remains that different states will interpret terms that are identical or similar terms in sufficiently different ways such that grouping would be improper.

2.4. Superiority

Finally, we consider whether class-action status in this case would be superior to the maintenance of individual actions. Our analysis is again guided by the factors set forth in *Rule 23(b)(3)*.

We find that the second factor, the extent and nature of any litigation already begun, and the third factor, the desirability of concentrating litigation in this forum, support a finding of superiority. Only a limited number of suits advancing a loan-based theory of injury attributable to LIBOR suppression were commenced, and concentration here is desirable for the reasons stated by the JPML in creating this multidistrict litigation in the first instance. See *In re LIBOR-Based Fin. Instruments Antitrust Litig., 802 F. Supp. 2d at 1381*.

As to class members' interests in individually controlling the prosecution of separate actions under *Rule 23(b)(3)(A)*, we are less confident that a class action is superior simply because the cost of prosecuting a separate action would exceed damages to each class member. (Berkshire Class Mem. 22, 26.) Indeed, the argument that superiority is established simply because individual actions "may not be pursued, [and] would be less efficient and lead to conflicting **[**382]** results," begs the superiority question and proves far too much: this reasoning could be deployed in almost every putative class action. As we explained in analyzing superiority in the Exchange-based action, this case does not resemble the type of consumer fraud class actions where damages are small in magnitude for each class member but certain in existence. See supra section III.3.6.

But even absent this skepticism, a class action is not superior because of manageability problems presented by the absence of predominance and the presence of variations in state law. See *Sykes, 780 F.3d at 82* ("[M]anageability 'is, by the far, the most critical concern in determining whether a class action is a superior means of adjudication.'" (quoting 2 William B. Rubenstein, Newberg on Class Actions **[*580]** § 4:72 (5th ed.) (Westlaw 2014)). As we explain above, Berkshire has not established that certification of a nationwide class "does not present insuperable obstacles" to management. *In re U.S. Foodservice, 729 F.3d at 127*. The creation of 56 subclasses (for 50 states plus 6 territories) would be unmanageable, see Manual for Complex Litigation § 21.23 (4th ed. 2004) ("The creation of a number of subclasses . . . may make the case unmanageable [and] may defeat the superiority requirement."), and Berkshire **[**383]** has not sufficiently established that grouping would alleviate our concerns about variations in state substantive law or that such grouping -- which would occur along three different dimensions -- would be manageable. "While numerous courts have talked-the-talk that grouping of multiple state laws is lawful and possible, very few courts have walked the grouping walk." *In re Pharm. Indus. Average Wholesale Price Litig., 252 F.R.D. 83, 94 (D. Mass. 2008)*.

Anticipating this issue, Berkshire contends that any manageability concerns are overblown. (Berkshire Class Reply 28.) Berkshire invokes the Second Circuit's identification of "a number of management tools available to a district court to address any individualized damages issues that might arise in a class action, including: (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *In re Visa Check, 280 F.3d at 141* (footnote omitted).

These tools address our manageability concerns, which are rooted in variations in state substantive **[**384]** law, only minimally. The first three pertain to individualized issues of damages and are not responsive. We have also rejected the creation of numerous subclasses, as the number of state-law subclasses required here would remain generally unmanageable. And finally, because Berkshire offers no serious argument that we should consider modification of the class definition or issue certification, we will not consider whether those approaches would be viable in this action. See *Lundquist, 993 F.2d at 14*.

2.5 Conclusion

Berkshire's motion to certify a Lender class is denied. While Berkshire has established the numerosity, commonality, and typicality requirements of *Rule 23(a)(1) through (3)*, we find that Berkshire would not be an adequate representative based on the previously undisclosed fee arrangement between Mordchai Krausz and interim class counsel. While our doubts about Berkshire's adequacy as a class representative is sufficient to preclude certification, the joinder of additional named plaintiffs that would fairly and adequately represent the class still would not render class certification appropriate, as we also conclude that common questions do not predominate over individual ones and that class-action status would not be superior **[**385]** to the maintenance of individual actions.[159]

[*581] V. OTC ACTION

OTC plaintiffs seek certification of a class defined as follows:

> All persons or entities residing in the United States that purchased, directly from a Panel Bank (or a Panel Bank's subsidiaries or affiliates), a LIBOR-Based Instrument that paid interest indexed to a U.S. dollar LIBOR rate set any time during the period August 2007 through August 2009 ("Class Period") regardless of when the LIBOR-Based Instrument was purchased.

The proposed class definition in turn defines "LIBOR-Based Instrument" and excludes certain entities and individuals associated with panel banks:

> "LIBOR-Based Instrument" means an interest rate swap or bond/floating rate note that includes any term, provision, obligation or right for the purchaser or counterparty to be paid interest by a Panel Bank (or a Panel Bank's subsidiaries or affiliates) based upon the 1 month or 3 month U.S. dollar LIBOR rate. For the avoidance of doubt, the term LIBOR-Based Instrument does not include instruments on which a Panel Bank (or a Panel Bank's subsidiaries or affiliates) does not pay interest, such as bonds/floating rate notes issued by entities other than Panel Banks (or Panel **[**386]** Banks' subsidiaries or affiliates). Nor does the term include instruments that include only a term, provision, or obligation requiring the purchaser or counterparty to pay interest, such as business, home, student or car loans, or credit cards.
>
> Excluded from the class are panel banks and their employees, affiliates, parents, and subsidiaries and any judicial officers and staff presiding over this action. "Panel Bank" means Bank of America, Bank of Tokyo Mitsubishi, Barclays Bank, Citibank, Credit Suisse, Deutsche Bank, HBOS, HSBC, JPMorgan, Lloyds, Norinchukin, Rabobank, Royal Bank of Canada, Royal Bank of Scotland, Societe Generale, UBS, and West LB (n/k/a Portigon).

The operative Corrected Third Consolidated Amended Complaint identifies six named plaintiffs: the Mayor and City Council of Baltimore, Maryland; the City of New Britain, Connecticut; Vistra Energy Corp.; Yale University; Jennie Stuart Medical Center, Inc.; and SEIU Pension Plans Master Trust (SEIU). (Corrected Third Consolidated Am. Compl. ("CTAC") ¶¶ 12-17, Apr. 20, 2017, ECF No. 1857.) Because OTC plaintiffs' claims may be asserted only against panel banks with which named plaintiffs transacted,[160] panel banks Bank of America, **[**387]** Barclays,

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[159] Though it does not affect our resolution of the motions, the parties are reminded that this Court's individual rules of practice and *Local Civil Rule 11.1(b)(3)* specify the formatting to be applied to motions papers, including memoranda of law: "all text must be double-spaced, except for headings, text in footnotes, or block quotations, which may be single-spaced." Double-spaced means double-spaced. Not 1.9x spaced, not 1.8x spaced, and certainly not approximately 1.75x spaced as Berkshire's papers are.

[160] This limitation derives from two sources: first, our holding in LIBOR III that OTC plaintiffs lack Article III standing to assert claims against panel banks with which they did not transact, see *LIBOR III, 27 F. Supp. 3d at 482* ("[OTC] plaintiffs' [state law] claims against non-counterparty banks do not meet the threshold Article III standing requirements." (citing *NECA, 693 F.3d at 159*)); see also *NECA, 693 F.3d at 159* ("[T]o establish Article III standing in a class action . . . for every named defendant there must be at least one named plaintiff who can assert a claim directly against that defendant." (omission in original) (quoting *Merck-Medco, 504 F.3d at 241*)); and second, our holdings in LIBOR VI that a plaintiff who did not transact with a panel bank is

Citi, Credit Suisse, Deutsche Bank, JPMorgan Chase, Royal Bank of Canada (RBC), and UBS (and certain affiliates of these panel banks) are named as defendants (collectively, "OTC defendants"); the remaining panel banks are not. (CTAC ¶¶ 18-39.)

[*582] OTC plaintiffs assert three claims: antitrust claims under the *Sherman Act*, breach of the implied covenant of good faith and fair dealing under state law, and unjust enrichment under state law. (CTAC ¶¶ 378-409.) The state-law claims were asserted against all defendants, but our rulings in LIBOR VI dismissed the antitrust claims against all defendants except Bank of America, Citi, and JPMorgan Chase, see *2016 U.S. Dist. LEXIS 175929, at *67, 2016 WL 7378980, at *25*, slip op. at app. A-1.

In June 2017, SEIU sought to withdraw as a named plaintiff. (Letter from William Carmody to the Court, June 15, 2017, ECF No. 1981.) We granted this request, see June 26, 2017 Order, ECF No. 1992, which resulted in none of the remaining named plaintiffs having transacted with Credit Suisse or RBC. We allowed the substitution of the Bucks County Water and Sewer Authority ("Bucks County") as a named plaintiff, which thereby preserved the class's Article III standing against RBC.[161] **[**388]** See *Sept. 8, 2017 Order, 2017 U.S. Dist. LEXIS 155700, 2017 WL 4174925*, ECF No. 2256. We also dismissed, consistent with our holding in LIBOR III, Credit Suisse as a defendant. See Sept. 29, 2017 Order, ECF No. 2291.[162]

Settlements between the OTC plaintiffs and certain panel banks have narrowed the scope of claims remaining in this action as well. We have preliminarily approved the OTC plaintiffs' settlements with Barclays and Citi, and OTC plaintiffs have moved for final approval.[163] (Letter from Michael Hausfeld to the Court, Sept. 22, 2017, ECF No. 2277 (Barclays); Letter from Michael Hausfeld to the Court, Dec. 15, 2017, ECF No. 2381 (Citi).) OTC plaintiffs have also settled with Deutsche Bank. (Feb. 27, 2018 Motion, ECF No. 2448.)[164]

Accordingly, OTC plaintiffs' antitrust claims remain only against Bank of America and JPMorgan Chase. The state-law implied covenant and unjust enrichment claims remain against Bank of America, JPMorgan Chase, RBC, and UBS. Having delineated the scope of the claims remaining in this action, we turn to the pending Daubert and class certification motions.

[*583] 1. Daubert Motion against Dr. Stiglitz

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not an efficient enforcer of the antitrust laws against that panel bank and therefore lacks antitrust standing to assert antitrust claims against that panel bank, see *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *52-53, 2016 WL 7378980, at *16*.

[161] No amended complaint incorporating Bucks County's claims against RBC has yet been filed.

[162] When we allowed Bucks County's substitution, we cautioned that the withdrawal of SEIU presented "a unique situation which required a departure from the Court's schedule in the interest of justice" and expressly reserved judgment on whether Bucks County is an adequate representative with typical claims. *Sept. 8, 2017 Order, 2017 U.S. Dist. LEXIS 155700, at *99, 2017 WL 4174925, at *1*. We initially dismissed Credit Suisse without prejudice, reasoning that "OTC plaintiffs may move to add a named plaintiff that transacted with Credit Suisse." Sept. 29, 2017 Order, at *slip op. at *1. But in the intervening six months, OTC plaintiffs have not moved to add a named plaintiff that transacted with Credit Suisse. Thus, no named plaintiff has Article III standing to sue Credit Suisse, and any attempt to add such a plaintiff (or a plaintiff who transacted with any panel bank not currently a defendant) at this juncture of the action would be untimely and unduly prejudicial as a matter of law. Cf. *Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993)* ("In determining what constitutes 'prejudice,' we consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [or] (ii) significantly delay the resolution of the dispute."). We therefore again dismiss Credit Suisse as a defendant, but with prejudice this time.

[163] We held fairness hearings on both of these settlements, (Oct. 23, 2017 Hr'g Tr., ECF No. 2344 (Barclays); Jan. 23, 2018 Hr'g Tr., ECF No. 2427 (Citi)), and deferred consideration of final approval until our resolution of these class certification motions.

[164] Though no longer a defendant following our personal jurisdiction rulings in LIBOR III and LIBOR VI, HSBC has also settled with the OTC plaintiffs. (Feb. 23, 2018 Motion, ECF No. 2442.)

In litigating class certification, the parties offer a significant amount of expert testimony. OTC plaintiffs **[**389]** offer one report from Dr. Joseph Stiglitz dated February 2, 2017 (Decl. of Michael Kelso ex. 1, May 10, 2017, ECF No. 1906) and two reports from Dr. B. Douglas Bernheim: (1) an initial report dated February 2, 2017 (Decl. of Michael Kelso ex. 2, May 10, 2017, ECF No. 1906); and (2) a rebuttal report dated May 9, 2017 (Decl. of Michael Kelso ex. 3, May 10, 2017, ECF No. 1906). We refer to these as the Stiglitz Report, the Bernheim Initial Report, and the Bernheim Rebutal Report, respectively. OTC defendants offer one report from Dr. Robert Willig dated April 3, 2017 (Decl. of Jamie Heine ex. 1, July 1, 2017, ECF No. 2031), and two expert reports from Dr. Janusz Ordover: (1) an initial report dated April 21, 2017 (Decl. of Abram Ellis ex. 1, July 3, 2017, ECF No. 2033); and (2) a sur-rebuttal report dated July 3, 2017 (Decl. of Abram Ellis ex. 2, July 3, 2017, ECF No. 2033). We refer to these as the Willig report, the Ordover Initial Report, and the Ordover Rebuttal Report, respectively. Only one Daubert motion, against Dr. Stiglitz, was filed in this action.

Dr. Stiglitz[165] offers a number of opinions in his report, identifying the "important economic features of the LIBOR process" (Stiglitz **[**390]** Report ¶¶ 13-17); discussing the "importance of LIBOR in financial markets" (Stiglitz Report ¶¶ 18-24); addressing the relationship between "LIBOR and competition in financial markets" (Stiglitz Report ¶¶ 25-43); concluding that "LIBOR submitters have economic incentives to collude" (Stiglitz Report ¶¶ 44-51); and finally opining that "LIBOR contributors' actions were inconsistent with non-collusive independent behavior" (Stiglitz Report ¶¶ 52-59). In addition, Dr. Stiglitz opines that all of his analysis and the evidence on which he relies "are common to all plaintiffs and class members described in Plaintiffs' Compliant [sic]." (Stiglitz Report ¶ 61.) Despite these broad headings, Dr. Stiglitz's opinions defy easy categorization. Accordingly, rather than parse through Dr. Stiglitz's report paragraph by paragraph in order to salvage the admissible portions, cf. *In re Pfizer, 819 F.3d at 665*, we set forth several principles governing the admissibility of Dr. Stiglitz's opinions.[166]

Dr. Stiglitz offers a number of opinions that collusion in LIBOR resulted in the distortion of capital markets and impeded effective regulatory oversight. (E.g., Stiglitz Report ¶ 28.) Because OTC plaintiffs have not seriously **[**391]** alleged that type of harm and do not claim damages based on this harm, Dr. Stiglitz's opinions to that effect are accordingly irrelevant and inadmissible. See *Raskin, 125 F.3d at 66 & n.5*. Additionally, Dr. Stiglitz offers several opinions based on alleged collusion in other financial indices, including foreign-currency LIBOR, Euribor, and ISDAFix. **[*584]** (E.g., Stiglitz Report ¶¶ 41-42.) These opinions are likewise irrelevant to the analysis of USD LIBOR, see *LIBOR IV, 2015 U.S. Dist. LEXIS 147561, at *201, 2015 WL 6243526, at *45*; cf. *Fed. R. Evid. 404(b)*, and are inadmissible, see *Nimely, 414 F.3d at 397*. Finally, Dr. Stiglitz may not offer opinions that purport to interpret documents like trader communications, government reports, and orders issued by regulatory authorities. (E.g., Stiglitz Report ¶¶ 52-59.) These opinions are not the product of Dr. Stiglitz's expertise, as the documents he purports to interpret are equally understandable by the trier of fact at this stage, and these opinions are therefore inadmissible.[167] See *Jiau, 734 F.3d at 154*.

OTC defendants' motion to exclude Dr. Stiglitz's opinion is therefore granted in part and denied in part. Dr. Stiglitz may not offer opinions relating to the distortion of capital markets, those relating to alleged collusion in indices other than USD LIBOR, and those purporting to interpret **[**392]** trader communications, government reports, and similar

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165 OTC defendants do not challenge Dr. Stiglitz's qualifications. We agree that he is qualified to offer the opinions presented in his report.

166 We also note, as a threshold matter, the limited relevance of Dr. Stiglitz's opinions at the class certification stage. The vast majority of Dr. Stiglitz's opinions consider whether the defendants could have engaged, and did engage, in collusion, with his opinions that the evidence necessary to prove such collusion is common and class-wide seemingly appended as an afterthought. As OTC plaintiffs themselves have reminded us, class certification is not an appropriate time for a full-on inquiry into the merits to the extent they do not overlap with *Rule 23*. See, e.g., *In re IPO, 471 F.3d at 41-42*. Nonetheless, because Dr. Stiglitz does opine that evidence of collusion will be common to all class members (e.g., Stiglitz Report ¶ 61), his report maintains some minimal relevance such that its wholesale exclusion is not warranted.

167 This conclusion is consistent with our holdings in the Exchange-based action, where we held that Exchange plaintiffs' experts Dr. Netz and Mr. Beevers may not offer opinions interpreting trader communications and other documents readily understandable by the trier of fact. See supra section III.1.2.1; section III.1.3.2.2.

documents. Additionally, based on OTC plaintiffs' concession that Dr. Stiglitz's opinions are limited and do not extend to "collusion's impact, its direction (suppression or inflation) or its magnitude," (OTC Pls.' Stiglitz Opp'n 11), Dr. Stiglitz may not opine on those subjects. The remainder of Dr. Stiglitz's opinions remain admissible, though their limited evidentiary basis will reduce the weight to which his opinions might otherwise be entitled.

2. Class Certification

Turning to class certification, we first consider issues of standing before addressing the *Rule 23(a)* requirements and the predominance and superiority requirements of *Rule 23(b)(3)*.

2.1. Standing

Following SEIU's withdrawal, each remaining named plaintiff alleges that it purchased LIBOR-based interest-rate swaps from panel banks; none asserts that it purchased LIBOR-based bonds (including floating-rate notes) from any panel bank. (CTAC ¶¶ 12-16.) OTC defendants contend that the named plaintiffs therefore lack both Article III standing and class standing to assert claims on behalf of bondholders. (OTC Defs.' Class Opp'n 29-30; OTC Defs.' Suppl. Opp'n 5.) They rely heavily on Sonterra Capital **[**393]** Master Fund, Ltd. v. UBS AG, a case alleging manipulation of Yen LIBOR and the Tokyo Interbank Offered Rate, in which Judge Daniels concluded that interest-rate swaps and forward rate agreements (FRAs) were sufficiently different such that plaintiffs transacting only in swaps "could not have suffered any injury traceable to [FRAs] and lack [Article III] standing to bring these claims." *No. 15 Civ. 5844 (GBD), 2017 U.S. Dist. LEXIS 38252, 2017 WL 1091983, at *2 (S.D.N.Y. Mar. 10, 2017)*.

OTC plaintiffs respond that swaps and bonds are sufficiently similar such that they have both Article III and class standing. (OTC Pls.' Class Reply 28-30.) They rely heavily on Sullivan v. Barclays Plc, a case alleging manipulation of Euribor, in which Judge Castel concluded that interest-rate swaps and forward rate agreements were sufficiently similar such that named plaintiffs transacting only in swaps had standing to represent absent class members transacting in FRAs, because "any harm suffered by a party to an FRA as a result of the Euribor's manipulation **[*585]** would have been caused by the identical misconduct of the identical parties." *No. 13 Civ. 2811 (PKC), 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *8 (S.D.N.Y. Feb. 21, 2017)*.

We are not entirely persuaded by OTC defendants' reliance on Sonterra. The Article III inquiry asks whether plaintiffs have suffered an injury-in-fact traceable to defendants' challenged behavior, **[**394]** not whether they have suffered a specific form of injury-in-fact. Injury suffered on swap purchases as a result of LIBOR suppression is not meaningfully different in the Article III context from injury suffered on bond purchases as a result of LIBOR suppression. Rather, named plaintiffs need only establish some injury from LIBOR manipulation, irrespective of the specific type of financial instrument on which that injury was incurred, to establish Article III standing; they have done so here. To the extent that differences between types of financial instruments raise "standing" considerations, they raise issues of class standing, not Article III standing.

To establish class standing to represent absent class members, a named plaintiff must "plausibly allege[] (1) that he personally has suffered some actual injury as a result of the putatively illegal conduct of the defendant, and (2) that such conduct implicates the same set of concerns as the conduct alleged to have caused injury to other members of the putative class by the same defendants." *RBPA, 775 F.3d at 161* (quoting *NECA, 693 F.3d at 162*). Consistent with our conclusion as to Article III standing, we first conclude that named plaintiffs have alleged that they have suffered **[**395]** actual injury on swaps purchased from panel banks as a result of defendants' alleged suppression of LIBOR during the class period. Second, we conclude that "such conduct" -- alleged LIBOR suppression during the class period -- is the same conduct that caused injury to absent class members purchasing bonds. Because the conduct in question is the same, NECA's second "same set of concerns" prong is satisfied. Accordingly, even though the named plaintiffs transacted only in swaps with panel banks, they nonetheless have class standing to represent absent class members transacting in bonds.

Despite this conclusion, we note that OTC plaintiffs' reliance on Sullivan is not entirely persuasive here. Interest-rate swaps and forward rate agreements are economically closer in nature than swaps and bonds. Compare *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *55-56, 2016 WL 7378980, at *19* ("An interest rate swap is an instrument in which 'two parties agree to exchange interest rate cash flows, based on a specified notional amount from a fixed rate to a floating rate (or vice-versa) or from one floating rate to another.'"), with *Sullivan, 2017 U.S. Dist. LEXIS 25756, 2017 WL 685570, at *7* ("In an FRA, the parties contract for payment at a settlement date, with the amount due based on the difference between an agreed-upon, fixed 'forward **[**396]** rate' and a fluctuating 'market rate' set by the Euribor."). Unlike these "highly negotiated" two-way transactions, bond purchases are "non-negotiated." *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *56, 2016 WL 7378980, at *18, *20*. But despite these difference in negotiability, we recognized that "[a]t bottom, swapholders are in a position similar to bondholders" with respect to LIBOR suppression, *2016 U.S. Dist. LEXIS 175929, at *58, [WL] at *20*; these differences therefore do not alter the ultimate outcome of the class standing analysis.

We conclude that differences between swaps and bonds do not, as a general matter, render the swap-only named plaintiffs lacking in class standing to assert claims on behalf of bond purchasers.

2.2. *Rule 23(a)*

Turning to the *Rule 23(a)* requirements, OTC defendants do not seriously dispute **[*586]** the requirements of numerosity or commonality.[168] We conclude that these requirements are satisfied: Dr. Bernheim's identification of thousands of swaps transactions into which Citi entered (Bernheim Initial Report ¶ 210), evidence that defendants do not challenge, is sufficient to establish numerosity. See *Pa. Pub. Sch. Emps., 772 F.3d at 120*.

As to commonality, we find that "the existence of a pricefixing conspiracy [is] susceptible to common proof" in this action. *Cordes & Co., 502 F.3d at 105*. The Second Circuit has held that a conspiracy to suppress LIBOR is in fact a horizontal **[**397]** pricefixing conspiracy, see *Gelboim, 823 F.3d at 771*, and we conclude that proof of the existence of the conspiracy will not differ from class member to class member. Each class member stands in the same position as to the conspiracy: receiving payments at an interest rate based on LIBOR. Though the actual impact that the conspiracy may have had may differ between class members, that variation does not render individual in nature the question of whether a conspiracy existed in the first instance. We conclude that the question of whether a conspiracy to suppress LIBOR existed is a common one, thereby satisfying *Rule 23(a)(2)*'s commonality requirement.

2.2.1. Typicality

OTC plaintiffs assert that their claims are typical of the class's claims, as all of the claims in question arise from the alleged suppression of LIBOR during the class period. (OTC Pls.' Class Mem. 16-17; OTC Pls.' Class Reply 28.) OTC defendants challenge specifically the typicality of Bucks County's claims based on a 2012 termination agreement between Bucks County and RBC, the panel bank with which Bucks County had transacted. (OTC Defs.' Suppl. Opp'n 2-5.) OTC defendants also challenge generally the typicality of the named plaintiffs' claims, contending **[**398]** that each named plaintiff is subject to the defense that it was not actually injured. (OTC Defs.' Class Opp'n 28.)

2.2.1.1 Bucks County

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[168] OTC defendants also do not contest the issue of ascertainability. Ascertainability "requires only that a class be defined using objective criteria that establish a membership with definite boundaries." *In re Petrobras, 862 F.3d at 264*. By setting forth specific transactions into which putative class members must have entered, the class definition satisfies this requirement.

OTC defendants contend that Bucks County is subject to a unique defense: in terminating its swap with RBC, Bucks County released the claims it now asserts. (OTC Defs.' Suppl. Opp'n 2-5.)

The swap between Bucks County and RBC, initiated in April 2005 and intended to run through June 2019, was supported by several underlying documents: an ISDA Master Agreement between RBC and Bucks County setting forth more general provisions, an accompanying "Schedule" setting forth certain of the swap's specific attributes, (Decl. of Brian Poronsky ex. B, Nov. 3, 2017, ECF No. 2340 ("Poronsky Bucks County Decl.")), and an additional confirmation setting forth further terms of the swap (Poronsky Bucks County Decl. ex. C.).

The swap was terminated in 2012, as reflected in a termination agreement between RBC and Bucks County. The Termination Agreement defined the "Transaction" to be "a transaction on 14 Apr 2005" with certain enumerated attributes,[169] and **[*587]** further provided that "[t]he Agreement shall remain in full force and effect and the parties agree that any existing and **[**399]** subsequent interest rate swap and currency exchange transactions together with confirmations exchanged between the parties confirming such transactions shall be governed by and form part of the Agreement." (Poronsky Bucks County Decl. ex. D.) Among other provisions, the Termination Agreement then provided that "[t]he Transaction shall be terminated and cancelled as of 14 Feb 2012 . . . and all rights, duties, claims and obligations of each of [RBC] and [Bucks County] thereunder shall be released and discharged on that date." (Poronsky Bucks County Decl. ex. D.)

OTC plaintiffs assert that the release does not extend to Bucks County's claims. Specifically as to the implied-covenant claim, OTC plaintiffs contend that despite the language of the termination agreement, Bucks County's claim is not released because the "Transaction" is defined separately from the ISDA Master Agreement. Under this theory, termination of the swap could not have affected Bucks County's claim arising from the ISDA Master Agreement, which remained in effect following the termination. (OTC Pls.' Suppl. Reply 3.)

This attempt to divorce the Transaction from the ISDA Master Agreement is unavailing. While OTC plaintiffs **[**400]** correctly assert that the ISDA Master Agreement "shall remain in full force and effect" under the Termination Agreement, this statement refers only to "any existing and subsequent interest rate swap and currency exchange transactions together with the confirmations exchanged between the parties confirming such transactions." (Poronsky Bucks County Decl. ex. D.) The ISDA Master Agreement and the confirmation documents supporting a transaction "form a single agreement between the parties" (Poronsky Bucks County Decl. ex. B ¶ 1(c)), a principle confirmed by the Termination Agreement's reference to the ISDA Master Agreement "together with confirmations exchanged between the parties," (Poronsky Bucks County Decl. ex. D 2). OTC plaintiffs' contention that their claim for breach of the implied covenant arises only out of the ISDA Master Agreement and not the contractual documents supporting the swap itself is unavailing, as nothing in the ISDA Master Agreement standing alone incorporates LIBOR or obligates RBC to pay interest to Bucks County at a rate determined with reference to LIBOR.

Further, the Termination Agreement refers to the "Transaction" and the parties' "rights, duties, claims **[**401]** and obligations . . . thereunder." (Poronsky Bucks County Decl. ex. D.) The "Transaction" is "evidenced by a Confirmation (as described in the [ISDA Master] Agreement)," but the Termination Agreement does not restrict the "Transaction" to refer only to the ISDA Master Agreement or the accompanying confirmations. Accordingly, "thereunder" refers to the "Transaction" itself and not merely the documents supporting and memorializing the "Transaction." Absent the swap -- the "Transaction" in question as defined in the Termination Agreement -- Bucks County would have no implied covenant claim against RBC at all. We conclude that Bucks County's implied covenant claim was released under the Termination Agreement.

As to unjust enrichment, OTC plaintiffs argue that their unjust enrichment claims are not asserted under any contract and **[*588]** therefore could not have been released under the Termination Agreement. OTC plaintiffs correctly recite our holdings in LIBOR II and LIBOR III, in which we determined that OTC plaintiffs' "unjust

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[169] The whereas clause in question recited, in full: "AND WHEREAS [RBC] and [Bucks County] entered into a transaction on 14 Apr 2005 (the 'Transaction') effective 18 Apr 2005 having a Notional Amount of USD 63,120,000.00 and a Termination date of 01 Jun 2019 such Transaction being evidenced by a Confirmation (as described in the Agreement) dated as of 14 Apr 2005." (Poronsky Bucks County Decl. ex. D.)

enrichment claims against counterparty banks are not barred by the existence of the contracts." LIBOR III, 27 F. Supp. 3d at 483-84. We reasoned that "[a]lthough the swap contracts clearly required defendants **[**402]** to pay plaintiffs the prescribed floating rate of return using the LIBOR reported by the BBA, the contracts did not clearly cover the subject matter now at issue, namely whether defendants were permitted to manipulate LIBOR itself and thereby depress the amount they were required to pay plaintiffs." LIBOR III, 27 F. Supp. 3d at 483 (alterations incorporated and internal quotation marks omitted) (quoting LIBOR II, 962 F. Supp. 2d at 630).

We are nonetheless unpersuaded that the extracontractual nature of an unjust enrichment claim implies that it was not released by the Termination Agreement. As we explained above in the implied covenant context, the Termination Agreement releases all claims arising under the "Transaction," which is defined to be the swap and includes more than simply the ISDA Master Agreement and accompanying confirmations. The operative question is not whether the unjust enrichment claim arises under the ISDA Master Agreement; it is whether it arises under the swap. We conclude that it does.[170]

In sum, we conclude that the release contained in the Termination Agreement extends to both Bucks County's implied covenant claim and its unjust enrichment claim.[171] While **HN72**[] "a representative may satisfy the typicality requirement even though that **[**403]** party may later be barred from recovery by a defense particular to him [or her] that would not impact other class members," Lapin, 254 F.R.D. at 179 (alteration in original) (quoting In re Frontier Ins. Grp., Inc. Sec. Litig., 172 F.R.D. 31, 41 (E.D.N.Y. 1997)), applying this principle here would be inappropriate. We allowed OTC plaintiffs to belatedly substitute Bucks County as a named plaintiff following the withdrawal of SEIU, see Sept. 8, 2017 Order, 2017 U.S. Dist. LEXIS 155700, 2017 WL 4174925, and Bucks County is the only plaintiff that transacted with RBC. Because Bucks County's presence is the only reason RBC remains as a defendant in this litigation, the unique defense that Bucks County released its claims nonetheless "threaten[s] to become the focus of the litigation" at this juncture. Baffa, 222 F.3d at 59.

Accordingly, we find that Bucks County's claims are not typical of the class's claims because it is subject to a unique defense: that it previously released its claims.[172] Because Bucks County is the **[*589]** only named plaintiff with standing to assert claims against RBC, no class will be certified against RBC even if the remaining Rule 23 requirements are met.

2.2.1.2. Lack of Injury

As to net injury, OTC defendants assert that each class representative is "subject to the unique defense that it suffered no injury," citing the "individualized, economically **[**404]** complex analysis required to evaluate injury." (OTC Defs.' Class Opp'n 28.) OTC Plaintiffs reply that because "netting and absorption apply to" all class members "and can be addressed with the same common formula," the defense is not "unique" and does not defeat typicality. (OTC Pls.' Class Reply 28.)

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[170] Additionally, OTC plaintiffs' argument here runs directly counter to their suggestion that their unjust-enrichment claims are subject to the choice-of-law provisions in the ISDA Master Agreement. Presumably, to the extent an extracontractual unjust enrichment claim is controlled by a contract's choice-of-law provision, it is similarly controlled by a release extinguishing claims arising under the same contract.

[171] Again, we need not have so concluded in order to find that Bucks County's claims are not typical of the class's claims. See, e.g., In re Digital Music, 321 F.R.D. at 97-98 ("[T]he defendant need not show at the certification stage that [a] unique defense will prevail." (second alteration in original) (quoting Lapin, 254 F.R.D. at 179)).

[172] Additionally, the Schedule to the ISDA Master Agreement provides that the parties submit to the "exclusive jurisdiction of the Courts of the Commonwealth of Pennsylvania and the United States District Court located in the Eastern District of Pennsylvania" as to "any suit, action or proceedings relating to this Agreement." (Poronsky Bucks County Decl. ex. B at 29.) This forum-selection clause would also appear to present an additional unique defense.

We find that, in this context, the named plaintiffs' purported lack of injury (unlike the release contained in the Bucks County termination agreement) is not a unique defense precluding a finding of typicality. See 1 William B. Rubenstein, Newberg on Class Actions § 3:45 (5th ed.) (Westlaw 2017) ("Courts generally find typicality lacking if the proposed class representative's claims are subject to a procedural bar such as res judicata or if the claims arose before the law on which the class claims are based came into effect."). Indeed, this argument is difficult to reconcile with OTC defendants' broader argument that many of the named plaintiffs and a substantial portion of absent class members were not injured. Accepting those arguments, the lack of injury would hardly be a "unique" defense.

"[A] purported representative who lacks standing is not a member of the putative class and thus cannot **[**405]** satisfy the typicality or adequate representation requirements," 1 McLaughlin on Class Actions § 4:18 (14th ed.) (Westlaw 2017) (emphasis added), but the named plaintiffs here do have standing. A lack of net injury does not compel a finding that the named plaintiff has failed to allege sufficient injury-in-fact for Article III standing purposes. See *Denney, 443 F.3d at 264*.

Rather, this typicality argument is largely a repackaging of the damages arguments that OTC defendants offer in the predominance context. Variation in the amount of damages by itself, of course, is not sufficient to defeat typicality. See 1 William B. Rubenstein, Newberg on Class Actions § 3:43 (5th ed.) (Westlaw 2017) ("Courts routinely find that the proposed class representative's claims are typical even if the amount of damages sought differ from those of the class or if there are differences among class members in the amount of damages each is claiming."); 1 McLaughlin on Class Actions § 4:19 (14th ed.) (Westlaw 2017) ("[T]he fact that damages will need to be calculated on an individual basis does not defeat typicality or otherwise bar class certification.").

2.2.1.3. Conclusion

We accordingly find that the named plaintiffs' claims -- with the exception **[**406]** of Bucks County's -- are typical of the class's claims and that *Rule 23(a)(3)*'s typicality requirement is satisfied. However, Bucks County's claims are not typical, and because Bucks County is the only named plaintiff that transacted with RBC, no class will be certified against RBC. Furthermore, OTC plaintiffs have never filed a complaint that includes Bucks County as a named plaintiff,[173] and doing so has been rendered unnecessary by our conclusions here as to the typicality of Bucks County's claims. RBC is dismissed, with prejudice, as a defendant in this action.

[*590] 2.2.2. Adequacy of Representation

Turning finally to adequacy of representation, OTC defendants contend that named plaintiffs are not adequate representatives because several of them "likely benefited from any persistent suppression" and because absorption of any LIBOR suppression into swap and bond transactions creates conflicting incentives to establish suppression based on the timing of class members' transactions. (OTC Defs.' Class Opp'n 28-29.) OTC plaintiffs respond that netting and absorption do not create significant conflicts because the Court will set, as a matter of law, the scope of any netting required and because any netting **[**407]** requirement can be implemented formulaically. (OTC Pls.' Class Reply 28.)

We find, as OTC defendants argue, that when the effects of absorption are taken into account, the damages attributable to different class members will be maximized by different amounts of suppression over time. That is, each class member has incentive to establish lower amounts of suppression at the time it entered into a swap and greater suppression thereafter, thereby minimizing the extent to which absorption will reduce its damages. To be sure, these incentives do create the potential for some conflict. However, we considered substantially similar arguments in the Exchange-based action and concluded as to the suppression-based class that conflicts created by

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[173] RBC also correctly points out that it has never had an opportunity to assert its defenses against Bucks County. (Letter from Brian Poronsky to the Court, Jan. 12, 2018, ECF No. 2402.)

differing incentives to establish the extent of suppression were not sufficiently fundamental so as to preclude a finding of adequacy. See supra section III.4.3.2. Unlike the trader-based class in the Exchange action, any diverging incentives within the putative OTC class (and within the proposed suppression class in the Exchange-based action) are necessarily limited by suppression's one-directional nature. Further, absorption is limited to swaps initiated **[**408]** during the suppression period. Accordingly, we again conclude that these conflicts, constrained as such, do not rise to the level of "fundamental" conflicts defeating adequacy. See *In re Payment Card Interchange Fee, 827 F.3d at 231*.

2.3. Predominance

In assessing predominance, we again begin with the elements of the OTC plaintiffs' claims. Because the issues raised by OTC plaintiffs' (federal) antitrust claims differ substantially from those raised by the state-law implied covenant and unjust enrichment claims, we analyze them separately.

2.3.1. Antitrust

HN73[] An antitrust claim has three elements: "(1) a violation of ***antitrust law***; (2) injury and causation; and (3) damages." *In re Visa Check, 280 F.3d at 136*. The second element has also been termed "antitrust injury" and "causation or impact." See *Cordes & Co., 502 F.3d at 105*. We analyze each, though we go out of order and consider damages before injury.

2.3.1.1. Violation of ***Antitrust Law***

As we have concluded, and as defendants do not substantially dispute, the existence of a conspiracy is a common question. See id. ("[Plaintiffs'] allegations of the existence of a price-fixing conspiracy are susceptible to common proof and, if proven true, would satisfy the first element of the plaintiffs' antitrust cause of action."); see also *In re Visa Check, 280 F.3d at 136*. Proof of a conspiracy **[**409]** to suppress LIBOR will be essentially the same for all class members, even if the conspiracy has ultimately differing impacts on different class members.

2.3.1.2. Damages

As we have consistently held, damages is an individualized question to some extent in every case, as the evidence **[*591]** needed to prove damages necessarily "varies from member to member." *Tyson Foods, 136 S. Ct. at 1045* (quoting 2 William B. Rubenstein, Newberg on Class Actions § 4:50 (5th ed. 2012)). Even when a common methodology or calculation may be applied, the evidence to which the methodology is applied or the calculation is based will generally vary from class member to class member. (Ordover Report ¶¶ 126-49.) Even assuming panel banks retained centralized records as to the swaps into which it entered (e.g., Bernheim Initial Report ¶ 210), the calculation of damages as to bonds will likely require individual records given their more actively traded nature; a class member cannot recover damages for reduced LIBOR-based interest payments if it had previously sold the underlying bond entitling the class member to those payments in the first place.

In addition to the individual question of exactly which LIBOR-based instruments a class member purchased from **[**410]** which panel bank, OTC defendants identify two additional individual issues: netting and absorption. By absorption, we mean specifically the principle we set forth in LIBOR VI that because parties "entering into a swap transaction . . . take into consideration the present level of LIBOR and their view of how LIBOR will change in the future," "the negotiated components [of a swap] absorbed the effects of LIBOR suppression" to some extent. *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *57, 2016 WL 7378980, at *20*.

We agree that any netting requirements will add individual issues. As we have explained, "a plaintiff both injured and enriched by illegal activity cannot choose to recover for his injuries yet retain his windfall" where "both result from a single wrong." *Minpeco, 676 F. Supp. at 488* (emphasis omitted) (citing *Abrahamson, 568 F.2d at 878*). We will require some degree of netting in order to calculate damages, and determining exactly what other LIBOR-based instruments a class member held will entail individual inquiry. For example, a class member that purchased a LIBOR-based swap from a panel bank, with the express purpose of eliminating all or part of its LIBOR exposure from other LIBOR-based financial instruments -- for example, its issuance of a LIBOR-based floating-rate note (Ordover Report ¶ 125 & tbl.27) **[**411]** -- would receive an unwarranted windfall if the LIBOR-based note were not considered. The determination of what instruments should be incorporated into the netting analysis will require extensive evidence that is specific to a given class member.

We also conclude that absorption, at least for swaps initiated during the suppression period, cannot be measured on a classwide basis given the negotiated nature of swaps. We acknowledge that plaintiffs' expert Dr. Bernheim and defendants' expert Dr. Ordover disagree on the issue. We find Dr. Ordover's opinions more compelling, given the variation in the fixed-rate components of swaps observed in the market -- including among swaps entered into by the named plaintiffs. (Ordover Initial Report ¶¶ 50-70.) We do not find that Dr. Bernheim's opinions fully support the proposition that the impact of absorption can be calculated formulaically for all class members with no class member-specific evidence required (Ordover Rebuttal Report ¶¶ 9-13), and Dr. Bernheim concludes only that the effects of absorption "should be similar across market participants," (Bernheim Rebuttal Report ¶ 296 (emphasis added)). Accordingly, we find that for swaps initiated **[**412]** during the suppression period, determining the fixed-rate component of the swap will require individual evidence. Our finding here comports with our earlier observation that "there is every expectation that the negotiated component compensated for manipulated LIBOR." **[*592]** *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *58, 2016 WL 7378980, at *20*; cf. *Gelboim, 823 F.3d at 780* ("The disputed transactions were done at rates that were negotiated.").

In sum, even to the extent that panel banks maintain centralized records of the swaps they issued, damages present an individual question that will require class member-specific evidence to analyze.

2.3.1.3. Antitrust Injury

HN74[] "[T]he second element of an antitrust cause of action -- 'antitrust injury' -- poses two distinct questions. One is the familiar factual question whether the plaintiff has indeed suffered harm, or 'injury-in-fact.' The other is the legal question whether any such injury is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Cordes & Co., 502 F.3d at 106* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. The Second Circuit has already answered the second question in the affirmative as to all class members. See *Gelboim, 823 F.3d at 772-75*. We accordingly focus on the first.

In disputing whether antitrust injury is susceptible to common proof, the **[**413]** parties dispute the proper definition of "injury" and the relationship between "injury" and "damages." OTC plaintiffs contend that "the law is clear that receiving at least one suppressed payment shows antitrust impact or injury from the conspiracy." (OTC Pls.' Class Reply 12.) They base this contention primarily on In re Nexium Antitrust Litigation, in which the First Circuit held that "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset" and that "if a class member is overcharged, there is an injury, even if that class member suffers no damages." *777 F.3d 9, 27 (1st Cir. 2015)*.

OTC defendants respond that determining injury entails "a complex analysis of the net impact of the alleged LIBOR suppression on each class member's LIBOR-linked portfolio" (OTC Defs.' Class Opp'n 12 (emphasis added).) -- that is, injury should be defined as having suffered damages greater than zero. They base this argument on our dismissal of Highlander Realty as a plaintiff for having failed to plead standing, *LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *52, 2015 WL 6696407, at *22-24*, and our reasoning that "the effect of a change in LIBOR cannot be isolated in the same way as the overcharge of a typical price-fixed product such as a book," *LIBOR VI, 2016 U.S. Dist. LEXIS 175929, at *53, 2016 WL 7378980, at *18*.

HN75[] The **[**414]** Second Circuit has held that antitrust injury and damages are related, but nonetheless distinct, concepts. As the Circuit has explained, "the injury-in-fact question" considers "whether a plaintiff was harmed," and "the damages question" considers "by how much a plaintiff was harmed." Cordes & Co., 502 F.3d at 107 n.11; see also In re Visa Check/MasterMoney Antitrust Litig., 192 F.R.D. 68, 82 (E.D.N.Y. 2000) ("The fact of injury, which is required as an element of the plaintiff's claim, should not be confused with the extent of injury (as reflected by the amount of damages)."), aff'd, 280 F.3d 124. Antitrust plaintiffs at class certification need not "demonstrate through common evidence the precise amount of damages incurred by each class member," but are expected to provide "common evidence to show all class members suffered some injury." Sykes, 780 F.3d at 82 (emphasis added) (quoting In re Rail Freight Fuel Surcharge Antitrust Litig., 725 F.3d 244, 252, 406 U.S. App. D.C. 371 (D.C. Cir. 2013)).

Both parties also rely on the Second Circuit's decision in Denney. The OTC defendants rely on Denney's statement that a **[*593]** class "must . . . be defined in such a way that anyone within it would have standing," 443 F.3d at 264, while OTC plaintiffs rely on its holding that "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing," id. at 265, which suggests that injury is distinct from net **[**415]** injury.

We are ultimately persuaded by neither interpretation of Denney. As to OTC defendants' interpretation, Denney's holding that a class must be defined to include only "injured" members refers to "injury" in the Article III context and not the antitrust context, and as we have pointed out, Denney sets a low bar for what injury-in-fact is required to establish Article III standing in the class-action context;[174] one underpayment as a result of LIBOR suppression is sufficient.[175] We are accordingly skeptical that Denney's Article III holding extends to the antitrust context.

But this same skepticism leads us to conclude that Denney's relaxed definition of "injury" does not bolster In re Nexium, which in effect defines (antitrust) "injury" in a way comparable to how Denney's defines (Article III) injury. Rather, Denney's statement that "an injury-in-fact need not be capable of sustaining a valid cause of action," 443 F.3d at 264, suggests that its interpretation of "injury" is specific to the Article III context and should not be generalized to every cause of action that requires "injury" as an element.

While these authorities guide our analysis, they do not squarely address **[**416]** the critical question: whether "injury" in the antitrust context may be established through a single overcharge or whether "injury" includes some conception of netting. We accordingly consider whether to apply In re Nexium's holding that an "antitrust injury occurs the moment the purchaser incurs an overcharge, whether or not that injury is later offset," 777 F.3d at 27, on its merits.

First and foremost, reduced payments on LIBOR-based instruments remain different from a series of purchases like the pharmaceuticals at issue in In re Nexium. Because LIBOR serves as a benchmark rate, a single pricing decision -- the setting of LIBOR on a given day -- necessarily diffuses to numerous instruments and impacts each of those instruments. By contrast, in a more conventional antitrust case, an inflated price impacts immediately only the sales

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[174] Accordingly, we would reject any suggestion that the proposed class presents Article III standing issues by encompassing class members that were, on net, not injured by LIBOR suppression.

[175] We previously dismissed named plaintiff Highlander Realty for lack of standing. LIBOR V, 2015 U.S. Dist. LEXIS 149629, at *108, 2015 WL 6696407, at *22-24. At the time of that decision, no antitrust claims remained pending against any defendant as a result of our decision in LIBOR I; our dismissal of Highlander "for lack of standing" necessarily refers to Highlander's Article III standing. Accordingly, OTC plaintiffs' suggestion that we "did not rule that Highlander lacked Article III standing or even address the issue," (OTC Pls.' Class Reply 15-16), is incorrect. OTC plaintiffs further suggest that this holding is "directly contrary to Denney's holding that an injury offset does not negate standing" (OTC Pls.' Class Reply 16), but this suggestion ignores the fact that Highlander never pleaded any injury at all: it alleged at the outset that it engaged in a single transaction under which it not only borrowed money from a panel bank affiliate (such that it paid interest at a LIBOR-based rate) but also eliminated any exposure to LIBOR through an interest-rate swap. (Highlander Compl. ¶¶ 6-7, No. 13 Civ. 2343, ECF No. 1.) Because Highlander failed to plead any exposure to LIBOR, it failed to plead any injury that could have been caused by LIBOR manipulation.

occurring at that price (or at prices based on that price); subsequent offsetting undercharges on subsequent **[*594]** purchases result from transactions occurring at a subsequently set price. That temporal component is absent here.

Second, as we observed in LIBOR VI, both bonds and swaps are subject to second-order effects that influence how LIBOR suppression impacts each class **[**417]** member. "[I]f LIBOR was suppressed at the time the bondholder purchased the bond, then both the expected future interest payments and the purchase price of the bond would have reflected that lower LIBOR level." *LIBOR VI, 2016 U.S. Dist. LEXIS 17592, at *53, 2016 WL 7378980, at *19*; see also *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541, at *15* ("[A] depressed LIBOR that caused expectations of future interest payments to decrease might result in lock-step reductions in the price of floating-rate instruments."). Similarly, "in entering into a swap transaction the parties take into consideration the present level of LIBOR and their view of how LIBOR will change in the future." *LIBOR VI, 2016 U.S. Dist. LEXIS 17592, at *57, 2016 WL 7378980, at *20*. While we cannot conclude from these effects that LIBOR suppression "could not have caused any losses" whatsoever, *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541, at *15* (emphasis added), they render this case meaningfully different from the prescription drug purchases considered in *In re Nexium*.

We also question the legal underpinnings of *In re Nexium*'s holding in question. In re Nexium cited two Supreme Court cases, *Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*, and *Adams v. Mills, 286 U.S. 397, 407, 52 S. Ct. 589, 76 L. Ed. 1184 (1932)*, see *In re Nexium, 777 F.3d at 27*, but we do not find In re Nexium's analysis of either case to be persuasive. Standard Oil considered whether antitrust injury suffered by the state of Hawaii as a consumer was properly offset by subsequent recoupment, reasoning that "damages are established by **[**418]** the amount of the overcharge" and that "courts will not go beyond the fact of this injury to determine whether the victim of the overcharge has partially recouped its loss in some other way, even though a State, for example, may ultimately recoup some part of the overcharge through increased taxes paid by the seller." *405 U.S. at 262 n.14* (emphasis added). We are skeptical that Standard Oil's exclusion of recoupment attributable to a distant second-order effect should extend to "later savings attributable to the same or related transaction," as the First Circuit reasoned, *777 F.3d at 27*.

Adams v. Mills, which considered damages under the Interstate Commerce Act incurred by livestock traders forced to pay extra unloading charges to a railyard operator, see *286 U.S. at 405-06*, is even further afield. There, the Supreme Court held that the third-party livestock shippers' reimbursement of the damaged traders was irrelevant to the defendant railyard operator's liability, reasoning that "the fact of subsequent reimbursement by the plaintiffs from funds of the shippers" was of no "concern to the wrongdoers." *Id. at 407*. Nothing in this holding suggests that it is translatable to the antitrust context or, for that matter, any claim involving a series **[**419]** of payments between the same parties rather than a third party.

In sum, we are skeptical of In re Nexium's holding that a single impacted payment is sufficient to establish antitrust injury, both as a general matter and as specifically applied to this action. Nonetheless, we need not squarely decide its applicability, as we conclude that the definition of injury does not ultimately alter the predominance balance.

On the one hand, accepting OTC plaintiffs' definition of injury, we conclude that they have established that the question of whether each class member has experienced **[*595]** injury as a result of the alleged 16-bank conspiracy is a common one. To show injury, OTC plaintiffs will need to offer classwide evidence that actual published LIBOR was suppressed (i.e., below but-for LIBOR). Regardless of whether this evidence consists of regressions that are capable of estimating but-for LIBOR over the class period in a few calculations (like those offered by Dr. Bernheim), or something more complex as Dr. Willig suggests is necessary, this evidence will nonetheless be classwide. OTC defendants' point that proof of the extent of suppression will differ across panel banks, tenors of LIBOR, and **[**420]** days is again well-taken, but these differences do not create individual questions because each putative class member is ultimately affected through published LIBOR.

On the other hand, if we accepted OTC defendants' definition, the element of "injury" would be an individual question, just as damages is an individual question, but it would be one that adds little to that side of the predominance balance. As counsel for the OTC defendants expressed at oral argument, "all that damages is in an antitrust case is the quantum of injury, not the fact of injury." (Hr'g Tr. 44:12-14.) Under OTC defendants' definition of injury, an assessment of whether a class member has been injured becomes an assessment of what amount of damages the class member has suffered and whether that amount of damages is greater than zero. The considerations that underlie this determination of "injury," including issues of absorption and netting, are otherwise identical to the determination of damages. Because any class member-specific question of fact relating to injury will be reducible to corresponding questions of fact relating to damages, and because those corresponding questions of fact are already taken into **[**421]** account as weighing against predominance in this action, those injury questions are of little marginal weight on the individual question side of the scale and do not tip the balance. That is, injury (as defined by OTC defendants) and damages would involve the same underlying (individual) questions of fact, and those same questions of fact should not be double-counted in the predominance inquiry simply because they bear on two closely related legal elements.

2.3.1.4. Conclusion

In sum, we conclude that common questions predominate as to OTC plaintiffs' antitrust claims. The only individual questions that OTC defendants have identified relate to damages -- or injury in a manner that essentially overlaps with damages, and "individualized damages determinations alone cannot preclude certification under *Rule 23(b)(3)*." *Roach, 778 F.3d at 409*.

2.3.2. State Law Claims

Because OTC plaintiffs' implied covenant and unjust enrichment claims are asserted under state law, we first conduct a choice-of-law analysis to determine "whether different state laws will apply to different members of the class," applying New York conflict-of-law principles. *Nextel, 780 F.3d at 140*. If certifying the proposed class would require the application of the laws of different **[**422]** jurisdictions, we consider whether variations in state law introduce individual questions and how those individual questions factor into the predominance analysis.

2.3.2.1. Implied Covenant of Good Faith and Fair Dealing

HN76[] Under New York law, the "'center of gravity' or 'grouping of contacts' [is] the appropriate analytical approach to choice of law questions in contract cases." *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317, 642 N.E.2d 1065, 618 N.Y.S.2d 609 (1994)*. "[I]n addition to the traditionally determinative choice of law factor of the place of contracting," four other factors are considered **[*596]** "in establishing this 'most significant relationship': the places of negotiation and performance; the location of the subject matter; and the domicile or place of business of the contracting parties." Id. (citing *Restatement (Second) of Conflict of Laws § 188(1)*). However, when a contract contains a choice-of-law provision, that provision "may reasonably be read as . . . a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply to disputes arising out of the contractual relationship." *Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466, 470, 25 N.Y.S.3d 21, 45 N.E.3d 917 (2015)* (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995)*). Indeed, "as a general rule, choice of law provisions are valid and enforceable in New York." *Terwilliger v. Terwilliger, 206 F.3d 240, 245 (2d Cir. 2000)* (alterations incorporated) (quoting *Marine Midland Bank, N.A. v. United Mo. Bank, N.A., 223 A.D.2d 119, 123, 643 N.Y.S.2d 528 (1st Dep't 1996))*.

Accordingly, for OTC plaintiffs' claims of breach of the implied **[**423]** covenant of good faith and fair dealing, each class member's claim will be governed by a contractual choice-of-law provision to the extent one exists.[176] See,

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[176] OTC defendants correctly note that "New York law allows a court to disregard the parties' choice when the most significant contacts with the matter in dispute are in another state." *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel, 346 F.3d 360, 365 (2d Cir. 2003)* (per curiam) (internal quotation marks omitted) (quoting *Cargill, Inc. v. Charles Kowsky Res., Inc., 949 F.2d 51, 55 (2d Cir. 1991))*; see also ***Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd., 230 F.3d 549, 556 (2d Cir.***

e.g., *ARS Kabirwala, LP v. El Paso Kabirwala Cayman Co., No. 16 Civ. 6430 (GHW), 2017 U.S. Dist. LEXIS 125389, 2017 WL 3396422, at *3 (S.D.N.Y. Aug. 8, 2017)* ("Choice-of-law provisions that govern a contract also govern related claims for breach of the implied covenant of good faith and fair dealing."); *Comprehensive Habilitation Servs., Inc. v. Commerce Funding Corp., No. 05 Civ. 9640 (PKL), 2009 U.S. Dist. LEXIS 30386, 2009 WL 935665, at *10 n.14 (S.D.N.Y. Apr. 7, 2009)* ("[B]reach of the implied covenant of good faith and fair dealing is a contractual cause of action, and the choice of law provision applies to the interpretation and enforcement of the contract."). In the absence of a governing choice-of-law provision, however, a class member's implied covenant claim will be governed by the law determined under the center of gravity analysis set forth by the New York Court of Appeals. See *Zurich Ins., 84 N.Y.2d at 317*.

OTC plaintiffs contend that the ISDA Master Agreements[177] underlying the **[*597]** swap transactions at issue contain a choice-of-law provision designating either New York law or English law, thereby obviating any class member-specific inquiry into governing law and limiting variation in the substantive law to be applied. (OTC Pls.' Class Reply 24-25.)

This argument misreads the standardized ISDA Master Agreement, which includes a choice-of-law **[**424]** provision that reads in full: "Governing Law. This Agreement will be governed by and construed in accordance with the law specified in the Schedule." (E.g., Porosnky Bucks County Decl. ex. B at 13.) Rather than designating either New York law or English law as OTC plaintiffs suggest, the ISDA Master Agreement designates governing law only with reference to a separate transaction-specific "Schedule."[178] Consideration of each individual schedule is therefore necessary.

The next provision in the ISDA Master Agreement does reference New York law and English law, but is itself not a choice-of-law provision. Titled "Jurisdiction," the provision states that each party "submits to the jurisdiction of the English courts, if this Agreement is expressed to be governed by English law, or to the non-exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City, if this Agreement is expressed to be governed by the laws of the State of New York." (E.g., Poronsky Bucks County Decl. ex. B. at 13 (emphasis added).) This provision suggests that many parties will in fact designate English law or New York law as controlling, but **[**425]** it is not itself a choice-of-law provision.

2000) ("Absent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction." (emphasis added)). This inquiry closely resembles the center-of-gravity analysis conducted in the absence of a choice-of-law provision, with "[f]actors potentially relevant to the existence of sufficient contacts include '(1) the place of contracting; (2) the place of contract negotiation; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile[s] of the contracting parties.'" *McPhee v. Gen. Elec. Int'l, Inc., 736 F. Supp. 2d 676, 680 (S.D.N.Y. 2010)* (quoting *Sabella v. Scantek Med., Inc., No. 08 Civ. 453 (CM), 2009 U.S. Dist. LEXIS 88170, 2009 WL 3233703, at *12 (S.D.N.Y. Sept. 21, 2009))*, aff'd, *426 F. App'x 33 (2d Cir. 2011)*. However, in light of the New York Court of Appeals's admonition that "New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract," *Ministers & Missionaries, 26 N.Y.3d at 474*, we question whether we should continue to analyze sufficient contacts and will decline to set aside an otherwise valid choice-of-law provision based on a lack of sufficient contacts.

[177] The ISDA Master Agreement is a contract template published by the International Swaps and Derivatives Association, which, once adopted by the parties to a given transaction, "governs the legal and credit relationship between the parties and other aspects of the agreement." *Aon Fin. Prods., Inc. v. Societe Generale, 476 F.3d 90, 93 n.4 (2d Cir. 2007)*. "Supplemental documents, such as confirmations, set forth economic terms and other transaction-specific modifications to the Master Agreement and other standard documents." Id. The ISDA Master Agreement "serves as the contractual foundation for more than 90% of derivatives transactions globally." *Lehman Bros. Special Fin. Inc. v. Bank of Am. Nat'l Ass'n (In re Lehman Bros. Holdings Inc.), 553 B.R. 476, 484 n.21 (Bankr. S.D.N.Y. 2016)*.

[178] *Aon Financial Products, 476 F.3d at 90*, and *In re Lehman, 553 B.R. 476*, each reference the ISDA Master Agreement, but do not discuss the ISDA Master Agreement's treatment of choice-of-law issues. Similarly, while ISDA's amicus brief in Aon states that "[i]n choosing New York law to govern their CDSs, market participants reasonably expect that courts in this jurisdiction will effectuate their contractual intent as expressed within the four corners of each CDS," Brief 11-12, Aon, No. 06-1080-cv, 2006 WL 1517230 (May 8, 2006), this statement describes only the expectations of market participants who in fact select New York law and indicates little about the frequency with which market participants do so.

In short, we find that the ISDA Master Agreement does not mandate that all, or even most, of the contracts underlying swaps will be analyzed under New York law. Rather, choice-of-law would appear to raise an individual question, in that the governing law will vary from class member to class member based on the law designated in the transaction-specific schedules attached to the each ISDA Master Agreement.

After oral argument, at which we identified OTC plaintiffs' failure to properly interpret the ISDA Master Agreement (Hr'g Tr. 47:23-48:10), OTC plaintiffs submitted supplemental materials supporting the contention that the ISDA Master Agreements controlling each of the named plaintiffs' transactions of LIBOR-based instruments designated New York law as governing. (Letter from William Carmody to the Court, Jan. 25, 2018, ECF No. 2414; **[*598]** Decl. of Geng Chen, Jan. 25, 2018, ECF No. 2415 ("Chen Decl.").) OTC defendants responded to this submission, identifying an ISDA Master Agreement governing certain transactions by named plaintiff Yale University that designated English law rather than New York law. (Letter from Abram Ellis to the Court, Feb. **[**426]** 1, 2018, ECF No. 2419; Decl. of Abram Ellis, Feb. 1, 2018, ECF No. 2420.) OTC plaintiffs responded that the Yale ISDA Master Agreement designating English law did not apply to any of Yale's LIBOR-based instruments. (Letter from William Carmody to the Court, Feb. 13, 2018, ECF No. 2424.)

Accepting this latter representation, the proposition that each of the ISDA Master Agreements underlying the named plaintiffs' LIBOR-based transactions with panel banks designated New York law as the substantive law to be applied is a correct one. But this fact hardly establishes that all of the class's ISDA Master Agreements so designated (or at least a sufficiently overwhelming percentage such that variations in controlling law do not pose predominance issues). Rather, Yale's English law ISDA Master Agreement -- even if did not ultimately support any of Yale's LIBOR-based transactions -- suggests that the designation of non-New York law in an ISDA Master Agreement is hardly hypothetical. Certain other named plaintiffs' designation of non-New York law -- even if limited to certain issues of law -- corroborates OTC defendants' suggestion that not all ISDA Master Agreements designate only New York law. **[**427]** Taken together, we find that this evidence is sufficient to suggest that for the class as a whole -- the inquiry of relevance here -- not all class members will have ISDA Master Agreements designating only New York law. In the absence of definitive evidence to the contrary, examples in the record of ISDA Master Agreements designating non-New York law render OTC defendants' argument here easily distinguishable from the "bald speculation" rejected by the Second Circuit in In re U.S. Foodservice, see *729 F.3d at 122*. OTC plaintiffs have not established that all ISDA Master Agreements designate New York law; any requirement that OTC defendants more actively disprove the proposition that New York law controls all ISDA Master Agreements would improperly invert the burden of proof.

Further, in focusing on whether the ISDA Master Agreements governing the LIBOR-based swaps have designated New York law, OTC plaintiffs have not addressed the choice-of-law issues relating to bonds, which remain equally relevant to the proposed class. Specifically, while ISDA Master Agreements govern swaps, no evidence in the record suggests that ISDA Master Agreements also govern bonds.[179] Rather, the structure and terms of the **[**428]** ISDA Master Agreement contemplate an ongoing relationship between two specified parties, which is applicable in the swap context but is incongruent with the more retail nature of bond issuances.[180] For example, provisions referring to the netting of payments have little bearing in this context: after the bond is initially purchased, payments are made only by the bond issuer to the bondholder. Similarly, provisions referring to default by either party (ISDA Master Agreement ¶ 5) are inapplicable in the context of a bond issuance, where the obligations flow only from **[*599]** the bond issuer to the bondholder; the concept of "default" by a bondholder in this context is nonsensical. In sum, the extensive references of this type to mutual obligations suggest that the ISDA Master Agreements apply in the swap context but not the bond context. OTC plaintiffs have offered no evidence that all (or even most) LIBOR-based bonds were governed by New York law, under an ISDA Master Agreement or otherwise.

In sum, we find that while ISDA Master Agreements control the vast majority of swaps, they do not uniformly designate only New York law as controlling. Further, based on our reading of the ISDA Master Agreement **[**429]**

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[179] There is no evidence in the record pertaining to named plaintiffs who purchased LIBOR-based bonds from panel banks. This fact is perhaps unsurprising given that there are no named plaintiffs who so transacted.

[180] OTC plaintiffs also allege that floating-rate notes are not derivatives. (CTAC ¶ 43.)

and the absence of evidence relating specifically to bonds, we find that bonds encompassed within the proposed class definition are not governed by ISDA Master Agreements at all. Because ISDA Master Agreements apply to only a portion of the LIBOR-based instruments in the class, certification of the proposed class will likely require the application of the substantive laws of multiple jurisdictions to OTC plaintiffs' implied covenant claim. Variations in substantive law are therefore a relevant consideration, and we turn to that issue.

As OTC defendants correctly point out and other courts have identified, the scope of the implied covenant varies across states. See, e.g., *Lane v. Wells Fargo Bank, N.A., No. C 12-4026 WHA, 2013 U.S. Dist. LEXIS 87669, 2013 WL 3187410, at *4 (N.D. Cal. June 21, 2013)* ("Plaintiffs' submission fails to address significant differences in state law raised by defendant, including whether the standard for good faith is subjective or objective . . . ."); *Yarger v. ING Bank, FSB, 285 F.R.D. 308, 325 (D. Del. 2012)* ("The states' laws vary as to whether there is an intent element and, if so, what intent must be proven.").[181]

In response, OTC plaintiffs contend, citing the Second Circuit's holding in In re U.S. **[**430]** Foodservice that "state contract law defines breach consistently such that the question will usually be the same in all jurisdictions," *729 F.3d at 127*, that variations in the state substantive law of the implied covenant of good faith and fair dealing do not preclude class certification. We are unpersuaded that In re U.S. Foodservice's holding, made in the context of claims for breach of contracts involving the sale of goods subject to the Uniform Commercial Code, see id., applies to OTC plaintiffs' claims for breach of the implied covenant of good faith and fair dealing. Additionally, In re U.S. Foodservice considered only contract claims under U.S. law; the record here suggests that application of English law will be required at least as to some swaps held by some class members.[182]

Additionally, in moving for class certification, the plaintiffs in *In re U.S. Foodservice* actually conducted an analysis of variations in state law, see, e.g., id. ("[P]laintiffs' papers in support of their motion for class certification demonstrate that all the relevant jurisdictions have adopted *U.C.C. § 1-303*."). By contrast, OTC plaintiffs have simply rested on their contention that no analysis of state-by-state variations need be **[**431]** undertaken and have not addressed the implied covenant of good faith and fair dealing under English **[*600]** law (OTC Pls.' Class Reply 24-25). The differences in state substantive laws identified by defendants -- that the scope of the implied covenant varies substantively between states -- stand essentially unrebutted, and we accordingly conclude that OTC plaintiffs have not carried their burden of establishing that variations in controlling law do not defeat predominance.

2.3.2.2. Unjust Enrichment

We consider unjust enrichment separately, as ***HN77***[] "[u]nder New York law, the choice of law analysis is generally done separately for each claim and defense." *2002 Lawrence R. Buchalter Alaska Tr. v. Phila. Fin. Life Assur. Co. ("Buchalter Trust"), 96 F. Supp. 3d 182, 200 (S.D.N.Y. 2015)*. "Some controversy appears to exist as to whether a claim for unjust enrichment is governed by a contract's enforceable choice-of-law provision, or whether it is instead governed by the law of the state that New York's interest analysis yields, being a fundamentally non-contractual cause of action." *Id. at 233*. While "[i]n general, New York courts are reluctant 'to construe contractual choice-of-law clauses broadly to encompass extra-contractual causes of action,'" *Tropical Sails Corp. v. Yext, Inc., No. 14 Civ. 7582 (JFK), 2017 U.S. Dist. LEXIS 38913, 2017 WL 1048086, at *12 (S.D.N.Y. Mar. 17, 2017)* **[**432]** (quoting *Fin. One Pub. Co. Ltd. v. Lehman Bros. Special Fin., Inc., 414 F.3d 325, 334 (2d Cir. 2005))*, "the more an unjust enrichment claim relates to an enforceable contract, the more likely it is to be considered contractual in nature for the purposes of New York's choice-of-law analysis," *Buchalter Trust, 96 F. Supp. 3d at 234*.

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[181] OTC plaintiffs' reliance on Pinnacle Performance, which considered only implied covenant claims asserted under New York substantive law, see *2013 U.S. Dist. LEXIS 150259, 2013 WL 5658790, at *12*, for the proposition that a class may be certified on a claim for breach of the implied covenant is unpersuasive. Pinnacle Performance had no occasion to consider whether variations in controlling law impacted the predominance analysis.

[182] Of course, we know even less about the substantive law governing claims arising from class members' bond purchases.

In light of our rulings in LIBOR II and LIBOR III that "the [swap] contracts did not clearly cover the subject matter now at issue, namely whether defendants were permitted to manipulate LIBOR itself and thereby depress the amount they were required to pay plaintiffs," *LIBOR III, 27 F. Supp. 3d at 483* (alterations incorporated and internal quotation marks omitted) (quoting *LIBOR II, 962 F. Supp. 2d at 630*), we conclude that OTC plaintiffs' unjust enrichment claims sound more in tort than in contract. Indeed, as the Second Circuit held regarding unjust enrichment claims asserted by other plaintiffs who transacted directly with panel banks, such "unjust enrichment claims sound in fraud." *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541, at *18*. Accordingly, the unjust enrichment claims are not controlled by the choice-of-law provisions contained in the ISDA Master Agreement Schedules. See *Buchalter Trust, 96 F. Supp. 3d at 233-34*. Rather, under New York conflict-of-law principles, the "'interests analysis,' under which the law of the jurisdiction having the greatest interest in the litigation is applied," governs. *Curley, 153 F.3d at 12*. As with the fraud claims asserted in the Lender action, the law of the state in which the injury occurred applies under the interests analysis; each putative class member's unjust enrichment claim is subject to the state **[**433]** in which that class member has its principal place of business. See supra section IV.2.3.5.

This choice-of-law analysis notwithstanding, OTC plaintiffs contend that we should apply New York law because OTC defendants purportedly conceded the applicability of New York law to the unjust enrichment claims in an earlier memorandum of law. (OTC Pls.' Class Reply 26-27.) This argument, which relies on a memorandum of law filed in support of an earlier motion to dismiss, not only mischaracterizes that memorandum but also raises serious due process concerns.

In the memorandum in question, submitted in the course of briefing motions that we resolved in LIBOR III (Mem. of Law, Nov. 26, 2013, ECF No. 508 ("LIBOR III Defs.' Mem.")), OTC defendants argued that OTC plaintiffs had failed to **[*601]** state a claim under New York law. In so arguing, OTC defendants explained that "OTC Plaintiffs have not alleged that any other jurisdiction's law is applicable, and the Defendants therefore address the OTC Plaintiffs' unjust enrichment and breach of implied covenant of good faith and fair dealing claims under New York law only." (LIBOR III Defs.' Mem. at 1 n.3.) Indeed, OTC defendants expressly noted the possibility **[**434]** that "[o]ther arguments may be available under other states' laws." (LIBOR III Defs.' Mem. at 1 n.3.) Given OTC defendants' express contemplation that the substantive laws of other states may apply, OTC plaintiffs' characterization of these statements as a concession that New York law applies is not a fair one; rather, it is an utter distortion.

But even assuming that some concession binds OTC defendants to the application of New York law, cf. *Krumme v. WestPoint Stevens Inc., 238 F.3d 133, 138 (2d Cir. 2000)*, we are skeptical that any binding effect can permissibly extend to absent class members. Those class members may have an interest in applying the substantive law of other states, especially to the extent that other states' substantive laws of unjust enrichment are more favorable to them than New York's. Binding these absent class members to New York law on the basis of OTC defendants' concessions would not only come dangerously close to modifying those plaintiffs' substantive rights in violation of the *Rules Enabling Act*, cf. *Dukes, 564 U.S. at 367* ("[T]he *Rules Enabling Act* forbids interpreting *Rule 23* to 'abridge, enlarge or modify any substantive right.'" (quoting *28 U.S.C. § 2072(b)*)), but would also raise serious due process concerns as to those class members, cf. *In re Payment Card Interchange Fee, 827 F.3d at 231* ("Class actions and **[**435]** settlements that do not comply with . . . the *Due Process Clause* cannot be sustained."). These concerns cause us to roundly reject OTC plaintiffs' concession argument.

In sum, we conclude that each class member's unjust enrichment claims will be governed by the law of the state in which that class member has its principal place of business or resides, and proceed to consider whether variations in state law contribute individual issues.

Despite OTC plaintiffs' burden of showing that variations in state law do not present "insuperable obstacles" to class certification, *In re U.S. Foodservice, 729 F.3d at 127*, they have offered no analysis here beyond their contention that the ISDA Master Agreement causes New York law to be applied to all class members -- a contention that we reject for multiple reasons. Under such circumstances, courts have declined to certify a nationwide unjust enrichment class. See, e.g., *It's Just Lunch, 300 F.R.D. at 143* (concluding that common issues did not predominate because "[p]laintiffs have not acknowledged any of these variations in states' unjust enrichment laws"); see also *Kottler v. Deutsche Bank AG, No. 05 Civ. 7773 (PAC), 2010 U.S. Dist. LEXIS 30590, 2010 WL 1221809, at *4*

(S.D.N.Y. Mar. 29, 2010) (HN78[]) "[V]ariations in state law have generally precluded nationwide class certifications based on unjust enrichment theories.").

Rejection of nationwide unjust-enrichment classes **[**436]** is not a universal rule, and OTC plaintiffs correctly identify certain decisions that have certified nationwide unjust enrichment clases. See, e.g., Rapoport-Hecht v. Seventh Generation, Inc., No. 14 Civ. 9087 (KMK), 2017 U.S. Dist. LEXIS 218781, 2017 WL 5508915, at *3 (S.D.N.Y. Apr. 28, 2017).[183] **[*602]** In the face of this split of authority -- a split that the Second Circuit has not resolved -- we find more persuasive in this action the line of cases declining to certify a nationwide class. Coupled with OTC plaintiffs' lack of analysis as to variations in state law, cf. In re U.S. Foodservice, 729 F.3d at 127, we conclude that variations in state law warrant a finding of no predominance here. "As countless courts have found, 'the states' different approaches to, or elements of, unjust enrichment are significant.'" Rapp v. Green Tree Servicing, LLC, 302 F.R.D. 505, 513 (D. Minn. 2014) (collecting cases and noting that "state laws vary widely regarding how 'unjust' a defendant's conduct must be to give rise to a recovery on an unjust-enrichment claim"); see also 1 McLaughlin on Class Actions § 5:60 (14th ed.) (Westlaw 2017) ("Where certification of a multistate unjust enrichment class is sought, variations in state law also have precluded class certification based on unjust enrichment theories.").

2.3.2.1 Conclusion

Variations in substantive law defeat predominance for both the implied covenant claim and the unjust enrichment claim, **[**437]** though in slightly different ways. The implied covenant will require application of the law designated in transaction-specific ISDA Master Agreement Schedules, which do not uniformly designate New York law and may include English law.[184] The unjust enrichment claim will require application of the law of the state in which the class member resides or has a principal place of business, which under the class definition extends to all 50 states.

2.4 Modification of the Class Definition

In a submission made following oral argument, OTC plaintiffs suggest, for the first time in a serious manner, a modification of the class definition to limit the class to LIBOR-Based Instruments (as defined in the class definition) "that contained a contractual clause specifying that the contract is to be construed in accordance with the laws of the State of New York." (Letter from William Carmody to the Court, Jan. 25, 2018, ECF No. 2414.)[185]

We are strongly disinclined to consider this belated proposal for modification. OTC plaintiffs have had ample time to introduce into the record before us the evidence that they ultimately submitted post-argument, and they could have rigorously analyzed issues regarding variations **[**438]** in state law. Instead, they offered an argument that, at best, overreads the ISDA Master Agreement.

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[183] Rapoport-Hecht considered variations in state substantive law in the context of a settlement class, see 2017 U.S. Dist. LEXIS 218781, 2017 WL 5508915, at *3, where the analysis of predominance differs from that in the context of a litigation class. "In the context of a settlement class, concerns about whether individual issues would create 'intractable management problems' at trial" -- such as issues presented by variations in governing law -- "drop out of the predominance analysis because 'the proposal is that there be no trial.'" In re AIG, 689 F.3d at 240 (quoting Amchem, 521 U.S. at 620).

[184] Further, different transactions undertaken by the same class member may be subject to different substantive law, if those transactions occurred under different ISDA Master Agreements. The record establishes, at minimum, that the same named plaintiff incorporated differing choice-of-law provisions into different ISDA Master Agreement Schedules. (Chen Decl. 3-4.)

[185] OTC plaintiffs' reply brief, which rattled off in a footnote a series of possible modifications to the class definition (OTC Pls.' Class Reply 25 n.60), does not qualify as serious analysis of modification. The footnote in question also asserts that "the vast majority of the LIBOR-based instruments in the class . . . are governed by New York law" based on the ISDA Master Agreement, which, as we discuss above, is unsupported by the record as to swaps and is entirely unfounded as to bonds.

However, *HN79*[] *Rule 23(c)* contemplates that class certification is not a one-shot process, as "[a]n order that grants or denies class **[*603]** certification may be altered or amended before final judgment." *Fed. R. Civ. P. 23(c)(1)(C)*. Indeed, the Second Circuit has interpreted *Rule 23(c)(1)(C)* to "require[] courts to 'reassess . . . class rulings as the case develops.'" *Amara v. CIGNA Corp., 775 F.3d 510, 520 (2d Cir. 2014)* (omission in original) (quoting *Boucher v. Syracuse Univ., 164 F.3d 113, 118 (2d Cir. 1999))*. Though we are loathe to make class certification an iterative process and strongly believe that proponents of class certification should be diligent in establishing their compliance with class certification requirements the first time around, cf. *LIBOR II, 962 F. Supp. 2d at 626-27*,[186] we will nonetheless exercise our discretion and consider -- however reluctantly -- OTC plaintiffs' proposal that the class definition be modified to limit the class to instruments governed by contracts designating New York law.

2.4.1 Implied Covenant of Good Faith and Fair Dealing

2.4.1.1 Remaining Choice-of-Law Issues

Turning to the implied covenant claims, OTC defendants argue first that the inclusion of a criterion requiring a New York choice-of-law provision does not resolve the choice-of-law issues plaguing **[**439]** the unmodified class definition. (Letter from Abram Ellis to the Court, Feb. 1, 2018, ECF No. 2419.) Citing certain named plaintiffs' ISDA Master Agreements belatedly supplied by the OTC plaintiffs, OTC defendants contend that even among choice-of-law provisions designating New York law, some explicitly exclude New York choice-of-law rules whereas others are silent on the issue. For example, one of named plaintiff Baltimore's ISDA Master Agreement Schedules designates simply "the laws of the State of New York," (Chen Decl. ex. C at 19), whereas another one of Baltimore's ISDA Master Agreement Schedules designates "the laws of the State of New York, without reference to its choice of law doctrine," (Chen Decl. ex. E at 7). Accordingly, OTC defendants contend, New York choice-of-law provision notwithstanding, that the determination of what substantive law to apply will continue to introduce individual issues.

HN80[] New York law, however, appears to treat as identical a choice-of-law provision designating New York law exclusive of New York conflict-of-law principles and a choice-of-law provision designating New York law without such an exclusion. The New York Court of Appeals has addressed choice-of-law **[**440]** provisions and the impact of an express exclusion of New York conflict-of-law principles in two recent decisions, *IRB-Brasil Resseguros, S.A. v. Inepar Invs., S.A., 20 N.Y.3d 310, 982 N.E.2d 609, 958 N.Y.S.2d 689 (2012)*, and *Ministers & Missionaries Benefit Bd. v. Snow, 26 N.Y.3d 466, 25 N.Y.S.3d 21, 45 N.E.3d 917*. IRB considered "whether a conflict-of-laws analysis must be undertaken when there is an express choice of New York law in the contract pursuant to *General Obligations Law § 5-1401*."[187] *20 N.Y.3d at 312*. The main **[*604]** contract in question, a guarantee, provided that it would be "governed by, and . . . construed in accordance with, the laws of the State of New York," but did not contain an express exclusion of New York conflict-of-laws principles. *Id. at 313*. A companion agreement also contained a choice-of-law provision designating New York law, but that agreement did include an express exclusion of New York conflict-of-laws principles. See id. The Court of Appeals concluded that New York substantive law governed the guarantee and that "parties are not required to expressly exclude New York conflict-of-laws principles in their choice-of-law provision in order to avail themselves of New York substantive law," relying on both the

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[186] This principle should be especially applicable in a case such as this one, where we have issued opinions on substantive issues totaling more than 1000 pages and where certain class-certification concerns have been previously raised by the defendants, briefed by the parties, and addressed by the Court.

[187] *Section 5-1401* of the General Obligations Law provides that the parties to a contract "covering in the aggregate not less than two hundred fifty thousand dollars . . . may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state." *N.Y. Gen. Oblig. Law § 5-1401*. This provision does not "apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of ***section 1-105*** of the uniform commercial code." Id.

language of *section 5-1401* of the General Obligations Law and guidance from the Restatement (Second) of Conflict of Laws. *Id. at 315-16*.

Ministers & Missionaries considered a related question. The contracts **[**441]** at issue in that case, a retirement plan and a death benefit plan, each contained a choice-of-law provision designating New York law with no exclusion of New York conflict-of-laws principles. See *26 N.Y.3d at 468*. Because the contracts in question involved testamentary dispositions, they implicated *section 3-5.1(b)(2) of the New York Estates, Powers & Trusts Law*, which is itself a choice-of-law provision requiring that "[t]he intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death." *N.Y. Est. Powers & Trusts Law § 3-5.1(b)(2)*.

The Court of Appeals concluded that New York substantive law applied based on the contracts' choice-of-law provisions, even though *section 3-5.1(b)(2)* of the Estates, Powers & Trusts Law called for the application of the law of another jurisdiction. *Ministers & Missionaries, 26 N.Y.3d at 477*. Holding broadly that "New York courts should not engage in any conflicts analysis where the parties include a choice-of-law provision in their contract, even if the contract is one that does not fall within General Obligations Law *§ 5-1401*" (as the contract at issue in IRB did), the Court of Appeals reasoned that "logic dictates that, by including **[**442]** a choice-of-law provision in their contracts, the parties intended for only New York substantive law to apply." *Id. at 474-75*.

Taken together, *IRB* and *Ministers & Missionaries* mandate the rejection of OTC defendants' argument distinguishing choice-of-law provisions expressly excluding New York conflict-of-laws principles and those silent on the matter. New York substantive law applies regardless. Accordingly, in this case, an ISDA Master Agreement with a choice-of-law provision designating New York law -- regardless of whether that provision expressly excludes New York conflict-of-laws principles -- will implicate the implied covenant under New York law. No further choice-of-law analysis is needed.[188]

[*605] OTC defendants emphasize that an ISDA Master Agreement Schedule template recommends the inclusion of express language excluding New York conflict-of-laws principles within a choice-of-law provision, and contend that the contracting parties' deletion of such language suggests an intent that New York conflict-of-laws principles should apply. We are unpersuaded that such an inference is sufficient. Indeed, IRB considered two contracts with New York choice-of-law provisions, **[**443]** one with an express exclusion of New York conflict-of-laws principles and the other without. See *IRB, 20 N.Y.3d at 313*. The Court of Appeals did not find this difference to be significant; rather, it held that New York substantive law applied regardless. *Id. at 315*. The inference that OTC defendants seek to draw from the deletion of language expressly excluding New York conflict-of-laws principles from the schedule template is no stronger than any inference to be drawn from the two dissimilar contracts in IRB, and it is insufficient to escape the broad holdings of *IRB* and *Ministers & Missionaries*.

2.4.1.2. Application of New York Law

Accordingly, we analyze substantively the implied covenant under New York law. As we have previously summarized:

> ***HN82***[] Under New York law, "a covenant of good faith and fair dealing in the course of contract performance" is "[i]mplicit in all contracts." The implied covenant of good faith and fair dealing obligates a

[188] This application of IRB and Ministers & Missionaries is at least somewhat counterintuitive and renders superfluous contractual language in a choice-of-law provision expressly excluding New York conflict-of-law principles. Cf. *Lawyers' Fund for Client Prot. v. Bank Leumi Tr. Co. of N.Y., 94 N.Y.2d 398, 404, 727 N.E.2d 563, 706 N.Y.S.2d 66 (2000)* ("[The proposed] interpretation would render the second paragraph superfluous, a view unsupportable under standard principles of contract interpretation."). Nonetheless, ***HN81***[] we are bound to apply New York law as established by the New York Court of Appeals. See, e.g., *Tiber Holding Corp., 277 F.3d at 253* ("[We], sitting in diversity, must follow the holdings of the New York Court of Appeals.").

> promisor to fulfill "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" in the contract. Specifically, implied in every contract is a promise that "neither party shall do anything which will have the effect of **[**444]** destroying or injuring the right of the other party to receive the fruits of the contract."

LIBOR II, 962 F. Supp. 2d at 631-32 (quoting *Dalton v. Educ. Testing Serv., 87 N.Y.2d 384, 389, 663 N.E.2d 289, 639 N.Y.S.2d 977 (1995))*. "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" *Dalton, 87 N.Y.2d at 389* (quoting *Murphy v. Am. Home Prods. Corp., 58 N.Y.2d 293, 304, 448 N.E.2d 86, 461 N.Y.S.2d 232 (1983))*.

The relevant inquiry called for by the implied covenant is objective, not subjective: we consider "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Id. at 389* (emphasis added) (quoting *Rowe v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 62, 69, 385 N.E.2d 566, 412 N.Y.S.2d 827 (1978))*. We accordingly reject OTC defendants' argument that the class members' subjective understandings of LIBOR will introduce additional individual questions. (OTC Defs.' Class Opp'n 24-25.) Given the strictly objective nature of this aspect of the class's implied covenant claims, this consideration does not weigh on the individual question side of the scale.

However, we lack OTC plaintiffs' confidence that a similar analysis of the implied covenant can be applied to all of the LIBOR-based instruments specified in the class definition. Because the implied covenant is limited by the "other terms of the contractual relationship," *Dalton, 87 N.Y.2d at 389*, the underlying contract **[**445]** must **[*606]** be analyzed. In this case, while ISDA Master Agreements (and accompanying schedules) govern the vast majority of swap transactions covered by the class definition, no evidence exists in the record as to whether bonds are similarly governed. Rather, as we analyzed above, the structure and format of the ISDA Master Agreement strongly suggests that bonds generally are not governed by ISDA Master Agreements at all. Again, OTC plaintiffs have offered no evidence of contracts governing bonds and have offered no analysis of whether those contracts may differ between bond issuances (even if issued by the same panel bank). In the face of this evidentiary void, we are skeptical that common questions will predominate over individual ones in analyzing the covenant of good faith and fair dealing implied in the contracts at issue.

This skepticism is confirmed by several additional dimensions of variation even within ISDA Master Agreements: some contain arbitration clauses, as suggested by an ISDA publication that "provides guidance on the use of an arbitration clause with either the ISDA 2002 Master Agreement . . . or the ISDA 1992 Master Agreement . . . and includes a range of model arbitration **[**446]** clauses" (OTC Defs.' Class Opp'n 24 & n.19); some contain waivers of a right to trial by jury, as one of Jennie Stuart's and one of Baltimore's ISDA Master Agreements do (Chen Decl. ex. B at 36, ex. C at 21); and some designate exclusive jurisdiction in other forums, such as the designation of Maryland state court or federal court in the District of Maryland in two of Baltimore's ISDA Master Agreements (Chen Decl. ex. D sched. at 7, ex. E sched. at 7), and the designation of Pennsylvania state court or federal court in the Eastern District of Pennsylvania in Bucks County's ISDA Master Agreement (Poronsky Bucks County Decl. ex. B at 29). Each of these dimensions of variation raises individual issues bearing directly on the justiciability of a putative class member's claims in a class action before this Court.

2.4.2. Unjust Enrichment

Limiting the class to instruments with a choice-of-law provision designating New York law also does not salvage class treatment for OTC plaintiffs' unjust enrichment claims. Those claims do not arise under a contract in this case. See *LIBOR III, 27 F. Supp. 3d at 483*; *LIBOR II, 962 F. Supp. 2d at 630*; cf. *Schwab, 2018 U.S. App. LEXIS 4519, 2018 WL 1022541, at *18*. Accordingly, OTC plaintiffs' unjust enrichment claims are not subject to any choice-of-law provision that may be contained in the contract(s) **[**447]** underlying the transaction. Thus, the proposed modification would not ameliorate the predominance issues presented by variations in states' substantive laws of unjust enrichment.

2.4.3. Conclusion

Modification of the class definition in the manner proposed by OTC plaintiffs at the eleventh, or perhaps thirteenth, hour would not cure the deficiencies that we have previously identified. Common questions would not predominate OTC plaintiffs' implied covenant claims even when the individual issues raised by variations in state law are not weighed in the predominance analysis. OTC plaintiffs have not established that the contracts underlying the LIBOR-based instruments specified in the class definition are sufficiently similar in material respects, and the individual questions introduced by the variations within ISDA Master Agreements identified by the OTC defendants further weigh against predominance. Further, modification of the class definition would have no impact on the predominance analysis as to unjust enrichment, given that contractual choice-of-law provisions will not dictate the state substantive law under which the unjust enrichment claims will be analyzed.

[*607] 2.5. Superiority

Once **[**448]** again applying the *Rule 23(b)(3)* factors, we conclude that class action treatment would be superior as to OTC plaintiffs' antitrust claims, but not their state-law implied covenant and unjust enrichment claims.

As we have discussed in the context of the other putative class actions, class members lack a strong interest in individually controlling the prosecution of separate actions in the absence of serious conflicts between them, supporting a finding of superiority under *Rule 23(b)(3)(A)*. This action has progressed further than the other actions asserting similar claims, thereby supporting superiority under *Rule 23(b)(3)(B)*. The desirability of concentrating litigation in this forum for the reasons expressed by the JPML, see *In re LIBOR-Based Fin. Instruments Antitrust Litig., 802 F. Supp. 2d at 1381*, coupled with the absence of plaintiffs implicating "[c]oncerns about foreign recognition of our judgments," *In re Vivendi, 838 F.3d at 264*, also support a finding of superiority under *Rule 23(b)(3)(C)*.

The antitrust claims and the state-law claims differ, however, under the manageability factor of *Rule 23(b)(3)(D)*. As we have discussed, a nationwide class asserting state-law causes of action raises manageability concerns. See *In re U.S. Foodservice, 729 F.3d at 127*; see also 2 William B. Rubenstein, Newberg on Class Actions § 4:75 (5th ed.) (Westlaw 2017) (noting that in a nationwide class of state-law claims, **[**449]** "common issues may not predominate . . . and/or the case may be unmanageable and therefore not a superior method of litigation"). Further, OTC plaintiffs have not attempted to demonstrate the feasibility of ameliorative measures such as the certification of subclasses grouped to accommodate variations in state law. Accordingly, as to OTC plaintiffs' state-law claims, we conclude that class-action treatment would not be superior to the maintenance of individual actions based on our manageability concerns. By contrast, OTC plaintiffs' antitrust claims, asserted under federal law, raise no such concerns; we accordingly find that class-action treatment would be superior as to those claims.

2.6. Conclusion

OTC plaintiffs' motion for class certification is granted in part and denied in part. A class limited to OTC plaintiffs' antitrust claims against Bank of America and JPMorgan Chase (Count 1 of the Corrected Third Consolidated Amended Complaint) will be certified. As to those claims, we conclude that OTC plaintiffs have sufficiently established the requirements of *Rule 23*, including the requirement that common questions predominate over individual ones. The individual questions of damages identified **[**450]** by OTC defendants are insufficient to defeat predominance or, by extension, certification.[189]

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[189] Our decision to certify a class as to OTC plaintiffs' antitrust claims rests on the action in its current form, including on OTC plaintiffs' allegations of a sixteen-bank conspiracy to suppress LIBOR. To the extent subsequent developments in the case call into question those allegations or the other bases on which we rely, "[a]n order that grants or denies class certification may be

While we certify a class as to their antitrust claims, OTC plaintiffs have not established that common questions predominate as to their state-law claims for breach of the implied covenant of good faith and fair dealing and for unjust enrichment. Variations in the substantive law to be applied introduce individual questions defeating predominance and superiority for the class **[*608]** as initially proposed, and modification to limit the class to transactions including a New York choice-of-law provision would not tip the predominance balance as to these claims. Choice-of-law provisions do not govern OTC plaintiffs' unjust enrichment claims, and OTC plaintiffs have not established predominance in the analysis of their implied covenant claims given the variations in ISDA Master Agreements observed in the record and the lack of evidence as to LIBOR-based instruments not governed by ISDA Master Agreements.

For the foregoing reasons, a class is certified under *Rule 23(b)(3)*, defined as follows:

> All persons or entities residing in the United States that purchased, directly from a Panel Bank (or a Panel Bank's subsidiaries or **[**451]** affiliates), a LIBOR-Based Instrument that paid interest indexed to a U.S. dollar LIBOR rate set any time during the period August 2007 through August 2009 ("Class Period") regardless of when the LIBOR-Based Instrument was purchased.

The term "LIBOR-Based Instrument" is defined with reference to page 298 of this opinion, and certain individuals and entities are excluded from the class consistent with the exclusion set forth on page 298 of this opinion. Additionally, the Mayor and City Council of Baltimore, Maryland; the City of New Britain, Connecticut; Vistra Energy Corp.; Yale University; and Jennie Stuart Medical Center, Inc. are appointed as lead plaintiffs. Pursuant to *Rule 23(g)*, and consistent with our prior order appointing interim colead class counsel, see Dec. 22, 2011 Order, ECF No. 90, Susman Godfrey LLP and Hausfeld LLP are appointed as class counsel.

VI. INTERLOCUTORY APPEALABILITY

HN83[] Under *Rule 23(f) of the Federal Rules of Civil Procedure*, the Court of Appeals "may permit an appeal from an order granting or denying class-action certification." The Second Circuit has held that "[v]iews expressed by the district court at the time of class certification, although not required, would be relevant to our determination of whether interlocutory **[**452]** appeal is warranted." *In re Sumitomo Copper Litig., 262 F.3d 134, 140 (2d Cir. 2001)*. A party "seeking leave to appeal pursuant to *Rule 23(f)* must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." *Id. at 139*. "The first category comprises the socalled 'death knell' cases and their counterparts -- namely cases in which the class certification order effectively terminates the litigation either because the denial of certification makes the pursuit of individual claims prohibitively expensive or because the grant of certification forces the defendants to settle." *Id. at 138*. The second category requires a "novel legal question . . . of fundamental importance to the development of the law of class actions and . . . is likely to escape effective review after entry of final judgment." *Id. at 140*.

Accepting the Circuit's invitation to express our views as to the propriety of interlocutory review, we offer the following observations. First, all three groups of plaintiffs have been afforded more discovery than is typical at the class **[**453]** certification stage. The class certification schedule lasted for almost a year and a half (Letter to Counsel from the Court, Dec. 23, 2015, ECF No. 1268), and as counsel for OTC plaintiffs have summarized, the record in this case has included more than 1.1 million documents and 6000 audio files (Dec. 15, 2017 Motion, ECF No. 2386). As we recognized even before the class certification process began in earnest, plaintiffs **[*609]** have had access to the materials generated by "multiple government investigations, consent decrees, [and] trials" regarding LIBOR manipulation. (Dec. 16, 2015 Hr'g Tr. 21:1-2, ECF No. 1271.)

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altered or amended before final judgment," *Fed. R. Civ. P. 23(c)(1)(C)*, and we must "ensure continued compliance with *Rule 23*'s requirements," *Amara, 775 F.3d at 520*.

Thus, the record is well-developed, and this extensive record has been considered in reaching the certification decisions set forth above. The parties have had ample time to marshal the strongest evidence in support of or in opposition to class certification, and the time to supplement the record -- at least for class certification purposes -- has passed. A lingering possibility as to the existence of more documents or data, potentially relevant to the propriety of certification but undiscovered after more than six years of litigation, will not be sufficient to render our certification **[**454]** decisions "questionable."

Second, in resolving these motions, we have analyzed -- over the course of several hundred pages -- each of the class certification requirements as they pertain to the three proposed classes, even when doing so was not strictly necessary to reach a decision on the certification question itself. Issues of standing, the varying definitions of what constitutes "injury," and the applicability of the First Circuit's decision in In re Nexium in this circuit have presented some challenge, and further clarity on those issues may broadly be helpful. However, none of our holdings depends strictly on our analysis of an unsettled area of law; rather, they represent our application of well-settled principles of class certification law to a unique set of facts. Accordingly, we do not view class certification in this case as having presented any "novel legal question[s] . . . of fundamental importance to the development of the law of class actions" that are also "likely to escape effective review after entry of final judgment." *In re Sumitomo, 262 F.3d at 140*.

VII. CONCLUSION

In the Exchange-based action, Rabobank's motions to exclude the opinions of Dr. Seyhun and Mr. Miller are granted; Rabobank's motions **[**455]** to exclude the opinions of Dr. Netz and Mr. Beevers are granted in part and denied in part; and Exchange plaintiffs' motions to exclude certain of Dr. Culp's and Dr. Hubbard's opinions and to exclude all of Dr. Willig's opinions are denied. Exchange plaintiffs' motion for class certification is denied.

In the Lender action, Lender defendants' motion to exclude certain opinions of Dr. Webb's is granted; Berkshire's motion to exclude certain opinions of Dr. Willig's is denied. Berkshire's motion for class certification is denied.

In the OTC action, OTC defendants' motion to exclude Dr. Stiglitz's opinions is granted in part and denied in part. OTC plaintiffs' motion for class certification is also granted in part and denied in part, with a class certified only as to OTC plaintiffs' antitrust claims against Bank of America and JPMorgan Chase as set forth fully in Section V above.

This memorandum and order resolves the motions listed at docket entries 1885, 1887, 1904, 2011, 2018, 2021, 2053, 2055, 2057, 2059, 2067, 2069, and 2072.

SO ORDERED.

Dated: New York, New York

February 28, 2018

/s/ Naomi Reice Buchwald

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

Int'l Equip. Trading, Ltd. v. Illumina, Inc.

United States District Court for the Northern District of Illinois, Eastern Division

February 28, 2018, Decided; February 28, 2018, Filed

No. 17 C 5010

Reporter

312 F. Supp. 3d 725 *; 2018 U.S. Dist. LEXIS 32239 **; 2018-1 Trade Cas. (CCH) P80,295; 2018 WL 1087641

INTERNATIONAL EQUIPMENT TRADING, LTD., Plaintiff, v. ILLUMINA, INC., Defendant.

Subsequent History: Motion denied by *Int'l Equip. Trading, Ltd. v. Illumina, Inc., 2018 U.S. Dist. LEXIS 136718 (N.D. Ill., Aug. 14, 2018)*

Injunction granted at *Int'l Equip. Trading v. Illumina, Inc., 2019 U.S. Dist. LEXIS 201380 (N.D. Ill., Nov. 20, 2019)*

Core Terms

sequencing, motion to dismiss, alleges, amended complaint, customers, intentional interference, declaratory judgment, argues, site, license fee, software, antitrust, probability, market power, monopolization, monopoly, license, survive, Counts, pled, factual allegations, motion to strike, relevant market, Sherman Act, sales, anticompetitive, expectancy, potential customer, place of business, false statement

Counsel: **[**1]** For International Equipment Trading Ltd., an Illinois Corporation, Plaintiff, Counter Defendant: Howard L. Teplinsky, LEAD ATTORNEY, Katherine A. Grosh, Levin Ginsburg, Chicago, IL.

For Illumina, Inc., Defendant: Jacob D Koering, LEAD ATTORNEY, Miller, Canfield, Paddock and Stone, P.L.C., Chicago, IL; Anita F. Stork, Ashley M. Simonsen, PRO HAC VICE, Covington & Burling LLP, San Francisco, CA.

For Illumina, Inc., Counter Claimant: Anita F. Stork, Ashley M. Simonsen, Covington & Burling LLP, San Francisco, CA.

Judges: Honorable Marvin E. Aspen, United States District Judge.

Opinion by: Marvin E. Aspen

Opinion

[*728] MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

Plaintiff International Equipment Trading, Ltd. ("IET") alleges Defendant Illumina, Inc. ("Illumina") engaged in predatory and anticompetitive behavior that violated federal ***antitrust law*** and Illinois state law. (Am. Compl. (Dkt. No. 21) ¶ 1.) Presently before us are three pending motions. First, Illumina has filed a motion to dismiss IET's amended complaint in its entirety. (Pl's Mot. (Dkt. No. 23).) Second, IET has filed a motion to strike Illumina's affirmative defenses under *Federal Rule of Civil Procedure 12(f)*. (Pl.'s Mot. to Strike (Dkt. No. 27).) Third, Illumina filed a motion requesting **[**2]** we postpone briefing on IET's motion to strike pending our ruling on its **[*729]** motion to dismiss. (Def.'s Mot. to Postpone (Dkt. No. 30).) For the following reasons, we grant Illumina's motion to dismiss in part and deny in part, and dismiss Counts I through V without prejudice. We also deny Illumina's motion to postpone briefing on IET's motion to strike as moot, and order briefing on IET's motion to strike. Illumina may file a response to IET's motion to strike Illumina's affirmative defenses and IET's supporting brief on or before March 16, 2018, and IET may file a reply brief on or before March 30, 2018.

BACKGROUND

For the purposes of a motion to dismiss, "we accept the well-pleaded facts in the complaint as true." *McCauley v. City of Chi., 671 F.3d 611, 616 (7th Cir. 2011)*. IET, an Illinois corporation with its principal place of business in Vernon Hills, Illinois, sells and leases laboratory equipment to laboratories, hospitals, and research institutions across the United States and internationally. (Am. Compl. ¶¶ 2, 11.) As part of its business, IET sources various models of used or refurbished genome sequencing unit systems ("sequencing units") manufactured by Illumina. (*Id.* ¶¶ 2, 5.) Illumina manufactures "integrated systems" that "serve **[**3]** the sequencing, genotyping and gene expression markets" and sells its used sequencing units in competition with IET. (*Id.* ¶¶ 3-4.)

IET alleges that beginning in or around 2007, once Illumina learns of a possible sale or lease by IET of a refurbished Illumina sequencing unit, Illumina engages in "scare tactic[s] . . . intended to kill the sale or lease between the customer and IET " (*Id.* ¶ 7.) Specifically, IET alleges Illumina informs IET's potential customers that they must pay a significant "site licensing fee" for operation and data collection software needed to operate a used Illumina sequencing unit purchased from IET. (*Id.* ¶¶ 5-6.) IET claims Illumina has discretion in charging the fee, sometimes charges the fee for machines exempt from site licensing fees based on a preexisting contract, and only threatens the fee to interfere with sales from "third party resellers like IET." (*Id.* ¶¶ 7-8, 17-18.) IET further alleges Illumina refuses to service sequencing units purchased from IET when the purchasers do not pay Illumina the site licensing fee. (*Id.* ¶¶ 8, 18.) Based on these allegedly anti-competitive tactics, IET alleges Illumina "has unlawfully attempted to create a monopoly within **[**4]** the secondary sequencing unit market over [Illumina] sequencing units." (*Id.* ¶ 9.) As a result, IET has lost sales, including the sale of a HiSeq 4000 Illumina sequencing unit to the University of Central Florida. (*Id.* ¶ 19.)

IET's amended complaint alleges Illumina violated various antitrust laws, and asserts attempted monopolization claims under *Section 2* of the Sherman Act, *15 U.S.C. § 2* (Count I); *Sections 4* and *16* of the Clayton Act, *15 U.S.C. §§ 15(a)*, *26* (Count II); and the Illinois Antitrust Act ("IAA"), *740 ILCS 10/1 et seq.* (Count V). IET claims Illumina's "predatory and anticompetitive conduct" in charging site licensing fees has been an attempt to "drive IET and other third-party resellers from the . . . sequencing unit markets and thereby strengthen its dominant position within these markets." (*Id.* ¶ 29.)

IET's amended complaint also includes claims under the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/1 et seq*,. ("ICFA") (Count III) and Illinois Uniform Deceptive Trade Practices Act, *815 ILCS 510/2 et seq.*, ("UDTPA") (Count IV) based on Illumina's willful engagement in "deceptive trade practices" and "unfair conduct." (*Id.* ¶¶ 37-45.) IET additionally includes a claim for intentional interference with a prospective economic advantage ("intentional interference") **[**5]** (Count VI), alleging Illumina intentionally **[*730]** and maliciously interfered with customers with whom IET had a "reasonable expectancy of completing sales and/or leases of refurbished sequencing units." (*Id.* ¶¶ 49-51.) Finally, IET seeks a declaratory judgment pursuant to *28 U.S.C. § 2201(a)* declaring Illumina cannot legally charge or threaten to charge site licensing fees to IET customers who purchase used Illumina sequencing units. (*Id.* ¶¶ 52-59.)

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) governs Illumina's motion to dismiss. "The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits." *Gibson v. City of Chi., 910 F.2d 1510, 1520 (7th Cir. 1990)* (internal citation omitted). When considering a motion to dismiss under *Rule 12(b)(6)*, we accept as true all well-pleaded facts alleged in the complaint and view them in the light most favorable to the plaintiff. *Santiago v.*

Walls, 599 F.3d 749, 756 (7th Cir. 2010). While "detailed factual allegations" are not required to survive a motion to dismiss, the complaint must "state a claim [for] relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949-50, 173 L. Ed. 2d 868 (2009)* (internal quotation marks omitted) (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))*. The plausibility standard "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft, 556 U.S. at 678, 129 S. Ct. at 1949* (quoting *Twombly, 550 U.S. at 556, 127 S. Ct. at 1965*). While the plaintiff need not **[**6]** plead "detailed factual allegations," the complaint must allege facts sufficient "to raise a right to relief above the speculative level." *Twombly, 550 U.S. at 555, 127 S. Ct. at 1964-65*. However, to protect defendants from expensive discovery, "[i]n a complex antitrust . . . case a fuller set of factual allegations . . . may be necessary to show that the plaintiff's claim is not largely groundless." *Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 803 (7th Cir. 2008)* (internal citation omitted).

ANALYSIS

I. Attempted Monopolization Claims (Counts I, II, and V)

We first consider whether IET sufficiently pled its antitrust claims to survive a *Rule 12(b)(6)* motion to dismiss. Our analysis focuses on the requirements of the Sherman Act, as IET's Clayton Act and IAA claims "stand or fall with the Sherman Act Claim."[1] *Int'l Equip. Trading, Ltd. v. AB SCIEX LLC, No. 13 C 1129, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *3 n.3 (N.D. Ill. Aug. 29, 2013)*. To succeed in an attempted monopolization claim under *Section 2* of the Sherman Act, a plaintiff must prove a defendant (1) engaged in predatory or anticompetitive conduct, (2) specifically intended to acquire monopoly power, and (3) reached a stage based on defendant's actions and market position where there is a **[*731]** dangerous probability defendant will achieve an actual monopoly. *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 890-91, 122 L. Ed. 2d 247 (1993)*; *Attempted Monopolization*, Holmes & Mangiaracina, ***Antitrust Law*** Handbook § 3:6.

Illumina argues IET's antitrust claims must be dismissed **[**7]** 3 because IET failed to plead any non-conclusory facts to establish that Illumina has a dangerous probability of establishing monopoly power. (Def.'s Mem. in Support of Mot. to Dismiss ("Mem.") (Dkt. No. 24) at 15-17.) A dangerous probability of establishing a monopoly in a particular market requires more than allegations of merely "unfair or predatory conduct"; instead, "the antitrust plaintiff must also prove the defendant has market power in a relevant market" and that the "market power will tend to approach monopoly power if the alleged unlawful conduct remains unchecked." *Walter Kidde Portable Equip., Inc. v. Universal Sec. Instruments, Inc., 669 F. Supp. 2d 895, 900-01 (N.D. Ill. 2009)* (citing *Spectrum Sports, 506 U.S. at 457, 113 S. Ct. at 891*; *DSM Desotech Inc. v. 3D Sys. Corp., No. 08 C 1531, 2009 U.S. Dist. LEXIS 5980, 2009 WL 174989, at *7 (N.D. Ill., Jan. 26, 2009))*. Courts regularly find pleading the defendant's share of the relevant market sufficient to allege this element at the pleading stage. *Walter Kidde, 669 F. Supp. 2d at 901*; *see also* *Avnet, Inc. v. Motio, Inc., No. 12 C 2100, 2015 U.S. Dist. LEXIS 10799, 2015 WL 425442, at *6 (N.D. Ill. Jan. 30, 2015)* (finding an allegation that defendant controlled 95% of a market sufficient to survive a motion to dismiss); *Hon Hai Precision Indus. Co. v. Molex, Inc., No. 08 C 5582, 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *3 (N.D. Ill. Feb. 9, 2009)* (dismissing attempted monopolization claim under the Sherman Act for failure to plead dangerous probability of achieving a monopoly, noting that "the extent of [defendant's] worldwide share in the

[1] IET's Clayton Act claim depends on the survival of its Sherman Act claim because *Sections 4* and *16* of the Clayton Act merely establish a private right of action for any person injured by a violation of the Sherman Act. *15 U.S.C. § 15*; *see also* Am. Compl. ¶ 36 (incorporating the Sherman Act attempted monopolization claim into the Clayton Act claim). Furthermore, *Section 2* of the Sherman Act controls interpretation of the relevant section of the IAA. *See* *Nucap Indus., Inc. v. Robert Bosch LLC, 273 F. Supp. 3d 986, 1010 (N.D. Ill. 2017)* ("'Because *§ 3(3)* of the Illinois Antitrust Act was modeled upon *§ 2* of the Sherman Act, Illinois courts apply federal ***antitrust law*** to resolve questions arising under the state statutory provision,' so the *Rule 12(b)(6)* analysis of [the Illinois Antitrust Act claims] collapses into the question of whether Nucap has stated a claim under *§ 2* of the Sherman Act.") (internal citation omitted)).

relevant market . . . would allow the Court to infer that [defendant] threatens or even has the capacity to obtain monopoly power"). **[**8]** Lack of "competition in the relevant market" also suggests a dangerous probability of establishing a monopoly. *Hon Hai, 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *3*.

IET has failed plead the dangerous proximity of monopoly element of attempted monopolization because IET has not identified any facts that establish Illumina's market power in the relevant secondary market of refurbished Illumina sequencing units.[2] (Am. Compl. ¶¶ 14, 24.) The only non-conclusory facts in IET's amended complaint establishing Illumina's market control involve the market of new sequencing units: IET alleges "Illumina controls approximately 65% of the market for *new* sequencing units." (*Id.* ¶ 16 (emphasis added).) This information is irrelevant to IET's market control in the used Illumina sequencing unit market, a market IET itself argues is entirely distinct from the market for new Illumina sequencing units based on the "enormous price differential between new and used models." (*Id.* ¶ 14.) Furthermore, IET acknowledges the existence of a number of competitors in the used sequencing unit market, which in itself suggests Illumina does not have a dangerous proximity of monopoly power. (*Id.* ¶ 31 ("IET is one of fewer than five companies in the United States and Canada **[**9]** who sell Illumina's sequencing units in the secondary markets.")); *see, e.g., Hon Hai, 2009 U.S. Dist. LEXIS 9165, 2009 WL 310890, at *3*.

[*732] We cannot consider IET's remaining allegations about Illumina's market power in the relevant market as they are all conclusory. *McCauley, 671 F.3d at 616* ("[L]egal conclusions and conclusory allegations merely reciting the elements of the claim are not entitled to this presumption of truth. After excising the allegations not entitled to the presumption, we determine whether the remaining factual allegations 'plausibly suggest an entitlement to relief.'") (citing *Iqbal, 556 U.S. at 681, 129 S. Ct. at 1951*). In its amended complaint, IET repeats general statements about Illumina's market control that merely repeat the dangerous proximity element of attempted monopoly. For example, IET states "Illumina maintains substantial market power in the . . . secondary resale market of its own sequencing units." (Am. Compl. ¶ 31.) IET also argues that based on "Illumina's substantial position in the market for used Illumina sequencing units" and the "anticompetitive policies of its sales representatives . . . , a dangerous probability exists that its attempts to monopolize the secondary sequencing unit markets will succeed." (*Id.*) These "'naked assertions' devoid of 'further factual **[**10]** enhancement'" do not sufficiently establish an element of a claim to survive a *Rule 12(b)(6)* motion to dismiss. *Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949* (citing *Twombly, 550 U.S. at 555-57, 127 S. Ct. at 1955*); *see also GlobalTap LLC v. Smart Tap LLC, No. 13 C 5322, 2015 U.S. Dist. LEXIS 21687, 2015 WL 791256, at **5-6 (N.D. Ill. Feb. 24, 2015)* (finding plaintiff's "conclusory statements" like "[t]here is a dangerous probability that GlobalTap[] . . . will create market power in the relevant market" without "factual allegations to support these conclusions" insufficient to survive a motion to dismiss); *Mitsubishi Elec. Corp. v. IMS Tech., Inc., No. 96 C 499, 1997 U.S. Dist. LEXIS 15350, 1997 WL 630187, at *6 (N.D. Ill. Sept. 30, 1997)* ("Mitsubishi's conclusory allegation that Hurco is 'one of the largest producers' of CNC systems, and the mere recitation that defendants possess 'substantial market presence' are not enough to allege market power."). Without any specific factual allegations about Illumina's power in the relevant market, IET has failed to sufficiently allege dangerous probability, a requisite element of attempted monopoly under the Sherman Act.

Citing *Endsley v. City of Chi., 230 F.3d 276, 282 (7th Cir. 2000)*, IET argues market share, a factually intensive inquiry, is "best addressed on a motion for summary judgment or a trial" instead of a motion to dismiss. (Pl.'s Resp. to Mot. to Dismiss ("Resp.") (Dkt. No. 33) at 12.) However, dismissal of IET's antitrust claims is proper here because IET has failed to identify any non-conclusory facts about Illumina's dominance in the used **[**11]** sequencing unit market. *GlobalTap LLC, 2015 U.S. Dist. LEXIS 21687, 2015 WL 791256, at **5-6* (finding dismissal proper when plaintiff "does not provide any factual allegations to support [market power] conclusions" despite *Endsley*).

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[2] Illumina argues IET's proposed market of used Illumina sequencing units fails because IET did not allege facts establishing one of the "rare circumstances" needed to establish a single-brand product market. (Mem. at 12-14.) For the purposes of our analysis, we assume the validity of the market without deciding whether IET met its burden of establishing the existence of a single-brand market.

In light of IET's failure to adequately plead facts to support the requisite elements of attempted monopolization under the Sherman Act, we accordingly dismiss IET's antitrust claims (Counts I, II, and V) without prejudice for failure to state a claim under *Rule 12(b)(6)*.

II. ICFA and UDTPA Claims (Counts III & IV)

Illumina also moved to dismiss IET's claims under Illinois statutes: the ICFA and UDTPA. Because the same geographical issue determines the outcome of both ICFA and UDTPA claims, we analyze these claims together.

We must dismiss IET's ICFA and UDTPA claims because IET failed to plead the requisite nexus to Illinois. In 2005, the Illinois Supreme Court held that the ICFA does not "apply to fraudulent transactions which take place outside of Illinois" and **[*733]** does not have extraterritorial effect. *Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 185, 835 N.E.2d 801, 853, 296 Ill. Dec. 448 (Ill. 2005)*; *see also* *Crichton v. Golden Rule Ins. Co., 576 F.3d 392, 396 (7th Cir. 2009)* (noting *Avery* "severely limited the extraterritorial reach of the ICFA"). In recent years, this district has interpreted *Avery*'s geographic requirement to also apply to the UDTPA. *LG Elecs. U.S.A., Inc. v. Whirlpool Corp., 809 F. Supp. 2d 857, 859 (N.D. Ill. 2011)* ("The Court concludes that the rule in *Avery* **[**12]** applies to the IUDTPA."); *see also* *Underground Sols., Inc. v. Palermo, No. 13 C 8407, 2014 U.S. Dist. LEXIS 132441, 2014 WL 4703925, at *10 (N.D. Ill. Sept. 22, 2014)* (listing cases applying the reasoning in *Avery* to UDTPA claims).

To qualify as sufficiently "within Illinois" to bring a claim under the ICFA or UDTPA, a plaintiff must allege "circumstances that relate to the disputed transaction occur primarily and substantially in Illinois." *Avery, 216 Ill. 2d at 187, 835 N.E.2d at 853*. "[T]here is no single formula or bright-line test for determining whether a transaction occurs within [Illinois]"; instead, "each case must be decided on its own facts." *Id.* Factors the Illinois Supreme Court has considered include "(1) the claimant's residence; (2) the defendant's place of business; (3) the location of the relevant item that is the subject of the disputed transaction; (4) the location of the claimant's contacts with the defendant; (5) where the contracts at issue were executed; (6) the contract's choice of law provisions, if there are any; (7) where the allegedly deceptive statements were made; (8) where payments for services were to be sent; and (9) where complaints about the goods or services were to be directed." *Haught v. Motorola Mobility, Inc., No. 12 C 2515, 2012 U.S. Dist. LEXIS 119575, 2012 WL 3643831, at *3 (N.D. Ill. Aug. 23, 2012)*.

We agree with Illumina that IET failed to allege Illumina's actions occurred primarily and substantially in Illinois. Based on IET's amended complaint, the only tangible connection **[**13]** to Illinois is that IET's state of corporation and principal place of business is in Illinois. (Am. Compl. ¶ 11.) IET claims its sales of occur within the United States, "including the State of Illinois," but the only specific sale IET alleges it lost because of Illumina impacted a customer in Florida. (*Id.* ¶¶ 2, 19.) Illumina is allegedly a dual citizen of Delaware and California with its principal place of business being San Diego, California. (*Id.* ¶ 11.) IET's ties to Illinois do not sufficiently establish the requisite connection to Illinois when the allegedly illegal actions of a California-based company impacted potential customers outside of Illinois. *Super Pawn Jewelry & Loan, LLC v. Am. Envtl. Energy, Inc., No. 11 C 8894, 2013 U.S. Dist. LEXIS 45112, 2013 WL 1337303, at *7 (N.D. Ill. Mar. 29, 2013)* (finding no substantial connection when only connection to Illinois is plaintiff being an Illinois business); *Vulcan Golf, LLC v. Google Inc., 552 F. Supp. 2d 752, 775 (N.D. Ill. 2008)* (dismissing case when only contact with Illinois is plaintiffs' residence in Illinois); *Walker v. S.W.I.F.T. SCRL, 491 F. Supp. 2d 781, 795 (N.D. Ill. 2007)* (same, further relying on lack of defendant connections to or transactions in Illinois).

IET cites *AB SCIEX*, a similar case in which IET was also a plaintiff, to argue that its citizenship in Illinois sufficiently establishes a nexus to Illinois at the pleading stage. (Resp. at 18.) We find inapposite because IET's *AB SCIEX* ***[**14]*** complaint pled connections beyond IET's incorporation and principal place of business in Illinois: IET also specifically identified three allegedly lost customers located in Illinois. *AB SCIEXAB SCIEX, LLC, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *11* (summarizing that three out of nineteen named customers were in Illinois). In this case, IET does not name any lost customers in Illinois; the only lost customer is in Florida. Accordingly, **[*734]** we dismiss IET's ICFA and UDTPA claims because IET has not pled a sufficient nexus to Illinois. To the extent Illumina's challenged behavior is "centered outside Illinois," IET "must rely on some other state's law" if it raises these claims in a second amended complaint. *LG Elecs. U.S.A., Inc., 809 F. Supp. 2d at 861* (internal citation omitted).

III. Intentional Interference with a Prospective Economic Advantage (Count VI)

We now turn to IET's claim for intentional interference with a prospective economic advantage. As a federal court sitting in diversity over this common law claim, state substantive law controls our analysis. *Harper v. Vigilant Ins. Co., 433 F.3d 521, 525 (7th Cir. 2005)*. Neither party raised any choice of law issues regarding the intentional interference claim, so we apply the law of Illinois, the forum state. *Camp v. TNT Logistics Corp., 553 F.3d 502, 505 (7th Cir. 2009)* ("Because none of the parties raised the choice of law issue, we apply the substantive law of **[**15]** Illinois, the forum state.")

To state a claim for intentional interference with prospective economic advantage under Illinois law, a plaintiff must allege "(1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference." *Foster v. Principal Life Ins. Co., 806 F.3d 967, 971 (7th Cir. 2015)* (citing *Voyles v. Sandia Mortg. Co., 196 Ill. 2d 288, 300-01, 751 N.E.2d 1126, 1133, 256 Ill. Dec. 289 (Ill. 2001))*. "Actions that form the basis of a tortious interference claim must be directed at third-party business prospects." *F:A J Kikson v. Underwriters Labs., Inc., 492 F.3d 794, 800 (7th Cir. 2007)*.

Since we must accept all of IET's well-pleaded allegations as true when considering a motion to dismiss, we find that IET has plausibly pled the elements of an intentional interference at this stage. Illumina does not contest that IET adequately pled a reasonable expectancy of a business relationship, Illumina's knowledge of IET's expectancy, or damage to IET. (Mem. at 19.) Illumina argues, however, that IET has failed to plead that any interference with IET's prospective business relationships was unjustified. (*Id.*) While IET claims Illumina falsely told its customers it could **[**16]** charge a site relicensing fee, Illumina argues it had the right to impose site licensing fees under its sales contracts and did not otherwise engage in "predatory or anticompetitive conduct under the antitrust laws." (*Id.*, Resp. at 20.) For the purposes of a motion to dismiss, we construe the pleadings in the light most favorable to the plaintiff. *Santiago, 599 F.3d at 756*. As false statements to potential customers "do[] not constitute privileged lawful competition," we find IET has plausibly pled unjustified interference. *AB Sciex, 2013 U.S. Dist. LEXIS 123109, 2013 WL 4599903, at *11*; *see also* *Medscript Pharmacy, LLC v. My Script, LLC, 77 F. Supp. 3d 788, 796 (N.D. Ill. 2015)* ("[A] plaintiff's claim for tortious interference survives when his complaint alleges that defendants made false statements that caused plaintiff to lose potential customers.").

Illumina also argues we should dismiss this claim because IET did not plead the purportedly false statements with *Rule 9(b)* particularity. (Resp. at 19.) Indeed, *Rule 9(b)* heightened pleading requirements apply to intentional interference claims when the claim alleges the defendant engaged in "fraudulent conduct," including making false statements to **[*735]** potential customers. *Medscript, 77 F. Supp. 3d at 793*; *see also* *PharMerica Chi., Inc. v. Meisels, 772 F. Supp. 2d 938, 955 (N.D. Ill. 2011)*. While IET argues *Rule 9(b)* does not apply to this claim because "it does not sound in fraud" (Reply at 20, n.9), we agree with Illumina that *Rule 9(b)* applies **[**17]** because IET alleges Illumina misled potential IET customers by misrepresenting its ability to charge site licensing fees.[3] *See* *Medscript, 77 F. Supp. 3d at 793, 797* (finding plaintiff's claims required *Rule 9(b)* particularity because defendant allegedly made false statements to plaintiff's patients and prescribers).

Nonetheless, IET sufficiently pled the elements of intentional interference under the heightened *Rule 9(b)* pleading standard. *Fed. R. Civ. P. 9(b)* ("In alleging fraud or mistake, a party must state with particularity the circumstances

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[3] The parties attempt to litigate whether Illumina licensed or sold operating software in sales of new Illumina sequencing units. (*See* Mem. at 3-6; Resp. at 13-17.) As discussed below, because it is not proper to consider the merits of the underlying claim on a motion to dismiss, we do not rule on this fact-intensive dispute at this time. *See* *Gibson, 910 F.2d at 1520*.

constituting fraud or mistake."). Under *Rule 9(b)*, the complaint must contain "'the who, what, when, where, and how' of the fraudulent conduct," but need not contain "extreme specificity." *Medscript, 77 F. Supp. 3d at 793* (citing *DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990))*. In its amended complaint, IET claims Illumina contacted potential IET customers beginning in or around 2007 and informed these third parties that unless they purchased a used sequencing unit directly from Illumina, Illumina would demand a site licensing fee to operate the units' operating software. (Am. Compl. ¶ 5.) IET cites exact figures Illumina stated it would charge for specific Illumina sequencing unit models, and identifies with particularity the potential sale of a specific unit model to the University of Central **[**18]** Florida that allegedly fell through because of Illumina's fraudulent communications. (*Id.* ¶¶ 5, 19.) Considering these allegations, we find IET has pled with adequate particularity how and when Illumina allegedly interfered with IET's prospective sales or leases to provide notice to Illumina of the claims against it. *Vicom, Inc. v. Harbridge Merch. Servs, Inc., 20 F.3d 771, 777-78 (7th Cir. 1994)* (noting "fair notice" to defendants is "'[p]erhaps the most basic consideration' underlying *Rule 9(b)*") (citing 5A Wright &Miller, Fed. Prac. & Proc. Civ. § 1297 (3d ed.)); *see* *Swervo Entm't Grp., LLC v. Mensch, No. 16 C 4692, 2017 U.S. Dist. LEXIS 56351, 2017 WL 1355880, at *4 (N.D. Ill. Apr. 13, 2017)* (slip op.) (finding *Rule 9(b)* did not require pleading of defendant's exact location when she made alleged misrepresentations, and did not necessitate identifying specific individuals within an entity who engaged in communications); *Medscript, 77 F. Supp. 3d at 793, 796* (finding identification of plaintiff's customers as a group, without individually naming them, sufficient under *Rule 9(b)*). Accordingly, we find IET has sufficiently alleged its intentional interference claim and deny Illumina's motion to dismiss Count VI.

IV. Declaratory Judgment under *29 U.S.C. § 2201(a)* (Count VII)

Finally, we consider IET's motion for a declaratory judgment under the Declaratory Judgment Act, *28 U.S.C. § 2201(a)*. IET requests a declaration as to whether Illumina "may charge or threaten to charge a 'site licensing fee' **[**19]** to customers purchasing Illumina sequencing units from IET." (Am. Compl. ¶¶ 52-59.) Because of constitutional limits on the jurisdiction of federal courts, the Declaratory Judgment **[*736]** Act "allows federal courts, in their discretion, to render declaratory judgments only where there exists an 'actual controversy.'" *Trippe Mfg. Co. v. Am. Power Conversion Corp., 46 F.3d 624, 627 (7th Cir. 1995)* (citing *Crown Drug Co., Inc. v. Revlon, Inc., 703 F.2d 240, 243 (7th Cir. 1983))*. Accordingly, to survive a motion to dismiss, a complaint seeking declaratory relief "must allege facts sufficient to establish such an actual controversy." *Int'l Harvester Co. v. Deere & Co., 623 F.2d 1207, 1210 (7th Cir. 1980)*. Even if a court considers the declaratory action otherwise justiciable, it is within our discretion to decline to consider a declaratory judgment action. *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc., 819 F.2d 746, 747 (7th Cir. 1987)* ("It is well settled that the federal courts have discretion to decline to hear a declaratory judgment action, even though it is within their jurisdiction.").

Illumina argues we should dismiss the declaratory judgment claim because Illumina licenses instead of sells its operating software on new Illumina sequencing units, and thus had the legal right to charge site licensing fees to purchasers of its resold machines. (Mem. at 20.) Illumina argues the Software License Agreement attached to its motion to dismiss as Exhibit A makes incontrovertible that Illumina **[**20]** licensed the operating software on its sequencing units, that the first sale doctrine does not apply, and that Illumina accordingly could charge site licensing fees to customers purchasing Illumina sequencing units from IET. (*Id.* at 4-6.) We may consider documents attached to a motion to dismiss as "part of the pleadings" under *Federal Rule of Civil Procedure 10(c)* "if they are referred to in the plaintiff's complaint and are central to [its] claim." *McCready v. eBay, Inc., 453 F.3d 882, 891 (7th Cir. 2006)* (internal citation omitted). IET argues we should not consider the Software License Agreement filed by Illumina because Illumina has not established that this is the software contract referred to in its amended complaint. (Resp. at 16 n.16 (arguing that Illumina has not established that the attached Agreement "governs all of its sales, or even the transactions identified in IET's Amended Complaint," and should not be considered at this stage as part of the pleadings because IET did not refer to this contract in its amended complaint).)

Without ruling on whether the submitted Agreement governed the transactions at issue, we have concerns about the applicability of this contract to all of the transactions at issue in the amended complaint: while the amended complaint **[**21]** involves IET's sales of equipment starting in 2007, the Agreement itself was not copyrighted until 2013. (Mem. Ex. A at 2.) Even assuming arguendo the Agreement governed all Illumina sequencing units IET attempted to sell during the relevant period, we nevertheless find that the Agreement does not conclusively establish that Illumina licensed its software equipment. *See* *Vernor v. Autodesk, Inc., 621 F.3d 1102, 1109 (9th Cir. 2010)* (requiring consideration of a number of factors in a software transfer to determine whether a license or sale occurred, beyond "whether the agreement was labeled a license"). Furthermore, a factually-intense analysis of the terms of the transfer of Illumina's software at the original sale of its unit sequencing machines is not properly addressed on a motion to dismiss. *See, e.g.,* *Burroughs Payment Sys., Inc. v. Symco Grp., Inc., No. C 11 06268 JCS, 2012 U.S. Dist. LEXIS 67198, 2012 WL 1670163, at *9 (N.D. Cal. May 14, 2012)* (denying motion to dismiss based on whether a transfer of software granted license or ownership, stating the analysis is "more appropriately addressed at a later stage of the case, after the factual record has been developed"). Taking IET's allegations as true, we find IET sufficiently alleged an actual controversy to survive a motion to dismiss **[*737]** its intentional interference claim. **[**22]** *F. McConnell & Sons, Inc. v. Target Data Sys., Inc., 84 F. Supp. 2d 961, 974 (N.D. Ind. 1999)* ("The purpose of the motion to dismiss is to test the legal sufficiency of the complaint and not to decide the merits.").

Illumina also argues IET's declaratory judgment claim is needlessly redundant and thus should be dismissed. (Mem. at 20.) IET does not address Illumina's redundancy argument in its response. While district courts regularly decline jurisdiction over a declaratory judgment action when it "substantially overlaps with Plaintiff's substantive claims," we disagree that the legal issue on which IET seeks a judgment is redundant. *Cohn v. Guaranteed Rate Inc., 130 F. Supp. 3d 1198, 1205 (N.D. Ill. 2015)* (citing *Vill. of Sugar Grove v. F.D.I.C., No. 10 C 3562, 2011 U.S. Dist. LEXIS 98438, 2011 WL 3876935, at *9 (N.D. Ill. Sept. 1, 2011)* (listing cases)); *c.f.* *Amari v. Radio Spirits, Inc., 219 F. Supp. 2d 942, 944 (N.D. Ill. 2002)* ("All of the issues in the declaratory judgment claim will be resolved by the substantive action, so the declaratory judgment serves no useful purpose."). The only other claim that stands in light of this Order is the intentional interference claim; we have dismissed Counts I through V. Taking all inferences in favor of IET, the declaratory judgment claim may proceed because it is sufficiently different from IET's intentional interference claim. *C.f.* *Cohn, 130 F. Supp. 3d at 1205* (finding claim for a declaratory judgment that plaintiff was discharged without cause redundant to a breach of contract claim because the legal issue is the same **[**23]** in both counts). Accordingly, we deny Illumina's motion to dismiss Count VII.

CONCLUSION

For the aforementioned reasons, we grant Illumina's motion to dismiss in part and deny in part. We hereby dismiss without prejudice Counts I through V and deny Illumina's motion to dismiss Counts VI and VII.[4] IET is granted leave to file a second amended complaint on or before March 16, 2018.

In light of our ruling, we deny Illumina's motion to postpone briefing on IET's motion to strike as moot. Illumina may file a response to IET's motion to strike Illumina's affirmative defenses on or before March 16, 2018, and IET may file a reply brief on or before March 30, 2018. It is so ordered.

/s/ Marvin E. Aspen

Honorable Marvin E. Aspen

United States District Judge

Dated: February 28, 2018

Chicago, Illinois

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[4] Whether or not IET can adequately re-plead a federal antitrust claim, we retain jurisdiction over this case based on diversity jurisdiction pursuant to *28 U.S.C. § 1332*, as IET sufficiently pled diversity of citizenship and the amount in controversy in its amended complaint. (Am. Compl. ¶ 11).

End of Document

Cal. Ass'n of Realtors v. PDFfiller, Inc.

United States District Court for the District of Massachusetts

March 2, 2018, Decided; March 2, 2018, Filed

CIVIL ACTION NO. 16-11021-IT

Reporter
2018 U.S. Dist. LEXIS 45482 *

CALIFORNIA ASSOCIATION OF REALTORS, INC., Plaintiff and Counterclaim Defendant, v. PDFFILLER, INC., VADIM YASINOVSKY, and BORIS SHAKHNOVICH, Defendants.PDFFILLER, INC., Third-Party Plaintiff, v. CALIFORNIA ASSOCIATION OF REALTORS, INC., Plaintiff and Counterclaim Defendant, and REAL ESTATE BUSINESS SERVICES, INC. and RE FORMSNET, LLC d/b/a ZIPLOGIX, LLC, Third-Party Defendants.

Subsequent History: Adopted by, Motion denied by *Cal. Ass'n of Realtors v. PDFfiller, Inc., 2018 U.S. Dist. LEXIS 44674 (D. Mass., Mar. 19, 2018)*

Prior History: *Cal. Ass'n of Realtors, Inc. v. PDFfiller, Inc., 2017 U.S. Dist. LEXIS 35496 (D. Mass., Mar. 13, 2017)*

Core Terms

PDFfiller, Software, Parties, zipForm, website, users, products, tied product, documents, third-party, counterclaims, commerce, allegations, competitors, consumers, monopoly power, relevant market, interchangeability, monopolization, antitrust, zipLogix, cases, market power, license, markets, pleadings, fillable, edit, pled, real estate

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Judges: MARIANNE B. BOWLER, United States Magistrate Judge.

Opinion by: MARIANNE B. BOWLER

Opinion

REPORT AND RECOMMENDATION RE: COUNTERCLAIM-DEFENDANT CALIFORNIA ASSOCIATION OF REALTORS, INC.'S MOTION TO DISMISS AMENDED COUNTERCLAIMS AND AMENDED THIRD-PARTY COMPLAINT OF PDFFILLER, [*3] INC. (DOCKET ENTRY # 121); DEFENDANTS' PARTIAL MOTION FOR JUDGMENT ON THE PLEADINGS (DOCKET ENTRY # 141)

BOWLER, U.S.M.J.

In this action, plaintiff and counterclaim defendant California Association of Realtors, Inc. ("CAR") sued defendants PDFfiller, Inc., Vadim Yasinovsky, and Boris Shakhnovich ("defendants") for copyright infringement under *17 U.S.C. § 501(a)*, trademark infringement under *15 U.S.C. §§ 1125(a)(1)* and *1114(1)*, violation of the *Digital Millennium Copyright Act ("DMCA"), 17 U.S.C § 1201(a)*, and violation of *Massachusetts General Laws chapter 93A ("chapter 93A"), sections two* and *11* ("*section 11*"). CAR alleges that defendants reproduce and sell unauthorized copies of CAR's works. (Docket Entry # 1). The works at issue purportedly bear CAR's trade name and logo, which are registered trademarks belonging to CAR and copyrighted. (Docket Entry # 1).

Defendant and third-party plaintiff PDFfiller, Inc. ("PDFfiller") brought an amended third-party complaint ("the third-party complaint") for antitrust violations under the *Sherman Act, 15 U.S.C. § 2*, against third-party defendant Real Estate Business Services, Inc. ("REBS") and third-party defendant RE FormsNet, LLC d/b/a zipLogix TM ("zipLogix"). (Docket Entry # 101). PDFfiller also brought amended counterclaims ("the **[*4]** counterclaims") for similar antitrust violations under the Sherman Act, *15 U.S.C. § 2*, against CAR, REBS, and zipLogix ("the CAR Parties"). (Docket Entry # 100).

Pending before this court is a motion filed by the CAR Parties to dismiss the counterclaims (Docket Entry # 100) and the third-party complaint (Docket Entry # 101) pursuant to *Fed. R. Civ. P. 12(b)(6)* ("*Rule 12(b)(6)*"). (Docket Entry # 121). PDFfiller opposes the motion. (Docket Entry # 123).

Also pending before this court is a motion for judgment on the pleadings filed by defendants to dismiss with prejudice CAR's chapter 93A claim pursuant to *Fed. R. Civ. P 12(c)* ("*Rule 12(c)*"). (Docket Entry # 141). CAR opposes the motion. (Docket Entry # 153). After conducting a hearing on January 10, 2018, this court took the motions (Docket Entry ## 121, 141) under advisement.

PROCEDURAL HISTORY

The complaint filed by CAR sets out the following causes of action: (1) copyright infringement under the United States *Copyright Act, 17 U.S.C § 501(a)*; (2) trademark infringement under the *Lanham Act, 15 U.S.C § 1125(a)(1)*; (3) violation of the DMCA, *17 U.S.C § 1201(a)*; and (4) violation of *chapter 93A, sections two* and *11*. (Docket Entry # 1). In the counterclaims against the CAR Parties and the third-party complaint against REBS and zipLogix, PDFfiller alleges: (1) unlawful tying **[*5]** in violation of the Sherman Act, *15, U.S.C. § 2*; (2) monopolization in violation of the Sherman Act, 15 U.S.C. § 2; and (3) attempted monopolization in violation of the Sherman Act, 15 U.S.C. § 2. (Docket Entry ## 100, 101).

I. The CAR Parties' Rule 12(b)(6) Motion

As previously noted, the CAR parties move to dismiss PDFfiller's Sherman Act claims for unlawful tying, monopolization, or attempted monopolization. To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain 'enough facts to state a claim to relief that is plausible on its face'" even if actual proof of the facts is improbable. *Bell Atlantic v. Twombly, 550 U.S. 544, 556, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*; *Miller v. Town of Wenham Massachusetts, 833 F.3d 46, 51 (1st Cir. 2016)*. The "standard is 'not akin to a probability' requirement," but it requires "'more than a sheer possibility that a defendant has acted unlawfully.'" *Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016)*; *Feliciano-Hernández v. Pereira-Castillo, 663 F.3d 527, 533 (1st Cir. 2011)*. "[A]ll reasonable inferences" are drawn "in the pleader's favor." *Sanders v. Phoenix Ins. Co., 843 F.3d 37 (1st Cir. 2016)*. Legal conclusions in the complaint are not part of the Rule 12(b)(6) record. See *In re Ariad Pharmacy, Inc. Securities Litigation, 842 F.3d 744, 750 (1st Cir. 2016)*. Facts are confined to those in the counterclaims and the third-party complaint supplemented by matters of public record and facts susceptible to judicial notice. See *Butler v. Balolia, 736 F.3d 609, 611 (1st Cir. 2013)* (supplementing facts in complaint "by examining 'documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice'").

"[W]hile there are no special **[*6]** pleading requirements for antitrust claims . . . invocation of antitrust terms of art does not confer immunity from a motion to dismiss." *Boston Scientific Corp. v. Schneider (Europe) AG, 983 F.Supp. 245, 253 (D. Mass. 1997)*. That being said, "[i]n antitrust cases, 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" *In re Asacol Antitrust Litig., 233 F.Supp.3d 247, 254 (D. Mass. 2017)* (citing *Meijer, Inc. v. Ranbaxy Inc., Civil Action No. 15-11828-NMG, 2016 U.S. Dist. LEXIS 120780, 2016 WL 4697331, at *8 (D. Mass. Sept. 7, 2016))* (quoting *Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976))*.

FACTUAL BACKGROUND

PDFfiller is a Massachusetts corporation with a principal place of business in Massachusetts. (Docket Entry # 100, p. 23) (Docket Entry # 101, p. 3).[1] CAR is a "California not-for-profit trade association" and its principal place of business is located in California. (Docket Entry # 100, p. 23). REBS is a California corporation also with a principal place of business in California. (Docket Entry # 100, p. 23) (Docket Entry # 101, p. 3). REBS is a "wholly-owned for-profit subsidiary of CAR." (Docket Entry # 100, p. 23) (Docket Entry # 101, p. 4). [Z]ipLogix is a "Delaware limited liability company" and its principal place of business is located in Michigan. (Docket Entry # 100, p. 23) (Docket Entry # 101, p. 4).

PDFfiller provides a "paperless transaction management system through the PDFfiller Website" ("PTM"). **[*7]** (Docket Entry # 100, p. 23) (Docket Entry # 101, p. 2). The PTM system "allows users to fill, edit, and modify electronic fillable forms, including EFRE." (Docket Entry # 100, p. 23) (Docket Entry # 101, p. 2). CAR is a producer of electronic fillable real estate forms, and specifically produces EFREs "for use in California."[2] (Docket Entry # 100, p. 21) (Docket Entry # 101, p. 2). PDFfiller's PTM Software is designed to edit and manage the same type of electronic fillable real estate form. (Docket Entry # 100, pp. 21-22). CAR devotes "significant resources to ensuring that its California EFRE remain up-to-date and compliant with relevant law." (Docket Entry # 100, p. 21) (Docket Entry # 101, p. 2). Specifically, CAR expends "considerable" resources "to continually revise, improve, and update the CAR Library to ensure that its works remain current with the myriad of legal and policy changes affecting the California real estate services industry." (Docket Entry ## 100, pp. 21, 25) (Docket Entry # 101, p. 6).

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[1] Page numbers refer to the page as docketed as opposed to the page number of the document itself.

[2] Electronic real estate forms used in California will be referred to hereinafter as "California EFREs."

CAR members are able to access CAR's EFRE[3] through a library ("the CAR Library") as a resulting benefit of their CAR membership. (Docket Entry # 100, p. 21) (Docket Entry # 101, p. **[*8]** 2). CAR EFRE can be edited using PTM Software that is comparable to PTM Software provided by PDFfiller. (Docket Entry # 100, p. 21) (Docket Entry # 101, p. 2).

PDFfiller's PTM Software is available through the PDFfiller website and, as noted above, it "allows users to fill, edit, manage, sign, and send a variety of electronic forms online." (Docket Entry # 100, p. 21) (Docket Entry # 101, p. 2). CAR, however, requires users to manage and edit CAR EFRE "only with 'zipFormx00AE;,' which is a real estate PTM Software offered for sale by zipLogix." (Docket Entry 100, p. 22) (Docket Entry # 101, p. 3). [Z]ipLogix is "majority-owned and managed" by CAR's wholly-owned subsidiary, REBS. (Docket Entry # 100, p. 22) (Docket Entry # 101, p. 2).

[Z]ipForm products include, but are not limited to, "zipForm Plus, zipForm Standard, and any other zipForm product sold, provided by, or otherwise offered by the CAR Parties that allows users to fill, edit, and sign EFRE." (Docket Entry # 100, p. 22) (Docket Entry # 101, p. 3). [Z]ipForm is "considerably more expensive than competitors' products," including products offered by PDFfiller. (Docket Entry # 100, p. 22) (Docket Entry # 101, p. 3). Additionally, **[*9]** when a non-CAR real estate professional "attempts to purchase a CAR EFRE online via CAR's website," he or she must also purchase zipForm. (Docket Entry # 100, pp. 22, 25) (Docket Entry # 101, pp. 3, 5). When non-member users click on the link to purchase zipForm, he or she is led "back to the zipLogix e-commerce website to create a zipLogix account and proceed with purchasing zipForm." (Docket Entry # 100, p. 25) (Docket Entry # 101, p. 5).

Real estate attorneys are able to "create a document similar to CAR EFRE." (Docket Entry # 100, p. 26) (Docket Entry # 101, p. 6). The use of real estate attorneys to create this type of document, however, is "significantly more expensive than EFRE" since EFREs are provided to CAR members for free. (Docket Entry # 100, p. 26) (Docket Entry # 101, p. 6). Further, EFREs maintain several "unique" features compared to other types of real estate forms, such as paper forms. (Docket Entry # 100, p. 26) (Docket Entry # 101, pp. 6-7). Some of these features include: the ability to easily change and edit EFREs; EFREs, combined with "search functionality," speed up the "process of reviewing and revising documents"; EFREs' format allows them "to be stored and **[*10]** retrieved without the significant storage fees typically endured in relation to the storage of a large number of paper real estate documents"; they minimize the risk of losing forms; it is easy and inexpensive to transfer EFREs, as they can be transferred by e-mail, which in turn "increases real estate transaction efficiency by simplifying the transmission of real estate forms between real estate professionals and their clients." (Docket Entry # 100, p. 26) (Docket Entry # 101, p. 7).

The electronic design of California EFRE "necessitate[es] software that is capable of filling, editing, managing, signing, and sending these types of forms - precisely what PTM Software is made to do." (Docket Entry # 100, p. 26) (Docket Entry # 101, p. 7). In addition, e-signatures allow "users to sign forms without having to print them out, and in some instances these signatures can be encrypted to remove doubts as to their authenticity." (Docket Entry # 100, p. 27) (Docket Entry # 101, pp. 7-8). California EFRE also allows for greater security measures, such as "two-factor" authentication, for payments to be linked to the forms and for an increase in overall efficiency for real estate professionals. **[*11]** (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8).

While PTM Software is needed to "obtain the full benefit of [an] EFRE," various types of PTM Software can be used to manage EFRE. (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8). Some consumers "frequently seek out non-Car PTM Software to edit CAR EFRE" from PTM Software providers like Dotloop, Instanet Solutions, and PDFfiller. (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8). Moreover, some California competitors offer EFRE

[3] "CAR EFRE" refers to the California EFRE produced by CAR. When CAR EFRE or CAR's EFRE is referenced, the reference is to California EFRE produced by CAR.

and PTM Software products separately, rather than bundling the two products as CAR does with its EFRE and zipLogix's zipForm.[4] (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8).

Moreover, "CAR EFRE has a market share of approximately 90% of all EFRE in California" and CAR describes its products "as 'the standard forms used in nearly every transaction in California.'" (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8). CAR EFRE forms and zipForm software are provided to members as a benefit[5] and CAR memberships are obtained "by joining a local REALTOR® affiliate." (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8).

Membership costs vary "by affiliate, but **[*12]** total membership fees are in excess of $600 per year." (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 8). Non-members must purchase zipForm before they are able to purchase CAR's ERFE and the most basic version of zipForm "costs $849 for an annual license." (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 8). Therefore, it costs between $600 and $849 per year for non-members to access CAR EFRE. (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 8). In contrast, a number of competitors of CAR, such as PDFfiller, offer PTM Software that is comparable to zipForm for prices as low as $72 per year. Other competitors even offer their most basic PTM Software for free. (Docket Entry # 100, p. 28) (Docket Entry # 101, pp. 8-9). Because CAR only allows users to manage CAR EFRE with zipForm PTM Software, however, users cannot use these cheaper alternatives provided by competitors. (Docket Entry # 100, p. 22) (Docket Entry # 101, p. 9).

REBS[6] "is licensed to sell CAR EFRE to non-CAR members for the benefit of CAR." (Docket Entry # 100, p. 28) (Docket Entry # 101). In general, however, CAR "does not license the use of its EFRE in California to third parties." (Docket Entry # 100, p. 28) **[*13]** (Docket Entry # 101, p. 9). Thus, consumers must "either join a REALTOR® affiliate or purchase a zipForm® subscription" if they wish to buy a CAR EFRE. (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 9). Either option of joining a REALTOR® affiliate or purchasing a zipForm® subscription is "significantly more expensive than CAR's competitors in the California EFRE market, and both options are conditioned on the purchase and use of zipForm®." (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 9). A "considerable number of consumers" have expressed frustration because they are unable to use a PTM Software other than zipForm to edit CAR EFRE. (Docket Entry 100, p. 31) (Docket Entry # 101, p. 11). Additionally, some consumers of zipForm complain that the "software has compatibility issues with mobile devices and occasionally requires forms to be printed in order to be completed." (Docket Entry # 100, p. 31) (Docket Entry # 101, 11).

Finally, on several occasions, CAR engaged in legal disputes over CAR's copyright policy.[7] (Docket Entry # 100, p. 29) (Docket Entry # 101, p. 10). CAR's copyright policy prohibits the "printing [of] blank CAR EFRE from zipForm®, or placing CAR EFRE in any **[*14]** PTM Software other than zipForm®." (Docket Entry # 100, p. 29) (Docket Entry # 101, p. 10). "[O]n information and belief, CAR is encouraging or asking its sister state realtor associations to sue PDFfiller." (Docket Entry 100, p. 30) (Docket Entry # 101, p. 11). The Texas Association of Realtors, Inc. ("TAR") "sent a cease-and-desist letter to and filed suit against PDFfiller, making essentially the same allegations as CAR in

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[4] As noted previously, zipForm is a type of PTM Software that is offered for sale by zipLogix. (Docket Entry # 100-22) (Docket Entry # 101).

[5] Assuming dubitánte that it is appropriate to consider an admission in a prior pleading in the context of a *Rule 12(b)(6)* motion, compare *Sulton v. Wright, 265 F.Supp.2d 292, 295 (S.D.N.Y. 2003)*, with *In re PXRE Grp., Ltd., Secs. Litig., 600 F.Supp.2d 510, 525 (S.D.N.Y. 2009)*; see also *TufAmerica, Inc. v. Diamond, 968 F.Supp.2d 588, 600 (S.D.N.Y. 2013)*, the added fact that CAR did not charge an "*additional* fee" for the benefit (Docket Entry # 32, p. 27) (emphasis added) does not alter this court's recommendation.

[6] As previously mentioned, REBS is a wholly-owned subsidiary of CAR. (Docket Entry # 100, p. 22) (Docket Entry # 101).

[7] PDFfiller cites to California Association of Realtors v. Zachery Childress, et al., Case No. 8:11-cv-304, 8:11-cv-1553 (C.D. Cal. 2011); California Association of Realtors v. Commerce Inn Inc., Case No. 2:02-cv-251 (C.D. Cal. 2002); California Association of Realtors v. Equisource Real Estate Inc., et al., Case No. 2:01-cv-01603 (C.D. Cal. 2001), to demonstrate current instances where CAR "has threatened and instituted lawsuits against non-CAR real estate professionals that use CAR EFRE without permission by claiming alleged copyright protection." (Docket Entry # 100, p. 29) (Docket Entry # 101, p. 10).

the present litigation." (Docket Entry # 100, p. 30) (Docket Entry # 101, p. 11). Similar to CAR, TAR owns an interest in zipForm. (Docket Entry # 100, p. 30) (Docket Entry # 101, p. 11).

DISCUSSION

A. Antitrust Claims: Unlawful Tying; Monopolization; and Attempted Monopolization

The Sherman Act was created "to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. To maintain the fundamental liberties of competition, the Sherman Act "prohibits '[e]very contract, combination . . . or conspiracy, in restraint **[*15]** of trade or commerce among the several States.'" Id.; *15 U.S.C. § 1*. "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." *Northern Pacific Railway Co., 356 U.S. at 5*. Section two of the Sherman Act "holds liable 'every person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize . . . any part of the trade or commerce among the several States.'" *Boston Scientific Corp., 983 F.Supp. at 268*; *15 U.S.C. § 2*.

The CAR Parties first contend that PDFfiller has not sufficiently defined the relevant product markets to satisfy any of PDFfiller's antitrust claims and, as such, all of the antitrust claims should be dismissed. Specifically, the CAR Parties suggest that California EFRE and PTM Software for California are incorrect tying and tied product markets, respectively. (Docket Entry # 122) (Docket Entry # 127). The CAR Parties further maintain that even if PDFfiller properly defined the relevant product markets, PDFfiller's unlawful tying claim[8] is still subject to dismissal because PDFfiller incorrectly considered California EFRE and California PTM Software as two separate products. (Docket Entry # 122, p. 15) (Docket Entry # 127, p. 5). Additionally, **[*16]** the CAR Parties argue that PDFfiller fails to plead sufficient facts to demonstrate the CAR Parties' market power in the alleged tying market, and also that PDFfiller's monopoly and attempted monopoly claims fail because PDFfiller has not pled wrongful or anticompetitive conduct by the CAR Parties, nor have they pled any antitrust injury. (Docket Entry # 122) (Docket Entry # 127).

Conversely, PDFfiller maintains that at this stage in the proceedings, it pled a factually detailed, legally sound basis for its allegations of the relevant tying and tied product markets. (Docket Entry # 123, p. 6). Additionally, PDFfiller argues that it not only pled sufficient facts to satisfy an unlawful tying claim using either a per se or rule of reason standard, but it also pled sufficient facts to show that the tying and tied products are separate products as well as sufficient facts to show the CAR Parties' market power (Docket Entry # 123). Finally, PDFfiller argues that its allegations of the CAR Parties' sham litigation demonstrate the CAR Parties' wrongful or anticompetitive conduct and this same conduct resulted in PDFfiller's antitrust injury. (Docket Entry ## 123, pp. 20-21).

1. Relevant Markets **[*17]** for Antitrust Claims

Turning to the relevant market argument, the CAR Parties maintain that the first criterion for all of PDFfiller's antitrust claims is to define the relevant markets. As set out in the counterclaims and the third-party complaint, PDFfiller defines the relevant tying market as California EFRE and the relevant tied product market as PTM Software for California EFRE. (Docket Entry # 100, pp. 25-26) (Docket Entry # 101, p. 6). The CAR Parties argue that naming California EFRE as the tying product market "excludes obvious substitute products" that "serve the same purpose as California EFRE." (Docket Entry # 122) (Docket Entry # 127). Additionally, the CAR Parties argue that naming PTM Software for California EFRE as the tied product market excludes possible substitutes and that PDFfiller provides no support for "why the relevant market should be PTM Software for California EFRE rather than PTM Software in general." (Docket Entry # 122, p. 18) (Docket Entry # 127, pp. 4-5). In response, PDFfiller maintains that the relevant tying and tied markets are properly defined, noting that these markets do not exclude reasonable substitute products. (Docket Entry # 123, p. 10).

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[8] A tying arrangement "may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railway Co., 356 U.S. at 5-6*.

[*18] All parties agree that the standard used to determine a relevant product market is a "reasonable interchangeability" standard; specifically, the determination of a relevant product market depends on "an analysis of the interchangeability of use" or rather, that a relevant product market "includes all goods that are reasonably interchangeable with each other." (Docket Entry # 122, p. 16) (Docket Entry # 123, p. 8). Each party, however, defines reasonable interchangeability differently. The CAR Parties suggest that reasonable interchangeability is determined by an equivalence test and that a relevant product market includes all products that serve the same purpose as each other. (Docket Entry # 122, pp. 16-17). PDFfiller suggests that reasonable interchangeability is determined instead by "the cross-elasticity of demand for the product in question - the extent to which purchasers will accept substitute products in instances of price fluctuation and other changes." (Docket Entry # 123).

For antitrust purposes, the "definition of the relevant market is ordinarily a question of fact." *Flovac, Inc. v. Airvac, Inc., 817 F.3d 849, 853 (1st Cir. 2016)*. There are two components that comprise the relevant market, the first being the relevant *geographic* market, **[*19]** and the second being the relevant *product* market. *Id.* "In general, the relevant geographic market consists of the *geographic area in which the defendant faces competition* and to which consumers can practically turn *for alternative sources of the product*." *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196 (1st Cir. 1996)* (emphasis added with internal citations omitted). The geographic market is relatively self-evident, whereas the product market demands a more complex analysis. *Flovac, 817 F.3d at 853*.

A relevant product market is "made up of 'commodities reasonably interchangeable by consumers for the same purposes.'" *In re Nexium (Esomeprazole) Antitrust Litig., 968 F.Supp.2d 367, 387 (D. Mass. 2013)* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. For a relevant product market to survive a *Rule 12(b)(6)* motion to dismiss, the CAR Parties aptly note that, "[A]n alleged product must bear a rational relation to the methodology courts prescribe to define a market for antitrust purposes-analysis of the *interchangeability of use* or *the cross-elasticity of demand*, and it must be plausible." *Chapman v. N.Y. State Div. for Youth, 546 F.3d 230, 237-38 (2d Cir. 2008)* (emphasis added). As also correctly noted by PDFfiller:

> The reasonable interchangeability of a set of products is not dependent on the similarity of their forms or functions; instead, "Such limits are drawn according to the cross-elasticity of demand for the product in question-the extent to such purchasers will accept **[*20]** substitute products in instances of price fluctuation and other changes."

In re Nexium (Esomeprazole) Antitrust Litig., 968 F.Supp.2d at 387-88 (quoting *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 552 (1st Cir. 1974))*. Thus, as explained by the Third Circuit in Queen City Pizza:

> [W]here the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997).

Although reasonable interchangeability need not focus solely on similar form and function of possible substitute products, *George R. Whitten, 508 F.2d at 552*, the determination of the interchangeability of products is a fact-intensive process. See *Eastman Kodak, 504 U.S. at 482* ("in most cases, proper market definition can be determined only after a factual inquiry into the commercial realities faced by consumers"). Here, at this stage in the pleadings, however, "courts hesitate to grant motions to dismiss for failure to plead a relevant product market" due to the "deeply fact-intensive" nature of the inquiry. *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)*. The Second Circuit in Todd further explains that:

> Cases in which dismissal on the **[*21]** pleadings is appropriate frequently involve either (1) failed attempts to limit a product market to a single brand, franchise, institution, or comparable entity that competes with potential substitutes or (2) failure even to attempt a plausible explanation as to why a market should be limited in a particular way.

Todd, 275 F.3d. at 200. Thus, Todd instructs that, "it is sufficient that plaintiff has alleged specific facts that support a narrow product market in a way that is plausible and bears a rational relation to the methodology courts prescribe to define a market for antitrust purposes." Id. at 203.

A determination of reasonable interchangeability using an equivalence test is based on "whether the substituted element in the accused device performs substantially the same function, in substantially the same way, to produce substantially the same result as the claimed element." Boston Scientific Corp., 983 F.Supp. at 261 (internal citations omitted). The Federal Circuit notes, however, that this type of test "goes too far . . . to describe the function-way-result test as 'the' test for equivalency" and that, "[a]s technology becomes more sophisticated, and the innovative process more complex, the function-way-result test may not invariably suffice to show **[*22]** the substantiality of the differences." Id. at 261 (internal citations omitted); see, e.g., In re Nexium (Esomeprazole) Antitrust Litig., 968 F.Supp. at 367, 388 ("Although it may be beyond this Court's competence to confirm the accuracy of the Direct Purchasers' characterization of the reasonable interchangeability of brand Nexium with other drugs, such a factually intensive determination is better left for resolution by a jury.").

Turning to the task, in the counterclaims and the third-party complaint, PDFfiller suggests that the relevant geographic market is EFRE in *California*. (Docket Entry # 100, p. 26) (Docket Entry # 101, p. 6). The pleadings specifically note that "real estate laws vary significantly by state and a consumer of EFRE is unlikely to have sufficient knowledge of the difference between different states' laws to efficiently adapt an out-of-state EFRE so that it is suitable for use in California." (Docket Entry # 100, p. 26) (Docket Entry # 101, p. 6). The aforementioned allegations render it plausible that EFRE, specifically in California, is a plausible geographic market for the tying product. It is reasonable to define California as the relevant geographic market particularly because, as PDFfiller alleges, real estate laws are unique to each **[*23]** state and EFRE deals explicitly with real estate laws. Moreover, based on the state-by-state peculiarity of real estate laws, the pleadings allow for a reasonable inference that the geographic area in which the CAR Parties face competition is California, as it is the area which consumers can turn for alternative sources of PTM Software to edit EFRE for California. Construing the facts in PDFfiller's favor, the alleged relevant geographic market in the pleadings is plausible.

Moving to the relevant product market, under either an equivalence analysis or a cross-elasticity demand analysis, the antitrust claims survive the Rule 12(b)(6) challenge. PDFfiller provides a reasonable basis not to broaden the product market from California electronic real estate forms to include non-electronic forms, namely paper forms created by attorneys or standard paper forms provided by a real estate professional. Thus, as stated in the counterclaims and the third-party complaint: real estate professionals are not reasonable substitutes for EFRE because it takes "considerable amounts of time and money . . . to continually revise, improve and update the CAR Library to ensure that its works remain current with the myriad **[*24]** of legal and policy changes affecting the California real estate industry"; real estate attorneys are also not reasonable substitutes because it would be significantly more expensive to use a real estate attorney "to create a document similar to CAR EFRE," and also because "attorneys themselves are consumers of EFRE"; and paper is not a reasonable substitute because, unlike paper forms, electronic forms can be changed easily, increase the efficiency of reviewing and revising documents, do not incur storage fees, and provide a low cost of transferring electronic forms. (Docket Entry # 100, pp. 25-26) (Docket Entry # 101, p. 7).

Here, PDFfiller pled adequate facts to demonstrate that under either interpretation of reasonable interchangeability, it is plausible that California EFRE is a relevant product market. Specifically, PDFfiller's allegations of "product performance differences" with non-electronic California real estate forms, "lack of interchangeability with other [non-electronic California real estate] products, and significant price differences between California EFRE and those other products" are sufficient to state a plausible product market consisting of electronic real estate **[*25]** forms in California. (Docket Entry # 123, p. 9). Whether this market definition adheres at trial or at summary judgment is not before this court. Additionally, PDFfiller's allegations render it plausible that the products the CAR Parties suggest as reasonable substitute products for California EFRE because they "serve the same purpose as California EFRE - preparation of real estate contracts - and are put to the same use" are not reasonable substitutes because PDFfiller provides ample support for its claim as to why these alternatives (attorneys, paper forms, and real estate professionals) either do not serve the same purpose or are not put to the same use. In particular, PDFfiller's allegations regarding the increased expense and time-consuming nature of the non-electronic products render it plausible that California EFRE provides an appropriate tying product market, at least for purposes of a *Rule 12(b)(6)* challenge.

In short, the relevant product market is a deeply fact-intensive process and it is necessary that the pleader adequately assert facts to demonstrate that the stated relevant market is plausible. Here, the counterclaims and the third-party complaint are sufficient to render California **[*26]** electronic real estate forms a plausible market. The antitrust claims therefore survive the *12(b)(6)* challenge to the alleged relevant market because the pleadings set out a plausible relevant product market.

2. Per Se Unlawful Tying

The CAR Parties next maintain that PDFfiller's unlawful tying claim is subject to dismissal because PDFfiller fails to demonstrate the existence of separate product demand for the tying and the tied products. (Docket Entry # 122, p. 18) (Docket Entry # 127, p. 5). The CAR Parties contend that there is no separate demand for the tied product. More specifically, they submit "there is no plausible basis to believe a consumer would purchase EFRE without also purchasing or obtaining the necessary software, or buy the software but not the EFRE." (Docket Entry # 122, p. 19) (Docket Entry # 127, p. 5). The CAR Parties argue that, because California EFRE cannot be used without some type of PTM Software, they cannot be considered separate products. The CAR Parties explain that California EFRE is "useless" without PTM Software and there is no "plausible demand for PTM Software for California EFRE without the California EFRE." (Docket Entry 122, p. 20) (Docket Entry **[*27]** # 127, p. 5).

PDFfiller, on the other hand, asserts that, because "there is consumer demand to use CAR EFRE on platforms other than zipForm, and that other providers of California EFRE do not bundle it with PTM Software," it has shown that "demand for California EFRE, the tying product, is not strongly correlated with the demand for the tied product, PTM Software for California EFRE." (Docket Entry # 123, p. 13). Thus, PDFfiller maintains that California EFRE and PTM Software for California are separate products because any variation of PTM Software can be used to edit California EFRE.[9] PDFfiller also argues that PTM Software for California, the alleged tied product, can be used to edit different electronic forms other than California EFRE and other providers of California EFRE do not bundle EFRE with PTM Software. (Docket Entry # 123, p. 14). According to PDFfiller, these characteristics establish a separate demand and therefore a separate product market for PTM Software for California from California EFRE.

Courts have "long recognized that 'certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se".'" *Lee v. Life Ins. Co. of N. Am., 829 F.Supp. 529, 536 (D.R.I. 1993)* (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, abrogated on **[*28]** other grounds by *Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006))*. The most important per se categories are "naked horizontal price-fixing, market allocation, and output restrictions." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)*. The four elements of a per se tying claim are as follows:

> (1) the tying and the tied products are actually two distinct products; (2) there is an agreement or condition, express or implied, that establishes a tie; (3) the entity accused of tying has sufficient economic power in the market for the tying product to distort consumers' choices with respect to the tied product; and (4) the tie forecloses a substantial amount of commerce in the market for the tied product.

CCBN.Com, Inc. v. Thomson Fin., Inc., 270 F.Supp.2d 146, 154 (D. Mass. 2003) (citing *Borschow Hospital and Medical Supplies, Inc. v. Cesar Castillo Inc., 96 F.3d 10, 17 (1st Cir. 1996)* (citations omitted)); see also *AVX Corp. v. Cabot Corp., 600 F.Supp.2d 286, 288-89 (D. Mass. 2009)* (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178-79 (1st Cir. 1994)*, abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick, 559*

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[9] This is an area of dispute because, as alleged in the amended counterclaim and third-party complaint, any general PTM Software can be used to edit California EFRE. The CAR Parties argue, however, that this is not true because CAR's copyright policy allegedly restricts any electronic manipulation of CAR's California EFRE forms using software other than zipForm. (Docket Entry # 100, pp. 26-29) (Docket Entry # 122, p. 8).

U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)); BookLocker.com, Inc. v. Amazon.com, Inc., 650 F.Supp 2d 89, 96 (D. Me. 2009). "[E]very refusal to sell two products separately cannot be said to restrain competition." Jefferson Parish Hosp., 466 U.S. at 11-12.

Moreover, "if each of the products may be purchased separately in a competitive market, one seller's decision to sell the two in a single package imposes no unreasonable restraint on either market," especially if "competing suppliers are free to sell either the entire package or its several parts." Id.; see also Northern Pacific Railway Co., 356 U.S. at 7 ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also **[*29]** took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."). Thus, the determination of the first element of a per se tying claim hinges on the existence of separate markets of both the tying and the tied products. See Jefferson Parish, 466 U.S. at 21-22.

A. Separate Products

To determine whether the tying and the tied products are distinct, "the Court looks to the character of the demand for the two items." Kell v. Am. Capital Strategies, Ltd., 278 F.Supp.2d 156, 161 (D.P.R. 2003); see Eastman Kodak, 504 U.S. at 462 ("[T]here must be sufficient consumer demand so that it is efficient for a firm to provide service separately from parts."). In addition, "The success of a single product defense ordinarily hinges on observations of actual market practices." SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 15 (1st Cir. 1999). In particular, "[i]f evidence shows that there is significant demand for separate components of what is alleged to be a single product and the product is in fact sold in those forms, there is no single product." Id. In other words, a tying arrangement cannot exist unless it can be shown that there is a sufficient demand for the purchase of the tied product separate from the tying product in order to "identify a distinct product market in which it is efficient to offer [the tied product] services separately **[*30]** from [the tying product] services." Jefferson Parish, 466 U.S. at 21-22.

Here, PDFfiller pled facts that demonstrate it is plausible there is a separate product market for the alleged tied product, PTM Software for California EFRE. The counterclaims and the third-party complaint state that the demand for the tying and the tied product is "not identical." (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8). Moreover, as also stated in the counterclaims and the third-party complaint, "consumers frequently seek out non-CAR PTM Software to edit CAR EFRE, turning to PTM Software providers such as Dotloop, Instanet Solutions, and PDFfiller." (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8). In addition, numerous competitors "do not typically bundle EFRE and PTM Software products." (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 9). These allegations are sufficient to avoid a Rule 12(b)(6) dismissal based on the CAR Parties' argument that the tying and the tied products are not two distinct products.

B. Economic Power to Distort Consumer Choice

The CAR Parties next contend that PDFfiller failed to plead plausible facts that demonstrate that "CAR has market power in the alleged tying market." (Docket Entry # 122, p. 21) (Docket **[*31]** Entry # 127, p. 5). Nor has PDFfiller, according to the CAR Parties, pled sufficient facts to show "high (or any) barriers to entry in the alleged market." (Docket Entry # 122, p. 21) (Docket Entry # 127, 6). PDFfiller maintains it alleged sufficient facts indicating CAR's "extremely high market share in the tying market, which is sufficient to demonstrate market power at this stage in the litigation." (Docket Entry # 123, p. 15). PDFfiller further contends it is not necessary to allege high barriers to entry in order to demonstrate market power in the tying market. (Docket Entry # 123, p. 15).

To determine the market power of the seller, "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other." Jefferson Parish, 466 U.S. at 14. More specifically:

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase **[*32]** elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Id. at 12. "Accordingly, we have condemned tying arrangements when the seller has some special ability—usually called 'market power' to force a purchaser to do something that he would not do in a competitive market." Id. at 13-14. There must be more than a single purchaser "forced" into buying the tied product for the "impact on competition . . . to warrant the concern of ***antitrust law***." Id. at 16; see also Lee v. Life Ins. Co. of North America, 23 F.3d 14, 16 (1st Cir. 1994) ("'market power' is the demonstrated ability of a seller to force a purchaser to do something that he would not do in a competitive market") (citations omitted).

Market power may be inferred from the seller's predominate share of the tying market. Hewlett-Packard Co. v. Boston Scientific Corp., 77 F.Supp.2d 189, 195 (D. Mass. 1999). "For pleading purposes, an allegation of market share of 70 percent has been held to be an adequate basis for an inference of power in a relevant market." Id. at 195-196 (citations omitted). Finally, "[w]hen the seller's share of the market is high . . . the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation **[*33]** appropriate." Jefferson Parish, 466 U.S. at 17.

PDFfiller pled facts to render it plausible that the CAR Parties' market power in the tying product market is so substantial that it forces users to purchase the tied product. See Jefferson Parish, 466 U.S. at 14. In the counterclaims and the third-party complaint, PDFfiller alleges that CAR has substantial market power based on: CAR's 90% market share of the tying market; CAR's 150,000 members in California; CAR's statements that "CAR products are the standard forms used in nearly every transaction in California"; and that the CAR Parties "are able to prevent California consumers from using the PTM Software of their choice" and "force those consumers to pay significantly higher prices for PTM Software." (Docket Entry # 100, pp. 21, 23, 27, 30-31) (Docket Entry # 101, pp. 8, 10, 12).

As set out in the counterclaims and the third-party complaint, these allegations render it plausible that the CAR Parties have substantial economic power in the tying product market and therefore *could* plausibly restrain competition in the tied product market. The allegation that CAR possesses 90% market share of the tying market alone is sufficient to infer the CAR Parties' economic power in the tying product market at **[*34]** this stage in the pleadings. See Hewlett-Packard Co., 77 F.Supp.2d at 195.

C. Tie Forecloses Substantial Amount Commerce in Market for Tied Product

The CAR Parties next argue that, "because PDFfiller is a competitor in the alleged tied market, it must allege that it has been wrongfully foreclosed as a competitor, rather than merely losing sales to a favored rival." (Docket Entry # 122, p. 24). The CAR Parties contend that, "PDFfiller has not alleged that it has been excluded or eliminated as a competitor, and it even admits that it continues to compete with zipLogix. Nor has it alleged injury to competition." (Docket Entry # 122, p. 24). Conversely, PDFfiller suggests it "satisfied this minimal showing by alleging that Defendants' conduct has excluded a substantial amount of competitors from the tied market." (Docket Entry # 123, p. 22).

To determine if the alleged tie forecloses a substantial amount of commerce in the market for the tied product:

> the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie, for it is unreasonable, per se, to foreclose competitors from any substantial market **[*35]** by a tying arrangement.

Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 501, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969) (citations omitted). Additionally, "the plaintiff must also 'make some showing of actual injury attributable to something the antitrust laws were designed to prevent.'" AVX Corp. v. Cabot Corp., 600 F.Supp.2d 286, 294 (D. Mass. 2009) (quoting Perkins v. Standard Oil Co., 395 U.S. 642, 648, 89 S. Ct. 1871, 23 L. Ed. 2d 599 (1969)). To survive a Rule 12(b)(6) motion, the counterclaims and the third-party complaint are sufficient if they demonstrates that "a not insubstantial amount of commerce has been foreclosed as a result of the alleged tying arrangement." Copeca, Inc. v. W. Aviation Servs. Corp., 653 F.Supp.2d 141, 148 (D.P.R. 2009).

Here, as set out in the counterclaims and the third-party complaint, "CAR does not license the use of its EFRE in California to third parties" and, as a result, "consumers that wish to buy CAR EFRE must either join a REALTOR affiliate or purchase zipForm subscription." (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 9). Either option is "significantly more expensive than CAR's competitors in the California EFRE Market, and both options are conditioned on the purchase and use of zipForm." (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 9). The CAR Parties' tying also forces users of CAR EFRE in California to use zipForm with CAR EFRE and "prevents users from using PTM Software that competes with zipForm, even if they are unsatisfied with the quality or price **[*36]** of zipForm." (Docket Entry # 100, p. 29) (Docket Entry # 100, p. 10). Finally, the CAR Parties' conduct "reduce[s] the likelihood of new entrants in the market for PTM Software" and also eliminates the opportunity for competition on the merits because CAR's EFRE products cost "several hundred dollars more than competitors." (Docket Entry # 100, pp. 28-31) (Docket Entry # 101, pp. 9-12).

The counterclaims and the third-party complaint, therefore, adequately allege facts from which it is reasonable to infer that a substantial amount of commerce has been foreclosed as a result of the CAR Parties' alleged tying arrangement. The alleged price discrepancies evidence the plausibility that a total amount of business - especially in terms of dollar-volume of lost business for competitors — is foreclosed to competitors as a result of the CAR Parties' conduct. In sum, at this stage in the proceedings and with facts construed in its favor, PDFfiller pled sufficient facts to render the elements of its per se tying claim plausible. The per se tying claim therefore survives the CAR Parties' *Rule 12(b)(6)* challenge.[10]

3. Monopoly and Attempted Monopoly

The CAR Parties next argue that PDFfiller's monopoly and attempted **[*37]** monopoly claims fail because PDFfiller did not allege facts "showing any evidence of market power or even indirect evidence in the form of market share and high entry barriers" in the alleged relevant market. (Docket Entry # 122, p. 22) (Docket Entry # 127, p. 7). The CAR Parties also assert that PDFfiller's monopoly and attempted monopoly claims fail because "PDFfiller has not pled wrongful or anticompetitive conduct by the CAR Parties." (Docket Entry # 122, p. 22) (Docket Entry # 127, p. 8). The CAR Parties suggest "there are no facts alleged to support any inference that CAR's copyrights are invalid, or that CAR has not acted in the lawful exercise of its rights as a copyright owner," and that PDFfiller fails to plead any facts to support its allegations of the CAR Parties' "baseless lawsuits." (Docket Entry # 122, p. 23) (Docket Entry # 127, p. 8). Finally, the CAR Parties argue that all claims fail because PDFfiller has not pled facts "sufficient to show not only that it has suffered injury-in-fact, but also that its alleged injury constitutes 'antitrust injury' - that is, 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' **[*38]** act unlawful.'" (Docket Entry # 122, p. 24) (quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*.

PDFfiller suggests that it pled sufficient facts that, "if proven, would constitute direct evidence of Defendants' monopoly power in the tied market." (Docket Entry # 123, p. 18). PDFfiller maintains that its contention that the CAR Parties charge supracompetitive prices for the tied product is sufficient to constitute "direct evidence of the CAR Parties' monopoly power" in the tied market. (Docket Entry # 123, p. 19) (Docket Entry # 100, pp. 27-28) (Docket Entry # 101, pp. 8-9). PDFfiller further contends that it need not show that the entity offering the tied product is the only entity in its market in order to provide evidence of monopoly power. (Docket Entry # 123, pp. 18-19).

Section two of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States . . .." *Díaz Aviation Corp. v. Airport Aviation Servs., 716 F.3d 256, 265 (1st Cir. 2013)*; *15 U.S.C. § 2*. The necessary elements of a monopolization claim are:

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[10] Because PDFfiller's per se tying claim survives the *Rule 12(b)(6)* challenge, it is not necessary to address PDFfiller's rule of reason argument.

> "(1) [p]ossession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." **[*39]**

Id. at 256 (quoting *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*; see also *In re Asacol Antitrust Litig., 233 F.Supp.3d 247, 266 (D. Mass. 2017)*. "In the First Circuit, courts refer to 'improper methods of acquiring or maintaining monopoly power as 'exclusionary conduct.'" *In re Asacol, 233 F.Supp.3d at 266* (quoting *Town of Concord v. Boston Edison Co., 915 F.2d 17, 21 (1st Cir. 1990))*. "This means conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." Id. (internal citations omitted).

The elements of attempted monopolization are "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Diaz Aviation, 716 F.3d at 265* (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*. Attempted monopolization "requires a finding of specific intent." *In re Asacol, 233 F.Supp.3d at 267*.

A. Monopoly Power

Monopoly power is defined as the "power of controlling prices or unreasonably restricting competition." *United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Simply stated, monopoly power is the "power to control price or exclude competition." *Id. at 392*; see also *Abarca Health, LLC v. PharmPix Corp., 915 F.Supp.2d 210, 218 (D.P.R. 2012)* (monopoly power "is evaluated in light of the 'relevant market' and 'the defendant's ability to lessen or destroy competition in that market'") (quoting *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196 (1st Cir. 1996))*. It is generally determined in one of two ways, the first is through a **[*40]** showing of supracompetitive prices. See *Diaz Aviation, 716 F.3d at 265*. "Absent direct proof of supracompetitive prices, monopoly power is typically proven by defining a relevant market and showing that the defendant has a dominant share of that market." Id.

PDFfiller adequately alleges that the CAR Parties have monopoly power in the tied product market. In the counterclaims and the third-party complaint, PDFfiller states that, "CAR's EFRE forms are provided as a benefit to members" and "[m]embership is obtained by joining a local REALTOR affiliate." (Docket Entry # 100, p. 27) (Docket Entry # 101, p. 8). The pleadings further allege that the cost of CAR membership fees "are in excess of $600 per year" and that "[n]on-members may not purchase CAR EFRE without first purchasing zipForm," which, in its most basic form, "costs $849 for an annual license." (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 8). As also stated in the counterclaims and the third-party complaint, CAR's EFRE competitors offer California EFRE forms for free and also offer PTM Software "starting at $72 per year" or for free. (Docket Entry # 100, p. 28) (Docket Entry # 101, p. 9). The aforementioned statements sufficiently allege facts showing **[*41]** that the CAR Parties have monopoly power in the tied product market through supracompetitive pricing and maintain the ability to control prices in the tied product market and potentially exclude competition.

The CAR Parties suggest that PDFfiller must also plead facts showing high barriers to entry in the alleged market in order to satisfy the market power element. Barriers of entry, however, is not the requisite standard under First Circuit law and, while the Ninth Circuit suggests that entry barriers also demonstrate monopoly power, the First Circuit in Diaz provides that supracompetitive prices will suffice to show monopoly power. See *Diaz Aviation, 716 F.3d at 265*.

B. Wrongful or Anticompetitive Conduct

The CAR Parties next argue that PDFfiller's allegations of CAR's "baseless lawsuits" are insufficient to satisfy wrongful or anticompetitive conduct. The CAR Parties contend that PDFfiller fails to allege facts that "support any inference that CAR's copyrights are invalid, or that CAR has not acted in the lawful exercise of its rights as a copyright owner" and that, in any event, such allegations of fraudulent lawsuits "must be pled with particularity under *Fed. R. Civ. P. 9(b)*." (Docket Entry # 122, p. 23). PDFfiller maintains, however, **[*42]** that it sufficiently alleged that CAR "engaged in a pattern of objectively baseless litigation, the intent of which" was "to intimidate consumers and competitors from using PTM Software for California EFRE other than zipForm." (Docket Entry # 123, p. 20). PDFfiller further points out that "this court has held in no uncertain terms that allegations of sham litigation do not require a heightened pleading standard." (Docket Entry # 123, p. 20).

To satisfy both the monopoly and the attempted monopoly claims, PDFfiller must show that the CAR Parties engaged in wrongful or anticompetitive conduct. See *In re Asacol, 233 F.Supp.3d at 247*. More specifically, PDFfiller must plead facts sufficient to show that the CAR Parties engaged in conduct designed to maintain, or with the intent to create, monopoly power in the relevant market. *Diaz Aviation, 716 F.3d at 265*. Further, anticompetitive means require a showing that is "distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Wojcieszek v. New England Tel. & Tel. Co., 977 F.Supp. 527, 533 (D. Mass. 1997)*; see also *Hewlett-Packard Co., 77 F.Supp.2d at 197*. "This means conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating **[*43]** or maintaining monopoly power." *In re Asacol, 233 F.Supp.3d at 267*. Conduct crosses into the threshold of anticompetitive "'when it obstructs the achievement of competition's basic goals—lower prices, better products, and more efficient production methods.'" *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1097 (1st Cir. 1994)* (quoting *Town of Concord, Mass. v. Boston Edison Co., 915 F.2d 17, 21-22 (1st Cir. 1990))*. The filing of a lawsuit violates antitrust laws when the lawsuit's primary purpose is not to seek the outcome of the governmental process, but rather to seek the use of the governmental process merely to interfere with the business relationships of a competitor. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 51, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* ("PRE").

PDFfiller submits that the CAR Parties' use of litigation constitutes anticompetitive conduct. (Docket Entry # 100) (Docket Entry # 101). As set forth in the Noerr-Pennington doctrine, "which arose in antitrust cases under the Sherman Act, . . . '[t]hose who petition [the] government for redress are generally immune from antitrust liability.'" *Picone v. Shire PLC, Civil Action No. 16-12396-ADB, 2017 U.S. Dist. LEXIS 178150, 2017 WL 4873506, at *5 (D. Mass. Oct. 20, 2017)* (internal citation omitted). There are exceptions to the Noerr-Pennington doctrine, however, the first dealing with a patent procured by fraud, and the second being that "immunity does not apply where petitioning the government 'is a mere sham to cover . . . an attempt to interfere directly with **[*44]** the business relationships of a competitor.'" *Crocs, Inc. v. Effervescent, Inc., 248 F.Supp.3d 1040, 1055 (D. Colo. 017)* (quoting *PRE, 508 U.S. at 56*). Thus, "litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." *PRE, 508 U.S. at 51*. Courts describe a sham as "evidenced by repetitive lawsuits carrying the hallmark of *insubstantial* claims." *Id. at 58* (emphasis added).

The Supreme Court established a two-prong inquiry of sham litigation, with the first prong being objective and the second prong subjective. *Id. at 51*. First, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id. at 60*. Second, "the court should focus on whether the baseless lawsuit conceals an attempt to interfere *directly* with the business relationships of a competitor, through the use of the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." *Id. at 60-61* (internal citations and brackets omitted); see also *Advanced Ion Beam Tech., Inc. v. Varian Semiconductor Equip. Assocs., Inc., 721 F.Supp.2d 62, 74-75 (D. Mass. 2010)*. An antitrust plaintiff is required "to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose." *PRE, 508 U.S. at 62*. "Probable cause to institute civil proceedings requires no more than a "reasonabl[e] **[*45]** belie[f] that there is a chance that [a] claim may be held valid upon adjudication." *Id. at 62-63*.

With respect to the applicability of the heightened pleading standard of *Fed. R. Civ. P. 9* ("*Rule 9(b)*"), "[a]lthough some cases in *other* Circuits have required greater specificity in pleading, the Federal Rules of Civil Procedure *do not contain such a requirement* and the Supreme Court has recently *expressed disapproval* of judicial attempts to heighten pleading requirements in other contexts." *Skinder-Strauss Assocs. v. Massachusetts Continuing Legal Educ., Inc., 870 F.Supp. 8, 11 (D. Mass. 1994)* (emphasis added). In fact, "There is no heightened pleading requirement for a claim of unfair competition based upon the institution of sham litigation." *Honeywell Consumer Prods. v. Windmere Corp., 993 F. Supp. 22, 24 (D. Mass. 1998)*. The more rigorous pleading standards of *Rule 9(b)* apply only to allegations of fraud or when fraud "lies at the core" of a claim. *Hayduk v. Lanna, 775 F.2d 441, 443*

(1st Cir. 1985) (conspiracy to commit fraud falls within *Rule 9(b)*'s requirements); *Enercon v. Global Computer Supplies, Inc., 675 F.Supp.2d 188, 197 (D. Me. 2009)* (tracing Hayduk line of cases and concluding that *Rule 9(b)* did not apply to negligent misrepresentation claim). Whereas *Rule 9(b)* may apply to the first exception to the Noerr-Pennington doctrine, i.e., a patent procured by fraud, it does not apply to the second exception, i.e., sham litigation. See *Honeywell, 993 F.Supp. at 24*. Simply stated, fraud does not lie at the core of the latter exception, which is the one PDFfiller invokes. Accordingly, **[*46]** *Rule 9(b)* does not provide a basis for dismissal.

Turning to the two prongs of sham litigation, the counterclaims and the third-party complaint state that, "CAR has threatened and instituted lawsuits against non-CAR real estate professionals that use CAR EFRE without permission by claiming copyright protection" and that, "on information and belief, these are sham lawsuits, objectively baseless, and subjectively intended to use the judicial process, as opposed to the outcome of that process, as an anticompetitive weapon." (Docket Entry # 100, p. 29) (Docket Entry # 101, p. 10). The counterclaims and the third-party complaint identify a number of cases[11] that either resulted in default judgments for failure to appear or settled before a decision was rendered on the merits of CAR's claims. Taking judicial notice of the dockets in these cases, none of the cases resulted in a judicial decision on the merits. See *Kowalski v. Gagne, 914 F.2d 299, 305 (1st Cir. 1990)* ("federal courts may take judicial notice of proceedings in other courts if those proceedings have relevance to the matters at hand"); see, e.g., *Bluetarp Financial, Inc. v. Matrix Construction Co., Inc., 709 F.3d 72, 78 n.4 (1st Cir. 2013)* (taking judicial notice of related state court cases).

The counterclaims and the third-party complaint further allege that, "CAR is encouraging or asking its sister state realtor association to sue PDFfiller" and that "the Texas Association of Realtors, Inc. sent a cease-and-desist letter to and filed suit against PDFfiller, making essentially the same allegations as CAR in the present litigation." (Docket Entry # 100, p. 30) (Docket Entry # 101, pp. 10-11). The counterclaims and the third-party complaint elaborate by stating that, "as with CAR's complaint, those allegations are baseless" and TAR "owns an interest in zipForm, and therefore has an interest in assisting CAR's anticompetitive practices through additional sham litigation." (Docket Entry # 100, p. 30) (Docket Entry # 101, p. 11).

Moreover, the counterclaims and the third-party complaint allege that the CAR Parties are using these lawsuits "to prevent competition on the merits between zipForm and competing PTM Software products, including PDFfiller"; "to reduce the likelihood of new entrants in the market for PTM Software"; "to enable the CAR Parties to improperly acquire and **[*48]** maintain market power in the tied market for PTM Software"; and "to acquire, maintain, and/or expand their monopoly power in the market for California EFRE." (Docket Entry # 100, p. 31) (Docket Entry # 101, p. 12). On balance, the allegations in the counterclaims and the third-party complaint sufficiently satisfy both prongs and adequately allege conduct that crosses into the threshold of anticompetitive to withstand the *Rule 12(c)* motion.

C. Antitrust Injury

As a final challenge to the monopolization and attempted monopolization claims, the CAR Parties assert that PDFfiller fails to allege facts showing an antitrust injury. The CAR Parties contend that PDFfiller must set out facts that "its alleged injury constitutes 'antitrust injury.'" (Docket Entry # 122). The CAR Parties submit that, "PDFfiller has not alleged that it has been excluded or eliminated as a competitor[,]" or "alleged injury to competition." (Docket Entry # 122, p. 25). PDFfiller maintains that it alleged facts from which an antirust injury can be inferred and particularly points to its allegations that PDFfiller "has been prevented from competing for the PTM Software business of California EFRE users that are unsatisfied with **[*49]** zipForm, and as a result has lost sales and suffered damage to its reputation and goodwill." (Docket Entry # 123, p. 24) (Docket Entry # 100, pp. 31-33) (Docket Entry # 101, pp. 12-15).

Here, both PDFfiller and the CAR Parties agree (Docket Entry # 122, p. 24) (Docket Entry # 123, p. 24) that "antitrust injury is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes

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[11] California Association of Realtors v. Zachery Childress, et al., Case No. 8:11-cv-304, 8:11-cv-1553 (C.D. Cal. 2011); **[*47]** California Association of Realtors v. Commerce Inn Inc., Case No. 2:02-cv-251 (C.D. Cal. 2002); California Association of Realtors v. Equisource Real Estate Inc., et al., Case No. 2:01-cv-01603 (C.D. Cal. 2001).

defendants' acts unlawful.'" *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 121 (1st Cir. 2011)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701, (1977))*; see also *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*. Moreover, "[p]laintiffs must show not only that they were injured as a result of the defendant's actions and that those actions constituted an antitrust violation, but also that their injury is the type of injury the antitrust violation would cause *to competition*." *Sterling Merch., 656 F.3d at 121* (emphasis in original).

The counterclaims and the third-party complaint allege that, as a result of the CAR Parties' actions, there has been antitrust injury in the following ways: (1) "CAR's unlawful tying . . . affects a substantial volume of interstate commerce"; (2) the CAR Parties' "anticompetitive practices" unreasonably restrained "competition in the relevant market, which is harmful to consumers by restricting consumer choice **[*50]** and forcing consumers to pay zipForm's monopoly price in order to be able to use CAR EFRE"; (3) "users of CAR EFRE in California have been and continue to be forced to use zipForm with CAR EFRE" and this conduct excludes "a substantial amount of competing PTM Software from the California market"; (4) the CAR Parties' conduct forces "users of CAR EFRE to use zipForm in place of other PTM Software" which "*harms PDFfiller* and competition in the market for PTM Software for California EFRE because it deprives PTM Software competitors, *including PDFFiller*, of the opportunity to freely compete in the marketplace with the CAR Parties"; (5) the CAR Parties' pattern of "sham litigation" intimidates customers "from using competition PTM Software other than zipForm and reduces "the likelihood of new entrants in the market for PTM Software"; and (6) "*PDFfiller* has been . . . injured by the CAR Parties' exclusionary and anticompetitive practice of depriving users of CAR EFRE of the benefits of competition, including the freedom to choose among PTM Software offerings such as the PTM Software offered through the PDFfiller website." (Docket Entry # 100, pp. 30-32) (Docket Entry # 101, 11-13) (emphasis **[*51]** added).

Such facts provide a plausible antitrust injury, namely, that PDFfiller was injured as a result of the CAR Parties' actions in a way that constituted an antitrust violation, and that its injury is the type of injury the antitrust violation would cause to competition. In sum, at this stage in the proceedings, counts one and two survive the CAR Parties' *Rule 12(b)(6)* challenge.

II. Defendants' *Rule 12(c)* Motion

PDFfiller seeks to dismiss CAR's chapter 93A claim because the misconduct did not occur "primarily and substantially" in Massachusetts. (Docket Entry # 141). It also maintains that CAR, as a nonprofit corporation, does not engage in "trade or commerce" as required under *section 11*. (Docket Entry # 142). CAR opposes the *Rule 12(c)* motion. (Docket Entry # 153).

STANDARD OF REVIEW

A *Rule 12(c)* motion for judgment on the pleadings "is treated much like a *Rule 12(b)(6)* motion to dismiss." *Perez Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008)*. Legal conclusions are ignored and, "under *Rule 12(c)*, courts need not credit conclusory statements or merely subjective characterizations." *Class v. Commonwealth of Puerto Rico, 309 F.Supp.2d 235, 236 (D.P.R. 2004)*; see *Soto-Torres v. Fraticelli, 654 F.3d 153, 158-159 (1st Cir. 2011)*.

A *Rule 12(c)* "motion calls for an assessment of the merits of the case at an embryonic stage, [so] the court must view the facts contained in the pleadings in the light most favorable to the nonmovant and draw all reasonable inferences **[*52]** therefrom" in the nonmovant's favor. *R.G. Financial Corp. v. Vergara-Nunez, 446 F.3d 178, 182 (1st Cir. 2006)*. Accordingly, "There is no resolution of contested facts in connection with a *Rule 12(c)* motion: a court may enter judgment on the pleadings only if the properly considered facts conclusively establish the movant's point." Id. In the event "a court grants a . . . *Rule 12(c)* motion based on an affirmative defense, the facts establishing that defense must: (1) be 'definitively ascertainable from the complaint and other allowable sources of information,' and (2) 'suffice to establish the affirmative defense with certitude.'" *Gray v. Evercore Restructuring L.L.C., 544 F.3d 320, 324 (1st Cir. 2008)*.

Subject to certain narrow exceptions and absent a conversion of the Rule 12(c) motion to a summary judgment motion under the procedure set forth in Rule 12(d), this court's review is confined to the complaint, the answer, and any attached exhibits. Fed. R. Civ. P. 12(d); see Fed. R. Civ. P. 10(c) ("a written instrument that is an exhibit to a pleading is part of the pleading for all purposes"). In evaluating a Rule 12(c) motion, a court may supplement the complaint with "facts of which judicial notice may be taken." R.G. Fin. Corp. v. Vergara-Nunez, 446 F.3d 178, 182 (1st Cir. 2016). For purposes of the Rule 12(c) challenge to the chapter 93A claim, the facts are as follows.

FACTUAL BACKGROUND

CAR is a "California not-for-profit corporation with its principal place of business located in Los Angeles, **[*53]** California." (Docket Entry # 1, p. 2). It is not registered to do business in Massachusetts. (Docket Entry # 143-1).[12] PDFfiller is "a Massachusetts corporation with its principal place of business located at 167 Corey Road" in "Brighton, Massachusetts." (Docket Entry # 1, p. 2). Defendant Vandim Yasinovsky ("Yasinovsky") is "the CEO and Secretary of PDFfiller," "operates the website, pdffiller.com," and is "an individual domiciled in the Commonwealth of Massachusetts." (Docket Entry # 1, p. 2). Defendant Boris Shakhnovich ("Shakhnovich") is the "President, Treasurer, and Director of PDFfiller," "operates the website, pdffiller.com," and is "an individual domiciled in the Commonwealth of Massachusetts." (Docket Entry # 1, p. 3). Drawing reasonable inferences in favor of CAR, Yasinovsky and Shakhnovich both operate the website from Massachusetts where they are domiciled and where PDFfiller has its principal place of business and office in Brighton. The Massachusetts office is "a focus of the unauthorized activities." (Docket Entry # 1, p. 4).

CAR was "founded in 1905 and is a non-profit trade association" that represents approximately 170,000 real estate professionals in California. **[*54]** (Docket Entry # 1, p. 4). CAR created and developed programs and services to assist its members in the real estate field. (Docket Entry # 1, p. 4). "Over many years, CAR[13] has created and maintained" the CAR Library, which is "an extensive resource library of specialized and copyrighted business works created and designed to cover essentially all aspects of the types of residential and commercial real estate purchase, sales, and leasing transactions in which CAR's members engage." (Docket Entry # 1, p. 4). The CAR name and logo are registered trademarks. (Docket Entry # 1, p. 4).

CAR restricts the access to the CAR Library to "paid members and other licensees." (Docket Entry # 1, ¶ 31). "Electronic versions of the CAR Library are only available via software" called zipForm, which is offered by zipLogix. (Docket Entry # 1, p. 5). [Z]iplogix is managed by REBS, "a wholly-owned subsidiary of CAR." (Docket Entry # 1, p. 5).

"REBS is licensed to provide the works in the CAR Library to CAR members and other non-member real estate professionals for the benefit of CAR." (Docket Entry # 1, p. 5). Access to certain works in the CAR Library "is also offered to CAR's paid members and other licensees **[*55]** for sale through the CAR Business Solutions online store operated by REBS." (Docket Entry # 1, p. 5). CAR's members gain access to the CAR Library "as a member benefit." (Docket Entry # 1, p. 5). "Access to the CAR Library," however, "is restricted to CAR's paid members and other licensees." (Docket Entry # 1, p. 5). Non-member real estate professionals are able to purchase "an annual license to access the CAR Library through zipForm" for a fee between $799 and $999 per year. (Docket Entry # 1, p. 5). Users must be licensed zipForm users in order to "access and use the software" that enables them "to fill in client transaction details and create different types of documents with different purposes and functions, as needed, and then download and send completed documents for use in a real estate transaction." (Docket Entry # 1, p. 6).

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[12] This court takes judicial notice of the screenshot of the business entity search for CAR that PDFfiller conducted through the publically available search tool on the corporations division of the Secretary of the Commonwealth of Massachusetts' website. PDFfiller filed the screenshot. (Docket Entry # 143-1); see Hadley v. Chrysler Group LLC, 2014 U.S. Dist. LEXIS 32547, 2014 WL 988962, at *2 (E.D.Mich. Mar. 13, 2014). ("[c]ourt can take judicial notice and consider documents posted on a government website").

[13] The complaint refers to CAR as C.A.R. For consistency, this court refers to CAR without including the periods.

PDFfiller's website is "designed to do the same thing," meaning, it allows users to access software that lets them fill in transaction details, create different types of documents, and download and send completed documents. (Docket Entry # 1, p. 6). As elaborated below, PDFfiller's website "directly mimics the functionality of zipForm concerning numerous **[*56]** works from the CAR Library." (Docket Entry # 1, p. 6).

Licensed and registered zipForm users are subject to an end-user license agreement for zipLogix products and services ("the zipLogix EULA"). (Docket Entry # 1, p. 6). The zipLogix EULA prohibits "the removal or alteration of any trademark or copyright notices" and also prohibits the "reproduction of blank documents from within zipForm in any file format or representation," including PDF, "except as expressly permitted in the zipLogix EULA." (Docket Entry # 1, p. 7). The zipLogix EULA also states that blank or partially blank CAR forms "may not be printed or exported" and that "use of CAR works other than as expressly licensed in prohibited." (Docket Entry # 1, p. 7).

CAR's copyrighted works "may only be downloaded from zipForm" and, once completed by the licensed user, used only "for the user's real estate transaction." (Docket Entry # 1, p. 7). Licensed zipForm users are able to export completed works in PDF format. (Docket Entry # 1, p. 7). "[T]the PDF versions," however, "are 'locked' by means of a password generated by zipForm and may not be altered or manipulated outside zipForm." (Docket Entry # 1, p. 7). [Z]ipForm users are **[*57]** "expressly advised when they email a filled out PDF document that the zipLogix EULA 'prohibits the modification of documents.'" (Docket Entry # 1, p. 7). The zipLogix EULA likewise bars "the printing, reproducing, or displaying on the Internet any blank or partially blank documents available through zipForm." (Docket Entry # 1, p. 7).

The CAR Library "reflects many original and creative copyrighted" CAR works. (Docket Entry # 1, p. 8). There are 64 CAR copyrighted works reproduced, distributed, or used, i.e., purportedly infringed, through the PDFfiller website. (Docket Entry # 1, p. 8). Each work bears a copyright notice as well as CAR's trade name and logo. (Docket Entry # 1, pp. 8-9).

Yasinovsky and Shakhnovich operate the PDFfiller website in Massachusetts. (Docket Entry # 1, pp. 1-3). The website mimics the functionality of zipForm and provides the basis of the purported misconduct by PDFfiller, Yasinovsky, and Shakhnovich. (Docket Entry # 1, pp. 6, 9-13). Through the website, PDFfiller allows registered and subscribing users "to upload forms and other documents to their accounts on the PDFfiller Website." (Docket Entry # 1, p. 9). Users can also "convert the uploaded documents **[*58]** into stock forms in PDF format" and then fill out the forms or documents "in a fillable PDF document." (Docket Entry # 1, p. 9). PDFfiller's website allows users "to save and maintain the electronic forms created from the uploaded content on the PDFfiller Website," which users can complete, repeatedly use, "email[] to any email address, or otherwise export[]." (Docket Entry # 1, p. 9). PDFfiller "designed and maintained" its website and software in order to "bypass the password lock on native CAR documents." (Docket Entry # 1, p. 9). PDFfiller also designed and maintained the website and software "to modify the completed documents exported from the CAR Library by converting a completed, locked file into an unlocked and fillable PDF." (Docket Entry # 1, p. 9). These fillable PDF documents exported from the CAR Library are then "maintained as part of the PDFfiller Website user's personal account and the PDFfiller Website database." (Docket Entry # 1, p. 9). PDFfiller also created "a private database of fillable PDF forms and business documents derived from the documents users have uploaded to the PDFfiller Website and other forms" as well as other documents collected by PDFfiller. (Docket **[*59]** Entry # 1, p. 10).

PDFfiller markets to the general public and sells subscriptions to use its "website and access its database of documents and forms." (Docket Entry # 1, p. 10). PDFfiller's users pay for the ability to: (1) "access and search the database of forms and documents maintained by" PDFfiller; (2) download "forms and documents to their accounts"; and (3) "use the PDFfiller Website to create and maintain" documents like fillable PDF documents, "which users can then use, email, download, or otherwise export from the PDFfiller Website." (Docket Entry # 1, p. 10). PDFfiller additionally sells "the newly created unlocked, reusable, and fillable PDFs maintained as part of" its website's database in a "form identical to CAR works" that are made available only through zipForm, "including all of CAR's content, trademarked name and logo, and CAR's copyright designations." (Docket Entry # 1, p. 10).

Without CAR's permission, PDFfiller, a Massachusetts corporation located in Massachusetts with employees in Massachusetts and the Ukraine, along with Yasinovsky and Shakhnovich, both domiciled in Massachusetts, created and sold "fillable PDFs identical to" CAR's works, which are "available **[*60]** only through zipForm." (Docket Entry # 1, p. 10). They also obtained and sold "numerous copyrighted works from the CAR Library" on the searchable PDFfiller database. (Docket Entry # 1, p. 10). PDFfiller markets its product and services by discussing on its website "the number of times users have downloaded a particular work" and by providing a running total of this statistic on its website. (Docket Entry # 1, P. 10). For example, PDFfiller's website, when searched for the terms "CAR form rpa ca," returned results that "the 'California Residential Purchase Agreement and Joint Escrow Instructions' work has been filled out 89,471 times." (Docket Entry # 1, p. 11).

PDFfiller also "engaged in search engine optimization techniques." (Docket Entry # 1, p. 11). The techniques include "making the titles of numerous CAR copyrighted works" searchable in its database through search engines "such as Google," and ensuring that "links to the PDFfiller Website also appear at the top of the list or near the top of the list of unpaid search results." (Docket Entry # 1, p. 11). In Massachusetts, PDFfiller has "over 15 full time employees" who are dedicated to "marketing and selling content including the **[*61]** Infringed Works" through methods such as "search engine optimization, Google and other search engine advertising, website analytics, and other strategic and state of the art techniques for targeting the public." (Docket Entry # 1, p. 12). These employees in Massachusetts use these methods to target the public, "including California real estate licensees," home buyers, and sellers, who are prospective customers of CAR and prospective clients of CAR's members. (Docket Entry # 1, p. 12). In the Ukraine, PDFfiller "has over 40 full time employees . . . dedicated to writing and maintaining software, website analytics, data mining, and maintaining the operation of the PDFfiller Website and business." (Docket Entry # 1, p. 12).

PDFfiller maintained, marketed, and sold a number of CAR's works to the public, all of which "contain express reference to CAR's copyright registration" that "forbids the unauthorized distribution, display and reproduction of the form, or any portion thereof, by photocopy machine or any other means, including facsimile or computerized formats." (Docket Entry # 1, pp. 8, 12) (Docket Entry # 1-2). Each of CAR's works maintained, marketed, and sold to the public via PDFfiller's **[*62]** website also "contain express reference to the trademarked name and logo of CAR by stating 'California Association of Realtors®, Inc.' next to CAR's logo." (Docket Entry # 1, p. 13).

CAR identifies the following purported misconduct in the complaint: "republishing the CAR works in their entirety on the PDFfiller searchable database"; "creating and selling unlocked, reusable and fillable PDF forms copied and derived from the CAR works in their entirety on the PDFfiller searchable database"; and "marketing, advertising, offering to sell[,] and selling the works from the CAR Library, bearing Plaintiff's trademarked name and logo, to the public through the PDFfiller Website." (Docket Entry # 1, p. 13).

Finally, CAR sent, and all defendants received, notices to "cease and desist from further sale and use of [sic] all documents bearing CAR's copyright notices and CAR's trademarks." (Docket Entry # 1, p. 13). Defendants, however, have not removed any of the works in question from PDFfiller's website. (Docket Entry # 1, p. 13).

DISCUSSION

In seeking to dismiss the *section 11 chapter 93A* claim, defendants first maintain that the conduct did not occur "'primarily and substantially' within the Commonwealth." **[*63]** (Docket Entry # 142, p. 5) (quoting *section 11*). According to defendants, the harm or injury took place exclusively in California, no wrongdoing occurred in Massachusetts, and the "'center of gravity' . . . does not rest in Massachusetts." (Docket Entry # 142, p. 7). Second, they submit that: (1) CAR, as a nonprofit corporation, did not engage in "trade or commerce"; and (2) *section 1(b) of chapter 93A* requires the "trade or commerce" to "directly or indirectly affect[] the people of this commonwealth." (Docket Entry # 142, p. 13).

CAR points out that defendants have the burden of proof to show "'with certitude'" that the "'transactions and actions did not occur primarily and substantially within the commonwealth.'" (Docket Entry # 153) (quoting *Gray v. Evercore Restructuring LLC, 544 F.3d at 324*, and *section 11*). CAR further maintains that the facts in the complaint sufficiently show that the misconduct occurred in Massachusetts and the center of gravity giving "'rise to the claim is primarily and substantially within the Commonwealth.'" (Docket Entry # 153) (quoting *Kuwaiti Danish Computer Co.*

v. Digital Equip. Corp., 438 Mass. 459, 781 N.E.2d 787, 788-99 (Mass. 2003)). CAR additionally contends that its status as a nonprofit corporation is not dispositive of whether it engaged in "trade or commerce" under section 11 and the fact-specific nature of the inquiry precludes a Rule 12(c) **[*64]** dismissal. (Docket Entry # 153).

I. Primarily and Substantially in Massachusetts

Section 11 precludes relief "unless the actions and transactions constituting the alleged unfair method of competition or the unfair or deceptive act or practice occurred primarily and substantially within the commonwealth." Mass. Gen. Laws ch. 93A, § 11. The underlying burden of proof is on "the person claiming that such transactions and actions did not occur primarily and substantially within the commonwealth," i.e., defendants. Mass. Gen. Laws ch. 93A, § 11. The applicable analysis considers the facts "'in the context of the entire § 11 claim'" and then determines "'whether the center of gravity of the circumstances that give rise to the claim is primarily and substantially within the Commonwealth.'" Sonoran Scanners, Inc. v. Perkinelmer, Inc., 585 F.3d 535, 546 (1st Cir. 2009) (quoting Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 799). Furthermore, "[t]he center of gravity analysis examines 'actionable conduct as opposed to conduct that is neither unfair nor deceptive.'" Controlled Kinematics, Inc. v. Novanta Corp., Civil Action No. 17-11029-ADB, 2017 U.S. Dist. LEXIS 195989, 2017 WL 5892200, at *3 (D. Mass. Nov. 29, 2017); see Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 800 (because "[t]here was nothing unfair or deceptive about" corporate policies adopted and applied in Massachusetts, they "cannot be considered" regarding whether "wrongful conduct occurred 'primarily and substantially' in Massachusetts"); accord Kenda Corp., Inc. v. Pot O'Gold Money Leagues, Inc., 329 F.3d 216, 236 (1st Cir. 2003) (noting **[*65]** that "defendants' actionable conduct occurred primarily in Michigan" and concluding that center of gravity "occurred primarily outside the Commonwealth").

No one factor predominates the analysis in every case "because of a tendency to shift the focus of the inquiry away from the purpose and scope of [chapter] 93A." Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 799; accord In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d 156, 194 (1st Cir. 2009) (inquiry is "'fact intensive'" with focus on "'purpose and scope' of Chapter 93A"). Moreover, the significance and weight of factors in "one case may be nonexistent in another" case such that the inquiry is not grounded on "any precise formula" and is "unique to each case." Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 798; In re Pharm. Indus. Average Wholesale Price Litig., 582 F.3d at 194. Hence, it may be appropriate to decide a case based on one instance of misconduct in one jurisdiction when that misconduct has a greater significance or impact on the case as a whole rather than on "a multiplicity of instances of misconduct in another jurisdiction." Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 798-799, 799 n.14. Depending upon each unique case, "[t]he situs of the loss," id. at 798 n.13, the locus of the misconduct, and the location where the plaintiff received and acted upon the unfair or deceptive act or practice may guide the analysis. See Controlled Kinematics, Inc. v. Novanta Corp., 2017 U.S. Dist. LEXIS 195989, 2017 WL 5892200, at *4; see also Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 799.

In the case at bar, a significant amount of the misconduct of marketing and selling the copyrighted **[*66]** and trademarked works through search engine optimization took place in Massachusetts. Fifteen PDFfiller employees in Massachusetts worked full time in selling and marketing the purportedly infringed works. Whereas 40 full-time employees in Ukraine worked on data mining, website analytics, and maintaining the website, Yasinovsky, the chief executive officer, and Shakhnovich, the president, both domiciled in Massachusetts, worked in PDFfiller's Massachusetts office operating the website.[14] See, e.g., Controlled Kinematics, Inc. v. Novanta Corp., 2017 U.S. Dist. LEXIS 195989, 2017 WL 5892200, at *5 (section 11 claim based on "actions of Defendant's senior employees in Massachusetts" where practice of withholding commissions "was developed by senior company officials" survived Rule 12(b)(6) challenge). Reasonable inferences demonstrate that their activities operating the website in Massachusetts involved extensive misconduct in Massachusetts, including approving and designing the website to allow PDFfiller subscribers to export locked, copyrighted documents from the CAR Library and convert them to

[14] As previously noted, the above finding is made by drawing reasonable inferences from the facts in the complaint in CAR's favor.

unlocked, fillable PDF documents in their personal PDFfiller accounts. Indeed, the website's database contains at least 64 separate copyrighted works.

Reasonable inferences also permit a finding that Yasinovsky and **[*67]** Shakhnovich operated the website in Massachusetts by, inter alia, allowing its users to save, maintain, download, and email proprietary documents obtained and converted from the CAR Library to their personal PDFfiller accounts without CAR's authorization. As further stated in the complaint, the website allows the unauthorized activities of unlocking the CAR Library of documents and making CAR's intellectual property, including its licensed and registered zipForms, available to the public for copying and use. The foregoing is sufficient to avoid a *Rule 12(c)* dismissal even under the more defendant-favorable standard applicable in the absence of an affirmative defense.

Defendants' remaining arguments are not convincing. Acknowledging that a number of cases in this district deny *Rule 12(b)(6)* motions due to language in Kuwaiti that "[s]ection 11 suggests" the court should determine the center of gravity "after making findings of fact," *Kuwaiti, 781 N.E.2d at 799*; see, e.g., *Workgroup Tech. Corp. v. MGM Grand Hotel, LLC, 246 F.Supp.2d 102, 118 (D. Mass. 2003)*, defendants distinguish these cases as "involve[ing] allegations that the plaintiff was located in and suffered an injury in Massachusetts." (Docket Entry # 142, n.3) (citing *Bruno Intl. Ltd. v. Vicor Corp., Civil Action No. 14-10037-DPW, 2015 U.S. Dist. LEXIS 123556, 2015 WL 5447652, at *18 (D. Mass. Sept. 16, 2015))*. As explained by the court in **[*68]** Bruno, courts in this district show a reluctance to allow motions to dismiss and reserve "the Kuwaiti assessment for after the factual record has been developed" when "the plaintiff has alleged that it is located in and claims some injury in Massachusetts." *Bruno Intl. Ltd. v. Vicor Corp., 2015 U.S. Dist. LEXIS 123556, 2015 WL 5447652, at *18* (collecting cases); see, e.g., *Guest-Tek Interactive Ent. Inc. v. Pullen, 731 F.Supp.2d 80, 92 (D. Mass. 2010)*. Defendants reason that these cases are consistent with cases dismissing *section 11* claims when an out-of-state plaintiff, such as CAR, "fails to allege sufficient harm or injury within Massachusetts." (Docket Entry # 142). Defendants accurately point out that CAR is a California corporation with a principal place of business in California and is not registered to do business in Massachusetts. (Docket Entry # 1, ¶¶ 7, 23) (Docket Entry # 143-1).

The Kuwaiti center of gravity analysis, however, eschews reliance on any one factor, such as the situs of the loss or the location of the plaintiff. See *Kuwaiti Danish Computer Corp. v. Digital Equip. Co., 781 N.E.2d at 799* (analysis "should not be based on any one factor or factors"). Rather, the focus is appropriately placed on the unique facts in the *Rule 12(c)* record in the context of the entire *section 11* claim. See generally *id. at 798-799*. Those facts and reasonable inferences show that a significant portion of the misconduct took place in Massachusetts thereby **[*69]** providing a sufficient basis to deny the *Rule 12(c)* motion. See, e.g., *Controlled Kinematics, Inc. v. Novanta Corp., 2017 U.S. Dist. LEXIS 195989, 2017 WL 5892200, at *5* (denying motion to dismiss *section 11* claim brought by out-of-state plaintiff injured in California against Michigan corporation with principal place of business in Massachusetts because complaint referenced actions that took place in Massachusetts); see *Fishman v. John Hancock Life Ins. Co., Civil Action No. 13-12166-LTS, 2014 U.S. Dist. LEXIS 40938, 2014 WL 1326989, at *3 (D. Mass. Mar. 27, 2014)* (out-of-state plaintiffs' *section 11* suit for nonpayment of commissions against Massachusetts company alleging failure to supervise general agents and respond to reports *in Massachusetts* warranted denying *Rule 12(b)(6)* motion). Indeed, the court in Kinematics rejected an argument similar to defendants' argument and determined that the allegations indicating "that Defendant committed the misconduct in Massachusetts" were sufficient to avoid a *Rule 12(b)(6)* dismissal. *Id. at *4-5*.

The *Weber* case relied on by defendants (Docket Entry # 142, p. 10) is distinguishable because the misconduct did not occur in Massachusetts. See *Weber v. Sanborn, 502 F.Supp.2d 197, 199 (D. Mass. 2007)* (events giving "rise to this lawsuit are centered around the planning and development of property in New Hampshire, by New Hampshire and New Jersey residents and/or business entities, to 'bring'" stadium to New Hampshire). CAR aptly distinguishes **[*70]** two other cases cited by defendants as relying on a three-factor test rejected in *Kuwaiti, 781 N.E.2d at 798-799*. (Docket Entry # 153, n.2).

Defendants additionally argue that the contacts of the competing jurisdictions are approximately in balance which leads to a determination that the conduct did not occur primarily in Massachusetts. (Docket Entry # 142, pp. 11-12). It is true that "Kuwaiti Danish did not retreat from the proposition that, if the significant contacts of the competing jurisdictions are approximately in the balance, the conduct in question cannot be said to have occurred primarily and substantially in Massachusetts." *Uncle Henry's Inc. v. Plaut Consulting Co., Inc., 399 F.3d 33, 45 (1st Cir. 2005)*. Drawing reasonable inferences and viewing the record in CAR's favor, however, the competing jurisdictions are not in approximate balance but, rather, weigh in favor of Massachusetts when viewed under a *Rule 12(c)* standard. Coupled with the purpose of chapter 93A "'to encourage more equitable behavior in the marketplace and impose liability on persons seeking to profit from unfair practices,'" defendants fail to satisfy their burden on the primarily and substantially issue to warrant a *Rule 12(c)* dismissal.

II. Trade or Commerce

Defendants next maintain that CAR, "as a not-for-profit corporation," does **[*71]** not meet chapter 93A's "trade or commerce" requirement. (Docket Entry # 142). CAR submits that its status as a nonprofit corporation is not dispositive and that PDFfiller's use of CAR's trademarks to sell CAR forms on its website is actionable. (Docket Entry # 153).

In addition to a commercial transaction, *section 11* requires, inter alia, a finding that CAR was "engaged in 'trade or commerce,' and therefore acting in a 'business context.'" *Linkage Corp. v. Trustees of Boston University, 425 Mass. 1, 679 N.E.2d 191, 206 (Mass. 1997)* (*sections 2(a)* and *11* "requires a dual inquiry," first, whether "interaction is 'commercial' in nature, and second, whether the parties were both engaged in 'trade or commerce,' and therefore acting in a 'business context'"); accord *Selmark Associates, Inc. v. Ehrlich, 467 Mass. 525, 5 N.E.3d 923, 942 (Mass. 2014)*; *States Resources Corp. v. The Architectural Team, Inc., 433 F.3d 73, 84 (1st Cir. 2005)*. An entity's "nonprofit status is not dispositive" of whether it was engaged in trade or commerce. *Kunelius v. Town of Stow, 588 F.3d 1, 17 (1st Cir. 2009)*; accord *Linkage Corp. v. Trustees of Boston University, 679 N.E.2d. at 207*. In applying the "'business context'" test, the court assesses "'the nature of the transaction, the character of the parties involved, and the activities engaged in by the parties'" as well as "'[o]ther relevant factors.'" *Kraft Power Corp. v. Merrill, 464 Mass. 145, 981 N.E.2d 671, 683 n.13 (Mass. 2013)*; *Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 887 N.E.2d 244, 259 (Mass. 2008)*; *Begelfer v. Najarian, 381 Mass. 177, 409 N.E.2d 167, 176 (Mass. 1980)*.

CAR is a nonprofit trade association comprised of an estimated 170,000 California real estate professionals which promotes real estate services for its members. (Docket Entry # 1, ¶¶ 23, 24). PDFfiller, in turn, **[*72]** sells subscriptions of its services to the public. (Docket Entry # 1, ¶ 71). In particular, PDFfiller's users pay to obtain access to the company's database of forms, including CAR's copyrighted forms. They also download forms to their accounts and use the website to "create and maintain such documents as fillable" PDF forms. (Docket Entry # 1, ¶ 66). CAR restricts access to the CAR Library and its locked forms to "paid members and other licensees." (Docket Entry # 1, p. 5). CAR also sells annual licenses to access the CAR Library and obtain access to its locked forms for $799 to $999. PDFfiller's website shows that users filled out CAR's copyrighted residential purchase agreement and joint escrow instructions 89,471 times. (Docket Entry # 1, ¶ 70) (Docket Entry # 1-2, p. 2).

CAR identifies the transactions at issue as involving PDFfiller's use of CAR's copyrighted works "to sell ripped off copies" of CAR forms on PDFfiller's website without CAR's permission. (Docket Entry # 153, p. 9). Here, construing the record in CAR's favor, CAR charged for its services or included the services as a membership benefit for "paid members." See *Linkage Corp. v. Trustees of Boston University, 679 N.E.2d. at 208* (paraphrasing *Planned Parenthood Federation of America, Inc. v. Problem Pregnancy of Worcester, Inc., 398 Mass. 480, 498 N.E.2d 1044, 1052 (Mass. 1986)*, that charitable entity did not charge **[*73]** for its services as showing it was beyond reach of chapter 93A). PDFfiller also charged website users for its services. It is also plausible that CAR's motivations (as well as PDFfiller's motivations) for charging membership fees or other fees to access and use the copyrighted forms were financial, namely, to obtain profits for the corporation, and that CAR viewed PDFfiller's activities of allowing subscribers to access and use fillable CAR forms as reducing that profit. See *Klairmont v. Gainsboro Restaurant, Inc., 465 Mass. 165, 987 N.E.2d 1247, 1256 (2013)* ("judge was permitted to infer that the defendants had a profit-seeking motive in constructing and maintaining the hazardous staircase in the context of their commercial enterprise, an enterprise that Jacob patronized as a paying customer"). It is also plausible that the nature of the transactions are business related. Finally, the transactions were not isolated, see *Begelfer v. Najarian, 409 N.E.2d at 176*, or incidental to CAR's business. See *Linkage Corp. v. Trustees of Boston University, 679 N.E.2d. at 208*.

Accordingly, the chapter 93A claim is not subject to dismissal on the basis that CAR was not engaged in trade or commerce.

As a final matter, defendants assert that the "indirectly or directly" language in *section 1(b)* precludes the *section 11* claim because CAR fails to allege any connection to Massachusetts that impacts Massachusetts **[*74]** citizens. *Section 1(b)* defines "'trade' and 'commerce'" and states, in part, that the term "shall include any trade or commerce directly or indirectly affecting the people of this commonwealth."[15] *Mass. Gen. Laws ch. 93A, § 1(b)*. The language "is of minimal utility in construing" the trade or commerce phrase because it "merely 'recites certain activities which are included within those terms and concludes by incorporating . . . "any trade or commerce directly or indirectly affecting the people of this commonwealth."'" *Lantner v. Carson, 374 Mass. 606, 373 N.E.2d 973, 976 n.4 (Mass. 1978)*. The language in *section 11*, which depicts the conduct of the person filing suit, i.e., CAR, as engaging in "*any* trade or commerce," is undeniably broad. *Mass. Gen. Laws ch. 93A, § 11*. Furthermore, courts interpret this language as restricting "trade or commerce" to transactions that are not private in nature. See *Gannett v. Lowell, 16 Mass. App. Ct. 325, 450 N.E.2d 1121, 1124 (Mass. App. Ct. 1983)*; *Newton v. Moffie, 13 Mass. App. Ct. 462, 434 N.E.2d 656, 659 (Mass. App. Ct. 1982)*. Thus, the conduct of "administering the estate" in Gannett did not constitute "trade or commerce 'directly or indirectly affecting the people of this Commonwealth'" because *section 11* "'is not available where the transaction is strictly private in nature and is no way undertaken in the ordinary course of a trade or business.'" *Gannett v. Lowell, 450 N.E.2d at 1124*. Likewise, the settlement of a dispute over a note in Newton did not "constitute[] trade or commerce 'directly or indirectly **[*75]** affecting the people of this commonwealth,' within the meaning of *§ 1(b)*" because section "11 was not enacted to 'provide an additional remedy for private wrongs which do not'" affect the "'public generally.'" *Newton v. Moffie, 434 N.E.2d at 659*. Moreover, the "directly or indirectly affecting the people of the commonwealth" language "was not intended . . . to create a separate element of the cause of action." Id. (dicta); see *Lantner v. Carson, 373 N.E.2d at 976 n.4*.

Here, CAR's conduct is public as opposed to private. In any event, solely for purposes of the *Rule 12(c)* motion, this court deems it plausible that CAR engages in conduct that indirectly affects Massachusetts residents.

CONCLUSION

In accordance with the foregoing **[*76]** discussion, this court **RECOMMENDS**[16] that CAR's motion to dismiss the amended counterclaims and the third-party complaint (Docket Entry # 121) and defendants' partial motion for judgment on the pleadings (Docket Entry # 141) be **DENIED**. This court will conduct a status conference on March 14, 2018, at 2:00 p.m. to address the discovery schedule for the antitrust claims.

/s/ Marianne B. Bowler

MARIANNE B. BOWLER

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[15] In full, the definition reads as follows:

> (b) "Trade" and "commerce" shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in *subparagraph (k) of section four hundred and one of chapter one hundred and ten A* and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

Mass. Gen. L. ch. 1(b).

[16] Any objections to this Report and Recommendation must be filed with the Clerk of Court within 14 days of receipt of the Report and Recommendation to which objection is made and the basis for such objection should be included. See *Fed. R. Civ. P. 72(b)*. Any party may respond to another party's objections within 14 days after service of the objections. Failure to file objections within the specified time waives the right to appeal the order.

United States Magistrate Judge

Carey & Assocs., P.A. v. Sheriffs & Counties of Cumberland

United States District Court for the District of Maine

March 5, 2018, Decided; March 5, 2018, Filed

Docket No. 2:17-cv-144-NT

Reporter

320 F. Supp. 3d 226 *; 2018 U.S. Dist. LEXIS 35084 **; 2018-1 Trade Cas. (CCH) P80,302; 2018 WL 1156285

CAREY & ASSOCIATES, P.A., GEORGE SHAW, both as class representatives, individually, and on behalf of all others similarly situated, Plaintiffs, v. SHERIFFS and COUNTIES OF CUMBERLAND, et al., Defendants.

Core Terms

anticompetitive, sheriffs, immunity, displace, state action, antitrust, civil process, municipality, effects, government entity, motion to dismiss, articulation, delegate

Counsel: **[**1]** For CAREY & ASSOCIATES PA, individually and on behalf of all others similarly situated, GEORGE SHAW, individually and on behalf of all others similarly situated, Plaintiffs: SETH T. CAREY, LEAD ATTORNEY, CAREY & ASSOCIATES, RUMFORD, ME.

For OXFORD COUNTY, OXFORD COUNTY SHERIFF, CUMBERLAND COUNTY, CUMBERLAND COUNTY SHERIFF, AROOSTOOK COUNTY, AROOSTOOK COUNTY SHERIFF, HANCOCK COUNTY, HANCOCK COUNTY SHERIFF, KENNEBEC COUNTY, KENNEBEC COUNTY SHERIFF, KNOX COUNTY, KNOX COUNTY SHERIFF, LINCOLN COUNTY, LINCOLN COUNTY SHERIFF, PENOBSCOT COUNTY, PENOBSCOT COUNTY SHERIFF, SAGADAHOC COUNTY, SAGADAHOC COUNTY SHERIFF, SOMERSET COUNTY, SOMERSET COUNTY SHERIFF, WALDO COUNTY, WALDO COUNTY SHERIFF, YORK COUNTY, YORK COUNTY SHERIFF, ANDROSCOGGIN COUNTY, ANDROSCOGGIN COUNTY SHERIFF, FRANKLIN COUNTY, FRANKLIN COUNTY SHERIFF, PISCATAQUIS COUNTY, PISCATAQUIS COUNTY SHERIFF, WASHINGTON COUNTY, WASHINGTON COUNTY SHERIFF, Defendants: CASSANDRA S. SHAFFER, LEAD ATTORNEY, PETER T. MARCHESI, WHEELER & AREY, P.A., WATERVILLE, ME.

Judges: Nancy Torresen, United States Chief District Judge.

Opinion by: Nancy Torresen

Opinion

[*227] ORDER ON THE DEFENDANTS' MOTION TO DISMISS

The Plaintiffs' class action lawsuit centers on allegations of antitrust violations **[**2]** in the manner and fees associated with the service of civil process in Maine. Pursuant to *Rule 12(b)(6)*, the Defendants have moved to dismiss all the claims in the Plaintiffs' Complaint. Defs.' Mot. to Dismiss (ECF No. 6). For the reasons discussed below, I grant the Defendants' motion to dismiss.

FACTS

The Complaint generally alleges that the Defendants have a monopoly in the service of civil process and are price-gouging for their services. Complaint (ECF No. 1). The Complaint includes claims for violations of: the *Maine Freedom of Access Act* (Count I); the *Maine Unfair Trade Practices Act* (Count II); the duty of good faith and fair dealing (Count III); the Maine antitrust statute (Count IV); the *Sherman Antitrust Act* (restraint of trade) (Count V); the *Sherman Antitrust Act* (exclusive dealing and other exclusionary agreements) (Count VI); the *Sherman Antitrust Act* (monopoly) (Count VII); the Maine antitrust statute (Count VIII); the Clayton Antitrust Act (Count IX); the *Sherman Antitrust Act* (attempted monopolization) (Count X); the *Federal Trade Commission Act* (Count XI); civil conspiracy (Count XII); unjust enrichment (Count XIII); accounting (Count XIII); the **[**3]** *Racketeer Influenced and Corrupt Organizations Act ("RICO")* (Count XIV); and punitive conduct (Count XV). The Plaintiffs seek damages and declaratory and injunctive relief.

STANDARD OF REVIEW

Pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a party may seek dismissal of "a claim for relief in any pleading" if that party believes that the pleading fails "to state a claim upon which relief can be granted." In assessing a motion to dismiss under *Rule 12(b)(6)*, a court "assume[s] the truth of all of the well-pleaded facts in the complaint and draw[s] all reasonable inferences in the plaintiff's favor." *Román—Oliveras v. Puerto Rico Elec. Power Auth., 655 F.3d 43, 45 (1st Cir. 2011)* (internal quotations omitted). To overcome the motion, the Plaintiffs must establish that their allegations raise a plausible basis for a fact finder to conclude that the defendant is **[*228]** legally responsible for the claims at issue. *Id. at 49*.

ANALYSIS

I. State Action Immunity

The Defendants have asserted state action immunity as a basis to dismiss the Plaintiffs' antitrust claims. The Supreme Court, relying on principles of federalism and state sovereignty, has held that the Sherman Act did not apply to anticompetitive restraints imposed by states "as an act of government." *Parker v. Brown, 317 U.S. 341, 352, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.[1]

Parker immunity does not apply to substate entities, such as municipalities and other political **[**4]** subdivisions, but "substate governmental entities do receive immunity from antitrust scrutiny when they act 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225-26, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)* (quoting *Lafayette v. La. Power & Light Co., 435 U.S. 389, 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*); *see also* *Hallie v. Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. "[I]mmunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *Id. at 226* (quoting *Cmty. Commc'ns Co., v. City of Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*).[2]

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[1] The state action immunity doctrine has also been applied to claims brought under the *Clayton Act*, *see* *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc., 790 F.2d 1032 (2d Cir. 1986)*, and the *Federal Trade Commission Act*, *see* *N.C. State Bd. Of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1117-1118, 191 L. Ed. 2d 35 (2015)*.

[2] The Plaintiffs assert that in order to shield the anticompetitive actions of the Defendants from antitrust laws, "a State must adopt some alternative regulatory mechanism that provides active state supervision of that conduct." Pls.' Opp'n 4 (ECF No. 7). While that requirement is true for private parties asserting state action immunity, it does not apply to substate entities. "[U]nlike private parties, [substate] entities are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)* (quoting *Hallie v. Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*).

The "clear articulation" test does not require a "state legislature to have stated explicitly that it expected [the governmental entity] to engage in conduct that would have anticompetitive effects." *Hallie, 471 U.S. at 42*. To satisfy the "clear articulation" test, the state need only delegate to the county "the express authority to take action that foreseeably will result in anticompetitive effects." *Id. at 43*. Mere authorization to act is insufficient; "the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively." *Phoebe Putney, 568 U.S. at 228*.

The Supreme Court has acknowledged that it would be "unrealistic" to "require state legislatures to explicitly authorize specific anticompetitive effects before state action immunity could apply" because **[**5]** " '[n]o legislature . . . can be expected to catalog all of the anticipated effects' of a statute delegating authority to a substate governmental entity." *Phoebe Putney, 568 U.S. at 229* (quoting *Hallie, 471 U.S. at 43*). Instead, the Supreme Court has "approached the clear-articulation inquiry more practically, but without diluting the **[*229]** ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Id.* (quoting *Parker, 317 U.S. at 352*). "[A] state policy to displace federal ***antitrust law*** [is] sufficiently expressed where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* "In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.*

A. The Maine Statutory Scheme

Under Maine law, "[s]ervice of process shall be as proscribed by rule of court." *14 M.R.S. § 701*. Rule 4(c) of the Maine Rules of Civil Procedure sets forth the requirements for service of a complaint and summons. It provides:

> (c) Service. Service of the summons and complaint may be made as follows:
>
> (1) By mailing a copy of the summons and of the complaint **[**6]** (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment form and a return envelope, postage prepaid addressed to the sender. If no acknowledgment of service under this paragraph is received by the sender within 20 days after the date of mailing, service of the summons and complaint shall be made under paragraph (2) or (3) of this subdivision.
> (2) By a sheriff or a deputy within the sheriff's county, or other person authorized by law, or by some person specially appointed by the court for that purpose. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.
> (3) By any other method permitted or required by this rule of by statute.

Me. R. Civ. P. 4(c).[3]

By statute, "[e]very sheriff and each of his deputies shall serve and execute, within his county, all writs and precepts issued by lawful authority to him directed and committed." *14 M.R.S. § 702*. Maine law provides that sheriffs and their deputies shall receive fees unless the sheriffs and deputies are paid a salary instead of the fees for service of process.

> 1. Civil process. For service of all writs or complaints with summonses, precepts, notices, executions, **[**7]** court orders, orders of service, copies and all other civil process or papers requiring service which are not specified in this section:
>
> A. For proceedings in forma pauperis, $4 for each such service and $8 if the service is made in hand;
> B. For service on behalf of the State, $4 for each such service and $8 if the service is made in hand; and
> C. For all other proceedings, $8 for each such service and $16 if the service is made in hand.

30-A M.R.S. § 421(1). The statute goes on to identify fees for enumerated types of service. *30-A M.R.S. § 421(2)-(15)*. The statute further provides for reimbursement for mileage in addition to the fees. *30-A M.R.S. § 421*.

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[3] The Federal counterpart to this rule permits personal service by "[a]ny person who is at least 18 years old and not a party." *Fed. R. Civ. P. 4(c)(2)*.

B. Anticompetitive Effects are a Foreseeable Result

Although Maine law does not grant county sheriffs exclusive authority to serve civil process, the statutory scheme demonstrates that the legislature intended county sheriffs and their deputies to play the **[*230]** primary role in completing personal service of civil process in Maine. The legislature's grant of broad authority to sheriffs and deputies as process servers displaces some competition. In order to have process served personally by someone other than the sheriff or his deputies, one would have to obtain a special **[**8]** appointment from the court or use one of a narrow class of individuals otherwise authorized by law to effectuate service. *See, e.g.*, *14 M.R.S. § 703* (service by constables). Although special appointments are to be granted liberally, the extra step creates an impediment to the use of alternate forms of personal service of process. Me. R. Civ. P. 4(c)(2).

Two other features of the Maine service statutes also support the foreseeability of an anticompetitive effect. First, the statute here not only authorizes the sheriff to effectuate personal service, it also sets the fees which can be charged. This is not a case like *FTC v. Ticor Title Ins. Co.*, where rating bureaus for title insurance companies were authorized by state statute to set fees because here the state set the fees. *504 U.S. 621, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*; *see also* *Phoebe Putney, 586 U.S. at 228* (broad grant of authority to hospital authorities did not delegate authority to act anticompetitively); *Cmty. Commc'ns Co., 455 U.S. at 52* (state's grant of broad neutral authority to municipalities to govern local affairs did not contemplate anticompetitive actions later taken by the municipality). Second, contrary to the Plaintiffs' contention, the statute is not neutral with respect to the actions challenged as anticompetitive. The statute compels sheriffs and **[**9]** their deputies to execute service of lawfully issued writs and precepts presented to them. The statutory language indicates that, provided payment is received, the sheriffs and their deputies "*shall* serve and execute" these documents. *14 M.R.S. § 702* (emphasis added). In *Hallie*, the Supreme Court stated that a municipality was not required to show compulsion in order to receive the benefit of state action immunity, but it acknowledged that "compulsion affirmatively expressed may be the best evidence of state policy [to displace competition]." *471 U.S. at 45-46*. Thus, in this case the anticompetitive effect can be attributed to the state itself.

Because displacement of competition is the ordinary, logical, and inherent result of the Maine statutory scheme, its anticompetitive effect on personal service of process is foreseeable and the "clear articulation" test is satisfied. Thus, the sheriffs and county Defendants are entitled to state action immunity on all the Plaintiffs' federal antitrust claims. *See* *Fisichelli v. Town of Methuen, 956 F.2d 12, 15-16 (1st Cir. 1992)* (where immunity attaches, it shields not only the municipality as a body corporate and politic, but also municipal officials who are responsible for implementation of the anticompetitive policy). This state **[**10]** action immunity encompasses both claims for damages and for injunctive relief.

II. The Plaintiffs' Abandoned Claims

The Defendants raised numerous additional arguments to support the dismissal of the remaining counts of the Complaint.[4] **[*231]** The Plaintiffs focused their response on state action immunity. Despite filing a 23-page brief in one-and-one-half line spacing,[5] the Plaintiffs failed to respond meaningfully to any of the Defendants' arguments

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[4] The Defendants assert that: 1) state action immunity extends to claims brought under state antitrust laws; 2) all antitrust claims fail because there is no connection to commerce; 3) the breach of duty of good faith and fair dealing count fails because the UCC does not apply to contracts for services; 4) the civil conspiracy claim fails because the Plaintiffs have not alleged an independently recognized tort; 5) the unjust enrichment claim fails because the Plaintiffs have failed to allege any benefit that they conferred on any of the defendants; 6) the accounting claim is not a separate cause of action; 7) violations of antitrust laws do not constitute predicate acts under RICO; and 8) the FOAA claim is an untimely appeal of an undefined request. Because I conclude that the Plaintiffs have abandoned these counts, I do not address the merits of any of the Defendants' additional arguments.

[5] Local Rule 7(d) requires memoranda to be double spaced and provides that "no memorandum of law . . . in opposition to a motion to dismiss . . . shall exceed 20 pages."

concerning the remaining counts.[6] I will not attempt to supply arguments that the Plaintiffs have not articulated. I find that the Plaintiffs have abandoned the remaining counts in their Complaint and have waived the right to challenge a judgment in favor of the Defendants on those claims. *Astro-Med, Inc. v. Nihon Kohden America, Inc., 591 F.3d 1, 19 (1st Cir. 2009)* ("[I]ssues adverted to . . . in a perfunctory manner, unaccompanied by some developed argumentation, are deemed to have been abandoned."(internal quotations omitted)); *Hopkins v. Women's Div., Gen. Bd. of Global Ministries, 284 F. Supp. 2d 15, 25 (D.D.C. 2003)* ("[W]hen a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."), *aff'd* *98 F. App'x 8 (D.C. Cir. 2004)*.

CONCLUSION

For the reasons stated above, I **GRANT** the Defendants' motion to dismiss the Plaintiffs' Complaint.

SO ORDERED.

/s/ Nancy Torresen

United States Chief District Judge

Dated this 5th day of March, 2018.

End of Document

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[6] The Plaintiffs' Opposition included one paragraph addressing the intrastate commerce argument and relying on "common sense" as opposed to properly cited authority. Pls.' Opp'n 4. I am not basing my ruling on the commerce issue. Aside from that one paragraph, the sum and substance of the Plaintiffs' response to the Defendants' additional arguments is as follows:

> The rest of Defendants [sic] arguments, such as "the Plaintiffs do not allege **[**11]** that the Defendants committed any torts," for example, is just too derisory and contemptable [sic] to even dignify with a response. The Defendants' counsel should be subject to sanctions for their motion to dismiss which is an act of absurd and illogical.[sic]"

Pls.' Opp'n 23.

PEG Bandwith TX, LLC v. Texhoma Fiber, LLC

United States District Court for the Eastern District of Texas, Sherman Division

March 7, 2018, Decided; March 7, 2018, Filed

Civil Action No. 4:16-CV-00815

Reporter

299 F. Supp. 3d 836 *; 2018 U.S. Dist. LEXIS 36798 **; 2018 WL 1184581

PEG BANDWIDTH TX, LLC v. TEXHOMA FIBER, LLC

Core Terms

Fiber, Lease, sites, non-circumvention, assign, Cellular, parties, summary judgment, Route, obligations, carriers, rights, asserts, customers, network, notice, provide a service, attorney's fees, Covenants, Compete, fiberoptic, Telephone, licensed, novation, restrictive covenant, Antitrust, binding, declare, obligor, unambiguous

Counsel: **[**1]** For PEG Bandwidth TX LLC, Plaintiff: Robert Rivera, Jr., LEAD ATTORNEY, Susman Godfrey, LLP, Houston, TX; Johnny William Carter, Susman Godfrey LLP, Houston, TX.

For Texhoma Fiber, LLC, Defendant: Christopher M. Staine, Lucas C Wohlford, Crowe & Dunlevy - Dallas, Dallas, TX; Glenn Talmadge Nix, III, Attorney at Law, Sherman, TX; Sanford C. Coats, Crowe & Dunlevy, P.C. - Oklahoma City, Oklahoma City, OK.

Judges: AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE.

Opinion by: AMOS L. MAZZANT

Opinion

[*838] **MEMORANDUM OPINION AND ORDER**

Pending before the Court are Defendant Texhoma Fiber, LLC's Motion for Summary Judgment (Dkt. #36) and Plaintiff PEG Bandwidth TX, LLC's Motion for Partial Summary Judgment (Dkt. #37). Having considered the relevant pleadings and evidence, the Court finds that Plaintiff's motion should be granted. The Court further finds that Defendant's motion should be granted in part and denied in part.

BACKGROUND

Plaintiff PEG Bandwidth TX, LLC ("PEG") provides network solutions for cellular telephone carriers. In 2010 and 2011, PEG began discussions with the Hilliary family about providing PEG access to fiber optic cables for the purpose of supplying "backhaul" service to cellular carriers in the Wichita Falls area. **[**2]** [1] Defendant Texhoma Fiber, LLC ("Texhoma Fiber") is owned by the Hilliarys. The fiber in Wichita Falls was owned by Community

[1] "Backhaul" service connects a cell phone tower or site to a switch location designated by the cellular telephone carrier in order to enable the cellular carrier to service a market.

Telephone, a subsidiary of Comcell, Inc. ("Comcell"), which was owned by the Humpert family. The Hilliarys were in discussions to purchase Comcell, but had not finalized the acquisition.

The parties negotiated an agreement whereby Texhoma Fiber would lease to PEG pre-existing fiber in the Wichita Falls area and PEG would pay Texhoma Fiber to build out and extend the Wichita Falls fiber network to make it suitable for PEG to supply backhaul service to its customers. **[*839]** In May 2011, the parties finalized the contract into an agreement called the Dark Fiber Lease Agreement (the "Lease Agreement"). Texhoma Fiber was named as the lessor in the Lease Agreement. The dark fiber leased in the Lease Agreement would eventually connect numerous sites in the Wichita Falls area. Under the Lease Agreement, PEG could connect its equipment to the fiber at each site and thereby use the fiber to transmit data between the sites for the benefit of its customers.[2] Specifically, PEG used the fiber leased pursuant to the Lease Agreement in order to service three CMRS [Commercial Mobile Radio **[**3]** Service] carriers — Verizon Wireless, US Cellular, and AT&T. The term of the Lease Agreement was thirty (30) years.

The Lease Agreement stated that "TEXHOMA FIBER owns and operates a continuous fiber optic network between the points identified in Exhibit A." The Lease Agreement defined the location of the fiber in Exhibit A as the "Texhoma Fiber Route." The Lease Agreement provided for PEG to pay Texhoma Fiber $1.6 million in order to design, engineer, and construct a continuous fiber optic network in the Wichita Falls area that PEG could lease for the purpose of serving its cellular telephone customers.

Initially, the network would consist of 48-count fiber optic cable that connected the cell sites described on Exhibit "A" to the Lease Agreement. As amended, the Lease Agreement gave PEG the exclusive right to use only six of those fibers throughout the network.[3] Therefore, there were 42 fibers in the bundle to which PEG did not have exclusive access, even though it had largely paid for the construction of the network for those additional fibers. In total, PEG paid Texhoma Fiber $2,240,000 for the Texhoma Fiber Route.

In order to protect PEG's interests, the parties agreed that Texhoma **[**4]** Fiber could lease the other 42 fibers to other lessees subject to a non-circumvention provision:

> 18.1 NON-CIRCUMVENTION. TEXHOMA FIBER shall not, directly or indirectly through other customers, offer or provide services to licensed CMRS carriers at the sites contained in Exhibit A, without the prior written consent of PEG. Nothing herein shall restrict TEXHOMA FIBER'S right to provide any services to wireless carriers at sites not contained in Exhibit A.

Lease Agreement, at § 18.1.

This 30-year non-compete obligation restricts Texhoma Fiber from directly or indirectly offering or providing any service to any licensed CMRS carriers at any of the sites located on Texhoma Fiber Route (or any other sites that became subject to the Lease Agreement), without first receiving written consent from PEG. The non-circumvention provision allowed Texhoma Fiber to use the other 42 fibers to service customers other than licensed CMRS carriers, such as local businesses seeking to connect multiple sites. It also permitted Texhoma Fiber to use the other **[*840]** 42 fibers to provide backhaul service to CMRS carriers at locations not subject to the Lease Agreement.

On July 15, 2011, PEG entered into a Master Services Agreement **[**5]** (the "US Cellular Agreement") to provide cellular communication services to United States Cellular Corporation ("US Cellular"). On August 10, 2011,

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[2] This is a typical arrangement in the telecommunications industry whereby the lessor installs, maintains, and retains title to the fibers but attaches no electronics to the fibers. Instead, at each end of the fibers and at other locations between the end points, the lessee attaches the transmitting and receiving electronic equipment that processes and passes the communications signals over the optical fibers. Typically, as is the case here, the lessor builds a network consisting of a large number of fibers and then leases or otherwise conveys, pursuant to a substantial upfront fee paid prior to and/or contemporaneously with the delivery of the fibers, the exclusive right to use a subset of those fibers to the lessee for the entire anticipated useful life of the fibers.

[3] After negotiations, the parties agreed that Texhoma Fiber would lease two fibers to PEG in the "backbone" of the fiber route, and four fibers in the "lateral" routes.

pursuant to the US Cellular Agreement, US Cellular issued a Market Service Order that authorized PEG to provide cell site backhaul services to US Cellular for five years at fourteen new cell sites in the Texhoma Fiber Route.

Texhoma Fiber ultimately never finalized its purchase of Comcell. Because Texhoma Fiber was using fiber owned by Comcell's subsidiary, Community Telephone, apparently without compensating Comcell, Comcell and Community Telephone eventually threatened to disconnect their fiber from the Texhoma Fiber Route. Then, Comcell and Community Telephone filed suit against both Texhoma Fiber and PEG.

Texhoma Fiber settled with Comcell and Community Telephone in 2014. In the settlement, Texhoma Fiber agreed to pay Comcell and Community Telephone $250,000, to assign to Comcell the Lease Agreement, and to convey to Comcell half the fiber in the route served by the Lease Agreement. PEG was not a party to this settlement. On January 1, 2014, Texhoma Fiber, pursuant to § 18.10 of the Lease Agreement, assigned the Lease Agreement to Comcell ("Comcell **[**6]** Assignment"). The relevant assignment provision reads:

> Texhoma does hereby assign and transfer unto Comcell, effective as of [January 1, 2014], all of Texhoma's benefits, obligations and liabilities under the PEG Bandwidth Contract, to have and hold the same. Subject to the provisions of Section 1(b) below, Comcell hereby accepts such assignment and transfer and therefore agrees to assume all of Texhoma's benefits, obligations and liabilities under the PEG Bandwidth Contract pursuant to the terms of this Assignment.

(Dkt. #36, Exhibit 6).

By letter dated March 12, 2014, Texhoma Fiber, pursuant to § 18.10 of the Lease Agreement, notified PEG about the Comcell Assignment, and directed PEG to send all further payments due under the Lease Agreement to Comcell. The notice letter stated, "Texhoma Fiber, LLC assigned to Comcell Inc., all rights, title and interest in the Dark Fiber Lease Agreement . . . . By this Notice, you are directed to make all future payments due under said Lease and amendments to Comcell, Inc." (Dkt. #37, Exhibit 21). On July 2, 2014, PEG and Comcell agreed to amend the Lease Agreement for a third time to include Comcell as successor in interest to Texhoma Fiber. After the assignment, the **[**7]** fiber optic sheath in the Texhoma Fiber Route contained 24 fibers owned by Texhoma Fiber and 24 fibers owned by Comcell, with Comcell's fibers servicing PEG (Dkt. #37, Exhibit 15).

After the assignment, Texhoma leased certain fiber to Dobson Technologies ("Dobson"), which Dobson has used to provide cellular communication services to US Cellular at some of the US Cellular Sites (Dkt. #39 at p. 7). In 2016, US Cellular did not renew its contract with PEG. US Cellular instead contracted for Dobson Technologies to provide service at the same sites subject to the Lease Agreement in the Wichita Falls area.

On December 1, 2016, PEG filed its amended complaint asserting that Texhoma Fiber breached the Lease Agreement's thirty-year non-compete obligation by leasing fiber to Dobson at some of the US Cellular Sites where PEG formerly provided cell site backhaul services to US Cellular **[*841]** (Dkt. #4). On December 8, 2017, the Texhoma Fiber filed its Motion for Summary Judgment (Dkt. #36). On the same day, PEG filed its Motion for Partial Summary Judgment (Dkt. #37). On December 29, 2017, both parties filed their respective responses (Dkt. #38; Dkt. #39). On January 5, 2018, Texhoma Fiber filed its reply **[**8]** (Dkt. #41). On January 8, 2018, PEG filed its reply (Dkt. #43). On January 8, 2018, PEG filed its sur-reply (Dkt. #44). On January 11, 2018, Texhoma Fiber filed its sur-reply (Dkt. #45).

LEGAL STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. Summary judgment is proper under *Rule 56(a) of the Federal Rules of Civil Procedure* "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A dispute about a material fact is genuine when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. Substantive law identifies which facts are material. *Id.* The trial court "must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment." *Casey Enters., Inc. v. Am. Hardware Mut. Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981)*.

The party seeking summary judgment bears the initial burden of informing the court of its motion and identifying "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials" that demonstrate the absence of a genuine issue of material fact. *Fed. R. Civ. P. 56(c)(1)(A)*; *Celotex, 477 U.S. at 323*. If the **[**9]** movant bears the burden of proof on a claim or defense for which it is moving for summary judgment, it must come forward with evidence that establishes "beyond peradventure *all* of the essential elements of the claim or defense." *Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986)*. Where the nonmovant bears the burden of proof, the movant may discharge the burden by showing that there is an absence of evidence to support the nonmovant's case. *Celotex, 477 U.S. at 325*; *Byers v. Dall. Morning News, Inc., 209 F.3d 419, 424 (5th Cir. 2000)*. Once the movant has carried its burden, the nonmovant must "respond to the motion for summary judgment by setting forth particular facts indicating there is a genuine issue for trial." *Byers, 209 F.3d at 424* (citing *Anderson, 477 U.S. at 248-49*). A nonmovant must present affirmative evidence to defeat a properly supported motion for summary judgment. *Anderson, 477 U.S. at 257*. Mere denials of material facts, unsworn allegations, or arguments and assertions in briefs or legal memoranda will not suffice to carry this burden. Rather, the Court requires "significant probative evidence" from the nonmovant to dismiss a request for summary judgment. *In re Mun. Bond Reporting Antitrust Litig., 672 F.2d 436, 440 (5th Cir. 1982)* (quoting *Ferguson v. Nat'l Broad. Co., 584 F.2d 111, 114 (5th Cir. 1978))*. The Court must consider all of the evidence but "refrain from making any credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007)*.

ANALYSIS

I. Breach of Contract

Both parties have moved for summary judgment on the contract **[**10]** issues **[*842]** (Dkt. #36; Dkt. #37). The Court, sitting in diversity, applies Texas law in the interpretation of contracts. *H.E. Butt Grocery Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 150 F.3d 526, 529 (5th Cir. 1998)*. Under Texas law, "[t]he elements of a breach of contract claim are: (1) the existence of a valid contract between plaintiff and defendant; (2) the plaintiff's performance or tender of performance;[4] (3) the defendant's breach of the contract; and (4) the plaintiff's damage as a result of the breach." *In re Staley, 320 S.W.3d 490, 499 (Tex. App.—Dallas 2010, no pet.)*. PEG claims that it can establish each element. Texhoma Fiber argues that the non-circumvention provision is invalid because it is overly broad, and that even if the covenant is valid, it did not breach the terms. The Court will address each argument in turn.

Section 18.1 of the Lease Agreement disallows Texhoma Fiber from, directly or indirectly through other customers, offering or providing services to licensed CMRS carriers at the sites contained in Exhibit A, without the prior written consent of PEG. It is undisputed that Texhoma Fiber, indirectly through its customer Dobson, has since 2016 provided service to US Cellular at sites listed in Exhibit A to the Lease Agreement, as amended (Dkt. #39 at ¶ 18). Thus, Texhoma Fiber would **[**11]** seem to be in breach of the Lease Agreement.

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[4] In its Response to PEG's Motion for Partial Summary Judgment, Texhoma fiber asserts that "PEG committed a prior breach of the [Lease Agreement] which excused Texhoma from continuing to perform." (Dkt. #39 at p. 20). "[T]he contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense that must be affirmatively pleaded." *Pivotal Payments, Inc. v. Taking You Forward LLC, No. 4:16CV-00598, 2017 U.S. Dist. LEXIS 29411, 2017 WL 834980, at *3 (E.D. Tex. Mar. 1, 2017)* (quoting *Compass Bank v. MFP Fin. Servs., Inc., 152 S.W.3d 844, 852 (Tex. App.—Dallas 2005, pet. denied))* (citing *RE/MAX of Tex., Inc. v. Katar Corp., 961 S.W.2d 324, 327 (Tex. App.-Houston [1st Dist.] 1997, pet. denied)* (citing *Tex. R. Civ. P. 94*)). *See* *Mullins v. TestAmerica, Inc., 564 F.3d 386, 411 (5th Cir. 2009)*. Here, Texhoma Fiber failed to affirmatively plead such defense. Thus, this affirmative defense is waived.

However, Texhoma Fiber argues that it assigned to Comcell all of its "benefits, obligations and liabilities" under the Lease Agreement. It further argues that the Lease Agreement does not limit the rights or obligations it can assign under the Lease Agreement, but simply requires it to provide notice to PEG of the assignment pursuant to § 18.10. Thus, the assignment did not exclude any of Texhoma Fiber's obligations under the Lease Agreement, and therefore, included the thirty-year non-circumvention obligation. Texhoma Fiber further claims that it conveyed to Comcell all of the fibers in the Wichita Falls Network that PEG had an exclusive right to use.

PEG claims that Texhoma Fiber's notice was incomplete. PEG asserts that Texhoma Fiber notified PEG only that it had "assigned to Comcell, Inc., all *rights, title, and interest*" in the Lease Agreement. Further, PEG asserts that the notice specifically addresses only payments due from PEG, which are to be directed to Comcell, instead of Texhoma Fiber, going forward. Thus, PEG claims that Texhoma Fiber did not notify PEG Bandwidth about assignment of any "obligations," such as the non-circumvention obligation. **[**12]**

PEG further claims that Texhoma Fiber's notice was false because Texhoma Fiber had not assigned *all* rights, title, and interest to Comcell. Rather, Texhoma Fiber had retained its rights, title, and interest in *half* of the fiber which is the subject matter of the Lease Agreement. The Settlement Agreement with Comcell required Texhoma Fiber to execute a Bill of Sale, in **[*843]** which Texhoma Fiber conveyed only half of its interest in the Texhoma Fiber Route. As a result, at most locations in the Texhoma Fiber Route, the fiber optic sheath contained twenty-four fibers owned by Texhoma Fiber and twenty-four fibers owned by Comcell, with Comcell's fibers servicing PEG Bandwidth.

PEG further argues that § 18.10 does not permit an assignment of all obligations, including the non-circumvention provision, but only part of the rights. According to PEG, in order to avoid the non-circumvention obligation with respect to its retained fibers, Texhoma Fiber has to prove a novation with respect to that obligation and asserts Texhoma Fiber has not presented any evidence showing PEG agreed to extinguish the non-circumvention obligation with respect to half of the fibers. PEG further argues Texhoma Fiber cannot point **[**13]** to any authority allowing it to destroy a contractual obligation by purporting to assign the obligation while keeping the contractual rights or property to which that obligation pertains.

The Court need not address whether Texhoma Fiber's notice of the assignment was sufficient because it finds that the Lease Agreement does not extinguish Texhoma Fiber's non-circumvention obligation through an assignment.

In *Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, the Texas Supreme Court held that an assignment relieves a party of its obligations only if it effects a novation. *207 S.W.3d 342, 346 (Tex. 2006)*. The Texas Supreme Court looked to the *Restatement (Second) of Contracts*, which states:

> An obligor is discharged by the substitution of a new obligor only if the contract so provides or if the obligee makes a binding manifestation of assent, *forming a novation*. . . . Otherwise, the obligee retains his original right against the obligor, even though the obligor manifests an intention to substitute another obligor in his place and the other purports to assume the duty.

RESTATEMENT (SECOND) OF CONTRACTS § 318, cmt. d. (emphasis added).

> *A duty cannot be "assigned" in the sense in which "assignment" is used in this Chapter*. The parties to an assignment, however, may not distinguish **[**14]** between assignment of rights and delegation of duties. A purported "assignment" of duties may simply manifest an intention that the assignee shall be substituted for the assignor. *Such an intention is not completely effective unless the obligor of the assigned right joins in a novation*, but the rules of this Section give as full effect as can be given without the obligor's assent.

RESTATEMENT (SECOND) OF CONTRACTS § 328, cmt. a. (emphasis added). *See* *Seagull Energy, 207 S.W.3d at 346-47*.

"A party raising the defense of novation must prove (1) the validity of a previous obligation; (2) an agreement among all parties to accept a new contract; (3) the extinguishment of the previous obligation; and (4) the validity of the new agreement. . . . It must clearly appear that the parties intended a novation, and novation is never presumed." *Fulcrum Central v. AutoTester, Inc., 102 S.W.3d 274, 277-78 (Tex. App.—Dallas 2013, no pet.)*.

Texhoma Fiber has failed to come forth with any evidence of novation and concedes that a party to a contract generally cannot escape its contractual obligations merely by assigning the contract to a third party (Dkt. #36 at p. 8). However, Texhoma Fiber contends that the operative language of the Lease Agreement, specifically Section 18.10, expressly and unambiguously permits Texhoma Fiber to assign all its contractual obligations, including the non-circumvention **[**15]** obligation (Dkt. #36 at p. 9).

[*844] "An unambiguous contract must be interpreted by the court as a matter of law." *Id.* (citing *SAS Institute, Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005))*. If a contract "is worded so that a court can give it a certain or definite legal meaning or interpretation, it is not ambiguous." *Id.* When a contract is unambiguous, extrinsic evidence "will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports.'" *Skyland Developers, Inc. v. Sky Harbor Assocs., 586 S.W.2d 564, 568 (Tex. App—Corpus Christi 1979, no writ)* (quoting *Universal C.I.T. Credit Corp. v. Daniel, 150 Tex. 513, 243 S.W.2d 154, 157 (Tex. 1951))*. The court must enforce the unambiguous language in a contract as written, and the applicable standard is the "objective intent" evidenced by the language used, rather than the subjective intent of the parties. *See* *Sun Oil Co. v. Madeley, 626 S.W.2d 726, 731-32 (Tex. 1981)*.

Contract terms "are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense." *Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 662 (Tex. 2005)*. The Court's primary concern is to enforce the parties' intent as expressed in the contract. *Sundaram, 2008 U.S. Dist. LEXIS 863, 2008 WL 80017 at *9*. When construing a contract, the intention of the parties is to be gathered from the instrument as a whole. *See* *Seagull Energy, 207 S.W.3d at 345*; *SAS Institute, 167 S.W.3d at 841*. The "court is bound to read all parts of a contract together to ascertain the agreement of the parties." *Forbau v. Aetna Life Ins. Co., 876 S.W.2d 132, 133 (Tex. 1994)*. "No single provision taken alone will **[**16]** be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument." *SAS Institute, Inc., 167 S.W.3d at 841*.

The assignment provision reads:

> PEG shall not assign this Agreement in whole or in part, nor sublet the Leased Fibers, without the prior written consent of TEXHOMA FIBER, which TEXHOMA FIBER may withhold in its sole discretion. Provided, PEG may assign this Agreement in whole or in part to an affiliate, subsidiary or parent company of PEG or pursuant to a merger, stock sale or sale or exchange of substantially all of the assets of PEG or any of its affiliates, subsidiaries or parent companies with prior notice to TEXHOMA FIBER. TEXHOMA FIBER may, without PEG's consent, but with notice to PEG, assign its rights and obligations hereunder to any entity, or to any affiliate of TEXHOMA FIBER or pursuant to a merger, stock sale or sale or exchange of substantially all the assets of TEXHOMA FIBER. This Agreement binds and inures to the benefit of any permitted assignees or successors to the parties.

Lease Agreement, at § 18.10.

Neither party disputes that the Lease Agreement is unambiguous. Furthermore, a plain reading of the Lease Agreement leads the Court to the conclusion that the **[**17]** contract is unambiguous and the Court, therefore, will interpret its meaning as a question of law. The Court finds that an assignment pursuant to § 18.10 of the Lease Agreement is not a valid release of Texhoma Fiber's liabilities and responsibilities.

"Generally speaking, a party cannot escape its obligations under a contract merely by assigning the contract to a third party." *Seagull Energy, 207 S.W.3d at 346-47* (citations omitted). "Thus, as a general rule, a party who assigns its contractual rights and duties to a third party **[*845]** remains liable unless expressly or impliedly released by the other party to the contract." *Id. at 347* (citations omitted). In *Seagull Energy*, the operator sought the reimbursement of costs incurred after the assignor assigned its interests to the assignee. The operating agreement in *Seagull Energy* included a provision entitled "Assignment of Interest." It states:

> Each Participating Party desiring to abandon a well pursuant to Section 14.2 shall assign effective as of the last applicable election date, to the non-abandoning Parties, in proportion to their Participating Interests, its interests in such well and the equipment therein and its ownership in the production from such well. Any party so assigning *shall be relieved* ***[**18]*** *from any further liability* with respect to said well.

Id. (emphasis in original). The Texas Supreme Court found that "[t]he operating agreement simply does not explain the consequences of an assignment of a working interest to a third party." *Id. at 346*. "[T]he operating agreement did not expressly provide that Eland's obligations under the operating agreement should terminate upon assignment and Seagull did not expressly release Eland following the assignment of its working interest." *Id. at 347*.

Accordingly, the Court reaches the same conclusion in this case. Section 18.10 of the Lease Agreement did not expressly provide that Texhoma Fiber's obligations under the agreement should terminate upon assignment; thus, Texhoma Fiber was not expressly released from its non-circumvention obligation following the assignment to Comcell.

When a court finds that there is no express release in an assignment, "the contract's subject or other circumstances may indicate that obligations were not intended to survive assignment." *Id.* The Court does not find that the Lease Agreement's subject or any other circumstances imply that Texhoma Fiber should be released from its non-circumvention obligation after it assigned its interests to **[**19]** Comcell. Section 18.8 of the Lease Agreement provides that "[n]o subsequent agreement concerning the Route shall be effective unless made in writing and executed by authorized representatives of the parties." There is no written, executed agreement releasing half of the fibers in the Texhoma Fiber Route from the non-circumvention obligation. Furthermore, the purpose of the non-circumvention provisions was to prevent Texhoma Fiber from providing cell site backhaul service to PEG's competitors at the sites subject to the Lease Agreement using the network paid for by PEG. To allow Texhoma Fiber to assign its non-circumvention obligation, retain half of the fibers subject to the Lease Agreement, and then subsequently lease those fibers to one of PEG's competitors would directly contradict that purpose. Therefore, the Court finds that Texhoma Fiber has a continuing obligation to not, directly or indirectly through other customers, offer or provide services to licensed CMRS carriers at the sites contained in Exhibit A to the Lease Agreement. Thus, the Court finds granting summary judgment in Texhoma Fiber's favor is unwarranted.

II. Texas Free Enterprise and Antitrust Act, and Texas Covenants Not to [**20] Compete Act

Texhoma Fiber asserts that § 18.1 of the Lease Agreement, the non-circumvention provision, is an unlawful, unreasonable, and unenforceable restraint of trade in violation of the *Texas Free Enterprise and Antitrust Act, Tex. Bus. & Com. Code § 15.01, et seq.*, and the *Texas Covenants Not to Compete Act, Tex. Bus. & Com. Code § 15.50, et seq.* The thirty-year non-compete obligation reads:

> **[*846]** TEXHOMA FIBER shall not, directly or indirectly through other customers, offer or provide services to licensed CMRS carriers at the sites contained in Exhibit A, without the prior written consent of PEG. Nothing herein shall restrict TEXHOMA FIBER'S right to provide any services to wireless carriers at sites not contained in Exhibit A.

Lease Agreement, at § 18.1.

Texhoma Fiber asserts that the Texas Covenants Not to Compete Act "supplements and clarifies" the Texas Free Enterprise and Antitrust Act's "broad proscription against trade restraints by establishing specific standards for covenants not to compete." (Dkt. #39 at p. 22). Texhoma Fiber further asserts that

> the general rule of reason [under the Texas Free Enterprise and Antitrust Act] does not apply to the noncompete obligation at issue in this case. Texhoma does not dispute that the Texas Free Enterprise and Antitrust Act **[**21]** is patterned off federal antitrust statutes or that the rule of reason standard that governs most restraints of trade under federal ***antitrust law*** also generally applies to contracts in restraint of trade under Texas law.

(Dkt. #39 at p. 23). Thus, the Court finds Texhoma Fiber has abandoned its affirmative defense under Texas Free Enterprise and Antitrust Act and exclusively relies on the Texas Covenants Not to Compete Act to invalidate the non-circumvention provision.

PEG asserts that the Covenants Not to Compete Act does not apply to the Lease Agreement because it applies exclusively to employment contracts, not commercial contracts (Dkt. #37 at pp. 20-22). The Court disagrees with

PEG's argument but finds the Texas Covenants Not to Compete Act is still inapplicable to the Lease Agreement because the non-circumvention provision is a restrictive covenant running with the land, i.e. the Texhoma Fiber Route, and should be analyzed as such.

Although not legally binding, the Court finds the analysis in *Rolling Lands Investments, L.C. v. Northwest Airport Management, L.P.* persuasive. *111 S.W.3d 187 (Tex. App.—Texarkana 2003, pet. denied)*. In that case, the court rejected a challenge under the Texas Covenants Not to Compete Act to a deed restriction **[**22]** associated with a sale of real property which prevented competition with a neighboring airport. *Id. at 200*. The court held that "[t]he fueling rights restriction [was] a restraint on the use of a single parcel of real property and thus should not be reviewed as a noncompetition contract." *Id.* Similar to the fueling rights restriction in *Rolling Lands*, the non-circumvention agreement is a restraint on the use of fiber optic cables at the specific locations in the Texhoma Fiber Route. Texhoma Fiber asserts that

> Section 18.1 of the [Lease Agreement] does not provide that Texhoma is prohibited from using the fibers in the Texhoma Fiber Route to compete with PEG for certain business at certain locations; it broadly provides that Texhoma is prohibited from offering or providing services to Cell Phone Companies at the sites covered by the [Lease Agreement] by any means whatsoever.

(Dkt. #39 at p. 11). The distinction is unavailing. The non-circumvention provision prevents Texhoma "from using the fibers in the Texhoma Fiber Route . . . [to offer or provide] services to Cell Phone Companies at the sites covered by the Lease Agreement by any means whatsoever." (Dkt. #39 at p. 11).

The noncompete agreements in the cases **[**23]** cited by Texhoma Fiber are also distinguishable because they specifically prohibit certain competitive conduct, not necessarily limit the use of the specific **[*847]** land (or in this case, fibers). *See* *CBIF Ltd. P'ship v. TGI Friday's Inc., No. 05-15-00157-CV, 2017 Tex. App. LEXIS 3605, 2017 WL 1455407, at *7 (Tex. App.—Dallas Apr. 21, 2017)* (analyzing a restrictive covenant providing the venture partners would not participate in other restaurant operations at the Airport, and a restrictive covenant concerning the ownership or operations of restaurants in direct competition with TGI Friday's); *Butts Retail, Inc. v. Diversifoods, Inc., 840 S.W.2d 770, 772 (Tex. App.—Beaumont 1992)*, *writ denied* (Apr. 21, 1993) (analyzing two restrictive covenants: (1) that if prior to the expiration of the franchise agreement, Appellee terminated the franchise agreement, Appellant was prohibited from operating a business selling fruit and nuts in Parkdale Mall for a period of two years from the date which Appellant ceased to conduct business pursuant to this agreement, and (2) that during the five-year term of the franchise agreement, Appellant would not operate another business selling fruit and nuts within the metropolitan area of the Parkdale Mall store in Beaumont, Texas). Those restrictive covenants prohibit competitive conduct within a specified geographical area, not necessarily prohibit the **[**24]** use of specific land. *See* *Ehler v. B.T. Suppenas Ltd., 74 S.W.3d 515, 520-21 (Tex. App.—Amarillo 2002, no pet.)*.

The Court now analyzes whether the non-circumvention provision is a valid restrictive covenant running with the land.[5] "A real covenant 'runs with land' if:(1) it touches and concerns the land; (2) it relates to a thing in existence or specifically binds the parties and their assigns; (3) it is intended by the original parties to run with the land; and (4) when the successor to the burden has notice." *Cummings v. Williams Prod.-Gulf Coast Co., L.P., No. 4:06CV11, 2007 U.S. Dist. LEXIS 3669, 2007 WL 172536, at *4 (E.D. Tex. Jan. 18, 2007)* (citing *Inwood North Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 635 (Tex. 1987)*. The Lease Agreement specifically provides that it is binding on the successors and assigns of Texhoma Fiber. Lease Agreement, at § 18.10 (the Lease Agreement "binds and inures to the benefit of any permitted assignees or successors to the parties."). The land is specifically identified. The agreement is to build a fiber optic cable network to service licensed CMRS carriers at the sites located in the

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[5] In its sur-reply, Texhoma Fiber asserts that "the fibers leased by PEG under the [Lease Agreement], and the remaining fibers in the Texhoma Fiber Route, are all personal property, not real property" and , thus, "the non-compete obligation cannot 'run with the fiber.'" (Dkt. #45 at p. 4). The Court disagrees. *See* *In re Energytec, Inc., 739 F.3d 215, 221 (5th Cir. 2013)* (finding "[t]he real property at issue . . . is a gas pipeline system and the rights-of-way required for its placement" constituted covenants running with the land including the right to transportation fees—because the traveling of natural gas along the length of the pipeline was for the use of the real property—and the right to consent to the assignment of the pipeline—because the rights impact the owner's interest in the pipeline).

Texhoma Fiber Route. There is also privity between the parties. The Court finds that the non-circumvention provision is a valid restrictive covenant that "runs with the fibers" and is binding on Texhoma Fiber. As such, summary judgment is PEG's favor is warranted.

III. Declaratory Relief

Both parties **[**25]** also move for summary judgment on PEG's claim for declaratory relief. PEG specifically seeks a declaration that "Texhoma Fiber has a continuing duty, extending for thirty years from the date of acceptance, for each site listed in the [Lease Agreement] or its amendments, not to directly or through other customers, offer or provide services to licensed CMRS carriers, without prior written consent of **[*848]** PEG Bandwidth." (Dkt. #37 at p. 37) (quotations omitted).

The federal Declaratory Judgment Act states, "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." *28 U.S.C. § 2201*. Federal courts have broad discretion to grant or refuse declaratory judgment. *Torch, Inc. v. LeBlanc, 947 F.2d 193, 194 (5th Cir. 1991)*. "Since its inception, the *Declaratory Judgment Act* has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co., 515 U.S. 277, 286, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)*. The Declaratory Judgment Act is "an authorization, not a command." *Public Affairs Assocs., Inc. v. Rickover, 369 U.S. 111, 112, 82 S. Ct. 580, 7 L. Ed. 2d 604 (1962)*. It gives federal courts the competence to declare rights, but **[**26]** does not impose a duty to do so. *Id.*

The Court finds that PEG's motion for summary judgment on its claim for declaratory relief should be granted and Texhoma Fiber is bound by the non-circumvention obligation until the expiration of the thirty-year Lease Agreement.

IV. Attorneys' Fees

Texhoma Fiber also moves for summary judgment on PEG's request for attorneys' fees, asserting that the Lease Agreement does not permit PEG to recover attorneys' fees and *Section 38.001 of the Texas Civil Practice and Remedies Code* restricts the proper target of reasonable attorneys' fees to an "individual" or a "corporation," but not other legal entities, such as limited liability companies. *Tex. Civ. Prac. & Rem. Code § 38.001(8)*. PEG concedes that "[a]s of now, the Texas Legislature still has not fixed the hole created by case law construing Texas statutory law so as not to allow recovery of attorney fees from a limited liability company in a breach of contract action." (Dkt. #38 at p. 5) (citing *See* *Vast Construction, LLC v. CTC Contractors, LLC, 526 S.W.3d 709, 728 n.16 (Tex. App.—Houston [14th Dist.] 2017, no pet. h.))*. Both PEG and Texhoma Fiber are limited liability companies and such a request for attorneys' fees is misplaced and PEG's claim for attorneys' fees should be dismissed. Summary judgment should be granted on this claim.

CONCLUSION

It is therefore **ORDERED** that Plaintiff's Motion for Partial Summary Judgment **[**27]** (Dkt. #37) is hereby **GRANTED** and the Court declares that Defendant is bound by the non-circumvention obligation until the expiration of the thirty-year Lease Agreement. Therefore, no material questions of fact exist with regard to whether Defendant is liable to Plaintiff for breach of the Lease Agreement. The only remaining issue to be decided by the trier of fact is the amount of damages.

It is further **ORDERED** that Defendant's Motion for Summary Judgment (Dkt. #36) is **GRANTED** in part and **DENIED** in part. Defendant's motion is granted only as to Plaintiff's claim for attorneys' fees and Plaintiff's claim for attorneys' fees is hereby dismissed.

IT IS SO ORDERED.

SIGNED this 7th day of March, 2018.

/s/ Amos L. Mazzant

AMOS L. MAZZANT

UNITED STATES DISTRICT JUDGE

Inline Packaging, LLC v. Graphic Packaging Int'l, LLC

United States District Court for the District of Minnesota

March 8, 2018, Decided; March 8, 2018, Filed

Court File No. 15-cv-3183 (ADM/LIB)

Reporter
2018 U.S. Dist. LEXIS 74102 *; 2018 WL 9919941

Inline Packaging, LLC, Plaintiff, v. Graphic Packaging International, LLC, Defendant.

Prior History: *Inline Packaging, LLC v. Graphic Packaging Int'l, Inc., 164 F. Supp. 3d 1117, 2016 U.S. Dist. LEXIS 22342, 2016 WL 727112 (D. Minn., Feb. 23, 2016)*

Core Terms

Inline, patents, email, punitive damages, sleeve, deliberate, drawings, rights, invention, microwave, expert report, susceptor, asserts, amend, employees, designs, Hot, high probability, deposition, Packaging, state law, motion to amend, invalid, portions, argues, claim for punitive damages, present motion, bids, development agreement, federal court

LexisNexis® Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN1[] **Pleadings, Amendment of Pleadings**

Fed. R. Civ. P. 15(a)(2) provides that a party may amend its pleading only with the opposing party's consent or the court's leave. The court should freely give leave when justice so requires. *Rule 15(a)(2)*. Although *Rule 15* favors liberal allowance of amendment, it does not mean that the right to amend is absolute.

Civil Procedure > Remedies > Damages > Punitive Damages

HN2[] **Damages, Punitive Damages**

Minn. Stat. § 549.20, subd. 1(a) allows punitive damages in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

Governments > Courts > Rule Application & Interpretation

HN3[] Federal & State Interrelationships, Erie Doctrine

The Erie Doctrine prohibits Congress from declaring substantive rules of common law applicable in a state. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any diversity jurisdiction case is the law of the State. Congress has enacted the *Rules Enabling Act*, which gives the United States Supreme Court the power to prescribe, by general rules, the practice and procedure in civil actions at law as long as such rules neither abridge, enlarge, nor modify the substantive rights of any litigant.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] Amendment of Pleadings, Leave of Court

The grant or denial of an opportunity to amend under *Fed. R. Civ. P. 15(a)* is within the discretion of the District Court, although outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion. Unlike *Fed. R. Civ. P. 23*, which vests discretion in the plaintiff and not the Court, *Rule 15* vests discretion in the Court to determine whether justice requires allowing the amendment sought by the moving party.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

HN5[] Pleadings, Amendment of Pleadings

There is no direct conflict between *Fed. R. Civ. P. 15(a)* and *Minn. Stat. § 549.191*. The discretion allowed a Federal Court under *Rule 15(a)* does not preclude or even conflict with the consideration of whether a party has also complied with *§ 549.191*.

Civil Procedure > Remedies > Damages > Punitive Damages

Evidence > Burdens of Proof > Clear & Convincing Proof

HN6[] Damages, Punitive Damages

Minn. Stat. § 549.20, subd. 1(a), allows punitive damages in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others. The clear-and convincing standard is satisfied when the evidence is sufficient to permit the jury to conclude that it is highly probable that the defendant acted with deliberate disregard to the rights or safety of others.

Civil Procedure > Remedies > Damages > Punitive Damages

HN7[] Damages, Punitive Damages

Of essence in determining vicarious punitive damages is the role of the employee or agent, who must be a managerial employee vested with authority to make policy and planning level decisions for the principal in order for the punitive damages to properly be awarded against the principal.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > Remedies > Damages > Punitive Damages

HN8[] **Pleadings, Amendment of Pleadings**

In order to show entitlement to plead punitive damages, a mere showing of negligence is not sufficient; instead, the conduct must be done with malicious, willful, or reckless disregard for the rights of others. Because a prima facie showing is one that prevails in the absence of evidence invalidating it, the court reviews the evidence in support of a motion to amend as the court would review a motion for judgment as a matter of law under the Federal Rules of Civil Procedure. In other words, in reaching the determination whether the plaintiff has established a prima facie case for punitive damages, the court makes no credibility rulings and does not consider any challenge, by cross-examination or otherwise, to the plaintiff's proof, but the court must carefully scrutinize the evidence presented by the moving party to make sure that it amounts to a prima facie showing that the substantive requirements for punitive damages have been met.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > Remedies > Damages > Punitive Damages

HN9[] **Pleadings, Amendment of Pleadings**

A plaintiff is not required to demonstrate an entitlement to punitive damages per se, but only an entitlement to allege such damages. However, the court is to scrutinize the record to assure the required showing has been met, and it must do more than to merely "rubber stamp" the movant's allegations.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Remedies > Damages > Punitive Damages

HN10[] **Remedies, Damages**

Punitive damages beyond the statutory trebled damages cannot be awarded for an antitrust violation because to do so would at the very least become duplication.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > Remedies > Damages > Punitive Damages

HN11[] **Remedies, Damages**

Under the law of Minnesota, antitrust claims brought under Minnesota state law may not also lead to an award of punitive damages.

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Prospective Advantage > Intentional Interference > Remedies

HN12[] **Damages, Punitive Damages**

Interference with prospective contractual relations may support a claim for punitive damages.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > Remedies > Damages > Punitive Damages

HN13[] **Pleadings, Amendment of Pleadings**

Where there is nothing more than argument dressed up as factual averment, an affidavit submitted in support of a motion to amend a complaint to assert punitive damages adds nothing to the prima facie showing required to succeed on such a motion.

Civil Procedure > Pleading & Practice > Pleadings > Amendment of Pleadings

Civil Procedure > Remedies > Damages > Punitive Damages

HN14[] **Pleadings, Amendment of Pleadings**

In considering a motion to amend the complaint to assert punitive damages, a court is entitled to look at the record as a whole—not to search for rebuttal or impeachment evidence, but to ensure that the evidence is presented in its proper context.

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For Graphic Packaging International, Inc., Defendant: Amanda Norris Ames, Jason C. Hicks, LEAD ATTORNEYS, PRO HAC VICE, Womble Bond Dickinson (US) LLP, Charlottesville, VA USA; Barry J. Herman, LEAD ATTORNEY, Womble Bond Dickinson (US) LLP, Baltimore, MD USA; Brent Fancher Powell, LEAD ATTORNEY, PRO HAC VICE, Womble Bond Dickinson (US) LLP, Winston-Salem, NC USA; Christine H. Dupriest, LEAD ATTORNEY, Womble Bond Dickinson (US) LLP, Washington, DC USA; Christopher L Lynch, LEAD ATTORNEY, Barnes & Thornburg LLP, Mpls, MN USA; David B. Hamilton, LEAD ATTORNEY, PRO HAC VICE, Womble Carlyle Sandridge & Rice, LLP, Baltimore, MD USA; Felicia J Boyd, LEAD ATTORNEY, Barnes & Thornburg LLP, Mpls, MN USA; John Gregory Perry, LEAD ATTORNEY, PRO HAC VICE, Womble Bond Dickinson (US) LLP, Atlanta, GA USA; Victoria Ann Bruno, LEAD ATTORNEY, PRO HAC VICE, Womble Bond Dickinson (US) LLP, Baltimore, **[*2]** MD USA.

Judges: Leo I. Brisbois, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Leo I. Brisbois

Opinion

ORDER

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment made in accordance with the provisions of *28 U.S.C. § 636(b)(1)(A)*, and upon Plaintiff Inline Packaging, LLC's Motion to Amend to Plead Punitive Damages, [Docket No. 504]. Plaintiff moves the Court for leave to further amend its Complaint, [Docket No. 1], to plead punitive damages on Counts I, II, and IV. (See, Motion, [Docket No. 504], 1). The Court held a Motion Hearing on January 30, 2018, and took Plaintiff's Motion under advisement as of that date. (Minute Entry, [Docket No. 513]). For the reasons discussed below, the Court **DENIES** Plaintiff's Motion to Amend to Plead Punitive Damages, [Docket No. 504].

I. BACKGROUND AND STATEMENT OF RELEVANT FACTS

The parties—and the Court—are familiar with the facts underlying this action. Therefore, only facts relevant to the Motion to Amend to Plead Punitive Damages presently before the Court will be set forth herein.

Plaintiff Inline Packaging, LLC ("Inline") and Defendant Graphic Packaging International, Inc. ("Graphic") compete in the microwave susceptor food packaging market; primarily with **[*3]** respect to microwave susceptor food packaging that crisps and browns the food product. (Order, [Docket No. 505], 1). In the present action, Inline brought claims against Graphic alleging tortious interference with prospective business relations; tortious interference with existing contractual relations; misappropriation of trade secrets; maintenance or misuse of monopoly power; and violations of *section 2 of the Sherman Act*, based upon assertions that Graphic engaged in predatory discount bundling, sham litigation, and misappropriation of intellectual property. (Id. at 1-2).

On April 6, 2017, the Court issued an Amended Pretrial Scheduling Order. [Docket No. 199]. On January 17, 2018, Inline timely filed the present Motion to Amend to Plead Punitive Damages. [Docket No. 504]. Inline seeks to amend its Complaint to plead punitive damages on three of its claims: Counts I and II, which are its Minnesota state law tortious interference with prospective business and existing contractual relationships claims, and Count IV, which is its Minnesota state law based antitrust claim. (See, Mem. in Supp., [Docket No. 381], 1). Additional facts, including a detailed description of the evidence Inline cites in support **[*4]** of its present Motion, are addressed in the Analysis section below.

On January 23, 2018, Graphic filed its Memorandum in Opposition to the present Motion to Amend to Plead Punitive Damages. [Docket No. 506]. Graphic argues that, as a matter of law, punitive damages are unavailable for Inline's Minnesota state law based antitrust claim. (Id. at 2). Graphic also contends that Inline's Motion must be denied because it fails to meet its burden to show that Graphic acted with a deliberate disregard for Inline's rights.[1] (Id.).

II. PLAINTIFF'S MOTION TO AMEND TO PLEAD PUNITIVE DAMAGES, [DOCKET NO. 504]

A. Standard of Review

HN1[] *Rule 15(a)(2)* provides: "[A] party may amend its pleading only with the opposing party's consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. Although *Rule*

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[1] Graphic additionally contends that the Court should deny the present Motion to Amend to Plead Punitive Damages because "Inline fails to present sufficient evidence to establish a prima facie case of tortious interference with contract or prospective economic advantage . . . ." (Mem. in Opp., [Docket No. 506], 2). However, "when deciding whether punitive damages are available, courts do not need to examine the merits of the underlying claims or determine whether they were properly pleaded. Those questions are best considered in the context of dispositive motions." See, *Coy v. No Limits Education, No. 15-cv-93 (BRT), 2016 U.S. Dist. LEXIS 193954, 2016 WL 7888047, *2 (D. Minn. April 1, 2016)*. Therefore, the Court does not further address Graphic's arguments which are based upon a challenge to the sufficiency of the merits of the underlying claims in this case.

15 "'favor[s] liberal allowance of amendment,'" it "'does not mean that the right to amend is absolute.'" Kozlov v. Assoc. Wholesale Grocers, Inc., 818 F.3d 380, 394 (8th Cir. 2016) (quoting Thompson-El v. Jones, 876 F.2d 66, 67 (8th Cir. 1989)).

On the other hand, Minnesota Statute § 549.191 provides:

> After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied **[*5]** by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.

HN2[] Minnesota Statute § 549.20, Subd. 1(a), allows punitive damages in civil actions "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others."

As an initial matter, Inline argues that in determining whether it is allowed to plead punitive damages, this Court should apply the more liberal standard for amending a complaint which is set forth in Federal Rule of Civil Procedure 15 rather than the stricter standard set forth in Minnesota Statutes §§ 549.191; 549.20, Subd. 1(a). (Mem in Supp., [Docket No. 381], 4 n.2; Jan. 30, 2018, Motion Hearing, Digital Record, 1:31-36). In support, Inline cites In re Bair Hugger Forced Air Warming Devices Products Liability Litigation, No. 15-cv-2666 (JNE/FLN), 2017 U.S. Dist. LEXIS 193938, 2017 WL 5187832 (D. Minn. July 27, 2017) ("In re Bair Hugger"), aff'd on other grounds on Oct. 19, 2017. (Mem. in Supp., [Docket No. 381], 4 n.2; Jan. 30, 2018, Motion Hearing, Digital Record, 1:31-36). To fully appreciate In re Bair Hugger, however, the Court must first examine the United States Supreme Court's preceding **[*6]** decision in Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010) ("Shady Grove"), upon which the relevant holding in In re Bair Hugger was based. See, In re Bair Hugger, 2017 U.S. Dist. LEXIS 193938, 2017 WL 5187832, at *1.

Shady Grove was a putative class action suit filed in the United States District Court for the Eastern District of New York on behalf of plaintiffs to whom Allstate Insurance Company allegedly owed statutory interest on benefits which had been paid after a statutory deadline for payment. 559 U.S. at 397. The United States District Court for the Eastern District of New York dismissed the case for lack of jurisdiction on the grounds that N.Y. Civ. Prac. Law Ann. § 901(b), "which precludes a suit to recover a 'penalty' from proceeding as a class action," applies in cases brought in Federal Court under diversity jurisdiction, and the statutory interest sought was a "penalty." Id. The Court of Appeals for the Second Circuit affirmed, holding that Federal Rule of Civil Procedure 23, which states that "'[a] class action may be maintained'" if two specifically enumerated conditions are met (both of which were met in Shady Grove), did not conflict with N.Y. Civ. Prac. Law Ann. § 901(b). Id. at 398. The Second Circuit further held that because there was no federal rule addressing the legitimacy of class action suits seeking to recover a penalty and the New York state **[*7]** law was substantive, the New York state law applied in diversity cases such as Shady Grove and prohibited the class action suit initiated therein. Id.

On review, the United States Supreme Court reversed, holding that Rule 23 does directly conflict with N.Y. Civ. Prac. Law Ann. § 901(b) because Rule 23 "empowers a federal court 'to certify a class in each and every case where the Rule's criteria are met'" and, in fact, Federal Courts must do so; Federal Courts do not have the discretion to decline to certify a class if Rule 23's requirements are satisfied. Id. at 399-400. Therefore, the New York state law, which would prohibit a class action seeking a penalty even if Rule 23's requirements are met, directly conflicted with Rule 23. Id.

HN3[] The Erie Doctrine prohibits Congress from "declar[ing] substantive rules of common law applicable in a state." See, Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any [diversity jurisdiction] case is the law of the State." Id. at 78. Congress has enacted the Rules Enabling Act, which gives the United States Supreme Court "'the power to prescribe, by general rules, . . . the practice and procedure in civil actions at law'" as long as such rules "'neither abridge, **[*8]** enlarge, nor modify the substantive rights of any litigant.'" See, Sibbach v. Wilson & Co., 312 U.S. 1, 7-8, 61 S. Ct. 422, 85 L. Ed. 479 (1941) (citation omitted).

A plurality of the Court in Shady Grove concluded that Rule 23 was procedural in nature, it did not violate the Rules Enabling Act, and it operated in Shady Grove to allow the class action to proceed in Federal Court despite the New York state law. Id. at 406-416. Justice Stevens, however, departed from the plurality's rationale in part and would have held that "there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the State's definition of substantive rights and remedies," but Justice Stevens nonetheless joined in the ultimate holding reversing the Second Circuit and remanding the case for further proceedings. Id. at 416-17.

In re Bair Hugger was a multi-district product liability litigation in which the plaintiffs sought to add claims for punitive damages to each respective complaint. 2017 U.S. Dist. LEXIS 193938, 2017 WL 5187832, at *1. Applying the Shady Grove rationale, United States Magistrate Judge Franklin L. Noel first concluded that Rule 15 conflicts with Minnesota Statute § 549.191. Id. at *3. Magistrate Judge Noel explained:

> The Court concludes that Rule 15 and the Minnesota punitive damages statute both address the same subject matter, namely whether **[*9]** Plaintiffs may amend their Master Long Form and Short Form Complaints. Federal Rule 15 "answers the question in dispute," and is "sufficiently broad to control the issue before the court." The statutes conflict because the Minnesota procedural rule would not allow for the amendment absent affidavits establishing prima facie evidence of deliberate disregard for the rights and safety of others, where the federal rule has no such procedural requirement. This Court is required to apply Rule 15 provided that it is valid pursuant to the Rules Enabling Act.

2017 U.S. Dist. LEXIS 193938 , [WL] at *4 (quoting the syllabus and concurring opinion in Shady Grove). Magistrate Judge Noel then determined that Rule 15 does not violate the Rules Enabling Act and, thus, he concluded that it governs amendment to a pleading to seek punitive damages despite the stricter standard set forth in Minnesota Statute § 549.191. Id.

Inline now argues that, in keeping with In re Bair Hugger, this Court should apply Rule 15's more lenient standard—rather than Minnesota Statute § 549.191's stricter standard—to determine whether Inline may amend its Complaint to plead punitive damages. (Mem. in Supp., [Docket No. 381], 4 n.2; Jan. 30, 2018, Motion Hearing, Digital Record, 1:31-36).

However, with all due respect to the reasoning of *In re Bair **[*10]** Hugger*, the undersigned disagrees.

Although Shady Grove was a fractured opinion, containing plurality (with portions that reached a majority of the Court), concurring, and dissenting opinions, a majority of the United States Supreme Court agreed that N.Y. Civ. Prac. Law Ann. § 901(b) was in direct conflict with Rule 23. See, Shady Grove, 559 U.S. at 399-400. The Court explained:

> [Rule 23] says that if the prescribed preconditions are satisfied "[a] class action *may be maintained*" (emphasis added)—not "*a class action may be permitted*." Courts do not maintain actions; litigants do. The discretion suggested by Rule 23's "may" is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes. And like the rest of the Federal Rules of Civil Procedure, Rule 23 *automatically* applies "in all civil actions and proceedings in the United States district courts."

Id. (emphasis in original). In other words, Rule 23 and N.Y. Civ. Prac. Law Ann. § 901(b) directly conflicted because Rule 23 mandated that a plaintiff can bring a class action if certain conditions are met, leaving Federal Courts no discretion to hold otherwise, while in contrast N.Y. Civ. Prac. Law Ann. § 901(b) required the dismissal of a class action if a plaintiff sought to seek to recover penalties even if the requirements of Rule 23 were **[*11]** met.

However, the type of direct conflict seen in Shady Grove is simply not present when this Court compares Rule 15 and Minnesota Statute § 549.191.

Rule 15 is by its very nature, and has long been recognized as being, discretionary. See, e.g., Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962) (**HN4**[] "[T]he grant or denial of an opportunity to amend [under *Rule 15(a)*] is within the discretion of the District Court, [although] outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion."); *Pliscott v. Colvin, No. 13-cv-1390 (SRN/SER), 2014 U.S. Dist. LEXIS 112030, 2014 WL 3955229, *2 (D. Minn. Aug. 13, 2014)* ("The determination as to whether to grant leave [to amend under *Rule 15(a)(2)*] is entrusted entirely to the discretion of the Court.").

Unlike *Rule 23*, which vests discretion in the plaintiff and not the Court, *Rule 15* vests discretion in the Court to determine whether "justice . . . requires" allowing the amendment sought by the moving party.

Shady Grove does not rearticulate in detail the traditional test for determining whether there is a direct conflict between a Federal Rule and a state law, likely because (in the view of a majority of the Court) *Rule 23* and N.Y. Civ. Prac. Law Ann. § 901(b) so plainly conflicted. See, *559 U.S. at 399-400*. Rather, the plurality in Shady Grove articulated the first question as whether the Federal Rule and the state statute at **[*12]** issue "answer the same question." See, *Id. at 401*; *In re Bair Hugger, 2017 U.S. Dist. LEXIS 193938, 2017 WL 5187832, at *4*. However, in his Shady Grove concurrence, Justice Stevens worded the question as: "whether the scope of the federal rule is sufficiently broad to control the issue before the court, thereby leaving no room for the operation of seemingly conflicting state law." *Shady Grove, 559 U.S. at 421* (Stevens, J., concurring). These are different questions. See, *Unity Healthcare, Inc. v. Cty. of Hennepin, 308 F.R.D. 537, 546 n. 4 (D. Minn. 2015)* (noting this discrepancy and suggesting, without deciding, that Justice Stevens' narrower position may be controlling under *Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977))*.

In any event, in the view of the undersigned, Federal *Rule 15* and *Minnesota Statute § 549.191* do not conflict. As already set forth above, unlike the N.Y. state statute and Federal Rule at issue in *Shady Grove*, application of the M.N. state statute here does not preclude application of the Federal Rule. Moreover, at least one Minnesota United States District Court has already concluded that ***HN5***[] "[t]here is no direct conflict between Federal *Rule 15(a)* and *section 549.191*." See, *Security Sav. Bank v. Green Tree Acceptance, Inc., Civ. No. 3-89-28, 1990 U.S. Dist. LEXIS 20224, 1990 WL 36142, *2 (D. Minn. March 22, 1990)*. As United States Magistrate Judge Bernard P. Becker held in that case, *Rule 15* can "peacefully co-exist" with *Minnesota Statute § 549.191*. Id. (citations omitted). The Court agrees. The discretion allowed a Federal Court under *Rule 15(a)* does not preclude or even **[*13]** conflict with the consideration of whether a party has also complied with *Minnesota Statute § 549.191*.

Although a majority of the United States Supreme Court in Shady Grove agreed that the conflict between *Rule 23* and the New York state statute was clear, *559 U.S. at 401*, the dissenting opinion in Shady Grove provides guidance for the direction this Court should take when, as here, Federal *Rule 15* is not in conflict with the M.N. state statute at issue. Interestingly, in dissent, Justice Ginsburg concluded that the conflict between *Rule 23* and N.Y. Civ. Prac. Law Ann. § 901(b) was not "really necessary." *559 U.S. at 437* (Ginsburg, J., dissenting). She went on to state:

> If . . . no Federal Rule or statute governs the issue, the Rules of Decision Act, as interpreted in Erie, controls. That Act directs federal courts, in diversity cases, to apply state law when failure to do so would invite forum shopping and yield markedly disparate litigation outcomes.

Id. at 438-39.

In the case presently before this Court, the failure to apply *Minnesota Statute § 549.191* would invite forum shopping and yield markedly disparate litigation outcomes because it would greatly lower the standard by which Inline must show its entitlement to plead punitive damages on M.N. state law claims, despite this Court's long history of applying **[*14]** *Minnesota Statute § 549.191* in materially indistinguishable cases. See, e.g., *Sorin Group USA, Inc. v. St. Jude Medical, S.C., Inc., 176 F. Supp. 3d 814, 828 (D. Minn. 2016)* ("Because this case is in federal court due to diversity jurisdiction, in order to add punitive damages to its claim, [plaintiff] had to seek leave to amend under *Minn. Stat. § 549.191*."); *Rassier v. Sanner, No. 17-cv-938 (DWF/LIB), 2017 U.S. Dist. LEXIS 196939, 2017 WL 5956909, *7 (D. Minn. Nov. 30, 2017)* ("Courts in this district, however, have consistently applied *§§ 549.191*-.20 to state-law claims."); *Streambend Props. III, LLC, v. Sexton Lofts, LLC, 297 F.R.D. 349, 360-61 (D. Minn. 2014)* ("*Minnesota Statutes sections 549.191* and *549.20* govern the pleading of punitive damages claims based on

Minnesota law."); *Nat'l Union Fire Ins. Co. of Pittsburgh, PA, v. Donaldson Co., Inc., No. 10-cv-4948 (JRT/TNL), 2016 U.S. Dist. LEXIS 193977, 2016 WL 6902408, *3-7 (D. Minn. June 15, 2016)* (applying *Minn. Stat. § 549.191* to determine whether punitive damages could be pled); *Coy v. No Limits Education, No. 15-cv-93 (BRT), 2016 U.S. Dist. LEXIS 193954, 2016 WL 7888047, *2-6 (D. Minn. April 1, 2016)* (same).

The portions of *Shady Grove* which gained the approval of a majority of the United States Supreme Court do not dictate that *Rule 15* conflicts with *Minnesota Statute § 549.191*, nor do they indicate that Erie concerns mandate anything other than the application in the present case of *Minnesota Statute § 549.191*. Accordingly, in the absence of binding precedent to the contrary, the undersigned finds that *Minnesota Statute § 549.191* provides the relevant standard of proof for the present motion.

Minnesota Statute § 549.191 provides:

> After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under **[*15]** *section 549.20* or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages.

HN6[] *Minnesota Statute § 549.20, Subd. 1(a)*, allows punitive damages in civil actions "only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others." "'The clear-and convincing standard is satisfied when "the evidence is sufficient to permit the Jury to conclude that it is highly probable that the defendant acted with deliberate disregard to the rights or safety of others."'" *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Donaldson Co., Inc., No. 10-cv-4948 (JRT/TNL), 2016 U.S. Dist. LEXIS 193977, 2016 WL 6902408, *4 (D. Minn. June 15, 2016)* (citation omitted).

Minnesota Statute § 549.20 further explains:

> [**Subd. 1**](b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (1) deliberately proceeds to act in conscious or intentional disregard of the **[*16]** high degree of probability of injury to the rights or safety of others; or
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.
>
> **Subd. 2. Master and principal**. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:
> (1) the principal authorized the doing and the manner of the act;
> (2) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit;
> (3) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment; or
> (4) the principal or a managerial agent of the principal, described in clause (3), ratified or approved the act while knowing of its character and probable consequences.

HN7[] Of essence in determining vicarious punitive damages is the role of the employee or agent, who must be a "managerial employee[] vested with authority to make policy and planning level decisions for [the principal]" in order for the punitive damages to properly be awarded against the principal.[2] See, *Doe YZ v. Shattuck-St. Mary's School, 214 F. Supp. 3d 763, 792-93 (D. Minn. 2016)*.

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[2] Inline cites *Doe YZ v. Shattuck-St. Mary's School, 214 F. Supp. 3d 763 (D. Minn. 2016)*, for the contradictory proposition that "because 'a corporation is charged with constructive knowledge of all material facts of which its officer or agent acquires knowledge while acting in the course of employment within the scope of his or her authority,' knowledge on the part of those with

HN8[] In order to show entitlement to plead punitive damages, "'[a] mere showing of negligence is not sufficient; instead, the conduct must be done with malicious, willful, or reckless disregard for the rights of others.'" *Nat'l Union Fire Ins. Co., 2016 U.S. Dist. LEXIS 193977, 2016 WL 6902408, at *4* (citation omitted). Moreover,

> Because a prima facie showing is one "that prevails in the absence of evidence invalidating it," "the Court reviews the evidence in support of a Motion to Amend as the Court would review a . . . Motion for Judgment as a Matter of Law" under the Federal Rules of Civil Procedure. In other words, in reaching the determination whether the plaintiff has established a prima facie case for punitive damages, the Court makes no credibility rulings and does not consider any challenge, by cross-examination or otherwise, to the plaintiff's proof, but the Court must carefully scrutinize the evidence presented by the moving party to make sure that it amounts to a prima facie showing that the substantive requirements for punitive damages have been met.

Target Corp. v. LCH Pavement Consultants, LLC, 960 F. Supp. 2d 999, 1010 (D. Minn. 2013) (citations omitted). ***HN9***[] "At the present stage, the plaintiff 'is not required to demonstrate an entitlement to punitive damages *per se*, but only an entitlement to allege such **[*18]** damages.'" *Coy v. No Limits Education, No. 15-cv-93 (BRT), 2016 U.S. Dist. LEXIS 193954, 2016 WL 7888047, *3 (D. Minn. April 1 2016)* (citations omitted). However, the Court is to scrutinize the record to assure the required showing has been met, and it must do more than to merely "rubber stamp" the movant's allegations. *Ulrich v. City of Crosby, 848 F. Supp. 861, 868-69 (D. Minn. 1994)*; *Swanlund v. Shimano Indus. Corp., Ltd., 459 N.W.2d 151, 154 (Minn. Ct. App. 1990)*.

B. Analysis

(i) Minnesota-law-based Antitrust Claim

Before addressing whether Inline has shown its entitlement to seek punitive damages on its Minnesota state law based antitrust claim, the Court must first address the threshold question: whether, as a matter of law, punitive damages are even available on a Minnesota state law antitrust claim. Inline asserts that they are, while Graphic asserts the opposite. (Mem. in Supp., [Docket No. 381], 7-9; Mem. in Opp., [Docket No. 506], 9-10).

The Minnesota ***Antitrust Law*** of 1971, *Minn. Stat. § 325D.49, et seq.*, provides that "any person . . . injured directly or indirectly by a violation of [the Minnesota ***Antitrust Law*** of 1971], shall recover three times the actual damages sustained . . . ." *Minn. Stat. § 325D.57*. Inline's antitrust claim on which it now seeks punitive damages is Count IV of its Complaint, which alleges a violation of *Minn. Stat. § 325D.52*. (See, Compl., [Docket No. 1], 29).

Inline acknowledges that the Minnesota statute quoted above is similar to the Federal **[*19]** *Clayton Act*, which provides treble damages for *Sherman Act* violations. (Mem. in Supp., [Docket No. 381], 7). See, *15 U.S.C. § 15(a)*

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managerial capacity will be imputed to the corporation." (Mem. in Supp., [Docket No. 381], 6). However, Doe YZ went on to point out the statutory language in *Minn. Stat. § 549.20, subd. 2(c)*, set forth above—which controls on questions of punitive damages under that statute—and it ultimately held that although the knowledge of employees who are not "managerial employees vested with authority to make policy and planning level decisions . . . is imputable to [the principal] for negligence purposes, it is not imputable to [the principal] for assessing punitive liability." *214 F. Supp. 3d at 792-93*. Therefore, contrary to Inline's assertion, the general principles of principal/agent liability do not expand the definitions set forth in *Minn. Stat. § 549.20, subd. 2*. Inline also argues that it "need not show managerial capacity for vicarious liability under *§ 549.20, subd. 2*, but nevertheless does so herein." (Mem. in Supp., [Docket No. 381], 6). In support, Inline cites ***[*17]*** *Nunn v. Noodles & Co., No. 9-cv-1286 (JNE/JJK), 2010 U.S. Dist. LEXIS 91544, 2010 WL 3170763, *8 n.1 (D. Minn. Aug. 6, 2010)*, which stated in dicta that the determination whether Plaintiff satisfied the required elements for vicarious liability for punitive damages was not required at the the pleading stage when plaintiff sought to amend her complaint to plead punitive damages. Rather, Nunn held that such a determination was more properly made in a summary judgment motion or at trial. Id. Nunn concluded, however that there was prima facie evidence that supported a finding of vicarious liability for punitive damages under *Minn. Stat. § 549.20, subd. 2*. Id. The portion of *Nunn* relied on by Inline is dicta and is not binding on this Court in any event, especially in light of the much more recent ruling in Doe YZ, which addressed the sufficiency of evidence to support vicarious liability on punitive damages in the context of a motion to amend the complaint such as the one presently before the Court. See, *214 F. Supp. 3d at 791-93*.

("any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . ."). Inline further concedes that some federal courts—including the Eighth Circuit—have held that punitive damages are not recoverable in addition to the treble damages authorized under the *Clayton Act*. (Mem. in Supp., [Docket No. 381], 7). See, *McDonald v. Johnson & Johnson, 722 F.2d 1370, 1384 (8th Cir. 1983)* (***HN10***[] "Punitive damages beyond the statutory trebled damages cannot be awarded for an antitrust violation [because to do so] would at the very least become duplication."). Nevertheless, Inline argues that applying such reasoning to the present case would conflict with the Minnesota Supreme Court's holding in *Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271, 277 (Minn. 1995)*, that "multiple compensatory damages are not duplicative of punitive damages where at least one objective of multiple compensatory damages is nonpunitive." (Mem. in Supp., [Docket No. 381], 7).

As Graphic points out, however, Phelps did not address punitive damages sought in relation to a claim under the *Minnesota Antitrust Act*; rather, Phelps addressed punitive damages sought **[*20]** in relation to a claim under the *Minnesota Human Rights Act ("MHRA")*. (Mem. in Opp., [Docket No. 506], 10); see, *Phelps, 537 N.W.2d at 273-77*.

The Phelps holding that an "award of both punitive damages and double actual damages does not constitute an unfair double recovery for punitive damages" was based in large part upon the specific legislative history of the MHRA, legislative history which has no effect on the interpretation of the Minnesota Antitrust Act. See, Id. Moreover, as Graphic also points out, the MHRA specifically authorizes compensatory damages "in addition to punitive damages in an amount not more than $8,500"; the Minnesota Antitrust Act does not. See, *Phelps, 537 N.W.2d at 273-74*. Because of these material differences, *Phelps* is not binding on this Court's analysis of whether punitive damages are available in conjunction with Inline's claim under the Minnesota antitrust laws.

To the contrary, at least one Federal Court within the District of Minnesota has already rejected the idea that Minnesota state law antitrust claims may result in recovery of punitive damages. See, *Insignia Systems, Inc. v. News America Marketing In-Store, Inc., No. 4-cv-4213 (JRT/AJB), 2008 U.S. Dist. LEXIS 129807, 2008 WL 11349956, *2 (D. Minn. Nov. 7, 2008)* As the Court noted in Insignia Systems, Inc., "'[t]he Minnesota Supreme **[*21]** Court has consistently held that the Minnesota ***Antitrust Law*** should be construed with the federal courts' construction of the federal antitrust laws.'" *2008 U.S. Dist. LEXIS 129807, [WL] at *2* (quoting *Keating v. Philip Morris, Inc., 417 N.W.2d 132, 136 (Minn. 1987))*. And, as Inline itself concedes, the Eighth Circuit has long held that punitive damages may not be awarded for a federal antitrust claim. See, *McDonald, 722 F.2d at 1381*). Moreover, neither party identifies nor has this Court's independent research found any case from either the Minnesota Supreme Court or the Minnesota Intermediate Court of Appeals which directly addresses, much less allows, punitive damages under the Minnesota ***Antitrust Law***. Thus, there is no indication from the Minnesota Supreme Court or the Minnesota Court of Appeals that punitive damages are treated differently under the Minnesota ***Antitrust Law*** than they are under the *Clayton Act*.

Accordingly, the undersigned concludes that, ***HN11***[] under the law of Minnesota, antitrust claims brought under Minnesota state law may not also lead to an award of punitive damages. See, *Insignia Systems, Inc., 2008 U.S. Dist. LEXIS 129807, 2008 WL 11349956, at *2* (holding that "none of [the plaintiff's] claims allow an award for punitive damages" when the only remaining claims were brought under the federal *Lanham Act* and the *Minnesota Deceptive Trade Practice Act*"); *McDonald, 722 F.2d at 1381* (citing Minnesota **[*22]** punitive damages law in a case involving a violation of *section 2 of the Sherman Act* and noting that "[p]unitive damages beyond the statutory trebled damages cannot be awarded for an antitrust violation").

Therefore, to the extent that Inline seeks to amend Count IV of its Complaint to plead punitive damages in relation to its state claim under the Minnesota ***Antitrust Law***, Inline's Motion to Amend to Plead Punitive Damages, [Docket No. 504], is **DENIED**.

(ii) Tortious Interference with Business Claims

Inline also seeks to plead punitive damages on Count I of its Complaint—Tortious Interference with Prospective Business Relations—and Count II of its Complaint—Tortious Interference with Existing Contractual Relations. (See, Compl., [Docket No. 1], 26-27; Mem. in Supp., [Docket No. 381], 1, 40-42). Unlike claims under the Minnesota ***Antitrust Law***, punitive damages are available on tortious interference claims brought under Minnesota state law. See, Sorin Group USA, Inc. v. St. Jude Medical Center, S.C., Inc., No. 14-cv-4023 (JRT/JSM), Docket No. 114 (granting motion to amend complaint to plead punitive damages on tortious interference with existing contractual rights claim); *Loyalton Group, Inc. v. Burton Energy Group, Inc., No. 9-cv-58 (DSD/JJK), 2009 U.S. Dist. LEXIS 139842 , 2009 WL 10678552, *7 (D. Minn. Sept. 25, 2009)* **[*23]** (***HN12***[] "[I]nterference with prospective contractual relations may support a claim for punitive damages.").

Graphic does not argue that punitive damages are not available on these claims as a matter of law; rather, Graphic argues that Inline has failed to establish the requisite prima facie case to show its entitlement to now plead punitive damages as to these claims. (Mem. in Opp., [Docket No. 506], 9-41).

First, however, the Court must resolve some preliminary challenges Graphic raises with regards to the documents Inline has filed with the Court in support of its present Motion to Amend to Plead Punitive Damages.

a. Preliminary evidentiary questions

1) **Expert Reports**

Graphic argues that the Court should not consider the expert reports submitted by Inline in support of its present Motion to Amend its Complaint to add Punitive Damages. (Mem. in Opp., [Docket No. 506], 8-9). In support, Graphic cites to *Berczyk v. Emerson Tool Co., 291 F. Supp. 2d 1004 (D. Minn. 2003)*. (Mem. in Opp., [Docket No. 506], 8). In Berczyk, Magistrate Judge Raymond Erickson considered the plaintiffs' motion to amend their complaint in order to add punitive damages. *291 F. Supp. 2d at 1007*. After addressing the various affidavits the plaintiffs had filed in support **[*24]** of their motion, Judge Erickson turned to the "opinion evidence of [plaintiff's] expert," and he stated:

> At best, [the expert's] report is an unsworn letter, which carries little evidentiary weight. Even apart from its non-evidentiary status, the [expert's] report does not constitution "clear and convincing" evidence. We apply no Daubert gatekeeping function, here, for the Defendants have not challenged [the expert's] expertise. Rather, we simply abide by our obligation to assess [the expert's] opinions, consistent with the prohibition that we not "rubber stamp" the showings advanced by a moving party. [The expert's] opinion is rife with concessions that he had been "advised" of certain predicates to his opinion, or that he had an "understanding" as to certain predicate facts. . . .
>
> . . . .
>
> As best as we can discern [the expert's] report is predicated on many of the same documents that we found to be an inadequate basis on which to establish a claim of deliberate disregard. We find little to suggest that the inadequacies of those showings can be rectified by the expedient of passing them through a retained expert.

291 F. Supp. 2d at 1015.

In the present case, Graphic contends that the expert reports Inline offers **[*25]** are similarly based on the underlying documents that Inline has also submitted to the Court, which—if those underlying documents are inadequate to show punitive damages—renders the Expert Reports of little to no weight on whether Inline has made a sufficient showing of deliberate disregard to justify pleading punitive damages. (Mem. in Opp., [Docket No. 506], 8-9).

For its part, Inline argues that the Court may (and should) consider its Expert Reports, and Inline cites to *In re Levaquin Prod. Liab. Litig., No. No. 8-cv-5743 (JRT), 2010 U.S. Dist. LEXIS 140977, 2010 WL 7852346 (D. Minn. Nov. 9, 2010)*. (Mem. in Supp., [Docket No. 381], 4). In re Levaquin also addressed a motion to amend the complaint to assert a claim for punitive damages, and the defendants in that case argued that Berczyk categorically stood "for the proposition that an expert report cannot be considered evidence warranting a right to assert punitive damages." *2010 U.S. Dist. LEXIS 140977, 2010 WL 7852346, at *11*. Judge John R. Tunheim (now Chief Judge) rejected this argument, stating that Berczyk instead "reaffirms the principle that prima facie evidence of punitive damages cannot be based on conjecture and conclusion." Id. The plaintiffs in In re Levaquin had "included over 100 exhibits including medical research, deposition testimony, internal **[*26]** email communications, and expert reports," so Chief Judge Tunheim found that it was sufficiently different from Berczyk that the expert reports were not automatically excluded from the Court's consideration. Id.

The circumstances and arguments present in *In re Levaquin* are materially different than those before the Court in the present Motion. Graphic does not cite Berczyk for the proposition that all expert reports are per se improper for consideration on a motion to amend a complaint to add punitive damages. Rather, Graphic asserts that in the present case, the expert reports are cited only to the extent that they characterize and summarize facts which are ostensibly available in the underlying documents to which Inline has access and which have separately been submitted to the Court in support of the present Motion. (Mem. in Opp., [Docket No. 506], 8-9). Moreover, in light of additional prior case law from the United States District Court for the District of Minnesota, this Court finds Graphic's argument more persuasive.

In *Stepnes v. Ritschel, No. 8-cv-5296, 2010 U.S. Dist. LEXIS 143497, 2010 WL 7093500, *6 n. 3 (D. Minn. April 13, 2010)*, then Magistrate Judge Keyes noted that ***HN13***[] where there is "nothing more than argument dressed up as factual averment," an affidavit **[*27]** submitted in support of a motion to amend a complaint to assert punitive damages "add[s] nothing to the prima facie showing" required to succeed on such a motion. The affidavit to which Judge Keyes was referring did "not testify[] about a fact, but [it] characterize[ed] the other evidence in the record. . . . These characterizations of the evidence and conclusory statements persist[ed] through the" affidavit and "they [were] not evidence." Id. However, Judge Keyes nevertheless "considered the items in the . . . Affidavit that can be considered evidence in reaching its determination." (Emphasis added). *Id.* Similarly, in *Hofmann v. Enterprise Leasing Co. of Minn., No. 13-cv-255 (JNE/SER), 2014 U.S. Dist. LEXIS 199825, 2014 WL 12601037, *5 (D. Minn. June 26, 2014)*, Magistrate Judge Rau quoted Stepnes and came to a similar conclusion; he stated that expert reports which "are merely 'characterizations of evidence and conclusory statements" . . . do not add to a prima facie showing."

Many of Inline's citations to the Expert Report by Alan W. Kowalchyk, (Kroll Dec., Exh. 81, [Docket No. 463], 2-48), and the Rebuttal Expert Report by Alan W. Kowalchyk, (Kroll Dec., Exh. 82, [Docket No. 464], 2-29), simply cite to portions of those expert reports which merely recite facts Kowalchyk **[*28]** gleaned from underlying documents, characterizes evidence, or makes conclusions about what individuals related to Graphic "should have" known or done. (See, e.g. Mem. in Supp., [Docket No. 381], 27 n. 12, citing Expert Report of Kowalchyk, [Docket No. 81], 6-7, which asserts that Biddle "should have known" information and makes conclusions about whether Graphic's behavior supports a legal claim). Inline also cites to portions of Kowalchyk's Rebuttal Expert Report which are no more than Kowalchyk's personal opinions about whether the inventorship of the elements regarding a patent the ownership of which is a putative issue. (See, Mem. in Supp., [Docket No. 381], 32, citing a portion of Kowalchyk's Rebuttal Expert Report, [Docket No. 464], 16-17, which is entitled "Specific Opinions a) Fitzwater Did Not Invent The Allegedly Patentable Combination of Elements Claimed in the Graphic Patents" and details the reasons for this opinion).

At other points, Inline cites wholesale to its expert reports as a summary of and characterization for other evidence it wishes the Court to consider. (See, e.g., Mem. in Supp., [Docket No. 381], 33, citing generally to "Exh. 81, ¶¶ 37-99; Exh. 82, ¶¶ 27-61, **[*29]** which is a total of 32 pages, in support of the sentence: "Graphic applied for multiple patents from 2005 to 2013 that incorporate and claim the three major categories of concepts and ideas Brower and others at Nestle provided under Projects Quantum and Roxanne and the JDA"). Although the cited pages in the expert reports summarize the evidence as Kowalchyk sees it, this sort of summarization is not "evidence" which the Court ought to consider in support of Inline's present Motion to Amend to Plead Punitive Damages.[3]

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[3] The section of this Order which sets forth the Court's analysis of the merits of the Motion to Amend to Plead Punitive Damages presently before the Court also includes, at times, Inline's citations to the expert reports when necessary to set forth alleged facts which are required to understand Inline's arguments. For example, as "evidence" of the relationship between the various patent

In light of the nature of the expert reports and the certain portions thereof to which Inline cites, the Court follows the collective rationale in *Berczyk*, *In re Levaquin*, *Stepnes*, and *Hoffman*, and the Court declines to consider those portions of the expert reports which contain no more than mere characterization of evidence, conclusory statements, or opinions as to the culpability, liability, or intent of Graphic. To the extent that Inline cites expert reports for evidence which should be considered, those portions of the expert reports are discussed below in the analysis of the sufficiency of Inline's argument that it is entitled to plead punitive damages in the present **[*30]** case.

2) **Consideration of "the record as a whole"**

Graphic also urges the Court to "consider the whole record to place Plaintiff's proffer in context." (Mem. in Opp., [Docket No. 506], 7). Essentially, Graphic asks the Court to consider "the full testimony" of witnesses for whom Inline has provided excerpts of deposition transcripts. (Id.). In support, Graphic cites to *Greer v. Walsh Construction Co., No. 15-cv-465 (PAM/JSM), 2016 U.S. Dist. LEXIS 194356, 2016 WL 6892109 (D. Minn. Feb. 23, 2016)*. (Id.). In Greer, Magistrate Judge Janie S. Mayeron ***HN14***[] considered a motion to amend the complaint to assert punitive damages, and she stated: "[T]he court is entitled to look at the record as a whole—not to search for rebuttal or impeachment evidence, but to ensure that the evidence is presented in its proper context." *2016 U.S. Dist. LEXIS 194356, 2016 WL 6892109, at *7* (citing *Stepnes, 2010 U.S. Dist. LEXIS 143497, 2010 WL 7093560, at *7 n.4*). In Stepnes, Magistrate Judge Jeffrey J. Keyes noted:

> To consider only those select portions of a deposition transcript a litigant chooses to place before the court on a motion to amend to add a claim of punitive damages and ignore other portions of that transcript because they are attached to the opposing party's opposition would only encourage plaintiffs to mischaracterize the evidentiary record by selective presentation. Just as the court in [*Olson v. Snap Products, Inc., 29 F. Supp. 2d 1027 (D. Minn. 1998)*] "seriously **[*31]** doubt[ed]" that its role could be "anything more than a rubber stamp were [it] to allow the Plaintiff to exclude his own personal testimony from [its] consideration, simply because he has chosen not to submit the evidence for [its] review," we cannot have a "fair appraisal" of Plaintiffs' prima facie case here without considering portions of [a] deposition that place [that] testimony in context.

*Stepnes, 2010 U.S. Dist. LEXIS 143497, 2010 WL 7093560, at *7 n.4*.

This reasoning is highly persuasive and applicable to the present Motion to Amend to Plead Punitive Damages. To the extent that Inline cites an excerpt of a deposition, the Court may review the surrounding portions of that deposition to place that excerpt in context; it need not constrain itself only to the particular, limited excerpt as cited by Inline. As needed to explain the Court's rationale below, this Order includes such context to clarify deposition testimony as necessary.

However, Graphic expands its argument in an effort to persuade the Court to consider additional depositions, declarations, and the like. (See, e.g., Mem. in Opp., [Docket No. 506], 12, 21-22, 37). Graphic describes this as providing "context" for the Court, but the Court's job in deciding the present Motion is not **[*32]** to weigh the evidence in support of Inline's argument against the evidence Graphic points to in an attempt to contradict that evidence. Graphic provides a citation to *Smith v. Morales, No. A07-2377, 2008 Minn. App. Unpub. LEXIS 1355, 2008 WL 4909630, *4 (Minn. Ct. App. Nov. 18, 2008)*, in which the Minnesota Court of Appeals (which is not a court of binding precedent, in any event) held in reviewing the denial of a motion to add a claim for punitive damages: "while appellant was entitled to have his evidence treated as unrebutted by the district court, meaning not subject to cross-examination or other challenge, the district court was permitted to weigh the evidence." (Mem. in Opp.,

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applications and issued patents involved in the present litigation, Inline cites only to a portion of the expert report that summarizes the evidence from the record which was available to the author of that expert report; Inline does not indicate to the Court where in the submissions currently before it that same information is to be found; if at all. (See, Mem. in Supp., [Docket No. 381], 33 citing Kroll Dec., Exh. 81, [Docket No. 463], 19-62; Exh. 82, [Docket No. 464], 12-21). However, because those patent applications and issued patents are referenced as well in evidence which is properly before the Court in the context of the present Motion to Amend to Plead Punitive Damages, the Court has considered the facts alleged therein, not for their value in determining whether Inline has made a prima facie showing of entitlement to punitive damages, but merely as necessary to understand the facts underlying the present litigation.

[Docket No. 506], 5). Graphic interprets this to mean that this Court should similarly weigh all of the evidence of record, even that which it offers in direct rebuttal to Inline's submissions, to determine whether there is a prima facie case to support a claim for punitive damages. (Id.).

To do so as Graphic suggests, however, would run afoul of the long-established standard that in the context of a motion seeking to amend a complaint to add a claim for punitive damages, "the Court makes no credibility rulings and does not consider any challenge, by cross-examination or otherwise, to the **[*33]** plaintiff's proof." *Target Corp., 960 F. Supp. 2d at 1010 (D. Minn. 2013)* (citations omitted). Despite Graphic's argument, its presentation of directly contradictory evidence is a "challenge . . . to the plaintiff's proof" which the Court will not consider. The distinguishing difference between the present case and *Smith, supra*, is that in Smith, "appellant submitted both his version of the facts and the versions of the officers involved . . . [which] . . . differ greatly from the appellant's account." See, *Smith, 2008 Minn. App. Unpub. LEXIS 1355, 2008 WL 4909630, at *4*. The Minnesota Court of Appeals held that the district court had properly considered and weighed all of the evidence submitted by the moving party. Graphic asks the Court not to simply consider and weigh all evidence submitted by Inline; but instead to consider and weigh the directly contradictory evidence submitted by Graphic—the party opposing the motion. To do so here, even in light of Smith, would be improper.

b. Has Inline made the required prima facie showing?

As already set forth above, in order to be entitled to plead punitive damages, Inline must provide evidence which, if unrebutted, clearly and convincingly allows a conclusion that Graphic (1) was aware of or intentionally disregarded facts that created a high probability of injury **[*34]** to Inline's rights, and (2) deliberately proceeded to act in conscious disregard, intentional disregard, or with indifference to that high probability of injury to Inline's rights. See, *Minn. Stat. § 549.20, Subd. 1(a)-(b)*.

Inline's argument can be summarized as follows: Graphic knew or intentionally disregarded facts about the invalidity of certain patents, and Graphic nevertheless deliberately asserted those patents to Nestle and in litigation against Inline. Graphic knew that its assertion of those invalid patents created a high probability of injury to Inline's right to business relations without interference, and in asserting the patents anyway, Graphic deliberately acted in conscious disregard, intentional disregard, or indifference to that high probability of injury.

Evidence Presented to the Court

Inline relies on the following evidence, as more fully detailed below, to support its proposed punitive damages claim:

1. Testimony from the April 2017 and July 2017 depositions of Jeffrey Voyzey, Graphic's Director of Business Development.

2. Testimony from the April 2017 *Rule 30(b)(6)* deposition of Graphic through its 30(b)(6) representative, Jeffrey Sloat.

3. Testimony from the May 2017 deposition of Kelly Fitzwater, a structural designer **[*35]** at Graphic from 2003 to at least 2007.
4. Testimony from the July 2017 deposition and portions of the November 2017 Declaration of Corey Brower, who was Graphic's principal contact at customer companies Chef America and Nestle.
5. Testimony from the July 2017 deposition of John Best, Graphic's vice president of sales and commercial development.
6. Testimony from the July 2017 deposition of Jim Seefeldt, Graphic's Vice-President of Sales.
7. Testimony from the July 2017 deposition of William Sedlacek, former Vice President and General Manager of Graphic's Microwave Division and current Vice-President of Innovation and Business Development for Graphic.
8. Testimony from the August 2017 deposition of Barry Biddle, Graphic's assistant general counsel and chief intellectual property counsel.

9. Testimony from the September 2017 deposition of Jeffrey Watkins, President of Inline.
10. Portions of the December 2017 Declaration of Lou Judge, who has been involved with procurement at Nestle since 1982 and has been Nestlé's Group Manager of Strategic Procurement since 2010.
11. An unsigned, undated, one-page document entitled "PPD Sales Tactical Challenges."

12. Pages from what appear to be power point **[*36]** presentations created for Graphic.
13. An Interoffice Memo dated June 12, 2001, authored by Brower and distributed to Voyzey and others.
14. Electronic appointment requests sent by Voyzey.
15. A Development Agreement[4] entered into by Graphic and Nestle in March 2005.
16. An email dated September 30, 2005 between Brower, Fitzwater, and Voyzey.
17. An October 2, 2005, internal Graphic email.
18. A form entitled "Graphic Packaging Corporation Invention Disclosure," dated October 7, 2005, and signed by Fitzwater.
19. A May 25, 2007, email from Biddle regarding patent applications.
20. An unsigned "update" of events in October 2008 prepared by an unknown Graphic employee.
21. Graphic's "Monthly Report" for April 2009, which was prepared by Best.
22. June 2009 emails between Tim Klisares, Graphic Sales Manager; Seefeldt; Lou Judge, a Nestle employee who was involved with procurement at Nestle since 1982; and additional Graphic employees whose roles at Graphic are unknown.
23. Internal Graphic emails from October 2009.
24. A November 2011 "project summary" by Voyzey regarding microwave susceptor sleeve business at Nestle.
25. Internal Graphic emails from November and December 2011.

26. An April 13, 2012, **[*37]** email from Klisares to Judge, and another email exchange that day between Klisares and Seefeldt.
27. A series of internal Graphic emails dated June 20 through 22, 2012.
28. An August 28, 2012, email from Judge to Watkins.
29. Multiple internal Graphic emails from May, September, and December 2013.
30. Screenshots purporting to show bids from the January 2014 ARIBA bidding for Nestle business.
31. A February 7, 2014, internal Nestle email.
32. A February 13, 2014 email from Kathryn Carlson, a Nestle employee, to Judge and Seefeldt, among others.
33. Multiple internal Graphic emails dated February 16 and 17, 2014.
34. An indemnification agreement dated February 20, 2014, which Watkins signed on behalf of Inline at Nestle's request.
35. Internal Graphic emails from March and June 2014.
36. Internal Graphic emails from October and December 2015.
37. Internal Graphic emails from May, September, and November 2015.
38. A May 6, 2015, email from Seefeldt to Judge, with a copy of the cease-and-desist letter Graphic had served on Inline attached.
39. Internal Graphic emails from January and February 2016.
40. A March 11, 2016, email from Seefeldt to Carlson.

41. An internal Nestle email dated June 28, 2016. **[*38]**
42. Multiple internal Graphic "sample requests," also referred to as a "CAD Requests" or "drawing request forms," which served to request drawings from Graphic designers.
43. Drawings that resulted from such requests.
44. Excerpts from Graphic's internal "Code of Business Conduct and Ethics."

(Mem. in Supp., [Docket No. 381]; Exhibits 1 through 119, [Dockets No. 384-501] (all filed under seal)). The Court has carefully considered the large volume of Exhibits individually, as well as a whole, and it finds that Inline has failed to demonstrate a prima facie case to support amending their Complaint to assert a claim for punitive

[4] Inline refers to this as the "Joint Development Agreement," or the "JDA." (See, Mem. in Supp., [Docket No. 381], 29).

damages as to Counts I and II. The Court discusses each of Inline's asserted bases for punitive damages in more detail below.

Evidence Which Inline Asserts Shows that Graphic Knew the Patented Designs Were Not Invented Solely by Fitzwater

Jeffrey Voyzey testified that in 2000 or 2001, Graphic and the company Chef America began Project Quantum, which was aimed at designing new microwave susceptor sleeves for Hot Pockets. (Kroll Dec., Exh. 17, [Docket No. 399], 3). Voyzey was Graphic's project leader for Project Roxanne, and Corey Brower was his principal contact at Chef **[*39]** America. (Id. at 3-4). Voyzey agreed that it was correct to say that he "worked with Mr. Biddle[, Graphic's assistant general counsel and chief intellectual property counsel,] on patent-related issues that arose in connection with Project Roxanne," as well as "contract-related issues." (Id. at 10). Generally, Voyzey agreed with the assertion that he kept Biddle "in the loop on what was going on in Project Roxanne." (Kroll Dec., Exh. 17, [Docket No. 399], 26-27). (Id. at 11). More specifically, Voyzey agreed that he participated in quarterly patent review meetings with Biddle and he was kept apprised of patent developments, including designs or concepts for which patent protection was being applied or on which patents had been granted. (Id. at 15). He testified that "[i]t wouldn't be uncommon" for Biddle to participate in meetings regarding Project Roxanne. (Kroll Dec., Exh. 17, [Docket No. 399], 10).

Voyzey further agreed that in 2002 or 2003, Nestle acquired Chef America, and "at some point" Project Quantum "morphed into" Project Roxanne, but Brower remained Voyzey's principal contact at Nestle on Project Roxanne. (Id. at 3, 19). A slide from an internal, undated (but which appears to have been produced in 2004 or 2005) Graphic power **[*40]** point presentation lists one of the goals for Project Roxanne as "Multi[-]year protection in the market." (Kroll Dec., Exh. 88, [Docket No. 470], 2).

Nestle acquired Chef America in 2002. (Kroll Dec., Exh. 83, [Docket No. 465], 3). Brower was the person responsible for communicating changes and suggestions to Graphic on behalf of Chef America and, after its acquisition, on behalf of Nestle. (Id. at 6). Brower described the design and development as a collaborative process. (Id. at 12-13). Brower further testified that during both Project Quantum and Project Roxanne, he often had his own ideas and suggestions about what the packaging should include, and he commonly communicated to Graphic—typically through Voyzey—what particular features Nestle wanted in the sleeves. (Id. at 4, 6). Brower stated in his Declaration that after he communicated Nestlé's desired changes to Voyzey, Graphic would provide samples of the desired designs as requested. (Kroll Dec., Exh. 85, [Docket No. 467], 4-5).

In his testimony, Voyzey agreed that it was fair to say that he and Brower worked jointly on ideas and designs and that Brower provided feedback from Nestle on proposals or designs. (Kroll Dec., Exh. 17, [Docket No. 399], 4). Voyzey **[*41]** further agreed that Brower provided comments, feedback, and suggestions on drawings or samples from Graphic and, broadly speaking, Voyzey would incorporate Brower's comments into what Voyzey asked Graphic designers to draw. (Id. at 21). John Best, Graphic's vice president of sales and commercial development, also testified that Graphic worked with Brower similarly to how Graphic worked with all of its customers: Brower "provid[ed] feedback on performance from the samples [Graphic] had provided, and [gave] direction on what he needed to see improvement in." (Kroll Dec., Exh. 3, [Docket No. 387], 3, 5-6).

Brower authored an Interoffice Memo dated June 12, 2001 ("the June 2001 Memo"), which was distributed to Voyzey, among others, and which summarized design concepts and anticipated "next steps" as discussed during a June 11, 2001, Project Quantum meeting involving representatives from Chef America and Graphic. (Kroll Dec., Exh. 84, [Docket No. 466], 2-3). Brower testified that the June 2001, Memo indicated that at that time, Chef America had told Graphic that it was interested in pillow packs (also known as end closures), tear strips, and gussets, and that the Hot Pocket Sleeve Chef America used **[*42]** at the time already had gussets. (Kroll Dec., Exh. 83, [Docket No. 465], 5, 8). In his Declaration, Brower stated:

> "As reflected in [the June 2001Memo], Chef America specifically requested that Graphic provide microwave susceptor sleeves that included closable end panels, a tear strip, gussets, and apertures. Notably, the

> microwave susceptor sleeve being sold in 2001 already had gussets and apertures, so Chef America directed Graphic to add end panels and a tear strip to the design.

(Kroll Dec., Exh. 85, [Docket No. 467], 5).

Voyzey similarly testified that the Hot Pocket sleeve Graphic made for Chef America in 2001, had gussets and an aperture but did not have a tear strip or end closures. (Kroll Dec., Exh. 17, [Docket No. 399], 5, 18). Voyzey also testified that the meeting in June 2001, reflected that Chef America was considering tear strips, end closures, and a new bottom panel for the new Hot Pockets sleeve design. (Id. at 6). Voyzey further testified that in 2001, Deb Pair, a designer at Graphic at the time, prepared Drawing 50019D, which was the design for a Hot Pocket Sleeve with pillow packs. (Id. at 8).

In March 2005, Graphic and Nestle entered into a (Joint) Development Agreement[5] to develop **[*43]** "certain thermal insulating, hand held microwave sleeve packaging for hand held food products and/or new cost reducing processes for producing Nestlé's existing microwave sleeve for hand held products." (Kroll Dec., Exh. 87, [Docket No. 469], 2). Biddle and Voyzey were both involved, to some extent, in the negotiation and approval of the Joint Development Agreement. ((Kroll Dec., Exh. 17, [Docket No. 399], 10; Kroll Dec., Exh. 33, [Docket No. 415], 6, 9-10; Kroll Dec., Exh. 87, [Docket No. 469], 11). Best testified that although he was not directly involved in negotiating the Joint Development Agreement, he was "kept aware of the status of it through updates from [Biddle] and [Voyzey]." (Kroll Dec., Exh. 3, [Docket No. 387], 7).

According to Biddle's testimony, "[a]ny development work that was performed under Project Roxanne was pursuant to the [joint] development agreement." (Kroll Dec., Exh. 33, [Docket No. 415], 16). Among other things, in the Joint Development Agreement, Nestle agreed to "[f]urnish GPI [Graphic] written criteria and concepts for the Packaging." (Kroll Dec., Exh. 87, [Docket No. 469], 2). The Joint Development Agreement defined "Improvements" as "any modifications, **[*44]** alterations, changes, improvements, enhancements, adaptations or derivative works of or to the Packaging." (Id. at 2). The Joint Development Agreement further provided:

> Patentable inventions that are invented jointly by the parties hereto shall be owned jointly by the parties in accordance with the law governing such jointly owned patents, and subject to Section 5.1 above," but "[a]ny Improvements developed solely by one party shall be owned solely by that party, shall be incorporated into the Packaging, and shall be subject to the exclusivity provision contained in Section 5.1 above.

(Id. at 6).

Voyzey testified that he understood the Joint Development Agreement to state that if Graphic solely developed a concept, Graphic would own it, but if there was an invention or a concept developed by both Nestle and Graphic, it would be jointly owned by them. (Kroll Dec., Exh. 17, [Docket No. 399], 17). Specifically, Voyzey testified that he understood "solely" to mean "no one else had a hand in that development." (Id.).

Voyzey agreed in his testimony that one way for Graphic to have multi-year protection in the market, which was identified in the previously mentioned PowerPoint presentation as a goal of Project Roxanne, was to patent **[*45]** the sleeve design. (Kroll Dec., Exh. 17, [Docket No. 399], 12). Voyzey further testified that by March 2005 he was "considering patent protection as a means of [o]btaining multi[-]year protection for sleeves produced by Graphic for Nestle." (Id. at 17).

Graphic structural designer Kelly Fitzwater testified that she began working on Project Roxanne at the end of 2005, but she had not worked on Project Quantum; Voyzey agreed with this timing in his testimony. ((Kroll Dec., Exh. 17, [Docket No. 399], 20; Kroll Dec., Exh. 89, [Docket No. 471], 3-4). Fitzwater further testified that she had no role in preparing drawing 50019D, which was the sleeve design with pillow packs. (Kroll Dec., Exh. 89, [Docket No. 471], 10). However, Fitzwater's role in Project Roxanne "would have been to take concepts of others, including project leaders, and essentially put them to paper, create drawings." (Id. at 5). She testified that she did not create drawings or samples absent a specific request to do so. (Id.). Brower similarly testified that that he worked with

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[5] See, fn. 4, supra.

Fitzwater and could not "recall any instances where [he] asked [Fitzwater] to come up with a new design without providing her some direction as to what [he] wanted **[*46]** in that design." (Kroll Dec., Exh. 83, [Docket No. 465], 7).

During her deposition, Fitzwater identified various drawings—Drawings 51616D, 51616E, and 51616F—and she noted the differences in the designs represented therein. (Kroll Dec., Exh. 89, [Docket No. 471], 11).

On September 30, 2005 ("the September 30, 2005, email"), Brower sent an email to Fitzwater—copied to Voyzey—that included suggestions on Drawings 51616D, 51616E, and 51616F. (Kroll Dec., Exh. 90, [Docket No. 472], 3). Brower testified that the September 30, 2005, email was "specifically advising [Fitzwater] that [Nestle] would like a new variation of the sleeve with a single tear strip located approximately halfway down the sleeve." (Kroll Dec., Exh. 83, [Docket No. 465], 9). Both Voyzey and Biddle testified that the September 30, 2005, email contained suggestions and feedback on Drawings 51616D, 51616E, and 51616F. ((Kroll Dec., Exh. 33, [Docket No. 415], 15-16); Kroll Dec., Exh. 39, [Docket No. 399], 23). Fitzwater confirmed that as of September 30, 2005, Brower communicated to her that he wanted one tab on the sleeve. (Kroll Dec., Exh. 89, [Docket No. 471], 11).

Voyzey testified that he had once referred to a "fourth" **[*47]** design—in addition to the three drawings referenced above--because of Brower's desire for a tear away panel that exposed approximately half of the sandwich at once. (Kroll Dec., Exh. 17, [Docket No. 399], 25). Biddle similarly testified that he understood the "fourth design" to be based upon the suggestion that Brower had made. (Kroll Dec., Exh. 33, [Docket No. 415], 17). Voyzey further testified that prior to Brower's suggestion, there was no drawing of a sleeve with a single tear-away portion that removed approximately half of the sleeve. (Id. at 24).

On October 2, 2005, Voyzey sent an internal Graphic "sample request" (also referred to as a "CAD Request" and a "drawing request form") requesting a change to Drawing 51616C "removing the top horizontal zipper. One zipper that removes the top 2 [inches] with one zipper." (Kroll Dec., Exh. 91, [Docket No. 473], 3). Voyzey testified that this sample request was intended to reflect the changes suggested by Brower in the September 30, 2005, email, and Fitzwater agreed that it appeared that the sample request was made to produce a design with the features Brower requested in the September 30, 2005, email. (Kroll Dec., Exh. 17, [Docket No. 399], 27-28; **[*48]** Kroll Dec., Exh. 89, [Docket No. 471], 12). Voyzey also testified that Drawing 51616G was completed on October 3, 2005, and was consistent with his October 2, 2005, sample request. (Id. at 28). Biddle similarly testified that Fitzwater's Drawing 51616G was the drawing that reflected Brower's suggestion in the September 30, 2005, email. (Kroll Dec., Exh. 33, [Docket No. 415], 18).

On October 2, 2005, Voyzey sent an email to Mark Sinclair (whose role at Graphic is not indicated in the record) and Biddle and copied it to Fitzwater, Best, Dan Keefe (whose role at Graphic is not known), Scott Middleton (whose role at Graphic is not known), and Terry Lafferty (whose role at Graphic is not known); that email referred to "3, soon to be 4, pillow pack designs we've shown to Nestle for project Roxanne." ((Kroll Dec., Exh. 33, [Docket No. 415], 14; Kroll Dec., Exh. 90, [Docket No. 472], 2). Voyzey further noted in the email that "Marketing was more excited about these than they have been about any concepts we've shown them to date. They seemed to forget that we had shown them pillow pack concepts 18 months ago." (Id.). Voyzey stated: "[Fitzwater] has submitted these designs to see if they are patentable. **[*49]** We need to move quickly to see if these are patentable concepts and if so to get them protected as soon as possible." (Id.). Attached to Voyzey's October 2, 2005, email was Brower's September 30, 2005 email, which explicitly stated that "these designs fall under our Exclusivity Agreement." (Id. at 3-4).

Biddle testified that he could not produce any documentation to show that he had inquired into the assertion in Voyzey's October 2, 2005, email that Graphic showed Nestle pillow pack concepts 18 months prior. (Kroll Dec., Exh. Exh. 33, [Docket No. 415], 17; Exh. 90, [Docket No. 472], 2).

On October 7, 2005, Fitzwater signed a form entitled "Graphic Packaging Corporation Invention Disclosure." (Kroll Dec., Exh. 95, [Docket No. 476], 2). The Invention Disclosure Form ("IDF") states: "This invention is a MW sleeve that contains a food product (a heat and serve sandwich, for example) which might be consumed by the user while 'on the go.' Consequently, it features tear-off portions which the person can remove as the product is 'eaten down.'" (Id.). The IDF refers to "GPI drawings #51616D, 51616G," and states that the invention "was first disclosed to another person" on September 23, 2005, when "[s]amples **[*50]** and drawing were submitted to Corey Brower @ Nestle." (Id.).[6] Fitzwater testified that if she had questions about an Invention Disclosure Form, she would "[p]robably" go to Graphic's patent attorneys, including Biddle. (Kroll Dec., Exh. 89, [Docket No. 471], 7). She further testified that her understanding was that an Invention Disclosure Form (IDF) would eventually go to Biddle or another individual involved with Graphic's patent attorneys. (Id. at 8, 13).

Graphic's *Rule 30(b)(6)* representative, Jeffrey Sloat, testified that once an IDF was completed, "[i]t goes through a witness process. Other people have to read through it, and then sign as witnesses, and then it gets sent to our internal Counsel, . . . Barry [Biddle] **[*51]** for approval. If he approves it, then it goes into [*sic*] our external Counsel for generation of an application." (Kroll Dec., Exh. 106, [Docket No. 487], at 3).

Biddle testified that his responsibilities at Graphic included managing Graphic's intellectual property portfolio and managing patent prosecution activities, including "sometimes" reviewing them, but he did not draft claims, applications, or responses to office actions. (Kroll Dec., Exh. 33, [Docket No. 415], 4).[7] Biddle was the primary contact person between Graphic and its outside patent counsel since at least 2005. (Id.). Biddle testified that he believed it was correct to say that "a sale of a purported invention . . . more than a year prior to the filing of application is a clear bar to patentability." (Id. at 22). He also testified that he was aware that the disclosure obligations required the disclosure of information on enablement, on possible prior public uses, sales, offers to sell, derived knowledge, prior invention by another, and inventorship conflicts. (Id. at 24).

Biddle further testified that he was "involved in pursuing patent [] protection on Kelly Fitzwater's inventions." (Kroll Dec., Exh. 33, [Docket No. 415], 11). He further **[*52]** testified that he is aware that Graphic "prepared and filed a

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[6] Inline merely cites generally to Expert Kowalchyk's explanation and summary of the process by which "Graphic applied for multiple patents from 2005 to 2013 that incorporate and claim the three major categories of concepts and ideas Brower and others at Nestle provided under Projects Quantum and Roxanne and the JDA." (Mem. in Supp., [Docket No. 381], 33, citing generally to "Exh. 81, ¶¶ 37-99; Exh. 82, ¶¶ 27-61). Similarly, Inline cites only to its Expert Report and Rebuttal Report as the support for the following paragraph:

> Someone at Graphic . . . created invention disclosures on the Hot Pocket designs that incorporate the drawings made pursuant to Brower's instructions and claim Brower's contributions. Someone also revised the disclosures after Brower's September 30, 2005, email, so that one of the disclosures specifically referenced the new Drawing 51616G. But Fitzwater is the only person identified as the inventor in all of the disclosures. Fitzwater signed the disclosures and submitted them for patenting.

(Mem. in Supp., [Docket No. 381], 32-33). Inline also cites only to the Expert Report and Rebuttal Report for the following assertions: (1) "Graphic applied for an entire family of patents (the "Invalid Patents") that were all premised on Nestlé's contributions"; (2) "Although the Invalid Patents claim concepts provided by Brower, on behalf of Nestle, none of the applications or patents list him or anyone else at Nestle as an inventor"; (3) "But because Brower and others came up with the patentable concepts, the law required that they receive attribution. Since the patents do not list them as at least co-inventors and instead incorrectly list Fitzwater as the sole inventor, the patents are invalid." (See, Mem. in Supp., [Docket No. 381], 33). Because it is improper to consider an expert's characterization of facts or conclusory statements as evidence relevant to a plaintiff's burden to show a prima facie case for punitive damages in order to succeed on a motion to amend a complaint to add punitive damages, the Court, as already explained above, does not consider this as evidence. In light of its ability to consider the record as a whole, however, the Court may consider as general background that Inline intends to argue that the patents which Graphic asserted in its conversations with Nestle and in its patent litigation against Inline are invalid because Fitzwater is allegedly listed as the only inventor when Inline asserts that this is untrue.

[7] On May 25, 2007, Biddle authored an email regarding a patent (unrelated to the patents currently at issue in this litigation) on which a third-party was claiming he should be listed as an inventor. (Kroll Dec., Exh. 108, [Docket No. 489], 2-3). In that email, Biddle states that he reviewed a patent application "as well as the development documents that have been forwarded to me by the listed inventors and I have had several conversations with GPI [Graphic] personnel that were involved in the development of the product." (Id.). The email continues on to communicate Biddle's thoughts on the validity of the third-party's claim to inventorship. (Id.). Inline cites this singular example in support of its broad assertion that "Biddle historically investigated inventorship issues relating to collaborative work between Graphic and other partners that involved less substantive concepts." (See, Mem. in Supp., [Docket No. 381], 37).

patent application on . . . the sleeve invention that she developed," and that while Biddle may or may not have reviewed or approved it, he would have worked with outside patent counsel and ultimately instructed outside patent counsel whether they were permitted to file the provisional patent application. (Id. at 5, 12, 23). But later, Biddle testified that he reviewed all of the Invention Disclosure Forms (IDFs) which were sent to outside patent counsel. (Id. at 28). Biddle testified that he would have seen Fitzwater's drawings "if they were attached to an [IDF] that was sent to [him]," and he "believe[d]" he eventually saw drawings for Fitzwater's IDF. (Id. at 14, 19). Biddle testified that he ultimately instructed outside patent counsel to file the nonprovisional patent application on Fitzwater's design, listing Fitzwater as the sole inventor. (Id. at 25).

Biddle testified that he did not ever ask for or review Voyzey's Project Roxanne file or interview him with regards to the IDF, he did not recommend to outside patent counsel that they interview Voyzey, and he could not recall whether he performed any due diligence[8] by looking through documents or interviewing people. **[*53]** (Kroll Dec., Exh. 33, [Docket No. 415], 20, 27, 29). Biddle also testified that he did not remember specifically talking to Fitzwater about "what it means to be an original, first and sole inventor" or discussing with her "the Corey Brower concept . . . at or about the time the [nonprovisional] patent application was filed." (Id. at 26).

Voyzey testified that he was aware that Fitzwater had submitted Invention Disclosure Forms claiming to be an inventor of the sleeve designs, and he agreed with the statement that he was "involved in the decision to seek patent protection on [the] designs drawn by Ms. Fitzwater." (Kroll Dec., Exh. 17, [Docket No. 399], 26-27). Voyzey's testified that during his employment at Graphic, he was never "questioned with regard to what is in the[] invention disclosure forms," nor did he recall anyone in connection with the patent-seeking process asking him for information "relating to the work that had been done prior to September 2005 in connection with Project Roxanne and Project Quantum." (Kroll Dec., Exh. 17, [Docket No. 399], 22, 27). Voyzey also testified that he did not recall ever being "asked to collect drawings, memos, materials with regard to the work that **[*54]** had been done on Project Quantum and Project Roxanne as part of patent prosecution efforts." (Id.at 30). Voyzey also testified that he did not talk to anyone at Graphic about whether it was permissible to file a patent solely in Graphic's name despite the joint work with Nestle on the Project Roxanne sleeve. (Kroll Dec., Exh. 17, [Docket No. 399], 14, 18).

Voyzey further testified that he did not recall ever having a conversation with Brower "telling him that the concept of a sleeve with a single tear away feature that exposes about half the sandwich with one tear was being submitted for patent protection by Graphic, and he did not recall ever telling anyone at Nestle that Brower was originally the person who suggested the single tear strip modification. (Kroll Dec., Exh. 17, [Docket No. 399], 29, 35).

Similarly, Fitzwater testified that she understood what it means to be the "sole inventor" of something. (Kroll Dec., Exh. 89, [Docket No. 471], 15). She also testified that "[i]f someone took part in the designing of whatever specifically is being claimed [on an "Invention Disclosure Form"], then they would be added to that invention disclosure. (Id. at 8). She specifically described "the type of information **[*55]** [she understood she] had an obligation to disclose" as "if I was taking somebody else's design and stealing it, I would have to disclose that. That would be wrong. Disclosing anything that I believe is unpatentable, I guess. . . . disclosing everything I know, that I believe has anything to do with what I created." (Id. at 16). Fitzwater further testified that she had "no role in preparing drawing 50019[D], and she created drawings of an already-existing but modified sleeve with added tear strips and a closed bottom. (Id. at 6, 10). She also testified, as related above, that Brower suggested modifications to the design, including the suggestions in the September 30, 2005, email. (Id. at 12). Yet, she testified that she didn't recall whether she "ever advise[d] Mr. Brower that [she] submitted an invention disclosure on the drawing that [she] did pursuant to his suggestion." (Id. at 14).

For his part, Brower testified that he did not recall anyone at Graphic ever advising him that they were seeking patent protection on the designs that resulted from his suggestions, and he did not recall ever being advised that Fitzwater had submitted invention disclosure forms claiming the resulting drawings as her own inventions. (Kroll Dec., **[*56]** Exh. 83, [Docket No. 465], 10-11).

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[8] The deposition excerpt provided by Inline does not provide context as to what, exactly, Biddle or Inline were referring to that Biddle could have performed due diligence in regard to. (See, Kroll Dec., Exh. 33, [Docket No. 415], 21).

On December 20, 2005, Voyzey submitted another sample request to Fitzwater, and included the following notation: "One more change for the Roxanne Sleeve. They'd like to add a locking tab to the bottom flaps. Something like a cereal box top." (Kroll Dec., Exh. 93, [Docket No. 383-2, 2). Brower used this sample request in his Declaration as "[a]nother particular example of Nestle providing instructions to Graphic." (Kroll Dec., Exh. 85, [Docket No. 467], 6). On December 20, 2005, Fitzwater completed Drawing 51616M. (Kroll Dec., Exh. 94, [Docket No. 475], 2).

Voyzey testified that the Project Roxanne Hot Pocket sleeves were commercialized in or around 2007, and Nestle was required to purchase 100 percent of the Roxanne Hot Pocket sleeves from Graphic from 2007 to 2014. (Kroll Dec., Exh. 17, [Docket No. 399], 16). Biddle testified that he "believe[d it] is correct" to say that "the Roxanne sleeve ultimately procured by Nestle was developed pursuant to" the Joint Development Agreement. (Kroll Dec., Exh. 33, [Docket No. 415], 10). Similarly, Best agreed "that the Roxanne sleeve ultimately procured by Nestle was developed pursuant to" the Joint Development **[*57]** Agreement. (Kroll Dec., Exh. 3, [Docket No. 387], 9).

In addition to the evidence detailed above, Inline also submitted to the Court excerpts from Graphic's "Code of Business Conduct and Ethics." Best and Jim Seefeldt, Graphic's vice president of sales, both testified that they were aware of the Code of Business Ethics and Conduct and that they signed and acknowledged it annually. (Kroll Dec., Exh. 3, [Docket No. 387], 17; Kroll Dec., Exh. 9, [Docket No. 391], 5). Best further testified that he had never self-reported that he had violated that ethical code, and although he had contacted Graphic's legal department "on occasion" about his concerns, none of those contacts "in any way, directly or indirectly, involve[d] the allegations" asserted by Inline in this litigation. (Kroll Dec., Exh. 3, [Docket No. 387], 20).

Inline states that "Graphic's code of ethics prohibited employees from engaging in the kind of deceit continuously exhibited by Graphic's leadership." (Mem. in Supp., [Docket No. 381], 37). The Court first notes that the page cited to support this assertion is the introduction to the Code of Business Conduct and Ethics and states only the "Purpose of Our Code" and that it "applies **[*58]** to us all." (See, Kroll Dec., Exh. 25, [Docket No. 407], 6). Inline also directs the Court to excerpts from Graphic's Code of Business Conduct and Ethics that state that (1) managers must "uphold[] the highest standards of professional conduct"; (2) employees should "Never get involved in any discussion that may be interpreted as interfering with free and fair competition"; (3) employees should "not take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair dealing practice"; and (4) employees should "speak up" even if they "only suspect unethical behavior." (Kroll Dec., Exh. 25, [Docket No. 407], 9, 11, 30-31).

Inline now contends that the evidence detailed above establishes by clear and convincing evidence that "Graphic leadership knew that the patented concepts were not invented by Fitzwater because the Concepts were developed under the JDA and Projects Quantum and Roxanne." (Mem. in Supp., [Docket No. 381], 35). Inline also argues that "Graphic leadership on Project Roxanne, Biddle in particular . . . knew facts creating a high probability that Fitzwater was not the sole inventor of **[*59]** the Invalid Patents, but willfully turned a blind eye." (Id. at 37).[9]

The Court observes, however, that some of Inline's assertions in its argument on this point are entirely conclusory and are not supported by its citations to the evidence in the record now before the Court. For example, while asserting Graphic had knowledge that the patents were invalid, Inline states that "Graphic leadership even

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[9] In their respective Memoranda in support of and in opposition to the present Motion to Amend to Plead Punitive Damages, both Inline and Graphic argue the ultimate merits of the underlying claims in this suit. Graphic does so extensively, as it argues that Inline "fails to establish a prima facie case of tortious interference with contractual relationship," that "Inline has failed to present a prima facie case . . . that Graphic's assertion of its patent rights was wrongful or unlawful," and that "Inline does not offer evidence of any specific intent to deceive the [United States Patent and Trademark Office." (Mem. in Opp., [Docket No. 506], 14, 22, 39). None of this is relevant to the present Motion to Amend to Plead Punitive Damages. See, *Coy v. No Limits Education, No. 15-cv-93 (BRT), 2016 U.S. Dist. LEXIS 193954, 2016 WL 7888047, *2 (D. Minn. April 1, 2016)* ("[W]hen deciding whether punitive damages are available, courts do not need to examine the merits of the underlying claims or determine whether they were properly pleaded. Those questions are best considered in the context of dispositive motions."). Therefore, the arguments of both parties which go to the merits of the underlying claims are not addressed in this Order.

acknowledged that there were 'valid concerns from past history regarding IP ownership.'" (Mem. in Supp., [Docket No. 381], 38). However, the email to which Inline cites in support of this specific contention is a February 11, 2016, email from Katie Kloth (whose role at Graphic is not known) to Seefeldt discussing a potential future project with Nestle that in fact has nothing to do with the issues in the present litigation. (See, Kroll Exh. 100, [Docket No. 481], 20.

Similarly, Inline states that "after the 2016 Nestle RFP process, Seefeldt noted that the Invalid Patents resulted from Nestlé's 'insight' and 'improvements' and acknowledged that it was Nestlé's design." (Mem. in Supp., [Docket No. 381], 38). The citation in support of this assertion, however, is actually **[*60]** to an October 28, 2015, email string with the subject line "Nestle Hot Pocket sleeve history" in which Kloth wrote to Seefeldt:

> We started the sleeve back in 1984 with a simply square sleeve designed for Nestle. Around 2005, they came back to us with some additional consumer insight wanting to make improvements. At that time we created 12† designs for them, which were tweaked a few times before they agreed to a final sleeve they are still using today. At that time, we patented the design, but had no exclusivity to Nestle - only an agreement and understanding that it was their "Nestle design". [*sic*]

(Kroll Dec., Exh. 112, [Docket No. 494], 2). In response, Seefeldt wrote only: "Thanks Katie[.]" (Id.).

In addition, some of Inline's other characterizations of the evidence in the record now before the Court are imprecise at best. For example, Inline asserts that "Best told the Graphic team to 'stay focused on . . . Inline' and to push for Nestle to license Graphic's patents via an 'economic move to incent this offer' and make 'the legal stuff go[] away." (Mem. in Supp., [Docket No. 381], 38). Inline cites here to Exhibit 113 to the Kroll Declaration, which includes an email from Best to various **[*61]** Graphic employees dated December 11, 2015, which stated, in relevant part:

> We are advancing a thought on how to get an extension on the Nestle Sleeve-Microwave business[.]
> He needs the following recap on all the Nestle Sleeve-Microwave business. Essentially, we are looking for you to go through the Nestle business and provide the following input.
>
> Lets [*sic*] stay focused on the Inline and GPI microwave business. I know that Westrock runs some patch items but believe this is a bit out of scope for this exercise.
>
> Item Supplier Sales Margin Is it Patented (y/N) [*sic*]
> If Yes, when expires How easy to get around the patent?
> Make sense?
>
> This is pretty hot...Bill, Jeff...we have the opportunity to talk with Mike U next week. Part of our conversation needs to checking [*sic*] his willingness to license Nestle on the Roxanne sleeve (provided we hold our volume-4 year deal) and all the legal stuff goes away. We would make an economic move to incent [*sic*] this offer and deliver some Stouffer [*sic*] carton growth.

(Kroll Dec., Exh. 113, [Docket No. 495], 2-3) (ellipses in original). When put into full context within the email, Best's language is not at all as Inline characterizes it.

Evidence Which Inline [*62] Asserts Shows that Graphic Asserted the Patents Despite Knowing that doing so had a High Probability of Injuring Inline's Right to Interference-Free Business Relations

Inline next argues that despite knowing or disregarding facts which showed that the implicated patents were invalid, Graphic nevertheless applied for the patents at issue because it sought "multi-year protection in the market" for Hot Pocket Sleeves, it was concerned about upcoming expirations of previously issued patents, increased competition from Inline motivated Graphic to seek the patents, and seeking patents based on others' ideas is common strategy for Graphic. (See, Mem. in Supp., [Docket No. 381], 34). Therefore, Inline claims, Graphic deliberately took actions which interfered with Inline's prospective and existing business relations despite knowing of a high probability that such actions would injure Inline's right to interference-free business relations. See, *Minn. Stat. § 549.20, Subd. 1(b)*.

The following is the evidence upon which Inline relies for this portion of its argument.

An unknown Graphic employee created an unsigned "update" regarding events in October 2008, stating:

> Inline Packaging is showing up within all groups within Nestle. **[*63]** They've made presentations to R&D, Stouffer's, HHFG in Denver and with Lou Judge [at Nestle] in St. Louis in the last 60 days. They have provided sample for 3 of the projects we are working on today . . . Project leaders report Inline being very aggressive and very innovative.

(Kroll Dec., Exh. 41, [Docket No. 423], 2; <u>see, also</u>, Kroll Dec., Exh. 52, [Docket No. 434], 1).

On May 13, 2009, Best issued Graphic's Monthly Report for April 2009, which reported: "Competitive activity from In Line [*sic*] packaging has risen to a troubling level. They have attacked in a number of our high profit, low end, and non protective structures at Nestle, Heinz, and Schwan's. It is obvious that our customers are using them to apply pressure to GPI." (Kroll Dec., Exh. 12, [Docket No. 394], 4).

In June 2009, a series of internal Graphic emails and an email to Lou Judge, Group Manager of Strategic Procurement at Nestle, from Tim Klisares, Sales Manager for Graphic, regarding Graphic's offer to reduce product pricing for Nestle in exchange for Graphic receiving 100% of Nestlé's business and Nestlé's rejection of that offer. (Kroll Dec., Exhs. 22-24, [Docket Nos. 404, 405, and 406).

In an internal Graphic email **[*64]** dated October 5, 2009, Larry Seaborg (whose role at Graphic is not known) informed Seefeldt, among others, that a third-party had "state[d] he would not give ideas to [Graphic] because they run out and get patents on his ideas." (Kroll Dec., Exh. 99, [Docket No. 480], 2).

Jeffrey Watkins, President of Inline, testified that Inline became a fully qualified Nestle supplier in 2011. (Kroll Dec., Exh. 5, [Docket No. 386], 4). (Kroll Dec., Exhs. 22-24, [Docket Nos. 404, 405, and 406; Kroll Dec., Exh. 52, [Docket No. 434], 1).

In November 2011, Voyzey prepared and issued an internal Graphic "project summary" that noted that Nestle had confirmed its intent to move the Kahiki sleeve business to Inline effective January 2012. (Kroll Dec., Exh. 9, [Docket No. 391], 22; Kroll Dec., Exh. 45, [Docket No. 427], 2). Voyzey testified that susceptor products that Graphic manufactured and sold generally have a higher margin when compared to folding carton products. (Kroll Dec., Exh. 17, [Docket No. 399], 33).

On November 30, 2011, Mike Vance (whose role at Graphic is not known) emailed Pete Lokar (whose role at Graphic is not known), Klisares, and Seefeldt, and he stated that in an open bid situation, **[*65]** Graphic could be forced to reduce its profitability margin on microwave sleeves by up to 20%. (Kroll Dec., Exh. 44, [Docket No. 426], 4). In the email, Vance also stated: "As you are aware the microwave business is under competitive pressure and will likely take a hit when our contract is up." (<u>Id.</u>).

William Sedlacek, former Vice President and General Manager of the Graphic's Microwave Division until 2011, when he became Vice-President of Innovation and Business Development for Graphic, testified that he had also received Vance's November 30, 2011, email. (Kroll Dec., Exh. 28, [Docket No. 410], 6; <u>Id.</u> at Exh. 44, [Docket No. 426], 4). Sedlacek further testified that at the time, he was willing to reduce the profitability margin on microwave sleeves provided that Graphic retained 100% of the paperboard production. (<u>Id.</u> at 7; <u>see, also</u>, Kroll Dec, Exh. 9, [Docket No. 391], 24).

In a related email on December 5, 2011, Seefeldt stated:

> I believe Nestle is committed to get a back[-]up source of supply on susceptor for leverage. Nestle believes — and has believed for some time that our prices on susceptor are very high because we are 'unchecked' in the market. . . . I think this is mostly about leverage **[*66]** and back up and the fact that Lou [Judge] has probably seen significant double digit saving opportunities via [I]nline.

(Kroll Dec., Exh 44, [Docket No. 426], 2). Seefeldt later testified that he learned in late 2011 that Nestle was awarding Inline—instead of Graphic—its Kahiki spring roll susceptor sleeve business. (Kroll Dec., Exh. 9, [Docket No. 391], 22).

Inline argues that "[i]ncreased competition from Inline put pressure on Graphic to obtain patents. (Mem. in Supp., [Docket No. 381], 34). However, the evidence Inline cites to support this extremely broad assertion is only Best's testimony that Graphic did "[n]ot necessarily" want a protectable design; "We wanted to solve the customer's issue." (See, Id.; see, also, Kroll Dec., Exh. 3, [Docket No. 387], 7). The deposition excerpt cited by Inline does not support its assertion that pressure from Inline motivated Graphic to obtain patents.

Similarly, at his deposition, Seefeldt was asked: "You would agree with me that patents on microwave susceptor technology are a party of Graphic's strategy for keeping its microwave susceptor business? Yes?" (Kroll Dec., Exh. 9, [Docket No. 391], 11). Seefeldt replied:

> I think that where we have worked **[*67]** and invested for patents and technology, that we want to use that to our advantage and the customer's advantage, and so does it ever tie into the strategy? It does. But again we've earned the patent and the customers found value in it. So . . . ."

(Id. (ellipses in original transcript)). Inline cites to this portion of Seefeldt's testimony to support its equally broad assertion that "patents are a part of Graphic's usual 'strategy' for keeping susceptor business." (See, Mem. in Supp., [Docket No. 381], 34). When considered in proper context, however, Inline's characterization of the cited deposition testimony is plainly imprecise.

In any event, on December 5, 2011, Klisares sent Judge (at Nestle) an emailed proposal offering a reduction in product price if Nestle would extend Graphic's Kahiki sleeve contract, extend other susceptor agreements with Graphic, and award additional business to Graphic. (Kroll Dec., Exh. 46, [Docket No. 428], 2-3). Sedlacek testified after becoming aware of the award of the Kahiki sleeve business to Inline, Graphic nevertheless sought to extend its right to sell Kahiki sleeves for another year, despite potential interference with the award to Inline. (Kroll **[*68]** Dec., Exh. 28, [Docket No. 410], 9).

In an April 4, 2012, email to Seefeldt, Klisares referred to an "applied-for patent" on the microwave sleeve and stated that the patent might not be issued "for months." (Kroll Dec., Exh. 9, [Docket No. 391], 25-26; Id. at Exh. 53, [Docket No. 435], 2). Yet in an April 13, 2012, email Klisares sent to Judge (at Nestle), Klisares purported to remind Judge of a conversation in November 2011, during which Klisares had informed Judge that the microwave sleeve in question was "a GPI patented structure" and so a licensing agreement might be necessary if Nestle awarded the sleeve production to another company. (Kroll Dec., Exh. 47, [Docket No. 429], 2-4). Judge stated in his Declaration: "Nestle takes allegations and threats relating to intellectual property infringement very seriously." (Kroll Dec., Exh. 52, [Docket No. 434], 3). Sedlacek testified that it was "likely" that Klisares made the statements to Judge regarding the GPI (Graphic) patent to create uncertainty about whether Inline could produce the sleeve without infringing on GPI's patent. (Kroll Dec., Exh. 28], 10).

In an email dated April 13, 2012, Klisares reported to Seefeldt that he had emailed **[*69]** Judge, and Seefeldt replied, "Well done." (Kroll Dec., Exh. 47, [Docket No. 429], 2). When Seefeldt was later asked if, at the time of those emails, he "understood that there had been no patent issued on the Kahiki sleeve," Seefeldt testified:

> I think that maybe the difference is if we applied for it, that that was, made it a valid. So if it's applied for, you know, it's almost like it's patented, you know, to laymen folks, maybe not in the legal sense of it. But if we have applied for it, we are protected for it and it's a protected structure from what I understand about patents, and I don't understand a lot, but that's what I thought to understand.

(Kroll Dec., Exh. 9, [Docket No. 391], 27).

Biddle testified that he "believe[d]" he had told Klisares—prior to Klisares' April 13, 2012, email to Judge—that they could not sue for patent infringement on a patent which is currently pending. (Kroll Dec., Exh. 33, [Docket No. 415], 30). What Inline doesn't acknowledge is that immediately following the deposition excerpt to which Inline cites, Biddle further testified that he felt that Klisares "had in particular at the time a poor understanding as to the difference between a patent and . . **[*70]** . a pending patent application", and Klisares "was ignorant" in "what you can and cannot do" with respect to each. (Kroll Dec., Exh. 33, [Docket No. 415], 30). In addition, although Biddle testified that he told Klisares that there was no patent at the time, Biddle further testified that he felt Klisares' statements to Judge were a mistake, rather than a lie. (Id. at 31).

On August 28, 2012, Judge (at Nestle) emailed Watkins (at Inline) an indemnification agreement Nestle planned to ask Inline to sign "concerning the sleeve currently packed at Kahiki Foods." (Kroll Dec., Exh. 48, [Docket No. 430], 2-3).

In a series of internal Graphic emails dated June 20 through June 22, 2012, Graphic employees discussed topics for an upcoming meeting between Graphic and Nestle regarding packaging safety and certificates of compliance. (Kroll Dec., Exh. 43, [Docket No. 436], 2-5). In one of the emails, Klisares stated that Sedlacek had:

> suggested we use this forum with [Nestlé's incoming Global Manager of Packaging Safety] to plant the seed of doubt with regards to the Microwave topic — that while GPI [Graphic] is a market leader in the field and can speak to our level of compliance, we can not [*sic*] vouch for **[*71]** lesser companies out there (Inline) that may not be as sophisticated or well resourced. Further — since he may not be aware that Nestle has recently moved some business to Inline — that he probe them in terms of [certificates of compliance] to make sure that they can, and will comply with the same level of scrutiny that GPI and other large suppliers are being asked to meet.

(Id. at 2). Pete Lokar (whose position at Graphic is not known) replied that he "like[d the] strategy of using this process as a way to highlight our resources . . . and also plant the seed of doubt in any upstart in this space (like InLine [*sic*]). We need to make sure that is an objective of this meeting." (Id.). Klisares agreed: "[I]t will be an objective of the meeting." (Id.).

Sedlacek himself testified that he "wanted to plant a seed of doubt" with Nestlé's incoming Global Manager of Packaging Safety, and that he did not have any evidence that Inline was not in compliance with safety requirements. (Kroll Dec., Exh. 28, [Docket No. 410], 11). Here again, what Inline does not acknowledge about the cited deposition testimony is that Sedlacek testified immediately thereafter that during the meeting he did not actually assert **[*72]** that Inline was not in safety compliance. (Id.).

In a May 30, 2013, internal Graphic email exchange, Warren Burn (whose role at Graphic is not known) asked, "Would In-Line [*sic*] make a good tuck under?" and Lokar responded, "Yes — just to get In-Line [*sic*] out of our way and from screwing up the market here." (Kroll Dec., Exh. 69, [Docket No. 451], 2).

On September 3 and 4, 2013, there were a series of internal Graphic emails including Sedlacek, Lokar, Klisares, and Seefeldt that identified two potential competitors—one of which was Inline—for microwave sleeve business which expired in June 2014, and later stated there was no data to suggest the other competitor was active in the microwave sleeve business. (Kroll Dec., Exh. 55, [Docket No. 437], 2-5).

On December 7, 2013, Jeff Martinez of Graphic (whose role there is not known) emailed Gregory Scharine of Nestle (whose role there is not known) and informed him that two sleeves they had been discussing were covered "at least" by two patents. (Kroll Dec., Exh. 58, [Docket No. 440], 2). Seefeldt later testified that he "believed" that Martinez had informed Nestle that there were Graphic patents which would be infringed if Nestle awarded **[*73]** Inline the sleeve business involved in anticipated January 2014, bidding for Nestle business. (Kroll Dec., Exh. 9, [Docket No. 391], 29). Voyzey also testified that "well in advance" of January 31, 2014, multiple people at Graphic—including Voyzey, Klisares, and possibly Martinez and/or Seefeldt—had informed Nestle that the Hot Pocket sleeves were patent-protected, and Voyzey believed that he himself had discussed the issue with Judge (at Nestle) in 2011 or 2012. (Kroll Dec., Exh. 51, [Docket No. 433], 9-10).

On January 8, 2014, Nestle accepted bids on multiple lots of business ("the ARIBA auction") that included provision of microwave susceptor sleeves. Watkins (at Inline) testified that even prior to the ARIBA auction, Inline and Nestle had communicated about possible Hot Pockets patent issues. (Kroll Dec., Exh. 5, [Docket No. 386], 9-10). Inline has provided screenshots from ARIBA Sourcing which it asserts shows that Inline's January 8, 2014, bids were the lowest bids for Nestlé's "Lot 1 — MEDFORD," Kahiki Spring Roll Wrappers, Hot Pocket, Croissant Pocket lots. (Kroll Dec., Exh. 59, [Docket No. 441], 2-4; Exh. 60, [Docket No. 442], 2-4). Inline has also provided screenshots from **[*74]** ARIBA Sourcing which Watkins later testified showed that bidding was completed and Inline had been awarded the Nestle lots. (Kroll Dec., Exh. 5, [Docket No. 386], 5-7); Kroll Dec., Exh. 62, [Docket No. 444], 2-9).

In a January 29, 2014, internal Graphic email string including Sedlacek, Seefeldt, Lokar, and various other Graphic employees, Sedlacek stated that Nestle had informed another Graphic employee that "they intend to move the entire sleeve business," that Graphic's bid was not the lowest, and that Graphic "might be able to salvage something (maybe up to 40$) with a bold move." (Kroll Dec., Exh. 61, [Docket No. 443], 2-3). Similarly, Voyzey testified that the feedback from Nestle after and regarding the ARIBA bids was that Nestle was "in a position to move 100 percent of the microwave susceptor sleeve business." (Kroll Dec., Exh. 51, [Docket No. 433], 7).

In an email dated February 7, 2014, Shannon Gavie (who appears to be a Nestle employee) informs Judge and Kathryn Carlson (who appears to be another Nestle employee) of an error that was discovered in one of the lots and an email dated February 9, 2014, in which Judge replies, in relevant part, "I do not think a rebid is in order **[*75]** as GPI [Graphic] will get all the business in a blocking strategy to keep Inline out." (Kroll Dec., Exh. 64, [Docket No. 446], 2).

In an internal Graphic email string dated February 16 and 17, 2014, Voyzey opined that it would be "[w]orth pointing out at this point that the croissant sleeve (drawing 51843) is covered by at least 2 patents (7,414,230 & 7,893,389) and 1 pending application. . . . We could remind [Nestle] of these patents now or let it slide for a while." (Kroll Dec., Exh. 65, [Docket No. 447], 2-3). In response, Sedlacek stated:

> Let's focus on getting the current proposal done and not overly complicate finalization of the negotiations. We can probably have greater impact later, rather than creating the turmoil now. While Nestle clearly is involved on the patent question, the legal issue ultimately would be with In Line [*sic*] as they would be the infringer on patents as the manufacturer. . . . My assessment is the patent issue will not force Nestle to give us any more share or prevent them from bringing In Line [*sic*] in with a simple die change. Let's use it with In Line [*sic*] where the legal issue would be anyway. The timing needs to be finalized, but one option would **[*76]** be to monitor In Line's [*sic*] qualifying activity with their limited award, presumptively on the current die cut. As the current contract end nears, play the patent card which should dictate that In Line [*sic*] is prevented from producing the current die cut. They presumably will then have to requalify a revised die cut, essentially starting over again, having wasted time and expense while they pursue the current die cut.

(Id. at 2).

On February 13, 2014, Kathryn Carlson at Nestle (whose role is not known) emailed Judge and Seefeldt, among others, confirming that Nestle was offering Graphic a 2-year extension for lots 3 and 4, which were the Hot Pocket lots. (Kroll Dec., Exh. 65, [Docket No. 447], 4-5).

On February 20, 2014, Watkins signed an indemnification agreement on behalf of Inline for Nestle. (Kroll Dec., Exh. 51, [Docket No. 432], 2). Watkins testified that Judge had informed him that Graphic had said that Inline supplying Hot Pockets would infringe upon Graphic patents. (Kroll Dec., Exh. 5, [Docket No. 386], 9).

In a March 12, 2014, email exchange with Lokar and Vance, Seefeldt noted that Inline had expanded an existing plant and hired additional employees. Seefeldt opined that this expansion **[*77]** was "[o]bviously part of Nestle strategy and probably others," and Lokar replied, "How did we not know this before? Did you share with Voyzey/Sedlacek?" (Kroll Dec., Exh. 66, [Docket No. 448], 2).

In an internal Graphic email dated March 26, 2014, Seefeldt identified topics to discuss during an upcoming internal Graphic phone conference. (Kroll Dec., Exh. 67, [Docket No. 449], 2). One of the 9 topics was: "with inline [*sic*] building new plant — it won't be long before they attack our susceptor margins. If more dollars are needed I suggest we consider reducing margins on susceptor piece to not further erode carton margins and to put us in a better position when inline [*sic*] comes after susceptor[.]" (Id.).

A June 30, 2014, internal Graphic email from Lokar to Best, Seefeldt, and Sedlacek, among other Graphic employees, stated:

> Guys, For preparation for Steve's CPD leadership meeting next Monday-Tuesday, please refer to the attached. Given recent events in the marketplace, we are going to be seriously challenged to find growth. Refer to Steve's email to me on Sunday as a reference. The spreadsheet that he has attached was a condensed version of the countermeasures lists we put together **[*78]** last month. It will serve as a starting point for building this target list. As per my team call last Friday, "gloves are off" gentlemen — what we didn't want to do/weren't willing to do are on the table. We need creative and aggressive ideas. [W]hat I will put together with your input is a starting point — and we will certainly discuss more at the staff meeting next week. See attached — we will discuss live this afternoon.

(Kroll Dec., Exh. 68, [Docket No. 450], 2). This email does not mention Inline in any way. (Id.).

Sedlacek later testified that in 2014, Graphic expressed interest in acquiring Inline. (Kroll Dec., Exh. 28, [Docket No. 410], 13-14). During a meeting with an Inline representative to discuss the acquisition, Sedlacek "didn't talk about the patents at all." (Id. at 13). When asked, "And the reason that you didn't raise those issues is if they weren't receptive to an acquisition, you wanted to be as disruptive to their business as possible. Isn't that correct?" Sedlacek answered, "Potentially, yes." (Id. at 14). Sedlacek further testified that Graphic sued Inline for patent infringement in 2015, and agreed with Inline's deposing counsel that thereby, "[t]he patent card [referred to in **[*79]** the February 2014, internal Graphic emails] was played." (Id.).

On May 5, 2015, Graphic sent Inline a cease-and-desist letter, informing Watkins that Graphic had filed a lawsuit for the alleged infringement by Inline of four patents. (Kroll Dec., Exh. 71, [Docket No. 453], 4). Biddle testified that he was involved in the decision to sue Inline. (Kroll Dec., Exh. 33, [Docket No. 415], 35-36). Inline also argues that "other Graphic leadership, such as Seefeldt" were also involved in the decision to sue Inline, but neither the portion of Biddle's deposition testimony nor the additional citation by Inline in support of this assertion demonstrate this to be the case. Seefeldt's only involvement—as supported by Inline through its citations to the present record—was that Biddle sent Seefeldt a copy of the complaint and cease-and-desist letter and stated: "Please let me know if you have any questions." (See, Id. at 35-36; Kroll Dec., Exh. 71, [Docket No. 453], 2-5). However, in a May 5, 2015, email from Biddle to Seefeldt identifying "talking points" for an anticipated conversation with Nestle, Biddle asked Seefeldt not to "answer any questions regarding strategy, intent, etc." (Kroll Dec., Exh. 72, [Docket **[*80]** No. 454], 2-3).

On May 6, 2015, Seefeldt sent an email to Judge (at Nestle) to which he attached a copy of the cease-and-desist letter meant for Inline. (Kroll Dec., Exh. 9, [Docket No. 391], 30; Kroll Dec., Exh. 70, [Docket No. 452]).

In November 2015,[10] a representative of another food supplier reached out to a Graphic employee seeking information on obtaining susceptor sleeves because it was "having issues with the current supplier on a couple issues." (Kroll Dec., Exh. 29, [Docket No. 411], 3). On November 6, 2015, Voyzey forwarded the email to Best and Sedlacek, among others, referring to it as "some background on Inline and issues they're having in the market." (Id.). Best replied, asking, "Do we know where Inline has business besides Nestle?" (Id. at 2). Voyzey responded, "I know a handful but let me poll the group and put together a comprehensive list of accounts, status, and $value." (Id.). Best replied, "Then put on your pirate hat and attack...Put your foot on their throat...no air[.]"(Id.). Voyzey responded: "Aye, Aye Captain!" (Id.)

On March 11, 2016, Seefeldt emailed Kathryn Carlson at Nestle (whose role is not known) and outlined a proposed agreement under which Nestle would award **[*81]** at least 90% of its microwaveable packaging products to Graphic and, in exchange, Graphic would provide a royalty-free license to Nestle, which it could then sublicense. (Kroll Dec., Exh. 74, [Docket No. 456], 3). The offer was also contingent on Inline dismissing its antitrust lawsuit; Inline's agreeing not to contest the validity of any patents licensed to Nestle; and Inline's agreement to cease any involvement in the inter partes review, other than efforts to assist Graphic in having the inter partes review

[10] The present case was filed in this Court on July 31, 2015.

dismissed. (Id.). In exchange, Graphic agreed to dismiss its infringement suit against Inline. (Id.). Seefeldt testified that Biddle had approved his reaching out to Nestle to discuss a patent license for Inline. (Kroll Dec., Exh. 9, [Docket No. 391], 31-32). Seefeldt further testified that he knew "that [Nestle] preferred [that the patent dispute between Graphic and Inline] wasn't there." (Kroll Dec., Exh. 9, [Docket No. 391], 33).

In an internal Inline email dated January 19, 2016, Jon Wolfe (whose role at Inline is not known) detailed for Watkins a draft of Inline's proposal for the Roxanne (Hot Pocket) susceptor sleeve business with Nestle. (Kroll Dec., Exh. 76, [Docket No. **[*82]** 458], 2-3).

An email dated February 11, 2016, from Kloth (at Graphic) to Seefeldt stated in part, "[E]veryone [at Nestle] really wants to work with Graphic on this [Lean Cuisine and Stouffer's] initiative and partner with us. They do have some valid concerns from past history regarding IP ownership and the recent issues with Inline." (Kroll Dec., Exh. 100, [Docket No. 481], 2). The email further detailed Nestlé's requests on the upcoming project: "[A]ny IP we already own, we keep and anything Nestle owns, they keep. Anything we work on together and create uniquely for Nestle during the session — Nestle would own the IP." (Emphasis in original). (Id.).

As part of an internal Nestle email string dated June 28, 2016, Andrew Leach (whose role at Nestle is not known) recommends keeping the Croissant Pocket business with Inline and keeping the Roxanne (Hot Pocket) sleeves with Graphic. (Kroll Dec., Exh. 77, [Docket No. 459], 2). Leach further noted: "Inline offered slightly higher savings although moving more volume away from GPI [Graphic] would increase the likelihood of GPI taking legal action on the perceived patent infringement." (Id.). The email string shows that ultimately Graphic and **[*83]** Nestle agreed to a 3-year contract extension—through June 30, 2019—with a minimum 85% share maintained by Graphic. (Id. at 2-3).

Based upon the evidence set forth above, Inline contends the record clearly establishes that Graphic perceived Inline to be a competitive threat at major food companies including Nestle. (Mem. in Supp., [Docket No. 381], 21). Inline further argues that after Graphic learned that Nestle had awarded Inline the Kahiki sleeve business in 2011, Graphic nevertheless attempted to extend its Kahiki sleeve business by offering price reductions in exchange for 100% of the business volume from Nestle. (Id.). When Nestle rejected this offer, Inline contends that Graphic asserted that it held patents which covered the Kahiki sleeves despite knowing that those patents had not yet been issued, were only applied-for, and therefore could not be sued upon. (Id. at 22). Inline also asserts that Graphic "attempted to convince Nestle in Summer 2012 that Inline did not comply with food packaging safety requirements" despite having no evidence of non-compliance by Inline. (Id. at 22-23).

Inline contends the record also clearly establishes that Graphic deliberately interfered with Inline's award of business from **[*84]** Nestle in the ARIBA Auction by deliberately asserting rights under patents it knew were invalid due to misrepresented inventorship both in communications to Nestle and in what Inline characterizes as "sham" patent litigation. (Id. at 23). Inline maintains that Graphic told Nestle that it held patents on the Hot Pocket and Croissant Pocket sleeves involved in the 2014, bidding process and there would be patent infringement if the business was awarded to Inline. (Id.). Inline only generally asserts that this communication occurred "[a]round the time of the [ARIBA] auction." (Id. at 24). Inline further argues that the assertion of the patent rights was done with intentional and deliberate disregard of Graphic's knowledge that the patents were invalid and that Graphic's assertion of patent rights "showed deliberate disregard for Inline's rights." (Id. at 37-38).

Inline asserts that although it had been awarded the business in the ARIBA auction because it had the lowest bid, Nestle took the patent threats by Graphic seriously such that it later transferred the Hot Pocket portion of the business back to Graphic, leaving Inline with the "much smaller Croissant Pocket and Kahiki sleeve business." (Id.). After a failed attempt **[*85]** to acquire Inline, Graphic then—according to Inline—decided to "play the patent card" and filed suit alleging infringement by Inline of four patents which Inline has responded to by maintaining Graphic knew the patents to be invalid. (Id. at 25). Inline conclusorily contends that Graphic sued only to "cause 'turmoil.'" (Id.). Inline also asserts that in the context of the business Nestle awarded in early 2016,[11] it awarded Graphic a

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[11] See, fn. 10, supra.

contract extension in part because Nestle felt "moving more volume away from GPI would increase the likelihood of GPI taking legal action on the perceived patent infringement." (Id. at 26). Thus, Inline contends that "Graphic's intentional assertions of patent rights interfered with Inline's business relations with Nestle, causing Inline to lose the award of Hot Pockets susceptor sleeve business." (Id. at 26-27).

Inline argues that its submitted evidence shows "Graphic's explicit pattern and practice of attempting to interfere with Inline's contractual and prospective relations, Graphic's knowledge of Inline's inroads at Nestle[,] . . . of the invalidity of certain patents due to incorrect inventorship, Graphic's intentions in asserting its sham patents, and Graphic's eventual **[*86]** success in interfering with Inline's relations . . . [thus] demonstrate[ing] Graphic's deliberate disregard for Inline's right to business relations without interference." (Mem. in Supp., [Docket No. 381], 41-42).

The Court, on the basis of the present record, cannot agree.

A "deliberate disregard for [the] right to business relations without interference" is not the showing Inline must make in order to succeed on its Motion to Amend the Complaint to Add Punitive Damages, [Docket No. 504], presently before the Court. Rather, as already stated above, Inline must provide evidence which, if unrebutted, clearly and convincingly allows a conclusion that Graphic (1) was aware of or intentionally disregarded facts that created a high probability of injury to Inline's rights, and (2) deliberately proceeded to act in conscious disregard, intentional disregard, or with indifference to that high probability of injury to Inline's rights. See, *Minn. Stat. § 549.20, Subd. 1(a)-(b)*.

After a thorough review of the multitude of Exhibits now before the Court, both individually and as a whole, the Court concludes that the evidence submitted by Inline, even unrebutted, does not establish a prima facie case to allow Claims I and II to be amended **[*87]** to asserts a claim for punitive damages. Although the proffered evidence, unrebutted as it currently is, might arguably convince a jury that Graphic tortuously interfered with Inline's existing and prospective business relations with Nestle by asserting patent rights under patents Graphic knew or should have known to be invalid, Inline has presented no evidence that Graphic policy makers intentionally disregarded or were aware of the invalidity of its patents, and Inline has presented no evidence that Graphic had "deliberate disregard for the rights" of Inline to interference-free business relations.

Inline attempts to closely parse certain internal emails and other documents in order to characterize them as showing this deliberate disregard, but often those characterizations are not supported by the actual evidence to which Inline cites in support. In addition, although Inline has proffered evidence that Graphic asserted patent rights in its communications with Nestle, a mere assertion of patent rights by Graphic alone does not entitle Inline to seek punitive damages. See, *Virtue v. Creamery Package Mfg. Co., 123 Minn. 17, 142 N.W. 930, 936 (Minn. 1913)* ("It is true that the owner of a patent may lawfully warn others against infringement, and give notice of his **[*88]** intention to enforce his rights, if done in good faith."). Inline must also make a prima facie showing that Graphic asserted those patent rights while either being plainly aware that the implicated patents were invalid or being likewise aware of a high probability that the implicated patents were invalid and that Graphic's assertion of rights on those patents had a high probability of injuring Inline's rights to conduct its business without undue interference.

Inline contends that it has done so. (Mem. in Supp., [Docket No. 381], 42). In support, Inline cites to two cases, both of which factually are materially distinguishable from the present case. First, Inline cites to Sorin Group USA, Inc., a case in which Magistrate Judge Jeffrey J. Keyes granted the plaintiff's motion to amend to add punitive damages under *Minnesota Statue § 549.191*. (Mem. in Supp., [Docket No. 381], 42); see, also, *Sorin Group USA, Inc., 2015 U.S. Dist. LEXIS 192649, 2015 WL 12803583, *1*. Similar to the present case, the plaintiff in Sorin Group USA, Inc. sought to plead punitive damages in relation to a Minnesota state law claim of tortious interference with contractual rights. Id. The asserted interference in Sorin Group USA, Inc. occurred when the defendant engaged in certain conduct regarding plaintiff's **[*89]** employees and eventually hired away two of plaintiff's employees. Id. In its motion to amend its complaint to plead punitive damages, the plaintiff in Sorin asserted that it had entered into employment agreements with both of its former employees, that the defendant knew of those employment agreements, and despite that knowledge, the defendant induced the plaintiff's former employees to violate their obligations under those employment agreements, and that this was conduct that had a high probability of injuring the defendant's contractual rights under those employment agreements. 2015 U.S. Dist. LEXIS 192649, [WL] at *1-2.

In support of its motion, the plaintiff in Sorin Group USA, Inc. provided evidence—by way of testimony from the defendant's in-house counsel—showing that the defendant's in-house counsel had received a copy of the employment agreement, had discussed it with the plaintiff's former employee and with the defendant's senior management, and had specifically warned both the plaintiff's former employee and the defendant's management not to violate its terms. 2015 U.S. Dist. LEXIS 192649, [WL] at *2. The plaintiff also provided direct email evidence that, despite knowledge of a non-compete clause in the employment agreement, high-ranking managerial employees **[*90]** of the defendant had email communication with one of the plaintiff's employees regarding how much business he could "'bring over'" when he left the plaintiff's employment and began working for the defendant. 2015 U.S. Dist. LEXIS 192649, [WL] at *3.

Inline also cites to Northwest Airlines, Inc. v. American Airlines, Inc., 870 F. Supp. 1499 (D. Minn. 1994). (Mem. in Supp., [Docket No. 381], 42). In Northwest Airlines, Inc., the evidence submitted in support of the motion to plead punitive damages included evidence showing that the managing director at Northwest Airlines, who was formerly the manager of American Airlines' yield management operations, telephoned an American Airlines employee and obtained certain information that, as a former manager of American Airlines, he knew or should have known that the information was proprietary, would violate American Airlines' right to employee confidentiality, as well as, violate its right to be free from misappropriation of its proprietary information. Id. at 1503

Both of the cases relied on by Inline are materially distinguishable from the case presently before the Court.

Unlike the plaintiff in Sorin Group USA, Inc. and the defendant in Northwest Airlines, Inc., Inline has not provided sufficient prima facie evidence that Graphic's senior management employees knew or should have **[*91]** known that their actions on behalf of Graphic had a high probability of injuring Inline's rights and nevertheless took those actions. In short, the materials Inline has provided from various lower level employees do not show by clear and convincing evidence that Graphic senior managers knew or disregarded facts showing that the patents it asserted were invalid and that Graphic asserted those patents anyway, despite a high probability that doing so would injure Inline's rights vis-à-vis Nestle.

The case presently before the Court is much more similar to Select Comfort Corp. v. Tempur Sealy International, Inc., No. 13-cv-2451 (DWF/SER), 2015 WL 12803582 (D. Minn. Nov. 6, 2015). In that case, the party moving to seek punitive damages submitted evidence that "[did] not demonstrate that the employees knew the statements [at issue] were false, and deliberately made the statements regardless of their falsity." Id. at *6. "At best, [the] evidence [submitted in support of the motion for punitive damages] may show that [the defendant] was negligent . . ., but this is insufficient to establish a claim for punitive damages." Id. at *4. Similarly, in the present case, the evidence Inline has submitted may show that Graphic negligently or carelessly committed the **[*92]** torts pled by Inline in this lawsuit, and it may show that Graphic's employees did not have a deep understanding of patent law, but it does not show the deliberate nature required to establish a claim for punitive damages.

Inline points out that the Eighth Circuit has allowed evidence of anticompetitive intent in antitrust cases to be inferred; it does not need to be proven by direct evidence. (Mem. in Supp., [Docket No. 381], 18); see, Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 802 (8th Cir. 1987) ("Specific intent [in the context of an attempted monopoly claim] need not be proven by direct evidence, but can be inferred from the defendant's anticompetitive practices or other proof of unlawful conduct."). While that precept applies to Inline's burden of proof regarding ultimate liability on the underlying state law antitrust claim (or possibly even its state law tortious interference claims) in this case as presented to a jury or other fact-finder, it has long been held in this District that "circumstantial evidence suggesting that defendants acted in deliberate disregard" is insufficient to plead a claim for punitive damages. Best Buy Stores, L.P. v. Developers Diversified Realty Corp., No. 5-cv-2310 (DSD/JJG), 2008 U.S. Dist. LEXIS 5559, 2008 WL 227689, *2 (D. Minn. Jan. 25, 2008).

Even considering the evidence proffered **[*93]** by Inline as unrebutted, as the Court must for purposes of the present Motion to Amend to Plead Punitive Damages, [Docket No. 504], Inline has not satisfied its burden to establish a prima facie case that Graphic had knowledge or intentionally disregarded facts that created a high probability of injury to Inline's rights to conduct its business without interference and that Graphic deliberately proceeded to act in conscious disregard, with intentional disregard, or with indifference to the high probability of injury to those rights. See, *Minn. Stat. § 549.20, subd. 1(b)*.

Accordingly, Inline's Motion to Amend to Plead Punitive Damages, [Docket No. 504], is **DENIED**.

III. CONCLUSION

For the reasons set forth above, **IT IS ORDERED**:

1. That Plaintiff's Motion to Amend to Plead Punitive Damages, [Docket No. 504], is **DENIED**.

Dated: March 8, 2018

/s/ Leo I. Brisbois

Leo I. Brisbois

U.S. MAGISTRATE JUDGE

Koppitz v. Chesapeake Energy Corp.

Court of Civil Appeals of Oklahoma, Division One

March 9, 2018, Decided

Case Number: 115521

Reporter

2018 OK CIV APP 50 *; 421 P.3d 319 **; 2018 Okla. Civ. App. LEXIS 21 ***

HAROLD KOPPITZ, On Behalf of Himself and All Others Similarly Situated, Plaintiff/Appellant, v. CHESAPEAKE ENERGY CORPORATION, and CHESAPEAKE EXPLORATION, L.L.C., As Successor By Merger to Chesapeake Exploration, L.P., Defendants/Appellees, Sandridge Energy, Inc., and Tom L. Ward, Defendants.

Prior History: [*1]** APPEAL FROM THE DISTRICT COURT OF WOODS COUNTY, OKLAHOMA. HONORABLE JUSTIN EILERS, JUDGE.

Disposition: REVERSED AND REMANDED.

Core Terms

state law, anti trust law, damages, antitrust claim, preempt, treble damages, federal law, state ***antitrust law***, motion to dismiss, alleged violation, antitrust, lack of subject matter jurisdiction, conflict preemption, subject matter jurisdiction, joint and several, state law claim, antitrust case, grant a motion, civil action, participated, recoverable, conflicted, provisions, Leniency, amnesty, courts, divest, terms

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Standards of Review, De Novo Review**

Appellate courts review de novo a district court's dismissal of an action for lack of subject matter jurisdiction. Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN2[] **Remedies, Damages**

The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) applies in any civil action alleging a violation of *section 1* or 3 of the Sherman Act, or alleging a violation of any similar state law. *15 U.S.C.S. § 1*, note, at § 213(a). ACPERA thus clearly limits recovery of single damages in both federal law antitrust cases and state law antitrust cases against ACPERA participants.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Constitutional Law > Supremacy Clause > Federal Preemption

HN3[] **Remedies, Damages**

Federal ***antitrust law*** does not preempt the assertion of antitrust claims under parallel state ***antitrust law***. Indeed, it appears well-recognized that Congress has not preempted the field of ***antitrust law***, but rather intends the federal antitrust laws to supplement, not displace, state antitrust remedies. That said, however, where state law conflicts with federal law, and impairs or impedes the enforcement of federal law, federal law preempts the application of state law to the extent of the conflict. By enacting the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), *15 U.S.C.S. § 1*, Congress has clearly extended amnesty from the joint and several, treble damages provisions of both federal ***antitrust law*** and state ***antitrust law*** to participants in ACPERA, and limited recoverable damages from ACPERA participants to "single" damages on claims under either federal ***antitrust law*** or state ***antitrust law***. *15 U.S.C.S. § 1*, note, at § 213(a).

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Constitutional Law > Supremacy Clause > Federal Preemption

HN4[] **Remedies, Damages**

To the extent the single damage limitation set forth in the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) conflicts with the treble damage provision of the Oklahoma Anti-Trust Reform Act, *Okla. Stat. tit. 79, § 201*, the doctrine of conflict preemption clearly applies and proscribes the recovery of state antitrust treble damages from an ACPERA participant. However, given the complimentary provisions of federal ***antitrust law*** and state ***antitrust law***, the doctrine of conflict preemption does not divest the state courts of subject matter jurisdiction to determine state law antitrust claims against ACPERA participants.

Counsel: Charles D. Watson, Drumright, Oklahoma, for Appellant.

Timothy J. Bomhoff, Patrick L. Stein, McAfee & Taft, Oklahoma City, Oklahoma, for Appellees.

Judges: Larry Joplin, Judge. BELL, P.J., dissents, and GOREE, V.C.J. (sitting by designation), concurs.

Opinion by: Larry Joplin

Opinion

[320]** Larry Joplin, Judge:

[*P1] Plaintiff/Appellant Harold Koppitz (Plaintiff) seeks review of the trial court's order granting the motion to dismiss of Defendants/Appellees Chesapeake Energy Corporation, and Chesapeake Exploration, L.L.C., As Successor By Merger to Chesapeake **[**321]** Exploration, L.P. (Defendants) on Plaintiff's claims to damages for the Defendants' violation of the *Oklahoma Anti-Trust Reform Act, 79 O.S. 201, et seq. (OARA)*, based on allegations of Defendants' "conspiracy to rig bids and depress the market for purchases of oil and natural gas leasehold interests located within the State of Oklahoma."

[*P2] Defendants filed a motion to dismiss for lack of subject matter jurisdiction "because the claim involves a unique issue under federal ***antitrust law***." Particularly, Defendants alleged they had confessed their violation of federal ***antitrust law*** and cooperated with the investigation **[***2]** conducted by the United States Department of Justice, Anti-Trust Division, which qualified them for leniency and limited any potential recovery of damages to "single" actual damages (as opposed to the joint and several treble damages ordinarily recoverable) under the *Antitrust Criminal Penalty Enhancement and Reform Act*, *15 U.S.C. §1*, note. So, said Defendants, to the extent the ACPERA federal law limited damages and conflicted with the treble damage provision of OARA, federal law preempted state law antitrust claims under the doctrine of conflict preemption.

[*P3] Plaintiff responded. Plaintiff first argued that the assertion of a federal defense -- the limitation on damages under ACPERA -- to his state law claim under OARA did not convert his state law claim under OARA into a federal claim within the exclusive domain of the federal courts. Plaintiff secondly argued that federal ***antitrust law*** did not, ipso facto, preempt state law antitrust claims. Plaintiff thirdly pointed out that ACPERA, by its own terms, applied to "any civil action alleging a violation of *section 1* or *3* of the Sherman Act, or alleging a violation of any similar State law." *15 U.S.C. §1*, note, at *§213(a)*. Plaintiff also pointed out that parallel federal and **[***3]** state law antitrust claims have been allowed to proceed against ACPERA participants.[1]

[*P4] On consideration of the parties' submissions and arguments, the trial court granted the motion to dismiss of Defendants:

> In his Petition, Plaintiff asserts claims against the Chesapeake Defendants arising under *Section 203(A) of the Oklahoma Antitrust Reform Act*, *79 Okla. Stat. §203(A)*. The Chesapeake Defendants argue in their motion that the federal Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") divests the Court of subject matter jurisdiction and preempts Plaintiffs state law antitrust claims because Chesapeake participated in the Leniency Program of the United States Department of Justice, Antitrust Division. The Court agrees and GRANTS the Chesapeake Defendants' motion to dismiss on this basis.
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> . . .
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> > IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Chesapeake Defendants motion to dismiss is GRANTED based on lack of jurisdiction and federal preemption. Therefore, Plaintiffs claims against the Chesapeake Defendants are hereby DISMISSED.

Plaintiff appeals, and the matter stands submitted on the trial court record.[2]

[*P5] ***HN1***[] "Appellate courts review *de novo* a district court's dismissal of an action for lack of subject matter **[***4]** jurisdiction." *Beachner Const. Co., Inc. v. State ex rel. Office of State Finance, 2014 OK CIV APP 3, ¶10, 316 P.3d 229, 231*. (Citations omitted.) (Emphasis original.) "'Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim.'" *Beachner Const. Co., Inc., 2014 OK CIV APP 3, ¶10, 316 P.3d at 231*. (Citations omitted.)

[*P6] The "unique" issue presented by this appeal is whether, by the adoption of ACPERA, **[**322]** *15 U.S.C. §1*, note, the Congress of the United States intended to preempt the prosecution of state law antitrust claims where a defendant has participated in ACPERA as to enjoy the ACPERA amnesty from treble damages.

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[1] See, e.g., *In re Capacitors Antitrust Litigation, 106 F.Supp.3d 1051 (N.D. Cal. 2015)*; *In re Polyurethane Foam Antitrust Litigation, 314 F.R.D. 226 (N.D. Ohio 2014)*; *Oracle America, Inc. v. Micron Technology, Inc., 817 F.Supp.2d 1128 (N.D. Cal. 2011)*.

[2] *See*, Rule 4(m), Rules for District Courts, 12 O.S. 2011, Ch. 2, App., and Okla.Sup.Ct.R. 1.36, 12 O.S. 12 O.S. 2011, Ch. 15, App.

[*P7] We first observe that, by its express terms, ***HN2***[] ACPERA applies in "any civil action alleging a violation of *section 1* or *3 of the Sherman Act*, or alleging a violation of any similar State law." *15 U.S.C. §1*, note, at *§213(a)*. ACPERA thus clearly limits recovery of single damages in both federal law antitrust cases and state law antitrust cases against ACPERA participants. The question remains, however, whether, by ACPERA's single damages limitation in both federal and state ***antitrust law*** cases, Congress in ACPERA intended to preempt the assertion of a state law antitrust claim against an ACPERA participant.

[*P8] We think not. It is well established that ***HN3***[] federal ***antitrust law*** does not preempt the **[***5]** assertion of antitrust claims under parallel state ***antitrust law***. Indeed, it appears well-recognized that "Congress ha[s] not preempted the field of ***antitrust law***, but rather intend[s] the federal antitrust laws to supplement, not displace, state antitrust remedies." *Major v. Microsoft Corp., 2002 OK CIV APP 120, ¶6, 60 P.3d 511, 513*.

[*P9] That said, however, where state law conflicts with federal law, and impairs or impedes the enforcement of federal law, federal law preempts the application of state law to the extent of the conflict. *See, e.g.,* Smith Cogeneration Mgmt. Inc. v. Corp. Comm'n, 1993 OK 147, ¶18, 863 P.2d 1227, 1229.[3] By ACPERA, Congress has clearly extended amnesty from the joint and several, treble damages provisions of both federal ***antitrust law*** and state ***antitrust law*** to participants in ACPERA, and limited recoverable damages from ACPERA participants to "single" damages on claims under *either* federal ***antitrust law*** *or* state ***antitrust law***. *15 U.S.C. §1*, note, at *§213(a)*.

[*P10] We therefore hold that, ***HN4***[] to the extent the ACPERA single damage limitation conflicts with the treble damage provision of OARA, the doctrine of conflict preemption clearly applies and proscribes the recovery of state antitrust treble damages from an ACPERA participant. However, given the complimentary provisions of federal ***antitrust law*** and state ***antitrust law***, we **[***6]** further hold that the doctrine of conflict preemption does not divest the state courts of subject matter jurisdiction to determine state law antitrust claims against ACPERA participants.

[*P11] The order of the trial court granting the Defendants' motion to dismiss for lack of subject matter jurisdiction is REVERSED, and the cause REMANDED for further proceedings.

BELL, P.J., dissents, and GOREE, V.C.J. (sitting by designation), concurs.

End of Document

[3] "The pre-emption doctrine stems from the Supremacy Clause of the United States Constitution and it invalidates any state law which contradicts or interferes with an act of Congress." (Footnote omitted.)

Ne. Farm Sales & Serv. v. Krone, NA Inc.

United States District Court for the District of Vermont

March 9, 2018, Decided; March 9, 2018, Filed

Case No. 5:17-cv-72

Reporter
2018 U.S. Dist. LEXIS 248563 *; 2018 WL 11469704

NORTHEAST FARM SALES AND SERVICE, INC., Plaintiff, v. KRONE NA, INC., Defendant.

Core Terms

consumer, dealership, motion to dismiss, parties, antitrust, products, consumer protection, security agreement, violations, distribution agreement, breach of contract, termination, geographic, indirect, terms, contractual, provisions, purchasers, fails

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For Krone NA Inc., Defendant: Connor A. Sabatino Esq., Roberta F. Howell Esq., Foley & Lardner LLP, Madison, WI; Daniel L. Burchard Esq., McCormick Fitzpatrick Kasper & Burchard P.C., Burlington, VT; Michael J. Lockerby Esq., Foley & Lardner LLP, Washington, DC.

For Northeast Farm Sales and Service Inc., Plaintiff: Glenn A. Robinson Esq., Glen Robinson P.C., Newport, VT; M. Jerome Diamond Esq., Newport, VT.

Judges: Geoffrey W. Crawford, Chief United States District Judge.

Opinion by: Geoffrey W. Crawford

Opinion

DECISION ON MOTION TO DISMISS

(Doc. 4)

This diversity action arises out of the termination of a dealership agreement. Plaintiff Northeast Farm Sales and Service, Inc. ("NEFS") sells and services farm equipment to retail customers. (Doc. 1-4 at 12). Defendant Krone NA, Inc. ("Krone") distributes agricultural equipment.

On December 17, 2001, the parties entered into a dealership agreement. (Doc. 1-4 at 12). By letter dated December 29, 2015, Krone terminated the agreement on the ground of "habitual late payments to Krone NA, Inc., and a recent Sold Out of Trust (SOT) situation."[1] (Doc. 1-4 at 18.)

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[1] A sale out of trust occurs when a dealer sells inventory subject to a security interest without repaying the distributor.

The original complaint **[*2]** was filed in Orleans Superior Court. NEFS claimed that the reasons given for the termination were false pretexts and that Krone's real motivation was the execution of a new dealership agreement with Champlain Valley Equipment, which competes with NEFS from a location five miles away. (Doc. 1-4 at 6.) NFS alleged three causes of action: breach of contract, violation of the *Vermont Consumer Protection Act, 9 V.S.A. § 2453*, and violation of the *Machinery Dealership Protection Law, 9 V.S.A. § 4072*.

Krone removed the case to this court on the basis of the diversity of the parties. The parties agree that this court has jurisdiction.

On May 3, 2017, following removal, Krone filed a motion to dismiss (Doc. 4). In its motion, Krone makes the following arguments:

- The claim of breach of contract (Count One) fails because "the facts alleged in the Complaint establish that NEFS sold out of trust and habitually failed to make payments on obligations when due." (Doc. 4-1 at 6.)
- The claim of contractual bad faith embedded in Count One duplicates the claim of breach of an express term of the parties' contract. In Krone's view, NEFS may allege one or the other, but not both. (Doc. 4-1 at 7).
- The alleged violation of the Vermont Consumer Protection Act fails because NEFS was not a "consumer" within **[*3]** the meaning of that statute. (Doc. 4-1 at 9).
- The alleged violation of the *Machinery Dealership Protection Law, 9 V.S.A. § 4072*, fails because Krone was entitled to cancel the distribution agreement due to late payments and the sale out of trust. (Doc. 4-1 at 13.) Krone also defends a provision in the distribution agreement which limits NEFS to a single business location absent written permission from Krone. (Doc. 4-1 at 14.)

NEFS has filed a response to the motion to dismiss (Doc. 15). The parties appeared for oral argument on July 5, 2017. Both parties have filed additional documentation for the court's review. (Docs. 25 and 26.)

On August 7, 2017, NEFS filed an amended complaint, adding a claim for tortious interference with contractual relations. The amended complaint contains more specific factual allegations. It continues to assert the claims of breach of contract and statutory violations under Vermont law.

ANALYSIS

In ruling on a motion to dismiss, the court accepts as true the facts as they appear in the complaint and makes all reasonable inferences in favor of the non-moving party. *See* *Shultz v. Congregation Shearith Israel of City of New York, 867 F.3d 298, 302 (2d Cir. 2017)*.

I. Breach of Contract (Count One)

Krone argues that it was entitled to cancel the distribution agreement on November 29, 2015, because NEFS was **[*4]** habitually late in payments and because it had previously sold a piece of equipment out of trust. (Doc. 4-1 at 4, ¶ 7.) Krone asserts that, since this conduct violated the terms of the parties' distribution agreement and security agreement, Krone was justified in terminating the contract without regard to its motivation. Krone contends that, "[a]s a matter of law, NEFS cannot assert a claim for breach where the conduct at issue is expressly permitted by the contract, only where there is a failure to comply." (Doc. 4-1 at 5.)

NEFS responds that in the week prior to the termination of the distribution agreement, it had brought all accounts current. (Doc. 26 at 5.) It describes the "out of trust" transaction as "caused by Krone, when a representative from Krone told an NEFS employee to take the money NEFS was going to pay Krone for the sale and pay it to [NEFS' floor-plan finance company] Agricredit/DLL instead." (*Id.* at 3.)

The court is in no position to make a judgment about whose story is correct on a motion to dismiss. The dealership agreement contains no specific terms concerning timeliness of payments for product by NEFS. It states only that

"Krone NA shall ... sell and Dealer shall **[*5]** purchase the Products covered by the Order at the prices and on the terms established from time to time by Krone NA, Inc." (Doc. 1-4 at 12.) The agreement contemplates the extension of credit to NEFS by Krone. (*Id.*)

The parties' security agreement includes a similar promise to pay for inventory. "Dealer does hereby promise to pay to Krone NA, Inc. any and all amounts due and owing to Krone NA, Inc. for products[.]" (Doc. 1-4 at 15.) The events of default listed in the security agreement include "[f]ailure by Dealer to pay Krone NA, Inc. any obligations past, present, or future, when due." (Doc. 1-4 at 16.)

Based on this slim record, the court must infer, for the limited purpose of ruling on this motion to dismiss, that Krone had not demanded payment in full until December 2015 and that when it did so, NEFS paid up. This may or may not be true, but it is a reasonable inference based on the account of the parties' dispute which appears in the complaint, and the court must draw it. There is certainly no record on which the court could draw the contrary inference that NEFS was in a position of default on its payments.

Similarly, there is no record on which the court can determine that NEFS **[*6]** was in default on the "sale out of trust" incident. Paragraph 36 of the Amended Complaint (Doc. 24) describes NEFS's version of the dispute. NEFS states that the sale of the equipment was subject to its floor-plan financing with Agricredit/DLL. The equipment was sold for a combination of cash and a trade-in. A Krone employee directed NEFS to send the cash to Agricredit to maintain that relationship. The trade-in remained on the floor subject to a lien in favor of Krone. Krone did not take it back when it took back other collateral in December 2015. (Doc. 24 at 10-11.) In the case of the sale out of trust incident, NEFS has made allegations that contradict Krone's claim that collateral was sold in violation of the security agreement, or at least that Krone affirmatively assented to the sale. NEFS' allegations are sufficient to defeat a motion to dismiss, which is predicated on a claim that it is undisputed that NEFS was in violation of its dealership agreement and that the sale out of trust provided just cause for termination.

The court denies the motion to dismiss the breach of contract claim.

II. Bad Faith (Count One)

NEFS identifies two bases for its claim for breach of contract. One **[*7]** is the alleged violation of Vermont's machinery dealership law discussed below. The other is that "NEFS is claiming the violation of [9 V.S.A. § 1-304] means Krone failed to perform or enforce, in good faith, a specific duty or obligation under the contract, and that constitutes a breach of that contract." (Doc. 15 at 6-7.) The court understands NEFS to be arguing that it cannot point to breach of a particular term in the distribution agreement but that Krone's behavior violated the obligation of good faith in performance.

Krone relies upon *Monahan v. GMAC Mortg. Corp., 179 Vt. 167, 2005 VT 110, 893 A.2d 298*, to bar claims of breach of contract and breach of the implied covenant of good faith and fair dealing. Following *Monahan*, the Vermont Supreme Court has further defined the relationship between overlapping claims of breach of express contract terms and the implied covenant. Plaintiffs are permitted to plead in the alternative even if the theories of recovery arise from the same facts. *See* *Abatiell Assocs. P.C v. Nicholas, 187 Vt. 652, 997 A.2d 447, 2010 Vt. Unpub. LEXIS 67, 2010 WL 1265841, at *2 (Vt. Apr. 1, 2010)* (unpublished entry order) ("Under our liberal pleading rules, a party can present inconsistent claims and demand relief in the alternative or of several different types."). The practice is the same under the Federal Rules of Civil Procedure. *See* *Top Ridge Investments, LLC v. Anichini, Inc., 2017 U.S. Dist. LEXIS 109299, 2017 WL 3016787, at *9 (D. Vt. July 14, 2017)* (noting that *Fed. R. Civ. P. 8(d)(2)* authorizes the pleading **[*8]** of alternative theories of recovery).

The court will not dismiss the bad faith claim solely because NEFS has also made a claim for breach of contract. At some point in the case, it may become necessary for NEFS (or the jury) to choose one legal theory for awarding relief, but the time for that choice is not the initial pleading stage.

III. Consumer Fraud Claim (Count Two)

NEFS also seeks to bring a claim under the *Vermont Consumer Protection Act, 9 V.S.A. §§ 2451 et seq.* Krone moves to dismiss on the ground that NEFS is not a "consumer" entitled to bring an action for civil remedies under *9 V.S.A. § 2461(b)*. *See* *Foti Fuels, Inc. v. Kurrle Corp., 2013 VT 111, ¶ 23* (holding that the purpose of consumer protection act is to protect consumers in the general public). NEFS admits that *9 V.S.A. § 2461* permits only a "consumer" to bring suit for deceptive acts or practices prohibited by *§ 2453*. It contends that *9 V.S.A. § 2465* affords a less restrictive remedy to "any person," including parties who are not consumers. Krone responds that *§ 2465* was enacted for the limited purpose of opening state antitrust remedies, including the remedy provided by *9 V.S.A. § 2453*, to plaintiffs who are indirect buyers of products such as computer software which may be incorporated into many different consumer products.

9 V.SA. § 2465(a) provides:

> Any person who sustains damages or injury as a result of any **[*9]** violation of State antitrust laws, including *section 2453* of this title, may sue and recover from the violator the amount of his or her damage, or the consideration or the value of the consideration given by the aggrieved person, reasonable attorney's fees and exemplary damages, not exceeding three times the value of the consideration given or damages sustained by the aggrieved person.

Enacted in 1999, this provision closely follows *9 V.S.A. § 2461*, which permits suit by "any consumer who contracts for goods or services in reliance upon false or fraudulent representations or practices prohibited by *section 2453*[.]"

Section 2465(b) provides that in an action seeking damages for antitrust violations pursuant to *§ 2453*, the lack of contractual privity between the indirect purchaser and the seller shall not be a defense.

The language of *§ 2465(a)* could be read in two ways. As NEFS argues, it could mean that consumer status is unnecessary for state antitrust claims. "Any person" would replace the more limited class of "any consumer" authorized to sue by *§ 2461(b)*. Alternatively, *§ 2465* could be read more narrowly and in a manner consistent with the other provisions of the Vermont Consumer Protection Act to eliminate only the substantive privity defense and to create no new **[*10]** cause of action for parties previously prevented from making use of the act.

In construing *§ 2465*, the Vermont Supreme Court has followed the second course. In *Elkins v. Microsoft Corp., 174 Vt. 328, 817 A.2d 9, 20 (2002)*, the court described *§ 2465* as a clarification of the substantive ***antitrust law*** relating to indirect purchasers. The court relied upon the official Statement of Intent for the legislation, which stated "[t]his act clarifies the right of indirect as well as direct purchasers to recover from violations of state ***antitrust law***." The court also looked to two decisions from the Supreme Court of the United States: *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, which ruled out federal antitrust claims by indirect purchasers, and *California v. ARC America Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*, which recognized the right of state legislatures to permit such recoveries under state antitrust laws.

The *Elkins* decision did not consider whether persons other than consumers might sue under *§ 2465*. The plaintiff was an individual representative of a class of indirect purchasers of computer equipment. In identifying the specific purpose of the legislation, however, the *Elkins* decision strongly suggests that when asked, the Vermont Supreme Court will not read "all persons" as literally any individual or corporation regardless of their rights under the other provisions of the Vermont **[*11]** Consumer Protection Act. Instead, it is more likely that the two provisions which authorize lawsuits under the act will be construed in a manner consistent with one another and subject to the same overarching condition that the remedies provided in the act are for the benefit of consumers.

As Krone points out in its reply brief, parties have standing under *§ 2465* only for violations of *§ 2453*, and an element of a violation of *§ 2453* is that the prohibited conduct have occurred in commerce. The "consumer" requirement flows from the "in commerce" language. *See* *Foti Fuels, 2013 VT 111 at ¶ 21* (holding that "the 'in commerce' requirement narrows the [Vermont Consumer Protection Act's] application to prohibit only unfair or deceptive acts or practices that occur in the consumer marketplace"). NEFS urges the court to read *§ 2465* in way that would remove a substantive element of a claim under *§ 2453*, but *§ 2465* does not and was never meant to do so.

Accordingly, the court will dismiss NEFS's claims for violations of the Vermont Consumer Protection Act.

IV. Vermont Machinery Dealership Protection Law (Count Three)

The Vermont Machinery Dealership Protection Law, *9 V.S.A. § 4072*, provides protection against cancellation of machinery dealership agreements. The provision requires **[*12]** 120 days notice and provides an opportunity for the dealership to cure any deficiency. The notice and cure provisions do not apply under specific circumstances, including a default on a security agreement. Krone invokes the sale out of trust event as an event excusing compliance with the notice and cure provision.

The court rejects this argument for the same reason it rejected a similar argument in the case of the breach of contract claim. The parties do not agree that a violation of the security agreement occurred. NEFS states that its actions would violate the security agreement except that they were authorized by a Krone representative. (Doc. 24 at 11-12.) For the purposes of this motion to dismiss, the court must accept this allegation as true. Krone's claim that it was excused from the other provisions of *§ 4072* thus fails, and dismissal of NEFS's *§ 4072* claims is not appropriate.

Krone also argues that NEFS's claim that Krone violated *9 V.S.A. § 4082* fails as a matter of law. *Section 4082* prohibits suppliers of industrial equipment from "limit[ing] the geographic area in which a dealer may sell or deliver inventory." NEFS points to paragraph 9(b) of the Dealership Agreement, which states that "[w]ithout the written **[*13]** consent of [Krone], [NEFS] may not open any additional business location for the sale or service of [Krone] Products nor stock Products at any location other than [NEFS's Irasburg location]." NEFS argues that this clause limiting its ability to open additional business locations is a limitation on the geographic area in which it can sell or deliver inventory in violation of *§ 4082*. Whether this contractual clause violates the statute is a matter of pure law and is appropriate for disposition on a motion to dismiss.

By its plain terms, *§ 4082* is directed at geographical limitations on sale and delivery, not on business location. Paragraph 9(b) of the Dealership Agreement contains no restriction on the geographical area in which NEFS can sell or deliver Krone products. The terms of the dealership agreement impose no geographic restrictions on NEFS's sale or delivery of equipment. NEFS remains free to sell or deliver Krone products anywhere. To the extent that NEFS's sales and delivery are geographically limited for logistical reasons, those limitations cannot be attributed to any contractual clause or to Krone, and do not constitute a violation of *§ 4082*. NEFS's claim of a violation of *§ 4082* will therefore **[*14]** be dismissed.

CONCLUSION

Krone's Motion to Dismiss (Doc. 4) is **DENIED** with respect to the breach of contract and bad faith claims in Count One, **GRANTED** with respect to the Vermont Consumer Protection Act claims in Count Two, **DENIED** with respect to the claim of violation of *9 V.S.A. § 4072* in Count Three, and **GRANTED** with respect to the claim of violation of *9 V.S.A. § 4082* in Count Three.

Dated at Rutland, in the District of Vermont, this 9 day of March, 2018.

/s/ Geoffrey W. Crawford

Geoffrey W. Crawford, Chief Judge

United States District Court

Hogan v. Pilgrim's Pride Corp.

United States District Court for the District of Colorado

March 14, 2018, Decided; March 14, 2018, Filed

Civil Action No. 16-cv-02611-RBJ

Reporter

2018 U.S. Dist. LEXIS 41909 *; 2018-1 Trade Cas. (CCH) P80,315; Fed. Sec. L. Rep. (CCH) P100,050; 2018 WL 1316979

PATRICK HOGAN, Individually and on Behalf of All Others Similarly Situated, Plaintiffs, v. PILGRIM'S PRIDE CORPORATION, WILLIAM W. LOVETTE, individually, and FABIO SANDRI, individually, Defendants.

Subsequent History: Reconsideration denied by *Hogan v. Pilgrim's Pride Corp., 2018 U.S. Dist. LEXIS 192190, 2018 WL 5886497 (D. Colo., Nov. 9, 2018)*

Motion granted by, Dismissed by, in part, Dismissed by, in part, Without prejudice *Hogan v. Pilgrim's Pride Corp., 2021 U.S. Dist. LEXIS 74317, 2021 WL 1534602 (D. Colo., Apr. 16, 2021)*

Appeal dismissed by, As moot *Hogan v. Pilgrim's Pride Corp., 2023 U.S. App. LEXIS 17759 (10th Cir. Colo., July 13, 2023)*

Core Terms

conspiracy, allegations, broiler, particularity, cuts, antitrust, prices, eggs, misleading, co-conspirators, defendants', misleading statement, motion to dismiss, falsity, circumstantial evidence, cut production, class period, price-fixing, competitors, heightened, indices, securities fraud, conspirators, omission, chicken, plant, pled, manipulation, coordinated, disclose

Counsel: **[*1]** For Patrick Hogan, Individually and on Behalf of All Other Similarly Situated, Plaintiff: Jeremy Alan Lieberman, Pomerantz LLP-New York, New York, NY; Jeffrey Mark Villanueva, Jeffrey M. Villanueva, P.C., Denver, CO.

For Pilgrim's Pride Corporation, William W. Lovette, Fabio Sandri, Defendants: Alex C. Myers, Caitlin C. McHugh, Lewis Roca Rothgerber Christie LLP-Denver, Denver, CO; Caroline Jane Hickey Zalka, Jonathan D. Polkes, Weil Gotshal & Manges, LLP-New York, New York, NY.

For Pilgrim's Pride Investor Group, Movant: Phillip C. Kim, Rosen Law Firm, P.A.-New York, New York, NY.

For George James Fuller, Movant: J. Ryan Lopatka, Kim Elaine Miller, Kahn Swick & Foti, LLC-New York, New York, NY; Rusty Evan Glenn, Shuman Law Firm-Denver, Denver, CO.

Judges: R. Brooke Jackson, United States District Judge.

Opinion by: R. Brooke Jackson

Opinion

ORDER ON MOTION TO DISMISS

This matter is before the Court on defendants Pilgrim's Pride Corporation's, William W. Lovette's, and Fabio Sandri's Motion to Dismiss the Amended Class Action Complaint, ECF No. 34. For the reasons discussed below, the motion is GRANTED.

BACKGROUND

This is a securities class action claim brought by lead plaintiff George James Fuller[1] against defendants on **[*2]** behalf of a purported class of investors in Pilgrim's Pride Corporation ("Pilgrim's"). ECF No. 29 at 1. According to the second amended complaint, which I will refer to simply as "the complaint," Pilgrim's is one of the largest producers and sellers of chicken in the United States. *Id.* at 11. Pilgrim's focuses on the production and sale of broilers, which are chickens under the age of 13 weeks that make up 98% or more of the chicken sold in the United States. *Id.* Pilgrim's is vertically-integrated, meaning that it owns or controls nearly all aspects of broiler production, from breeding, hatching, rearing, and feeding, to processing and selling. *Id.* at 13. The market for broilers is characterized by inelastic demand, meaning that demand does not meaningfully change when the price of the good changes, although a change in supply will change the price of the good. *Id.* at 12. As a result of broiler market characteristics, the price and supply of broilers have historically followed a "boom and bust" cycle, in which rising prices for broilers would incentivize rising production to capitalize on higher prices—the "boom." *Id.* The resulting oversaturation in the market would lead to a decrease in prices, and thus a decrease **[*3]** in production—the "bust." *Id.*

Plaintiff's complaint alleges on information and belief that beginning in 2008, after "a particularly low trough in the ordinary business cycle" and following its emergence from a bankruptcy in 2009, Pilgrim's conspired with other major players in the United States broiler market to cut production, thereby limiting supply and ensuring prices would stay high. *Id.* at 22, 31-32, 138. According to the complaint, Pilgrim's and its co-conspirators conducted two coordinated production cuts, the first between 2008 and 2009 and the second between 2011 and 2012. *Id.* at 32. These production cuts were achieved through various means, including reducing eggs, reducing broiler breeder flocks, destroying chicks or eggs, temporarily or permanently shutting down facilities, and exporting eggs or chicks. *Id.* These coordinated cuts allegedly resulted in "an artificial stabilization in the industry even during a time of soaring feed costs." *Id.* at 33. The complaint additionally alleges that Pilgrim's and its co-conspirators continued to depress supply to the United States in the period from 2013 to 2016 by increasing broiler exports and cutting production overall. *Id.* at 35-37.

Plaintiff alleges that this broiler price-fixing **[*4]** conspiracy was facilitated through the conspirators' use of Agri Stats, a private reporting service that compiles detailed confidential data on nearly all aspects of broiler production including inventory, production, and pricing data. *Id.* at 23-25. According to plaintiff, Pilgrim's and its co-conspirators had the capacity to de-anonymize the Agri Stats data to determine which data corresponded to which industry member, thereby allowing the conspirators to track and coordinate their participation in the conspiracy. *Id.* at 26. Plaintiff also points to the "cliquish" nature of the industry and numerous industry conferences and events at which industry members may have associated to coordinate the production cuts at issue. *Id.* at 16-19.

The final element of Pilgrim's price-fixing conspiracy, according to plaintiff, was the manipulation of the Georgia Department of Agriculture's ("GDA") Georgia Dock Broiler pricing index, one of the three primary indices that tracks broiler prices.[2] *Id.* at 37. The Georgia Dock index price was compiled by a weekly telephone call to the top broiler

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[1] The case was originally filed on behalf of Patrick Hogan with his lawyers as proposed lead counsel for the purported class. A competing plaintiff, George James Fuller, then sought his designation as lead plaintiff and his lawyers as lead counsel. Thereafter the first filers withdrew their request for lead plaintiff/counsel designation, and Mr. Fuller and his lawyers were ultimately designated as lead plaintiff and counsel. *See* ECF No. 24 (granting George James Fuller's unopposed Motion for Appointment as lead plaintiff). Mr. Fuller claims to have sustained a loss by comparing the price he paid for his shares in 2015 to the "holding value" of the shares for the 90-day period beginning on October 7, 2016. *See* ECF No. 8-2.

producers in the state, who would report the price they offered to companies with whom they had contracts, such as grocery stores. *Id.* at 38. The Georgia Dock influenced **[*5]** "prices for roughly 25% of the entire U.S. Broiler market," but unlike the other two primary price indices, the Georgia Dock did not require verification of reported prices. *Id.* The Georgia Dock price was higher than the other two primary indices "nearly every day" between 2007 and 2016, and "diverge[d] sharply in 2011-2012 and during the class Period." *Id.* at 39. Plaintiff alleges that this divergence between the Georgia Dock price index and the other two major price indices is evidence that the broiler industry was manipulating the index as part of the price-fixing conspiracy.

According to the complaint, this multi-pronged conspiracy to cut production and raise broiler prices led to Pilgrim's ensuing financial stability and success and artificially increased the value of Pilgrim's securities. The crux of plaintiff's complaint is that during the Class Period between February 21, 2014 and November 17, 2016, defendants made untrue or misleading public statements by failing to disclose the price-fixing conspiracy and instead touting legitimate causes for Pilgrim's success. *See id.* at 51-106 (citing annual and quarterly Securities Exchange Commission filings, press releases, and earnings calls throughout the **[*6]** Class Period referring, for example, to the chicken industry as "highly competitive" when in fact Pilgrim's had been allegedly colluding to inflate the price of chicken). Plaintiff asserts that "[d]efendants falsely assured investors that this stabilization was attributable to the implementation of its legitimate business strategy over the previous years, but this was not true." *Id.* at 33. Plaintiff alleges that defendants' conspiracy came to light in a series of revelations in 2016, including a private antitrust class action complaint filed in the Northern District of Illinois containing evidence of collusion and price-fixing between 2008 and 2016. *Id.* at 21-22. Plaintiff also points to a subsequent analyst report about the case and two newspaper articles about the alleged conspiracy. *Id.* As a result of these revelations, according to plaintiff, the price of Pilgrim's securities dropped from $23.54 on September 2, 2016 to $18.61 on November 17, 2016 "and continued to slide" to the detriment of the company's investors. *Id.* at 107-10.

Plaintiff thus raises three claims in his securities class action complaint: two claims for violations of *§ 10(b) of the Securities and Exchange* Act (the "Exchange Act") and *Rule 10b-5* promulgated thereunder **[*7]** against all defendants, and one claim for violation of *§ 20(a)* of the Exchange Act against defendants Lovette (Pilgrim's Chief Executive Officer and President during the Class Period) and Sandri (Pilgrim's Chief Financial Officer during the Class Period). *Id.* at 142-44. "*Section 10(b)* of the Exchange Act prohibits the 'use or employ[ment], in connection with the purchase or sale of any security . . . [of] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.'" *In re Gold Res. Corp. Sec. Litig., 776 F.3d 1103, 1108 (10th Cir. 2015)* (citing *15 U.S.C. § 78j(b)*). "*[R]ule 10b-5* implements *§ 10(b)* by making it unlawful to 'make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading . . . in connection with the purchase or sale of any security.'" *Id.* (quoting *17 C.F.R. § 240.10b-5*)). *Section 20(a)* of the Exchange Act establishes liability for "[e]very person who . . . controls any person liable under any provision of this chapter or of any rule or regulation thereunder." *15 U.S.C. § 78t(a)*. To establish controlling person liability, a plaintiff must establish both a primary violation and the alleged controlling person's control over the primary violator. *Maher v. Durango Metals, Inc., 144 F.3d 1302, 1305 (10th Cir. 1998)*. Defendants move to dismiss all three claims. ECF **[*8]** No. 34. The motion has been fully briefed. ECF Nos. 35, 36.

STANDARD OF REVIEW

When "faced with a *Rule 12(b)(6)* motion to dismiss a *§ 10(b)* action, courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*. "[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on *Rule 12(b)(6)* motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.*

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[2] The Georgia Dock was dismantled in December 2016 after inquiries into the index's independence led to calls for additional price verification, prompting a decline in industry submissions to the index. *Id.* at 46-48.

Complaints in civil actions generally should contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. (8)(a)(2)*. "A plaintiff suing under *Section 10(b)*, however, bears a heavy burden at the pleading stage." *In re Level 3 Communs. Sec. Litig., 667 F.3d 1331, 1333 (10th Cir. 2012)*. To state a securities fraud claim, a plaintiff's complaint must allege that:

> (1) the defendant made an untrue or misleading statement of material fact, or failed to state a material fact necessary to make statements not misleading; (2) the statement complained of was made in connection with the purchase or sale of securities; (3) the defendant acted with scienter, that is, **[*9]** with intent to defraud or recklessness; (4) the plaintiff relied on the misleading statements; and (5) the plaintiff suffered damages as a result of his reliance.

Id. (citing *Adams v. Kinder-Morgan, Inc., 340 F.3d 1083, 1095 (10th Cir. 2003))*.

Prior to the passage of the Private Securities Litigation Reform Act of 1995 (PSLRA), *Federal Rule of Civil Procedure Rule 9(b)* governed the pleading requirements for securities fraud actions. *City of Philadelphia v. Fleming Cos., 264 F.3d 1245, 1258 (10th Cir. 2001)*. Now, however, under the PSLRA, a heightened pleading standard applies to the first and third elements of securities fraud claims, also referred to as falsity and scienter, respectively. *Id.* Thus, with respect to falsity and scienter the PSLRA requires that:

> (1) [T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.
>
> (2) [T]he complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b)(1)—(2). In this case, defendants seek to dismiss plaintiff's complaint on the grounds **[*10]** that it fails to adequately plead falsity, scienter, and loss causation. ECF No. 34 at 2-3. Because the failure to plead falsity is dispositive, I need not consider the parties' arguments with respect to either of the remaining two elements.

Although the parties agree that the PSLRA's heightened pleading standard applies to the element of falsity, they disagree about whether the heightened standard applies only to the allegedly misleading or untrue statements, or if it also applies to the facts that establish the alleged underlying price-fixing conspiracy. *Compare* ECF No. 34 at 7 (defendants arguing that '"if the complaint fails to allege facts [with particularity] which would establish such an illegal scheme, then the securities law claims premised on the *nondisclosure* of the alleged scheme are fatally flawed'") (quoting *In re Mirant Corp. Sec. Litig., No. 02-CV-1467-RWS, 2009 U.S. Dist. LEXIS 789, 2009 WL 48188, at *17 (N.D. Ga. Jan. 7, 2009)*) (alteration in original)) *with* ECF No. 35 at 9 (plaintiff asserting that "[t]he PSLRA's heightened pleading standards apply only to allegations of falsity and scienter"). As a result, I must determine the appropriate standard of review with respect to the underlying allegations of an antitrust conspiracy before proceeding **[*11]** to the parties' substantive arguments.

The District Court for the Western District of Arkansas recently answered this question in the context of the very same conspiracy alleged in this case. *See* *In re Tyson Foods, Inc. Secs. Litig., 275 F. Supp. 3d 970, 2017 WL 3185856, at *8 (W.D. Ark. July 26, 2017)*. As such, that court's resolution of the issue is instructive in this case. Like plaintiff in this case, the plaintiffs in *Tyson* argued that '"the PSLRA's heightened pleading standards apply only to allegations of falsity and scienter.'" *Tyson, 2017 U.S. Dist. LEXIS 116824, 2017 WL 3185856, at *10*. While noting that this was an "undoubtedly correct proposition," the *Tyson* court emphasized that it "misses the point: The question is whether the underlying allegations of wrongdoing fall within the 'falsity' category." *Id.* Thus, the key inquiry is whether the "underlying facts purporting to establish the allegation" that there was an antitrust conspiracy "must be pleaded with particularity," or if it is instead "sufficient to particularize only the allegation itself, with the underlying facts subjected to the less demanding general pleading standard?" *2017 U.S. Dist. LEXIS 116824, [WL] at *9—*10*.

After reviewing the parties' arguments, the *Tyson* court concluded that:

> *One*, it is clear that a plaintiff must satisfy the particularity requirement by setting forth the who, what, when, where, and how *of* ***[*12]*** *the statement itself* . . . . *Two*, to the extent that a plaintiff's allegations of underlying wrongdoing "regarding the statement or omission" rest "on information and belief," those allegations must be supported by particularized facts. *15 U.S.C. § 78u—4(b)(1)*.

Id. (emphasis in original). By way of example, the court explained that when the plaintiffs in that case alleged on information and belief that a chicken producer cut its production as part of an underlying conspiracy, the plaintiffs need not "supply evidence proving" their allegation in the initial complaint, but must provide "a statement of the grounds on which the pleader's belief rests." *Id.* (internal citation and quotation marks omitted).

I agree with the *Tyson* court's interpretation of the statute. Requiring that allegations of underlying wrongdoing that rest on information and belief be supported by particularized facts comports with the PSLRA's dictate that "if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is made." *15 U.S.C. § 78u-4(b)(1)*. This interpretation is also bolstered by the cases cited by the *Tyson* defendants, two of which were also cited by **[*13]** defendants in the present case. *See* *In re Immucor, Inc. Sec. Litig., No. 09-CV-2351-TWT, 2011 WL 2619092, at *4—*5 (N.D. Ga. June 30, 2011)* (noting that "[w]here false or misleading statements are based on the failure to disclose illegal activity, the allegations about the underlying illegal activity must also be stated with particularity" and finding that the plaintiff had failed to do so where it did not "even attempt to allege facts showing an explicit agreement . . . to fix prices"); *In re Mirant Corp. Sec. Litig., No. 02-CV-1467-RWS, 2009 U.S. Dist. LEXIS 789, 2009 WL 48188, at *17 (N.D. Ga. Jan. 7, 2009)* ("[I]n cases alleging securities fraud based on the failure to disclose the existence of an underlying illegal scheme, the basis for the illegality must be pled with particularity."); *In re JP Morgan Chase Sec. Litig., 363 F. Supp. 2d 595, 632 (S.D.N.Y. 2005)* (plaintiffs' claim that defendant made material omissions by failing to disclose violations of statutes failed where plaintiffs "failed to allege with particularity that JPM Chase or its agents violated" the statutes at issue); *In re AXIS Capital Holdings Ltd. Sec. Litig., 456 F. Supp. 2d 576, 585 (S.D.N.Y. 2006)* (where plaintiffs' nondisclosure claims were dependent on predicate allegations of an anticompetitive scheme, "if the complaint fails to allege facts which would establish such an illegal scheme, then the securities law claims premised on the *nondisclosure* of the alleged scheme are fatally flawed.") **[*14]** (emphasis in original). Thus, in this case, where plaintiff's central allegation is that defendants' statements and omissions during the Class Period were misleading because, on information and belief, they failed to disclose an underlying antitrust conspiracy, plaintiff must plead with particularity the facts that establish the existence of the antitrust conspiracy.[3]

Having decided that the PSLRA's heightened pleading standard applies to the underlying allegation of an antitrust conspiracy, the remaining question is what standard to use to determine whether the complaint pleads such a conspiracy sufficiently. Helpfully, the Tenth Circuit interpreted the PSLRA's particularity requirement for allegations of misleading statements or omissions made on information and belief in *Adams v. Kinder-Morgan, Inc., 340 F.3d 1083, 1099 (10th Cir. 2003)*. The plaintiff's complaint in *Adams* alleged that the defendant company made false or misleading statements when it claimed that a particular branch of the company was contributing positively to company earnings, when in fact that branch was losing money. *340 F.3d at 1096*. The court outlined the following six-factor test to assess whether the complaint stated with particularity specific facts **[*15]** that "support a reasonable belief that the defendant's statements identified by the plaintiff were false or misleading":

> (1) the level of detail provided by the facts stated in a complaint;
> (2) the number of facts provided;
> (3) the coherence and plausibility of the facts when considered together;
> (4) whether the source of the plaintiff's knowledge about a stated fact is disclosed;

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[3] The District Court for the Southern District of New York recently echoed this standard in a case "strikingly similar" to *Tyson* based on the same alleged conspiracy. *See* *Gamm v. Sanderson Farms, Inc., No. 16-CV-08420-RMB, 2018 U.S. Dist. LEXIS 9944, *5 (S.D.N.Y. Jan. 19, 2018)* (ECF No. 39-1) ("Where the '[p]laintiffs' underlying allegation [in a *Rule 10b-5* case is] that [a defendant] participated in an antitrust conspiracy' the '[p]laintiffs must plead the facts of the alleged conspiracy with particularity.'") (quoting *Tyson, 2017 U.S. Dist. LEXIS 116824, 2017 WL 3185856 at *9—*10))*. The *Gamm* court found that the plaintiffs had failed to explain the "who, what, when, where and how" of the scheme, and thus found the plaintiffs had failed to plead the underlying conspiracy with particularity. *2018 U.S. Dist. LEXIS 9944, [WL] at 6*.

(5) the reliability of the sources from which the facts were obtained; and
(6) any other indicia of how strongly the facts support the conclusion that a reasonable person would believe that the defendant's statements were misleading.

Id. at 1098-99 (citing *In re Cabletron Sys., Inc., 311 F.3d 11, 29-30 (1st Cir. 2002))*. The Tenth Circuit calls this "a common-sense, case-by-case approach" to determine whether a plaintiff has alleged securities fraud with the particularity required by *§ 78u-4(b)(1)*. *Id. at 1102*. Applying this approach to the facts alleged in that case, the *Adams* court found that the "level of detail about why [the branch] was unprofitable is significant," and it noted that the plaintiffs had used "objectively verifiable market data, sources who were inside the company, and statements made by industry observers made to a trade publication" to explain the branch's unprofitability. *Id. at 1104*. As a result, the **[*16]** court concluded that the plaintiffs had done far more than "rest[] on conclusory assertions," but instead had sufficiently pled with particularity the facts supporting their belief that the defendant's statements were false or misleading. *Id.*

In this case, therefore, in addition to assessing whether the allegedly false or misleading statements were pled with the requisite particularity, I will apply the *Adams* framework to assess the sufficiency of the facts pled in support of plaintiff's allegation of an underlying conspiracy.

ANALYSIS

A. Sufficiency of Allegations Regarding False or Misleading Statements.

As an initial matter, plaintiff has sufficiently satisfied the first PSLRA requirement for pleading false or misleading statements by "'specify[ing] each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading.'" *Adams, 340 F.3d at 1096* (quoting *15 U.S.C. § 78u-4(b)(1)*). The complaint contains a detailed accounting of each allegedly misleading statement made during the Class Period, including press releases, SEC filings, and investor calls, and the complaint explains why each statement is alleged to have been misleading at the time it was made. ECF No. 29 at 51-106 (noting that the statements **[*17]** were misleading because, for example, they failed to disclose the underlying anticompetitive scheme or they falsely represented that Pilgrim's success was based on legitimate strategies, rather than the price-fixing scheme). The complaint thus satisfies the PSLRA's standard for pleading a false or misleading statement.

B. Sufficiency of Allegations Regarding Underlying Conspiracy.

However, with respect to the complaint's allegations about the underlying antitrust conspiracy, which are made on information and belief, I agree with defendants that the complaint fails to "state with particularity all facts on which that belief is formed." *Adams, 340 F.3d at 1096* (citing *15 U.S.C. § 78u-4(b)(1)*). In this vein, defendants contend that the complaint "offers none of the requisite particulars regarding the 'who, what, when, and where' of any purported antitrust conspiracy made by Pilgrim's with its competitors during the Class Period." ECF No. 34 at 2. Plaintiff counters that his complaint adequately pleads that Pilgrim's participated in a collusive scheme to fix broiler prices, citing the complaint's allegations that the co-conspirators "shared proprietary production data to monitor and enforce compliance with an anticompetitive agreement" **[*18]** and its details about the "two rounds of coordinated production cuts," the "particular industry meetings . . . attended to discuss production cuts, the specific means by which they cut production . . . and the impact of the production cuts on Broiler prices." ECF No. 35 at 10-11.

In support of his complaint's sufficiency, plaintiff cites Sherman Act antitrust cases in which such allegations of collusion were upheld. *Id.*; *see also* ECF No. 37 (citing *In re Broiler Chicken Antitrust Litig., No. 16-CV-8637, 290 F. Supp. 3d 772, 2017 U.S. Dist. LEXIS 191754 (N.D. Ill. Nov. 20, 2017)* (denying defendants' *Rule 12(b)(6)* motion to dismiss the case asserting antitrust violations for the same alleged conspiracy).[4] However, as the *Tyson* court

[4] The 92-page decision on the motion to dismiss in *In re Broiler Chicken Antitrust Litigation* was provided to the Court by means of a letter from plaintiff's counsel. ECF No. 37 and 37-1. It was issued after the (amended) complaint in the present case, so plaintiff Fuller obviously could not have factored that decision into the allegations of his securities law complaint. In any event,

notes, while the Sherman Act provides the appropriate framework for a court reviewing underlying allegations of an antitrust conspiracy, those antitrust allegations will be held to the heightened PSLRA pleading standard when, like here, they form the basis of a securities fraud claim. Tellingly, the court in *Tyson* cautioned that its finding that the underlying antitrust allegations in that case were insufficient was "not necessarily indicative of how it would have decided the case were it presented as a regular Sherman **[*19]** Act claim." *Tyson, 2017 U.S. Dist. LEXIS 116824, 2017 WL 3185856, at *15, *19*. Similarly in this case, I must apply the heightened pleading requirements described herein to the elements in the Sherman Act's antitrust framework.

A Sherman Act antitrust claim must satisfy a three-pronged test by demonstrating that (1) there was a conspiracy, *i.e.*, an agreement or concerted action toward a common goal; (2) the agreement unreasonably restrained trade; and (3) the restraint affected interstate commerce. *Id. at *15*. With respect to the first prong, because direct evidence of concerted action or an agreement is "'so rare,' the ***antitrust law*** has 'granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances.'" *Beltran v. InterExchange, Inc., 176 F. Supp. 3d 1066, 1072 (D. Colo. 2016)* (quoting *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1450-51 (9th Cir. 1988))*. Allegations of parallel conduct alone are insufficient to satisfy the first prong, but "'must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.'" *Id. at 1073* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Thus in this case, because there is no direct evidence of an agreement, plaintiff must allege both parallel conduct and "circumstantial evidence of a conspiracy." *Id.*

i. Facts **[*20]** Supporting Parallel Conduct.

I am persuaded by defendants' argument that plaintiff has failed to plead that the co-conspirators engaged in parallel conduct in the first place. *See* *In re Beef Indus. Antitrust Litig., 907 F.2d 510, 514 (5th Cir. 1990)* ("When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a *§ 1* claim, he must first demonstrate that the defendants' actions were parallel."). Instead, because the complaint lacks facts about the means and amounts by which the alleged conspirators cut production or when those particular cuts occurred, it is difficult to determine whether the conspirators were acting in parallel. Using the common-sense approach provided in *Adams* to assess the sufficiency of the complaint's allegation of parallel conduct, I find that the facts provided here fall short. *Adams, 340 F.3d at 1099*.

Plaintiff's complaint alleges that "[t]he production cuts by Pilgrim and other Broiler producers took a number of different forms," including "[r]educing egg sets or egg placements . . . [r]educing the size of broiler breeder flocks . . . [p]ulling eggs . . . [d]estroying chicks . . . [r]educing chicks sent to contract farmers . . . [i]ncreasing pickup/delivery days between flocks . . . [c]hanges to facility production, **[*21]** such as temporary or permanent shut-downs; and . . . [e]xporting hatching eggs or chicks." ECF No. 29 at 32. This general list of methods used to cut production does little to establish what exactly Pilgrim's actually did to cut production and when, or how its actions compared with those of its co-conspirators as necessary to establish that there was a course of parallel conduct. The complaint does not provide numbers of eggs destroyed, for example, or what impact such reductions had on broiler production levels. *See, e.g., id.* at 32-33, 36 (alleging that superiors directed employees to break eggs without providing the dates or frequency of such instructions, how many eggs were to be broken, or whether other co-conspirators were acting in concert). Without more information about the particular cuts that occurred and how these compared to competitors' cuts, the complaint's allegations do not establish parallel conduct. *See, e.g., Gamms*, ECF No. 39-1 at 7 (finding the complaint in that case insufficient because it did not "provide particularized facts such as when and how Sanderson Farms and its co-conspirators destroyed eggs; how many eggs the co-conspirators destroyed; [and] whether and when Sanderson **[*22]** Farms or any of its co-conspirators revealed that they were destroying eggs"); *see also* *Burtch v. Milberg Factors, Inc., 662 F.3d 212, 228 (3rd Cir. 2011)* (noting that "allegations fall far short of demonstrating parallel behavior" where the alleged conduct occurred "at different time periods").

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that case does not change my analysis of plaintiff's complaint. He must do more than piggyback on allegations in the antitrust case if he wishes to prosecute a securities suit. This is not to say that a compliant complaint could not be drafted when more facts become known.

Moreover, to the extent the complaint does provide some detail about particular actions co-conspirators took to cut production, those actions would have had such disparate effects that they do not represent a parallel course of conduct. The complaint notes, for example, that around the same time Pilgrim's was shutting down four of its processing plants between 2008 and 2009, another industry member was making adjustments to bird weights. ECF No. 29 at 120. Similarly in 2011, soon after Pilgrim's announced that it was closing a processing plant and laying off 1,000 employees, a competitor announced it would not "set any more eggs until we pick up a big account." *Id.* at 125-26. Along the same lines, in late 2015, Pilgrim's was allegedly breaking eggs while its competitor was closing a plant, eliminating a shift at another plant, and increasing purchases from competitors. *Id.* at 36-37. The disparate effect of a permanent plant closure as compared to a competitor's merely temporarily **[*23]** changing the weights of its broilers or the number of eggs it was setting indicates in my view that these are not parallel conduct. As defendants argue, and I agree, "it is facially implausible to assert an antitrust claim based on an allegation that a producer agreed to give up 10% of its sales, while its rivals gave up only 1%." ECF No. 34 at 13. Thus, even the somewhat more particularized information provided in the complaint fails to establish a course of parallel conduct between Pilgrim's and its co-conspirators.

Similarly, plaintiff's allegations concerning defendants' use of Agri Stats and manipulation of the Georgia Dock index fail to plead a parallel course of conduct. With respect to the use of Agri Stats, plaintiff's complaint merely alleges that Pilgrim's used the service and that it could have parsed the data to determine which data corresponded with specific competitors. ECF No. 29 at 24-30. However, there are no particularized allegations that Pilgrim's did in fact reverse-engineer the data in the way insinuated in the complaint. *See, e.g., id.* at 27 (explaining that a former Agri Stats employee who took a job at Pilgrim's "may have even taken the master list with him over to **[*24]** Pilgrim['s]"). Such non-particularized allegations of hypothetical actions do not suffice to establish that Pilgrim's conspired to use Agri Stats data for nefarious purposes. Similarly, with respect to the alleged manipulation of the Georgia Dock price index, though the complaint is replete with allegations about the index's inaccuracy and lack of verification, there are no particularized facts about Pilgrim's sending false or misleading information to the index on any particular occasion and no facts indicating that if it did, its conduct was in parallel to that of its co-conspirators. *Id.* at 38-46. I find that the complaint's allegations related to the use of Agri Stats and the Georgia Dock index manipulation fail to plead parallel conduct sufficient to meet the exacting standards of the PSLRA.

ii. Facts Supporting Circumstantial Evidence of a Conspiracy.

Even if plaintiff had pled particularized facts demonstrating parallel conduct, I agree with the *Tyson* court's finding that plaintiff has not provided circumstantial evidence of a conscious commitment to a common unlawful scheme.[5] "'Allegations of parallel conduct and a conclusory assertion of a conspiracy alone will not suffice to state a plausible **[*25]** conspiracy claim under *§ 1 of the Sherman Act*.'" *Tyson, 2017 U.S. Dist. LEXIS 116824, 2017 WL 3185856, at *16* (quoting *Precision Rx Compounding, LLC v. Express Scripts Holding Co., No. 16-CV-0069-CEJ, 2016 U.S. Dist. LEXIS 112851, 2016 WL 4446801, at *2 (E.D. Mo. Aug. 24, 2016)*). Instead, to be liable under the Sherman Act defendants must have had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Id.* Where there is no "smoking gun" to establish an agreement, courts assess whether complaints contain sufficient circumstantial evidence of an agreement.

Thus, in *Tyson*, under a very similar set of facts, the court found insufficient evidence of an agreement after assessing the defendants' motive to raise prices, indications that production cuts made pursuant to the conspiracy would otherwise be against defendants' interests absent a conspiracy, and other indicia of an agreement. *2017 U.S. Dist. LEXIS 116824, [WL] at *16*. In particular, Tyson's use of a "buy-versus-grow" strategy, in which it occasionally bought chicken from its competitors rather than growing its own, undercut its motive to keep prices high. *2017 U.S. Dist. LEXIS 116824, [WL] at *17*. Similarly, the 2008 recession was deemed a plausible alternative for the *Tyson* defendants' production cuts, undermining the conclusion that such cuts would be against the defendants' interest absent a conspiracy. *2017 U.S. Dist. LEXIS 116824, [WL] at *18*. Finally, **[*26]** with respect to other indicia of

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[5] Because I find that the complaint fails to provide particularized facts indicating an underlying conspiracy, I need not reach the parties' debate over whether the Court should take judicial notice of the USDA data defendants provide to undermine plaintiff's allegations of a conspiracy. *See* ECF No. 34 at 12; *see also* ECF No. 35 at 2 n.3.

agreement, the court was unpersuaded that membership in industry associations, attendance at industry conferences, and the use of Agri Stats were enough to support the plaintiffs' "information-and-belief allegation that the industry's production cuts were coordinated." *2017 U.S. Dist. LEXIS 116824, [WL] at *19*. As a result, the court found that the plaintiffs in that case had not provided sufficient evidence of an underlying agreement under the exacting PSLRA standard for pleading the falsity element of securities fraud claim.

Using *Tyson*'s analysis of circumstantial evidence as a guide, I find there are insufficient facts pled to establish circumstantial evidence of an agreement in this case. First, the complaint does not support a conclusion that production cuts made pursuant to the conspiracy would otherwise be against Pilgrim's interest absent a conspiracy. Instead, there are strong indications that cutting broiler production was in Pilgrim's interest given the company's bankruptcy in 2008-2009. The complaint notes that immediately preceding and following Pilgrim's bankruptcy, the company cut production in rather permanent ways, including by closing four processing plants in 2008 and 2009 **[*27]** alone. ECF No. 29 at 119-20. According to the complaint, "[t]he production cuts were not enough to save Pilgrim['s] from its immediate financial crisis," indicating that the cuts were in fact made in an effort to avert crisis rather than to comply with a price-fixing conspiracy. *Id.* at 119. The complaint further notes that "bankruptcy allowed for Pilgrim['s] to close plants, and thus when the Company emerged from bankruptcy a year later . . . Pilgrim['s] emerged with substantially reduced production." *Id.* As a result, the facts pled in the complaint provide a possible explanation of why cuts in production were in Pilgrim's interest as it emerged from bankruptcy.

With respect to Pilgrim's motive to keep prices high, the company did not use a "buy-versus-grow" strategy like Tyson's that would undercut such a motive. However, in such a case where there is little other circumstantial evidence of a conspiracy, the motive to keep prices high can more aptly be said to describe the reality of an industry characterized by inelastic demand than to be an indicator that a party had a motive to conspire. Additionally, I agree with the *Tyson* court that defendants' membership in trade associations and social **[*28]** interactions with other industry members is insufficient "without significantly more in a *Rule 10b-5* case" to establish the existence of a conspiracy. *2017 U.S. Dist. LEXIS 116824, [WL] at *18*. Ultimately, I agree with defendants that it is inappropriate to plead "fraud by innuendo," which is essentially what plaintiff has done in this complaint. ECF No. 34 at 7.

C. Conclusion.

Because plaintiff did not plead the underlying antitrust conspiracy with sufficient particularity according to the PSLRA's requirements, his claims for *§ 10* violations fail to satisfy the falsity elements. As a result, his remaining *§ 20(a)* claim against defendants Lovette and Sandri must also necessarily fail.[6] The Court therefore GRANTS Pilgrim's motion to dismiss plaintiff's second amended complaint.

As a final note, plaintiff requested leave to amend his complaint in response to defendants' motion to dismiss. ECF No. 35 at 20 n.13. "[A] court need not grant leave to amend when a party fails to file a formal motion." *Harris v. Avant, No. 10-CV-00027-PAB-CBS, 2012 U.S. Dist. LEXIS 44458, 2012 WL 1079318, at *3 (D. Colo. March 29, 2012)*. I presume that if plaintiffs had additional facts to allege at this time, they would have done so. But I do not mean to foreclose the possibility that plaintiff might obtain facts (through the antitrust case or otherwise) **[*29]** that would enable him to assert a securities claim that would satisfy the requirements of the PSLRA. *See supra* n.4. His securities case is essentially premature but not necessarily hopeless. Accordingly, I dismiss this case without prejudice.

ORDER

For the reasons stated herein, defendants' motion to dismiss plaintiff's second amended complaint, ECF No. 34, is GRANTED. Plaintiff's second amended complaint is DISMISSED without prejudice.

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[6] Where a complaint fails to state a *Rule 10b-5* claim, the related *Section 20(a)* claim for control person liability must also necessarily fail. *Adams, 340 F.3d at 1107-08*.

DATED this 14th day of March, 2018.

BY THE COURT:

/s/ R. Brooke Jackson

R. Brooke Jackson

United States District Judge

Marion Healthcare, LLC v. S. Ill. Healthcare

United States District Court for the Southern District of Illinois

March 14, 2018, Decided; March 14, 2018, Filed

Case No. 12-cv-871-SCW

Reporter

2018 U.S. Dist. LEXIS 41955 *; 2018-1 Trade Cas. (CCH) P80,311; 2018 WL 1318054

MARION HEALTHCARE, LLC, Plaintiff, vs. SOUTHERN ILLINOIS HEALTHCARE, Defendants.

Prior History: *Marion HealthCare LLC v. S. Ill. Healthcare, 2013 U.S. Dist. LEXIS 120722 (S.D. Ill., Aug. 26, 2013)*

Core Terms

pleadings, alleges, outpatient, contracts, exclusionary, payors, partial judgment, Antitrust, surgical services, non-written, insurers, exclusivity provision, summary judgment, HealthCare, buyer, tying arrangement, anti trust law, provider, argues, notice, exclusive contract, written contract, tied product, competitors, provisions, reimbursed, inpatient, monopoly

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For Health Care Service Corporation, Defendant: Stacey Gabris Pagonis, Kirkland & Ellis LLP - Chicago, Chicago, IL.

For HealthLink, Inc., Interested Party: Martin J. Bishop, LEAD ATTORNEY, Dan J. Hofmeister, Jr., Rebecca R. Hanson, Reed Smith - Chicago, Chicago, IL.

For Health Alliance Medical Plans, Inc., Interested Party: Matthew J. O'Hara, LEAD ATTORNEY, Freeborn & Peters LLP, Chicago, IL.

For Marion Hospital Corporation, Interested Party: Richard J. Behr, Jason W. Kinser, Behr, McCarter et al., St. Louis, MO.

For United States of America, Interested Party: Jonathan H. Lasken, LEAD ATTORNEY, U.S. Department of Justice **[*2]** - Antitrust Division, Washington, DC.

Judges: STEPHEN C. WILLIAMS, United States Magistrate Judge.

Opinion by: STEPHEN C. WILLIAMS

Opinion

MEMORANDUM AND ORDER

WILLIAMS, Magistrate Judge:

I. INTRODUCTION

Plaintiff Marion Healthcare ("MHC") brought the present antitrust action against Southern Illinois Healthcare ("SIH") pursuant to *sections 1* and *2 of the Sherman Act* (*15 U.S.C. §§ 1* & *2*), as well as, provisions of the *Illinois Antitrust Act (740 ILCS 10/1, et seq.*). MHC—an outpatient surgery center—alleges that SIH—a large hospital system in southern Illinois—illegally suppressed competition for outpatient surgical services in a specified market in southern Illinois through exclusionary agreements with certain commercial health insurers.

On October 22, 2012, MHC filed its First Amended Complaint, naming SIH and Health Care Service Corporation, d/b/a BlueCross and BlueShield of Illinois ("BCBS") as defendants. (Doc. 13). Some of the claims raised were dismissed with prejudice by Judge Herndon on August 26, 2013. (Doc. 57). Shortly thereafter, MHC filed its Second Amended Complaint, (Doc. 58), and this matter was subsequently transferred to Judge Yandle. In ruling on motions to dismiss filed by both defendants, Judge Yandle dismissed all claims against BCBS with prejudice, **[*3]** and denied SIH's motion. (Doc. 16). On February 17, 2016, MHC filed its Third Amended Complaint, which is the current, operative complaint, naming only SIH as a defendant. (Doc. 127). Subsequent to the filing of that complaint, the parties consented to the disposition of this matter before the undersigned.

This matter is before the Court on SIH's Motion for Partial Judgment on the Pleadings (Doc. 273). As the basis for the motion, SIH indicates that written contracts containing exclusivity provisions with BCBS and another payor named Health Alliance only existed during certain time periods. SIH argues that MHC cannot recover on its antitrust claims for the time periods in which SIH did not have in effect written contracts with exclusivity provisions. Among its arguments raised in response, MHC asserts that expert discovery has demonstrated evidence that SIH's exclusionary agreements continued on a "constructive" or de facto basis during times in which there were no explicit and written exclusionary agreements in effect. Since there appear to be issues of fact as to whether SIH continued to have de facto exclusionary agreements with BCBS and Health Alliance even when no such written **[*4]** agreements existed, and since the Third Amended Complaint adequately placed SIH on notice of such a claim, SIH's Motion for Partial Judgment on the Pleadings is **DENIED**.

II. BACKGROUND AND ALLEGATIONS

a. The Third Amended Complaint

According to the allegations raised in the Third Amended Complaint, MHC is a multi-specialty freestanding outpatient surgery center offering outpatient surgical services to residents of Williamson and Jackson Counties, as well as, the local surrounding area. SIH is a nonprofit hospital system which owns three hospitals in Jackson and Williamson Counties: Memorial Hospital of Carbondale, Herrin Hospital, and St. Joseph Memorial Hospital. MHC alleges that the geographic market relevant to its suit comprises Williamson and Jackson Counties, as well as, the surrounding area.

According to MHC, in this geographic market, SIH has approximately a 77% share of the market for inpatient hospital services reimbursed by commercial insurers and a greater than 85.3% share of the market for outpatient services reimbursed by commercial insurers. MHC also alleges that SIH has roughly a 72.3% share of the market for inpatient hospital admissions and 75% market share for inpatient **[*5]** days reimbursed by all payors. It has a greater than 77.2% share of the market for outpatient services reimbursed by all payors. According to MHC, most all health insurance payors in the relevant market consider SIH a "must-have" hospital system due to the fact that it is easily the largest hospital in the region and the only local provider of essential services.

MHC alleges that SIH has maintained a monopoly power in the relevant geographic market by entering into exclusionary contracts with commercial health insurers such as BCBS, Health Alliance, and others. MHC has attached some of the exclusivity agreements to the Third Amended Complaint. In referring to an Illinois Department of Insurance report, MHC alleges that in 2010, BCBS received 47.46% of all premiums for insurance companies selling group health insurance plans in the entire state, while the next closest insurer had a market share of 6.46%. MHC also alleges that Health Alliance is the largest health plan in downstate Illinois.

MHC alleges that the exclusionary contracts effectively prevent insurers from contracting with other health-care facilities competing with SIH, including MHC. In the fall of 2003, MHC applied to become **[*6]** a network provider for BCBS. The application, however, was denied. At various times between the fall of 2003 and October 2011, MHC made renewed requests to join BCBS's provider network; however, it was declined. Similar requests to join Health Alliance's network were also declined.

In October 2011, MHC first learned of SIH's exclusive contract with BCBS. Quoting from a contract provision attached to the Third Amended Complaint, MHC alleges that as early as 2003, SIH has entered into an exclusivity agreement with BCBS wherein

> Blue Cross agrees not to enter into a CPO [Community Participating Option] agreement...with another hospital in the Southern Illinois counties of Jackson, Williamson, Franklin, Saline, Johnson, Union, Pulaski, Alexander, or Perry without the express written consent of [SIH].

(Doc. 127, p. 29; Doc. 127-9, p. 2). According to MHC, SIH has also entered into an exclusivity agreement with Health Alliance dating back to 2003.

MHC alleges that due to SIH's exclusionary contracts, most patients must pay substantially more for its outpatient services as compared to having a procedure performed at an independent, non-SIH, outpatient facility. The exclusionary contracts, according **[*7]** to MHC, effectively prevent members of the public from accessing full service outpatient surgical services in a cost efficient manner. MHC alleges that SIH has (1) delayed and prevented the expansion and entry of SIH's competitors, which has likely lead to higher healthcare costs and higher insurance premiums; (2) limited price competition for price sensitive patients, likely leading to higher healthcare costs for such patients; and (3) reduced quality competition between SIH and its competitors.

MHC alleges SIH has violated both the Sherman Antitrust Act and Illinois state ***antitrust law***. First, MHC alleges that SIH has entered into exclusive dealing contracts that violate *section 1 of the Sherman Act, 15 U.S.C. § 1*, and the Illinois Antitrust Act, ***740 ILCS § 10/3***. Second, MHC alleges that SIH's exclusive contracts constitute illegal tying arrangements in violation of *section 1 of the Sherman Act* and the Illinois Antitrust Act. It alleges that SIH illegally coerced BCBS, Health Alliance, and other payors into entering into agreements that tied discounts for coverage of SIH's inpatient hospital services with exclusive contracting for in-network coverage of SIH's outpatient surgical services, which prohibited the payors from contracting **[*8]** for in-network coverage with competing independent outpatient surgery centers in the region.

Finally, SIH is also alleged to have violated *section 2* of the Sherman Act, ***15 U.S.C. § 2***. MHC alleges that SIH has a monopoly in the market for outpatient surgical services in the relevant geographic market, regardless of whether the market is defined as being reimbursed by any payors[1], or merely by commercial insurers. It is alleged that SIH acted to willfully maintain and extend its monopoly power in the market for outpatient surgical services by using its market power to coerce payors into accepting exclusivity provisions with respect to outpatient services in contracts, which were not wanted by the payors, in exchange for discounted inpatient services, which the payors required.

b. SIH's Motion for Judgment on the Pleadings

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[1] Any and all payors, as opposed to merely commercial insurers, would constitute a market including government payor programs, such as Medicare and Medicaid, as well as, private commercial payors.

In the motion at-bar, SIH indicates that it did not have contracts containing the exclusivity provisions at issue for the entirety of the timeframe alleged in the Third Amended Complaint. According to SIH, there were no exclusivity provisions between it and BCBS prior to January 1, 2007, and there were no such provisions between it and Health Alliance between December 1, 2005 and May 31, 2007 **[*9]** and again from June 1, 2010 to the present. SIH argues that MHC cannot demonstrate antitrust injury, causation, or injury-in-fact during the time period which SIH did not have exclusivity contracts.

MHC raises multiple arguments in response. First, it argues that a *partial* judgment on the pleadings is procedurally improper under *Federal Rule of Civil Procedure 12(c)*. Next, generally, MHC argues that the effects of a contract can extend even beyond the time it is in existence, and that the question of damages is a factual issue to be determined by the trier of fact. Finally, MHC asserts that the issue of what agreements were in effect at what times is a question of disputed fact. MHC points to evidence that the exclusionary contracts continued on a de facto basis even when the written contracts were not in effect. The Court need not address all of these arguments, as MHC's final argument is dispositive.

III. Judgment on the Pleadings Standard

Rule 12(c) of the Federal Rules of Civil Procedure permits a party, "[a]fter the pleadings are closed—but early enough not to delay trial—[to] move for judgment on the pleadings." A motion for judgment on the pleadings is governed under the same standard as a motion to dismiss under *Rule 12(b)(6)*. ***Gill v. City of Milwaukee, 850 F.3d 335, 339 (7th Cir. 2017)***. To survive a motion governed under the *12(b)(6)* **[*10]** standard, the complaint must "'state a claim for relief that is plausible on its face.'" ***Katz-Crank v. Haskett, 843 F.3d 641, 646 (7th Cir. 2016)*** **(quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))***. The Court accepts as true the allegations raised by Plaintiff in its Complaint unless the allegations are "'threadbare recitals of a cause of action's elements, supported by mere conclusory statements.'" ***Katz-Crank, 843 F.3d at 646*** **(quoting *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009))***. A court may grant a motion for judgment on the pleadings only where "the moving party clearly establishes that no material issue of fact remains to be resolved and that he or she is entitled to judgment as a matter of law." ***National Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987)***. If all of the factual disputes are not resolved by the pleadings, a trial, rather than judgment on the pleadings, is more appropriate. ***Roberts v. Robert V. Rohrman, Inc., 909 F.Supp. 545, 552 (N.D. Il. 1995)*** **(citing Wright & Miller, 5A Federal Practice and Procedure: Civil 2d § 1367 pp. 509 — 10 (1990))**.

Rule 12(d) provides that when ruling on a *12(c)* motion, if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under *Rule 56*." ***Fed.R.Civ.P. 12(d)***. An exception exists, however, where the moving party attaches a document that is central to the plaintiff's claim and is referred to in the complaint. ***188 LLC v. Trinity Industries, Inc., 300 F.3d 730, 735 (7th Cir. 2002)*** **(quoting *Wright v. Assoc. Ins. Cos. Inc., 29 F.3d 1244, 1248 (7thCir. 1994))***. Where such a document is attached to a 12(c) motion, it may be considered **[*11]** by the Court without the motion being converted into a motion for summary judgment. ***See Tierney v. Vahle, 304 F.3d 734, 738 (7th Cir. 2002)***.

IV. Analysis

MHC first argues that a motion for *partial* judgment on the pleadings is procedurally improper. It is true that while summary judgment under *Rule 56* may be granted on "the part of each claim or defense," ***Fed.R.Civ.P. 56(a)*** **(emphasis added)**, *Rule 12(c)* makes no explicit mention of a partial judgment on the pleadings. Certainly, one could argue that if the drafters of the rules of civil procedure had wished for *Rule 12* to allow for partial judgments, then they would have explicitly indicated as such in the rule's text. *See e.g. Murphy v. Smith, 583 U.S. ___, 138 S. Ct. 784, 200 L. Ed. 2d 75, 79 (2018)* **("[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own.")**. MHC, in fact, cites to a case wherein the Seventh Circuit suggested that a motion for partial judgment on the pleadings may not be proper.

See* *BBL, Inc. v. City of Angola, 809 F.3d 317, 325 (7th Cir. 2015). That court noted the difference in the language between *Rule 56* and *Rule 12(b)(6)*, which provides the governing standard for a motion brought under *Rule 12(c)*. ***Id.*** The court noted that a motion brought pursuant to *12(b)(6)* does not permit piecemeal dismissal of portions of claims. ***Id.*** The Seventh Circuit's rumination **[*12]** on this issue, however, in dicta, culminated in nothing more than a suggestion that a partial judgment may be improper, and the court expressly declined to resolve the issue, finding that the case before it could be resolved on other grounds. ***See id.*** While acknowledging the textual argument for the proscription of a partial judgment on the pleadings under *Rule 12(c)*, as other grounds demonstrate that SIH is not entitled to judgment on the pleadings, this Court refrains from deciding this specific question.

Turning to the merits of the issues before it, the Court next addresses MHC's contention that factual issues exist regarding the times at which the exclusive contracts were in effect. In support, MHC quotes from a portion of its expert report:[2]

> It makes no rational business sense to not contract with Marion HealthCare if Health Alliance was free to contract with any provider in the 7-County Market. If a provider is willing to offer better rates than competitors, a rational insurer would include that provider in a competitive market. Yet the decision not to negotiate a contract with Marion HealthCare resulted in significantly higher cost for outpatient surgical services paid by Health Alliance. **[*13]** This suggests that the exclusionary provisions continued even though they were not formally written into the contracts. It suggests the parties were engaging in a "constructive exclusive contract" throughout the timeframe.

(Doc. 282, p. 10).

The Court finds that it can consider this portion of MHC's expert's report without converting SIH's motion to a motion for summary judgment. In a footnote in ***Geinosky v. City of Chicago***, the Seventh Circuit indicated that a party opposing a motion under *Rule 12(b)(6)* may permissibly submit materials outside the pleadings in order to illustrate facts that the party expects to prove. ***675 F.3d 743, 746, n. 1 (7th Cir. 2012)*** **(citing *Thomas v. Guardsmark, Inc., 381 F.3d 701, 704 (7th Cir. 2004)*)**. There, the court stated that

> [i]n the turmoil concerning civil pleading standards stirred up by *Ashcroft v. Iqbal*...and *Bell Atlantic Corp v. Twombly*...a plaintiff who is opposing a *Rule 12(b)(6)* or *Rule 12(c)* motion and who can provide such illustration may find it prudent to do so. (It may also be prudent to explain to the district court that the materials are being submitted for illustrative purposes and should not be used to convert the motion into a *Rule 56* motion for summary judgment.)

Geinosky, 675 F.3d at 746, n. 1.

Indeed, MHC specifically states that it provides the portion of its expert report merely for the purpose of demonstrating **[*14]** that the issues raised in SIH's motion are disputed issues of fact. The Court accepts the provided portion of MHC's expert report, and considers it only for the purpose of determining whether factual issues exists, and the Court does not consider or attempt to ascertain the truth of the report or the weight to be given to it.

SIH contends in its Reply that even if the Court were to consider the expert report, because the gravamen of MHC's complaint is based on injury from the written contracts, the face of the contracts themselves make clear that MHC cannot state a claim for relief during the periods where the contracts did not contain exclusivity provisions. SIH also appears to attempt to cast doubt on the notion that the causes of action raised by MHC may include non-written agreements as a matter of law. If, however, the causes of action pleaded by MHC cover non-written agreements, and if MHC can be said to have adequately pleaded non-written agreements in its Third Amended Complaint, then MHC has likely demonstrated a question of fact. The Court takes each of these issues in turn.

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[2] Because the Court relies only the quoted portion of the report for the proposition that an issue of fact exists, the Court will not require that any portion of the expert report be filed in the record at this time, either sealed or unsealed.

The Court first addresses MHC's exclusive dealing and tying claims. Though those claims are brought **[*15]** pursuant to both federal and state law, the same standard is used to govern both. "Illinois law provides that its courts should use the construction of federal ***antitrust law*** by federal courts to guide their construction of those state antitrust laws that are substantially similar to federal ***antitrust law***." ***Marion Healthcare, LLC v. Southern Illinois Healthcare, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168, *14 (S.D. Il. Aug. 26, 2013)*** **(quoting *State of Ill., ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1480 (7th Cir. 1991))* (internal quotations omitted)**. In ruling on a prior motion to dismiss in this matter, the Court applied federal law to both federal and Illinois claims. ***Marion Healthcare, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168 at *14***. In regards to the motion at-bar, neither party indicates that they are of the position that differing standards apply to MHC's federal versus state claims. The Court treats MHC's federal and Illinois claims as being governed under the same standard.

MHC's exclusive dealing and tying claims arise under *section 1* of the Sherman Act. That section provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." ***15 U.S.C. § 1***. Though the statute reads very broadly on its face in prohibiting "[e]very contract, combination...or conspiracy in restraint of trade," the Supreme Court has read the statute only **[*16]** to apply to "unreasonable" restraints of trade. ***See e.g.*** ***Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)***.

An exclusive dealing arrangement exists where a supplier induces a buyer to purchase most or all of the suppliers' goods or services for a certain period of time. **ABA Section of *Antitrust Law*, *ANTITRUST LAW* DEVELOPMENTS p. 209 (7th ed. 2012)**. Such arrangements violate ***antitrust law*** "when they foreclose competition in a substantial share of the line of commerce at issue." ***Republic Tobacco Co. v. North Atlantic Trading Co., Inc., 381 F.3d 717, 737 - 38 (7th Cir. 2004)***. In addition, a tying arrangement exists when a sale of one product or service is conditioned on the buyer also taking a second product or service. **Herbert Hovenkamp, FEDERAL ANTITRUST POLICY § 10.1 p. 435 (4th ed. 2011)**. "'The principal evils of tying arrangements are the foreclosure of competitors in the tied product market and the denial to buyers of the advantages of marketplace shopping.'" ***Marion Healthcare, 2013 U.S. Dist. LEXIS 120722, 2013 WL 4510168 at *11*** **(quoting *Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 724 (7th Cir. 1979))***.

Courts have found that implied or unwritten agreements may constitute both illegal exclusive dealing arrangements and illegal ties. In ***West Penn Allegheny Health System, Inc. v. UPMC***, the Third Circuit provided that to successfully plead a *section 1* claim, generally, a "plaintiff may plead an agreement by alleging direct or *circumstantial* evidence, or a combination of the **[*17]** two." ***627 F.3d 85, 99 (3d Cir. 2010)*** **(emphasis added)**. In regards to exclusive dealing arrangements specifically, the Third Circuit also has found, in an *en banc* opinion, that a plaintiff can recover on an antitrust claim regarding such arrangements even where the arrangements contained no express exclusivity provision.[3] ***LePage's, Inc. v. 3M, 324 F.3d 141, 157 - 58 (3d Cir. 2003)*** (***en banc***). In addition, circuit courts have also found that actionable illegal ties need not be explicit. For instance, the Sixth Circuit has stated:

> Unlawful ties need not be explicit contractual provisions preventing buyers from purchasing the tied product from third parties. The existence of a tying arrangement depends on..."the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." [***Jefferson Parish Hosp. v. Dist. No. 2 v. Hyde****, 466 U.S. 2, 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*.] When a defendant adopts a policy that makes

[3] SIH argues that *LePage*, a case involving rebates given by a manufacturer in order to induce exclusive dealing, is "irrelevant to determining if a plaintiff alleging exclusive dealing and tying based on written agreements can state a claim when those written agreements did not exist." (Doc. 291, p. 5, n. 4). SIH, however, assumes that the Third Amended Complaint is confined solely to express written agreements. As already discussed by the Court, whether MHC's causes of action may be maintained through de facto agreements and whether MHC adequately pleaded such agreements are two separate questions. The Court relies on *LePage* in deciding only the former question.

> it unreasonably difficult or costly to buy the tying product...without buying the tied product from the defendant, it 'forces' buyers to buy the tied product from the defendant and not from competitors.

Collins Inkjet Corp. v. Eastman Kodak Co.**, 781 F.3d 264, 272 (6th Cir. 2015)*. ***See also ***Aerotec International, Inc. v. Honeywell International, Inc.**, 836 F.3d 1171, 1179 (9th Cir. 2016)* ("We readily acknowledge that tying conditions **[*18]** need not be spelled out in express contractual terms to fall within the Sherman Act's prohibitions."). The Court adopts these previous circuit court findings and finds that MHC, as a matter of law, may plead illegal exclusive dealing and tying arrangements that are non-explicit.

In addition, illegal monopolization under *section 2* clearly need not be the product of explicit contractual provisions. The elements of a *section 2* claim make such a notion clear on their face. To prevail on a claim under *section 2*, a plaintiff must demonstrate that the defendant (1) possesses monopoly power in the relevant market; and (2) "'willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" ***Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP**, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (quoting ***U.S. v. Grinell Corp.**, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*. The first element merely requires a defendant to hold monopoly power, and the second element requires an exercise of that power—i.e. some form of anticompetitive conduct. ***See*** Hovenkamp, ***supra***, at §§ 6.2, 6.3, pp. 292, 296. Both exclusive dealing and tying arrangements can constitute anticompetitive conduct for purposes of *section 2*. ***See Ticketmaster Corp. v. Tickets.com Inc.**, 127 Fed.Appx. 346, 347 - 48 (9th Cir. 2005)* (exclusive dealing); ***Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.**, 386 F.3d 485, 501 - 02 (2d Cir. 2004)* (exclusive dealing); ***Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.**, 63 F.3d 1540, 1550 (10th Cir. 1995)* ("Illegal tie-ins and predatory pricing under *section 1* may also **[*19]** qualify as anticompetitive conduct for *section 2* purposes.").

Since the causes of action raised by MHC may be pleaded through de facto agreements or arrangements, the question then turns to whether MHC sufficiently raised such agreements in its Third Amended Complaint. It is true that MHC's complaint generally references and relies on written agreements between SIH and BCBS and SIH and Health Alliance. The Federal Rules require only notice pleading, and the question is whether SIH was placed on notice of alleged violations arising from non-written agreements. ***See*** ***Erickson v. Pardus**, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)* ("[In a complaint,] [s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.") (quoting ***Twombly** 550 U.S. at 555*) (internal quotations omitted). Antitrust suits, though often complex, do not demand a more stringent pleading standard. ***See*** ***Midwest Gas Services, Inc. v. Indiana Gas Co., Inc.**, 317 F.3d 703, 710 (7th Cir. 2003)* ("[A]ntitrust plaintiffs need not plead to a heightened level of particularity.")

The Third Amended Complaint fairly placed SIH on notice of non-written agreements. Though MHC references the written agreements and relies heavily upon them, the Third Amended Complaint does not explicitly foreclose the existence of non-written agreements **[*20]** or arrangements. To the contrary, beginning on the first page of the complaint, MHC provides the following basic summation of its claims:

> In short, through exclusionary agreements and *ongoing related conduct*, including exclusive dealing, tying and monopolization, Defendant has substantially suppressed competition for outpatient surgical services in a specified, relevant market in southern Illinois.

(Doc. 127, p. 1 - 2) (emphasis added). As such, the Court finds that the Third Amended Complaint, though mainly addressing the written agreements, also encompasses unwritten continuing agreements or conduct. Upon reading the complaint, it simply would not be reasonable for SIH to argue that it was not fairly placed on notice of claims alleged to have arisen from ongoing conduct and/or unwritten agreements continuing after the expiration of the written contracts at issue.[4]

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[4] Moreover, SIH, who had access to the same discovery as MHC, had the opportunity to rebut Plaintiff's expert's testimony regarding non-written agreements with its own expert's testimony, and, presumably, has done as much.

Given that it has adequately pleaded non-written agreements and/or ongoing conduct, MHC has also demonstrated a factual dispute as to the issues raised in SIH's motion. Simply put, while SIH contends that MHC cannot state a cause of action for the periods in which SIH did not have written exclusivity agreements with payors, **[*21]** MHC's expert opines that such agreements essentially continued on a constructive basis. Though SIH argues that the expert's opinion is speculative, such an argument is best reserved for an examination of the facts, and is not appropriate for a motion for judgment on the pleadings. The Court is satisfied that a factual issue exists, and that the issue raised by SIH is more appropriate for summary judgment or trial.

V. Conclusion

The Court finds that MHC has adequately pleaded causes of action arising, in part, from non-written agreements and/or ongoing conduct. As such, an issue of fact exists as to whether MHC can recover for the times in which SIH did not have in effect express written exclusive contracts. The Court notes that in making its ruling, it takes no position as to the ultimate merits of MHC's claims. Today, the Court merely finds that the issues raised by SIH in its motion are better left for trial or summary judgment. SIH's Motion for Partial Judgment on the Pleadings (Doc. 273) is **DENIED**.

IT IS SO ORDERED.

DATED: 3/14/2018

/s/ Stephen C. Williams

STEPHEN C. WILLIAMS

United States Magistrate Judge

Contant v. Bank of Am. Corp.

United States District Court for the Southern District of New York

March 15, 2018, Decided; March 15, 2018, Filed

17 Civ. 3139 (LGS)

Reporter

2018 U.S. Dist. LEXIS 42870 *; 2018-1 Trade Cas. (CCH) P80,310; 2018 WL 1353290

JAMES CONTANT, et al., Plaintiffs, -against- BANK OF AMERICA CORPORATION, et al., Defendants.

Subsequent History: Later proceeding at *Contant v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 155572 (S.D.N.Y., Sept. 12, 2018)*

Motion granted by, in part, Motion denied by, in part *Contant v. Bank of Am. Corp., 2018 U.S. Dist. LEXIS 183586, 2018 WL 5292126 (S.D.N.Y., Oct. 25, 2018)*

Motion denied by *Contant v. Bank of Am. Corp., 2019 U.S. Dist. LEXIS 238112, 2019 WL 12276133 (S.D.N.Y., Apr. 18, 2019)*

Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Contant v. Bank of Am. Corp., 385 F. Supp. 3d 284, 2019 U.S. Dist. LEXIS 84251 (S.D.N.Y., May 17, 2019)*

Later proceeding at *Contant v. Bank of Am. Corp., 2019 U.S. Dist. LEXIS 238103, 2019 WL 12276060 (S.D.N.Y., July 29, 2019)*

Later proceeding at *Contant v. Bank of Am. Corp., 2019 U.S. Dist. LEXIS 211317 (S.D.N.Y., Dec. 7, 2019)*

Motion denied by *Contant v. Bank of Am. Corp., 2019 U.S. Dist. LEXIS 222641 (S.D.N.Y., Dec. 23, 2019)*

Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Motion denied by, As moot *Contant v. Bank of Am. Corp., 2020 U.S. Dist. LEXIS 105880, 2020 WL 3260958 (S.D.N.Y., June 17, 2020)*

Settled by, Dismissed by, Judgment entered by *Contant v. Bank of Am. Corp., 2020 U.S. Dist. LEXIS 217458 (S.D.N.Y., Nov. 19, 2020)*

Request granted *Contant v. Bank of Am. Corp., 2021 U.S. Dist. LEXIS 207767, 2021 WL 4950347 (S.D.N.Y., Oct. 25, 2021)*

Reserved by *Contant v. Bank of Am. Corp., 2021 U.S. Dist. LEXIS 210714 (S.D.N.Y., Oct. 29, 2021)*

Motion denied by, Motion granted by *Contant v. Bank of Am. Corp., 2022 U.S. Dist. LEXIS 2428, 2022 WL 46606 (S.D.N.Y., Jan. 5, 2022)*

Later proceeding at *Contant v. Bank of Am. Corp., 2022 U.S. Dist. LEXIS 3476 (S.D.N.Y., Jan. 5, 2022)*

Appeal dismissed by, As moot *Contant v. AMA Cap., LLC, 66 F.4th 59, 2023 U.S. App. LEXIS 8954, 2023 WL 2939946 (2d Cir. N.Y., Apr. 14, 2023)*

Motion granted by, Settled by, Class certification granted by, Costs and fees proceeding at, Costs and fees proceeding at, Dismissed by, in part *Contant v. Bank of Am. Corp., 2023 U.S. Dist. LEXIS 89813 (S.D.N.Y., May 19, 2023)*

Motion granted by, Costs and fees proceeding at *Contant v. Bank of Am. Corp., 2023 U.S. Dist. LEXIS 188889 (S.D.N.Y., Oct. 17, 2023)*

Prior History: *Simmtech Co. v. Citibank, N.A., 2013 U.S. Dist. LEXIS 172327 (S.D.N.Y., Dec. 3, 2013)*

Core Terms

Plaintiffs', antitrust, factors, allegations, customers, proximate cause, anti trust law, prices, damages, fails, exchange rate, purchasers, broker, antitrust claim, Defendants', enforcer, indirect, trades, alleged conspiracy, motion to dismiss, consumer protection, state law claim, spot market, manipulate, currency, injuries, remote, injunctive relief, foreign currency, causal chain

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For Martin-Han Tran, on behalf of themselves and all others similarly situated, Carlos Gonzalez, on behalf of themselves and all others similarly situated, Ugnius Matkus, on behalf of themselves and all others similarly situated, Jerry Jacobson, on behalf of themselves and all others similarly situated, Paul Vermillion, on behalf of themselves and all others similarly situated, Plaintiffs: Michael C. Dell'Angelo, Joshua Ripley, Berger & Montague, P.C., Philadelphia, PA; R. Bryant McCulley, McCulley McCluer PLLC, Sullivans Island, SC; Stuart Halkett McCluer, McCulley Mccluer PLLC, Oxford, MS.

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Judges: LORNA G. SCHOFIELD, UNITED STATES DISTRICT JUDGE.

Opinion by: LORNA G. SCHOFIELD

Opinion

LORNA G. SCHOFIELD, District Judge:

Plaintiffs,[1] a group of individuals and businesses that purchased foreign currency from retail foreign exchange dealers ("RFEDs"), bring this putative class action against eighteen banks and their affiliates[2] seeking injunctive

[1] The named plaintiffs are James Contant, Sandra Lavender, Victor Hernandez, Martin-Han Tran, FX Primus Ltd., Carlos Gonzalez, Ugnius Matkus, Charles G. Hitchcock III, Jerry Jacobson, Tina Porter and Paul Vermillion.

relief under the *Sherman Antitrust Act, 15 U.S.C. § 1 et seq.*, and damages under certain state antitrust and consumer protection laws. Plaintiffs allege that they paid inflated foreign currency exchange rates caused by Defendants' alleged conspiracy to fix prices in the foreign exchange ("FX") or foreign currency market. Defendants move to dismiss the Consolidated Class Action Complaint (the "Complaint") pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. For the reasons stated below, Defendants' **[*6]** motion to dismiss is granted.

I. BACKGROUND

The following facts are taken from the Complaint and assumed to be true for the purposes of this motion. *See* *Littlejohn v. City of New York, 795 F.3d 297, 306 (2d Cir. 2015)*.

On May 20, 2015, the United States Department of Justice ("DOJ") announced that Defendants Citigroup, JPMorgan Chase, Barclays, RBS and UBS AG were pleading guilty to conspiring to manipulate the price of U.S. dollars and euros exchanged in the foreign currency exchange spot market. Traders at Defendant banks used chat rooms with names such as "The Cartel" "The Bandits' Club," "One Team, One Dream," "the 3 musketeers," "the A-team," "The players," "the Essex Express" and "The Mafia" to manipulate benchmark exchange rates. Those exchange rates are set, among other ways, through daily fixing rates or "fixes," the most important of which are the 1:15 P.M. European Central Bank fix and the 4:00 P.M. World Markets/Reuters fix. Third parties collect trading data at these times to calculate and publish a daily "fix rate," which in turn is used to price orders for many large customers. Defendants allegedly coordinated their FX trading to manipulate benchmark rates set at the fixes in an effort to increase their profits.

The traders also used **[*7]** these chat rooms to manipulate the exchange rates in other ways. For example, the traders agreed to fix the bid-ask spreads paid by customers for various currency pairs at artificially high levels. Bid-ask spreads are a primary source of revenue for FX dealers, and in a competitive market, a dealer would seek to gain customers and market share by offering narrower spreads than those offered by competitors. Customers want narrower spreads, allowing them to buy currency at lower prices and sell at higher prices.

Defendants entered into illegal price-fixing agreements to manipulate the foreign currency exchange rates to Plaintiffs' detriment by causing them to pay more for the currency they purchased than they otherwise would have paid. Plaintiffs claim that the price-fixing agreements are violations of *§ 1 of the Sherman Antitrust Act*; the state antitrust statutes of Arizona, California, Illinois, Minnesota, New York and North Carolina; and the consumer protection statutes of California, Florida and Massachusetts.

Plaintiffs claim to have purchased currency indirectly from Defendants by executing trades with non-conspiring RFEDs, who in turn executed covering trades with counterparties such **[*8]** as Defendants and charged Plaintiffs a markup. The RFEDs quoted Plaintiffs exchange rates based on the rates in the price-fixed spot market, thereby passing on to Plaintiffs the costs caused by Defendants' anticompetitive practices.

This class action was the result of consolidating two separate actions by indirect purchasers represented by the same counsel against the same defendants, *Contant, et al. v. Bank of America Corporation, et al.*, No. 17 Civ. 3139, and *Lavender, et al. v. Bank of America Corporation, et al.*, No. 17 Civ. 4392. Plaintiffs then filed the Consolidated Class Action Complaint. Defendants moved to dismiss under *Rule 12(b)(6)*.

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[2] Defendants are Bank of America Corporation, Bank of America, N.A., Merrill Lynch, Pierce, Fenner & Smith Incorporated, The Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays Bank PLC, Barclays Capital Inc., BNP Paribas, BNP Paribas North America, Inc., BNP Paribas Securities Corp., BNP Paribas Prime Brokerage, Inc., Citigroup Inc., Citicorp, Citibank, N.A., Citigroup Global Markets Inc., Credit Suisse Group AG, Credit Suisse AG, Credit Suisse Securities (USA) LLC, Deutsche Bank AG, Deutsche Bank Securities Inc., The Goldman Sachs Group, Inc., Goldman, Sachs & Co., HSBC Holdings plc, HSBC Bank plc, HSBC North America Holdings, Inc., HSBC Bank USA, N.A., HSBC Securities (USA) Inc., JPMorgan Chase & Co., JPMorgan Chase Bank, N.A., Morgan Stanley, Morgan Stanley & Co., LLC, Morgan Stanley & Co. International PLC, RBC Capital Markets, LLC, The Royal Bank of Scotland Group plc, RBS Securities Inc., Société Générale, Standard Chartered PLC, UBS AG, UBS Group AG and UBS Securities, LLC.

II. STANDARD

On a motion to dismiss, a court accepts as true all well-pleaded factual allegations and draws all reasonable inferences in favor of the non-moving party, *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt., 843 F.3d 561, 566 (2d Cir. 2016)*, but gives "no effect to legal conclusions couched as factual allegations," *Stadnick v. Vivint Solar, Inc., 861 F.3d 31, 35 (2d Cir. 2017)* (quoting *Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010)*. To withstand a motion to dismiss, a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

In deciding **[*9]** a *Rule 12(b)(6)* motion, the court is limited to reviewing the complaint, any documents attached to that pleading or incorporated in it by reference, any documents heavily relied upon by the complaint as to their "terms and effect" and which are therefore integral to the plaintiff's allegations even if not explicitly incorporated by reference, and facts of which the court may take judicial notice. *Goel v. Bunge, Ltd., 820 F.3d 554, 559 (2d Cir. 2016)*.

II. DISCUSSION

The Complaint fails to plead facts sufficient to establish antitrust standing as to Plaintiffs' claims under the Sherman Act and the state ***antitrust law*** of California, Illinois and New York. The Complaint also fails to plead sufficient facts to establish proximate cause, which is required for each of Plaintiffs' claims. Plaintiffs' state law claims, including those under Arizona and North Carolina law, but excluding those under New York law, also fail under federal due process requirements for bringing state law claims. Finally, Plaintiffs' Sherman Act claim fails because the Complaint fails to establish the availability of injunctive relief. Defendants' motion to dismiss pursuant to *Rule 12(b)(6)* is thus granted.

A. Antitrust Standing

In addition to Article III standing, an antitrust plaintiff must demonstrate **[*10]** antitrust standing at the pleading stage. Although general "harm" to the plaintiff is sufficient to satisfy the constitutional standing requirement, "the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016)* ("*Aluminum Warehousing*") (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. "The limitation of antitrust standing to 'a proper party' arose because '***antitrust law*** has long recognized that defendants who may have violated a provision of the antitrust statutes are not liable to every person who can persuade a jury that he suffered a loss in some manner 'that might conceivably be traced' to the conduct of the defendants." *Id.* (quoting *Reading Indus., Inc. v. Kennecott Copper Corp., 631 F.2d 10, 12 (2d Cir. 1980))*.

These "antitrust standing" doctrines have arisen primarily under federal law. In *Illinois Brick Co. v. Illinois, 431 U.S. 720, 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court created a "direct purchaser" doctrine limiting treble damage actions under *§ 4 of the Clayton Act* to direct purchasers. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 536-45, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("*AGC*"), the Court created a multi-factor "efficient enforcer" doctrine to measure the link between the defendant's conduct and the plaintiff's injury in a federal antitrust action. Those factors include:

> (1) the "directness or indirectness of the asserted injury," which requires evaluation of the "chain of **[*11]** causation" linking [the plaintiffs'] asserted injury and the [defendants'] alleged price-fixing; (2) the "existence of

> more direct victims of the alleged conspiracy"; (3) the extent to which [the plaintiffs'] damages claim is "highly speculative"; and (4) the importance of avoiding "either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other."

Gelboim v. Bank of Am. Corp., 823 F.3d 759, 778 (2d Cir. 2016) (quoting AGC, 459 U.S. at 540-45). The *Illinois Brick* direct-purchaser doctrine and the *AGC* efficient enforcer doctrine are "analytically distinct." Blue Shield of Va. v. McCready, 457 U.S. 465, 476, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982); *see also* Laumann v. Nat'l Hockey League, 907 F. Supp. 2d 465, 484 n.105 (S.D.N.Y. 2012).

The direct purchaser doctrine and the efficient enforcer doctrine are the product of federal law. They do no preempt state ***antitrust law***. California v. ARC Am. Corp., 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989) ("[T]he Court of Appeals erred in holding that the state indirect purchaser statutes are pre-empted."). [F]ederal antitrust laws serve "to supplement, not displace, state antitrust remedies." Id. at 102. States are therefore free to adopt or reject either or both of the federal antitrust standing doctrines.

1. State Applications of the AGC Test

While the highest courts of the states at issue have not considered whether the *AGC* factors apply to those states' respective antitrust statutes, Defendants claim that *AGC* should be **[*12]** applied to the state law antitrust claims except under Minnesota law. As explained below, the Court is persuaded that the AGC efficient enforcer doctrine applies under California, Illinois and New York law.

a. California

At least one California intermediate appellate court and the Ninth Circuit have applied the *AGC* factors to claims under the Cartwright Act, California's state antitrust statute. *See* Vinci v. Waste Mgmt., Inc., 36 Cal. App. 4th 1811, 43 Cal. Rptr. 2d 337, 338-39 (Cal. Ct. App. 1995); Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 987-92 (9th Cir. 2000) (cited in In re Wholesale Elec. Antitrust Cases I & II, 147 Cal. App. 4th 1293, 55 Cal. Rptr. 3d 253, 265 (Cal. Ct. App. 2007). Several federal district courts have done the same. *See, e.g.,* Supreme Auto Transport LLC v. Arcelor Mittal, 238 F. Supp. 3d 1032, 1039 & n.4 (N.D. Ill. 2017) (holding that the *AGC* factors apply to a Cartwright Act claim); Salveson v. JP Morgan Chase & Co., 166 F. Supp. 3d 242, 257-59 & n.7 (E.D.N.Y. 2016), *aff'd*, 663 F. App'x 71 (2d Cir. 2016), *cert. denied*, *137 S. Ct. 1826, 197 L. Ed. 2d 760 (2017)*; In re Dairy Farmers of Am. Inc. Cheese Antitrust Litig., No. 09 Civ. 3690, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *7-8 (N.D. Ill. June 29, 2015); Sahagian v. Genera Corp., No. 08 Civ. 7613, 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6 (C.D. Cal. July 6, 2009); In re Dynamic Random Access Memory (DRAM) Antitrust Litig., 516 F. Supp. 2d 1072, 1088-89 (N.D. Cal. 2007). The Court is mindful that the Ninth Circuit has noted in the context of the Cartwright Act that "California law affords standing more liberally than does federal law." Knevelbaard Dairies, 232 F.3d at 987.

b. Illinois

The Illinois Appellate Court, the state's intermediate appellate court, cited *AGC* approvingly in dismissing state antitrust claims because the injury alleged was not sufficiently direct and the damages were too speculative. *See* County of Cook v. Philip Morris, Inc., 353 Ill. App. 3d 55, 817 N.E.2d 1039, 1045-47, 288 Ill. Dec. 389 (Ill. App. Ct. 2004). The Seventh Circuit held that federal antitrust standing rules apply under the Illinois Antitrust Act. O'Regan v. Arbitration Forums, Inc., 121 F.3d 1060, 1066 (7th Cir. 1997); *see also* United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901, 930 (N.D. Ill. 2015) ("[T]he Court sees no reason why the Illinois Supreme Court would not follow *AGC*.").

c. New York

New **[*13]** York's Supreme Court, Appellate Division, its second-highest court, endorsed the lower court's application of the *AGC* factors in an indirect-purchaser case. *See Ho v. Visa USA, Inc., 16 A.D.3d 256, 793 N.Y.S.2d 8, 8-9 (N.Y. App. Div. 2005)* (affirming dismissal of plaintiffs' antitrust claims due to "the remoteness of their damages from the alleged injurious activity"), *aff'g 3 Misc. 3d 1105[A], 787 N.Y.S.2d 677, 2004 NY Slip Op 50415[U] [N.Y. Sup. Ct. 2004]* (applying the *AGC* factors in determining that "plaintiffs' alleged injury is far too remote to provide antitrust standing under the *Donnelly Act*"); *see also State ex rel. Spitzer v. Daicel Chem. Indus., Ltd., 42 A.D.3d 301, 840 N.Y.S.2d 8, 12 (N.Y. App. Div. 2007)* (affirming the dismissal of price-fixing claims under *N.Y. Gen. Bus. Law § 349* where the plaintiff's injury was "too remote" from the alleged wrongdoing), *aff'g in relevant part sub nom. State v. Daicel Chem. Indus., Ltd., 2005 N.Y. Misc. LEXIS 8435, 2005 WL 6056054 (Sup. Ct. Aug. 9, 2005)*; *Williams v. Citigroup, Inc., 36 Misc. 3d 1201[A], 954 N.Y.S.2d 762, 2012 NY Slip Op 51145[U], at *4 [N.Y. Sup. Ct. 2012]* (finding that plaintiffs "damages [we]re too remote 'from the alleged injurious activity' to confer standing") (citing *Ho, 793 N.Y.S.2d at 8*). Federal district courts have likewise found that New York's highest court would apply the *AGC* factors to determine antitrust standing under the state's Donnelly Act. *See, e.g., Nichols v. Mahoney, 608 F. Supp. 2d 526, 545 (S.D.N.Y. 2009)* ("[I]f the plaintiffs do not have standing to assert a federal antitrust claim, they do not have standing to bring a Donnelly Act claim."); *Supreme Auto Transp., 238 F. Supp. 3d at 1039 & n.4*; *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *13-14*; *In re Refrigerant Compressors Antitrust Litig., No. 2:09 MD 2042, 2013 U.S. Dist. LEXIS 50737, 2013 WL 1431756, at *10 (E.D. Mich. Apr. 9, 2013)*; *Sahagian, 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6*. *But see In re Ductile Iron Pipe Fittings Indirect Purchaser Antitrust Litig., No. 12 Civ. 169, 2013 U.S. Dist. LEXIS 142466, 2013 WL 5503308, at *16 (D.N.J. 2013)* ("The Court is not persuaded that the *AGC* test applies **[*14]** to New York . . . ***antitrust law***. In reaching this conclusion, the Court notes that Defendants have not cited any state appellate cases to show that the highest court in [New York] would apply the *AGC* factors in that state[].").

d. Arizona

No Arizona appellate court has considered whether the *AGC* efficient enforcer doctrine applies to the *Arizona Antitrust Act* ("AAA"). The Arizona Supreme Court rejected *Illinois Brick* and concluded that an indirect-purchaser of goods and services has standing to sue under the AAA. *See Bunker's Glass Co. v. Pilkington PLC, 206 Ariz. 9, 75 P.3d 99, 102 (2003)* (noting that nothing in the AAA precludes indirect purchaser claims). There, the majority permitted claims by indirect purchasers of flat glass and tobacco based on allegations of passed on overcharges without discussing the *AGC* factors, although the dissent stated that *AGC* should apply. At least one Arizona trial court has since decided that *AGC* does apply to state ***antitrust law***. *See Luscher v. Bayer AG*, No. 04 Civ. 14835, 2005 WL 6959406, at *1-2 (Ariz. Super. Ct. Sept. 16, 2005) (applying *AGC* factors to dismiss Arizona state antitrust claims by indirect purchasers). Federal district courts are divided on the issue. *See Supreme Auto Transp., 238 F. Supp. 3d at 1039 & n.4* (dismissing AAA claims based on *AGC* analysis); *DRAM, 536 F. Supp. 2d at 1134-42* (same). *But see In re Pool Prods. Distrib. Mkt. Antitrust Litig., 946 F. Supp. 2d 554, 567 (E.D. La. 2013)* ("But given the Arizona Supreme Court's failure to apply *AGC* in *Bunker's Glass* ***[*15]*** , the trial court's *Luscher* decision is unpersuasive."); *In re Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133, 1152 (N.D. Cal. 2009)* (declining to apply *AGC* to the AAA considering the lack of supporting appellate court authority); *D.R. Ward Constr. Co. v. Rohm and Haas Co., 470 F. Supp. 2d 485, 497 (E.D. Pa. 2006)* ("Notwithstanding the *Luscher* decision, this Court predicts that the Arizona Supreme Court would apply its traditional standing approach, rather than an *AGC* analysis."). The Court thus declines to decide whether *AGC* applies to the AAA and decides the motion to dismiss the Arizona Antitrust claim on other grounds.

e. North Carolina

An intermediate North Carolina state court declined to apply *AGC* and held that "the *AGC* factors do not apply in determining which indirect purchasers have standing to sue under the North Carolina antitrust statutes." *See*

Teague v. Bayer AG, 195 N.C. App. 18, 671 S.E.2d 550, 556-57 (N.C. Ct. App. 2009). *But see* *Crouch v. Crompton Corp., 2004 NCBC LEXIS 6, 2004 WL 2414027, at *18-19 (N.C. Super. Ct. 2004)* (applying modified *AGC* test to determine indirect purchaser standing under North Carolina law). Several federal district courts nonetheless have concluded that North Carolina's high court would apply *AGC* to determine antitrust standing. *See* *Dairy Farmers, 2015 U.S. Dist. LEXIS 84152, 2015 WL 3988488, at *15* (concluding that North Carolina's high court would apply *AGC* to assess antitrust standing, noting that "[d]espite its sometimes-dubious and often-difficult-to-follow analysis, *Teague* cannot be interpreted as a wholesale rejection of *AGC*"; **[*16]** following instead the "more persuasive" trial court decision in *Crouch*); *Sahagian, 2009 U.S. Dist. LEXIS 132583, 2009 WL 9504039, at *6*; *DRAM, 516 F. Supp. 2d at 1094*. The Court thus declines to decide whether *AGC* applies to North Carolina ***antitrust law***, and decides the motion to dismiss the North Carolina antitrust claim on other grounds.

2. Antitrust Standing Analysis

To summarize, the Court concludes that the highest courts in three of the states at issue -- California, Illinois and New York -- would apply some version of the *AGC* factors in determining whether Plaintiffs have antitrust standing to assert their claims under the respective state antitrust laws. With regard to these claims (Counts V, VII and II), the Complaint fails adequately to allege antitrust standing.

The Supreme Court recently discussed the *AGC* factors in the context of the *Lanham Act*, noting that the first factor "must be met in every case" but the third and fourth factors (as enumerated in *Gelboim, 823 F.3d at 778*) are "problematic," and the "potential difficulty in ascertaining and apportioning damages is not . . . an *independent* basis for denying standing where it is adequately alleged that a defendant's conduct has proximately injured an interest of the plaintiff's that the statute protects." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 1392, 188 L. Ed. 2d 392 (2014)*; *see also* *In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 552 (S.D.N.Y. 2016)* (citing *Lexmark* ***[*17]*** in connection with claims under the Sherman Antitrust Act); *DNAML Pty, Ltd. v. Apple Inc., 25 F. Supp. 3d 422, 430 (S.D.N.Y. 2014)* (same).

As to the first factor, the Complaint fails to show that Plaintiffs' injury has a sufficiently direct relationship to the alleged conspiracy. "Directness in the antitrust context means close in the chain of causation." *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C., 711 F.3d 68, 78 (2d Cir. 2013)*. The Complaint does not allege facts showing a sufficiently direct connection between the FX spot market, where Defendants allegedly manipulated prices, and the retail trading market, where Plaintiffs purchased foreign currency.

The Complaint alleges that Plaintiffs executed FX trades with non-conspiring RFEDs, who in turn executed covering trades with Defendants, among other counterparties. According to the Complaint, Defendants set supracompetitive prices for their trades with the RFEDs, who passed these markups on to Plaintiffs. The Complaint fails to explain the RFEDs' presumably independent and various pricing and execution strategies, which may well have broken the chain of causation.

As stated in the Complaint:

> To purchase an FX instrument from an FX broker, *a customer* sends an order electronically or by phone to the FX broker for an FX Instrument with a specific currency pair, *exchange rate*, and **[*18]** volume. If the FX broker accepts the trade, the customer pays the agreed-upon rate, often with an additional fee or commission determined by the broker, and the broker places the FX Instrument in the customer's account. Upon receipt of an order from a customer, in order to hedge or cover its exposure on the resulting FX Instrument, the FX broker concurrently executes an FX Instrument with an FX dealer such as a Defendant with the same volume and currency pair as the FX Instrument that the broker sells to the customer. . . .
>
> FX brokers generally receive quotes from several liquidity providers for each currency pair that they offer to their customers. The liquidity providers provide bid-ask quotes for FX spot transactions to the FX brokers, and the FX brokers offer those quotes to their customers, often with some additional markup determined by the brokers.

(emphasis added). According to this description, for any given trade the customer, rather than the RFED, proposes an exchange rate, which the RFED may then accept or decline. The exchange rate may or may not come with an additional fee, commission or markup. The Complaint contains no allegations as to how any such additional fee, commission **[*19]** or markup is computed. The Complaint further alleges that the liquidity providers such as Defendants provide quotes to the RFEDs, which the RFEDs provide to customers, "often" with a markup. But the Complaint provides no explanation as to how these quotes from various sources relate to the exchange rates customers propose to the RFEDs, and how the RFEDs then determine whether to accept the proposed trades. Thus, as alleged, for each transaction there are two independent actors -- the RFEDs and the customers themselves -- who influence the exchange rate of the trades at issue in this case after Defendants' alleged overpricing. In particular, it is unclear from the non-conclusory allegations in the Complaint whether and to what extent the RFEDs absorbed the alleged price increases or passed them on to Plaintiffs.

The Complaint therefore does not support a reasonable inference that Plaintiffs are direct victims of the alleged conspiracy. *See* AGC, 459 U.S. at 540 (finding the directness factor not pleaded where "the chain of causation between the Union's injury and the alleged restraint in the market . . . contains several somewhat vaguely defined links"); In re Dig. Music Antitrust Litig., 812 F. Supp. 2d 390, 402 (S.D.N.Y. 2011) (finding that CD purchasers did not plead a sufficiently **[*20]** direct relationship between prices in the CD market and alleged misconduct in the Internet Music market because they failed to allege "how the pricing of Internet Music affected CD pricing, how the CD market operated generally . . . or any kind of tie . . . between CD pricing and Internet Music pricing").

The second factor -- whether there are more direct victims of the alleged conspiracy -- weighs against finding that Plaintiffs are efficient enforcers based on the allegations in the Complaint. As participants in the FX spot market, the plaintiffs in In re Foreign Exchange Benchmark Rates Antitrust Litigation, No. 13 Civ. 7789, 2016 U.S. Dist. LEXIS 128237, 2016 WL 5108131, at *9 (S.D.N.Y. Sept. 20, 2016) ("*FOREX*") are more direct victims of the alleged conspiracy to manipulate prices in that market than Plaintiffs in this case. *See id.* (holding that Exchange Plaintiffs, in addition to Over-the-Counter Plaintiffs, are efficient enforcers with respect to the alleged conspiracy in the FX spot market).

The third and fourth factors also weigh against Plaintiffs. Regarding the third factor, the Complaint's failure to allege how prices in the retail trading market are determined and the relationship between the FX spot market and the retail trading market means that Plaintiffs' alleged "damages would necessarily be 'highly speculative.'" Gelboim, 823 F.3d at 780 (quoting **[*21]** AGC, 459 U.S. at 542). Under the fourth factor, the Complaint's failure to allege facts showing a direct relationship between the alleged conspiracy and Plaintiffs' injuries raises the risk that Plaintiffs' damages are derivative of the *FOREX* plaintiffs' damages, and therefore would be duplicative and excessive of any judgment in *FOREX*. *See* id. at 780 (noting that existence of other actions seeking damages on behalf of victims raises issue of duplicate recovery). Based on the allegations in the Complaint, none of the efficient enforcer factors weigh in Plaintiffs' favor. Plaintiffs lack antitrust standing to bring their claims under federal ***antitrust law*** as well as California, Illinois and New York ***antitrust law***.

B. Proximate Cause

To succeed on any of their claims, Plaintiffs must prove that Defendants' conspiracy in the FX spot market proximately caused Plaintiffs' injuries in the FX retail investor market. Courts "generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute. For centuries, it has been a well established principle of the common law, that in all cases of loss, [courts] are to attribute it to the proximate cause, and **[*22]** not to any remote cause." Lexmark, 134 S. Ct. at 1390. The proximate cause inquiry is meant to determine "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Id.* In determining proximate cause, courts ask:

> whether the injury that resulted was within the scope of the risk created by the defendant's [wrongful] act; whether the injury was a natural or probable consequence of the [conduct]; whether there was a superseding or intervening cause; whether the [conduct] was anything more than an antecedent event without which the harm would not have occurred.

Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 412 (2d Cir. 2014) (alterations in original) (quoting CSX Transp., Inc. v. McBride, 564 U.S. 685, 717, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (2011) (Roberts, C.J., dissenting)).

Directness, the first *AGC* factor discussed above, is in essence a proximate cause requirement. Lexmark, 134 S. Ct. at 1392. Although "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy . . . there is a point beyond which the wrongdoer should not be held liable." AGC, 459 U.S. at 534. For the same reasons that Plaintiffs are unable to show directness of injury under *AGC*, they are likewise unable to show that their injuries were proximately caused by Defendants' conduct.

Proximate cause is required to bring an antitrust action under Minnesota, Arizona **[*23]** and North Carolina law. Although the Court has declined to apply the *AGC* analysis to antitrust claims under Minnesota law, Minnesota imposes at least a proximate cause requirement for bringing an antitrust claim. *See, e.g.,* Lorix v. Crompton Corp., 736 N.W.2d 619, 631 (Minn. 2007) ("Standing under Minnesota ***antitrust law*** must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the ***antitrust law***; otherwise, almost any antitrust violation would provide almost any citizen with a cause of action arising from the resulting ripples of harm throughout the state's economy."). Similarly, the Arizona Supreme Court opinion declining to follow *Illinois Brick* acknowledges that plaintiffs should not be able to bring an antitrust action if they "have sustained injuries [that are] too remote." Bunker's Glass, 75 P.3d at 110. The North Carolina Supreme Court has likewise held that proximate cause is required to recover under the state's ***antitrust law***. Lewis v. Archbell, 199 N.C. 205, 154 S.E. 11, 12 (N.C. 1930); *see also* Mayton v. Hiatt's Used Cars, Inc., 45 N.C. App. 206, 262 S.E.2d 860, 863 (N.C. Ct. App. 1980) (quoting Lewis, 154 S.E. at 12). The Fourth Circuit affirmed the dismissal of a claim under the North Carolina Unfair Trade Practices Act, which governs both antitrust and general consumer protection claims, explaining that under the statute, "a plaintiff must **[*24]** show . . . the act proximately caused injury to the plaintiff." Ellis v. Louisiana-Pac. Corp., 699 F.3d 778, 787 (4th Cir. 2012) (citation omitted). *But see* Dicesare v. Charlotte-Mecklenburg Hosp. Auth., 2017 NCBC LEXIS 33, 2017 WL 1359599, at *8 (N.C. Super. Ct. 2017) ("Plaintiffs are not required at the pleading stage to prove a causal chain between the . . . challenged [anticompetitive] conduct and Plaintiffs' alleged injury."), *cert. denied*, *370 N.C. 215, 804 S.E.2d 541 (N.C. 2017)*.

Each of Plaintiffs' state consumer protection claims also requires allegations plausibly showing proximate cause to survive a motion to dismiss. *See, e.g.,* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 24 (1st Cir. 2016) (Under Massachusetts's consumer protection law, "the plaintiff must lay the groundwork for findings of both actual and proximate causation. If an examination of the claim leads to the conclusion that it fails plausibly to allege a causal chain sufficient to ground an entitlement to relief, that claim is susceptible to dismissal under Rule 12(b)(6)."), *cert. denied*, *137 S. Ct. 622, 196 L. Ed. 2d 579 (2017)*; In re Fla. Cement & Concrete Antitrust Litig., 746 F. Supp. 2d 1291, 1321-22 (S.D. Fla. 2010) (dismissing indirect purchasers' Florida consumer protection claim for failure to adequately plead proximate causation); Lorenzo v. Qualcomm Inc., No. 08 Civ. 2124, 2009 U.S. Dist. LEXIS 69843, 2009 WL 2448375, at *6 (S.D. Cal. Aug. 10, 2009) (dismissing California consumer protection claim because, aside from conclusory allegations as to proximate cause, the complaint "does not allege[] facts to demonstrate how Qualcomm . . . proximately caused Plaintiff's alleged injury.").

For the same reasons that the Complaint fails to satisfy **[*25]** the AGC efficient enforcer factors, it also fails to allege proximate cause. All of Plaintiffs' claims are dismissed for failure to allege facts plausibly showing proximate cause.

C. Due Process Requirements to Bring State Law Claims

Plaintiffs' state law claims, other than those under New York law, also fail because the Complaint fails to allege any nexus between those states and the parties and events in this case, apart from a plaintiff's domicile. Under the Due Process Clause of the Fourteenth Amendment, a state law may not be applied unless that state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985) (citing Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981)). The Due

Process Clause requires a court to invalidate the application of a state's law where the state has "no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction." *Allstate, 449 U.S. at 308*. The Court's decision in *Allstate* places "modest restrictions on the application of forum law." *Shutts, 472 U.S. at 818*.

Plaintiffs' state law claims fail to clear even these "modest restrictions." "[A]n action alleging violations of the antitrust laws is a claim for injuries sustained, and therefore **[*26]** in the nature of a tort." *Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 841 (E.D.N.Y. 1971)* (analyzing antitrust actions for purposes of the New York long-arm statute); *see also Daniel v. Am. Bd. of Emergency Med., 988 F. Supp. 127, 231-32 (W.D.N.Y. 1997)* (same); *Saratoga Harness Racing Inc. v. Veneglia, 897 F. Supp. 38, 44 n.8 (N.D.N.Y. 1995)* (same). For tort claims, the factors relevant to determining a state's interest are: "(a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered." *Johnson v. Nextel Commc'ns Inc., 780 F.3d 128, 142 (2d Cir. 2015)* (citing *Restatement (Second) of Conflict of Laws § 145(2)* (1971)).

As to Plaintiffs' state law claims (except those brought under New York law), the Complaint alleges facts relevant only to factor (c) -- that at least one plaintiff is domiciled in each of the relevant states. The Complaint fails to allege that Plaintiffs transacted and thus were injured in their home states (factor (a)), or that the alleged conspiratorial activity took place in any of those states (factor (b)). Factor (d) confers no interest in this case because, as alleged, Plaintiffs did not transact with Defendants and thus had no relationship with them. Plaintiffs' domicile alone creates an insufficient state interest to justify applying a particular state's law under the **[*27]** *Due Process Clause*. *See Allstate, 449 U.S. at 308, 320*. Plaintiffs' state law claims, except those under New York law, are dismissed for failing to meet due process requirements.

D. Standing to Bring a Sherman Act Claim

Plaintiff's Sherman Act claim fails additionally because the Complaint fails to allege Article III standing as to that claim. "[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)* (citation omitted).

As to their Sherman Act claims, Plaintiffs seek only injunctive relief, presumably because they may not seek damages under *Illinois Brick. 431 U.S. at 735*. But Plaintiffs are ineligible for injunctive relief because they fail to allege any ongoing misconduct. *15 U.S.C. § 26*; *see also Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*; *Nicosia v. Amazon.com, Inc., 834 F.3d 220, 239 (2d Cir. 2016)* (affirming dismissal of injunctive claim because past injuries "do not confer standing . . . unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way").

The Complaint alleges no threat of ongoing or recurring violations. Rather, the Complaint alleges a Class Period ending on December 31, 2013, suggesting an **[*28]** end to the alleged violations in 2013. The Complaint further alleges that following government investigations, guilty pleas and fines, "Defendants terminated and suspended traders, forced traders to resign and implemented internal safeguards after the class period," supporting an inference that Defendants have changed their practices, and the threat of recurring violations has passed. Plaintiffs are thus not entitled to injunctive relief.

Because Plaintiffs may obtain neither damages nor injunctive relief under the Sherman Act, their alleged injury under the act is not "likely to be redressed by a favorable judicial decision." *Spokeo, 136 S.Ct. at 1547*. Plaintiffs lack Article III standing to bring their Sherman Act claim.

E. Leave to Replead

Plaintiffs ask, in the event of dismissal, for leave to file a Third Amended Complaint. Leave to amend should be freely given when justice so requires. *Fed. R. Civ. P. 15(a)*. "However, where the plaintiff is unable to demonstrate that he would be able to amend his complaint in a manner which would survive dismissal, opportunity to replead is rightfully denied." *Hayden v. Cty. of Nassau, 180 F.3d 42, 53 (2d Cir. 1999)*. Leave to amend also may be denied where the plaintiff "fails to specify either to the district court or to the court of appeals how **[*29]** amendment would cure the pleading deficiencies in its complaint." *TechnoMarine SA v. Giftports, Inc., 758 F.3d 493, 505 (2d Cir. 2014)*. Any motion for leave to replead must be consistent with this Opinion and shall be filed as provided below.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Complaint pursuant to *Rule 12(b)(6)* for failure to state a claim is GRANTED. Should Plaintiffs choose to attempt to replead, they must file a motion to do so, a supporting memorandum of law and proposed Third Amended Consolidated Class Action Complaint, together with a redline showing how it differs from the Consolidated Class Action Complaint dismissed here, within 21 days.

Defendants The Bank of Tokyo-Mitsubishi UFJ, Ltd., Barclays PLC, HSBC Holdings plc, HSBC Bank plc, The Royal Bank of Scotland Group plc, Société Générale S.A., Standard Chartered Bank and UBS AG's separate motion to dismiss the claims against them pursuant to *Federal Rule of Civil Procedure 12(b)(2)* for lack of personal jurisdiction is denied as moot. The Clerk of Court is respectfully directed to close the motion at Docket Nos. 103, 105 and 120.

Dated: March 15, 2018

New York, New York

/s/ Lorna G. Schofield

LORNA G. SCHOFIELD

UNITED STATES DISTRICT JUDGE

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Amphastar Pharms., Inc. v. Momenta Pharms., Inc.

United States District Court for the District of Massachusetts

March 19, 2018, Decided; March 19, 2018, Filed

Civil Action No. 16-10112-NMG

Reporter

297 F. Supp. 3d 222 *; 2018 U.S. Dist. LEXIS 45054 **; 100 Fed. R. Serv. 3d (Callaghan) 4; 2018-1 Trade Cas. (CCH) P80,321

AMPHASTAR PHARMACEUTICALS, INC. and INTERNATIONAL MEDICATION SYSTEMS, LTD., Plaintiffs, v. MOMENTA PHARMACEUTICALS, INC. and SANDOZ INC., Defendants.

Subsequent History: Motion denied by *Amphastar Pharms., Inc. v. Momenta Pharms., Inc., 313 F. Supp. 3d 366, 2018 U.S. Dist. LEXIS 92813 (D. Mass., June 1, 2018)*

Prior History: *Amphastar Pharms. Inc. v. Momenta Pharms., Inc., 850 F.3d 52, 2017 U.S. App. LEXIS 3956, 2017 WL 876260 (1st Cir. Mass., Mar. 6, 2017)*

Core Terms

enoxaparin, patent, generic, antitrust, Pharmaceuticals, alleges, antitrust claim, motion to dismiss, defendants', Collaboration, manufacturers, documents, deceived, restraint of trade, infringement, judicial notice, material cause, counterclaim, mandatory, monopoly, misuse

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Judges: Nathaniel M. Gorton, United States District Judge.

Opinion by: Nathaniel M. Gorton

Opinion

[*225] **MEMORANDUM & ORDER**

GORTON, J.

This is an antitrust case in which plaintiffs Amphastar Pharmaceuticals, Inc. ("Amphastar Pharmaceuticals") and International Medication Systems, Ltd. ("IMS")(collectively, "Amphastar" or "plaintiffs") allege that defendants Momenta Pharmaceuticals, Inc. ("Momenta Pharmaceuticals") and Sandoz Inc. ("Sandoz")(collectively, "Momenta" or "defendants") restricted trade and prevented competition in the manufacture and sales of the generic drug enoxaparin.

Pending before the Court is Momenta's motion to dismiss the complaint (Docket No. 17), which will be treated as **[**3]** a motion to dismiss the amended complaint pursuant to the parties' stipulation. For the following reasons, the motion to dismiss will be denied.

I. Background and Procedural History

A. The Parties

Plaintiff Amphastar Pharmaceuticals is a pharmaceutical company located in California which develops, manufactures and sells pharmaceutical products including generic enoxaparin throughout the United States. Enoxaparin is an anti-coagulant used to prevent blood clots.

Plaintiff IMS is a wholly-owned subsidiary of Amphastar Pharmaceuticals with a principal place of business in California. It manufactures the active pharmaceutical ingredient in Amphastar's generic enoxaparin.

Defendant Momenta Pharmaceuticals is the assignee of United States Patent No. 7,575,886 ("the '886 patent") which concerns a testing process used in manufacturing enoxaparin. Momenta Pharmaceuticals acts as the contract laboratory for defendant Sandoz and is a Delaware corporation with its principal place of business in Massachusetts.

Defendant Sandoz distributes, markets and sells generic enoxaparin products throughout the United States. It is a Colorado corporation with its principal place of business in New Jersey. It allegedly entered into a profit-sharing, contractual relationship **[**4]** with Momenta which rendered it the exclusive licensee of the '886 patent.

B. The Alleged Conduct

In November, 2003, defendants entered into a Collaboration and License Agreement ("Collaboration Agreement") to develop, market and sell "enoxaparin sodium injection" in the United States. The Collaboration Agreement granted an exclusive license of the '886 patent, which had not yet issued, to Sandoz. Plaintiffs claim that the agreement "heavily" incentivized anti-competitive behavior by requiring Sandoz to make "milestone payments", profit sharing payments and royalty payments to Momenta Pharmaceuticals for the privilege of remaining the sole source of generic enoxaparin in the United States.

In or before February, 2007, the United States Pharmacopeial Convention ("USP") commenced the process for establishing a drug standard to test enoxaparin products. The USP is a scientific and impartial nonprofit organization which sets uniform standards for the identity, strength, quality and purity of medicines, food ingredients and dietary supplements. USP policy prohibits it from favoring one manufacturer over another during the standard-setting process and requires its committee members to disclose any conflicts of interest. **[**5]** A member with a conflict cannot attend the final discussion, deliberation or vote on the conflicted issues.

Sanofi-Aventis ("Aventis") proposed the standard known as USP Method <207> ("the 207 Method") to the USP. Dr. Zachary Shriver ("Dr. Shriver"), an employee and director of Momenta Pharmaceuticals **[*226]** who would later be named as an inventor on the '886 patent, served as Momenta's representative on the USP panel tasked with developing and approving the USP standard for enoxaparin. Sandoz also participated in the panel discussions.

The amended complaint alleges that Dr. Shriver and defendants learned, during the USP's consideration of the 207 Method, that Aventis had a pending patent application containing claims which would read on the 207 Method. Defendants purportedly demanded that Aventis abandon its patent application so that any member of the public could practice the enoxaparin standard adopted by the USP. Plaintiffs proffer that demand as evidence that defendants were "very familiar" with the 207 Method and the USP policy on conflicts of interest.

In November, 2008, the USP convened a panel meeting which commenced with a review of the USP policy on conflicts. Momenta Pharmaceuticals presented **[**6]** the 207 Method in a "detailed" presentation to the USP. USP staff reported that it was "not aware of any patent issue that may cover the test". Plaintiffs allege that neither Dr. Shriver, who was present at the meeting, nor any other representative of the defendants disclosed to the USP the conflicts posed by their own pending application for the '886 patent and the Collaboration Agreement. Plaintiffs assert that no other USP panel member knew that the '886 patent, which eventually issued in August, 2009, would cover the use of the 207 Method.

In December, 2009, the USP approved and adopted the 207 Method as its enoxaparin standard after Aventis agreed to abandon its patent application. The USP convened two more panel meetings in March and April of 2011. Plaintiffs claim that Dr. Shriver and another Momenta representative participated in the meetings and continued to violate their duty to disclose their and the defendants' conflicts of interest to the USP.

Sandoz was the first entity to receive approval from the United States Food and Drug Administration ("FDA") to sell generic enoxaparin in the United States in July, 2010. Defendants thus became the sole source of generic enoxaparin until Amphastar also **[**7]** received FDA approval to sell enoxaparin September, 2011. Plaintiffs allege that 1) the FDA required them to comply with the 207 Method as a condition of approval, 2) the 207 Method included steps protected by the patented method, 3) the '886 patent excluded unlicensed competitors from receiving FDA approval and thus 4) the '886 patent excluded new entrants from the market.

Two days after Amphastar received FDA approval, Momenta commenced an action in this Court alleging that Amphastar infringed the '886 patent. Amphastar claims that the lawsuit prevented it from selling generic enoxaparin in the relevant market.

C. Procedural History

Amphastar initiated this antitrust action by filing a complaint in the Central District of California in September, 2015. The complaint alleges violations of 1) federal ***antitrust law***, i.e., the *Sherman Act*, 2) California ***antitrust law***, i.e., the *Cartwright Act* and 3) California state law on unfair business practices. Amphastar amended the complaint in December, 2015 to replace "Sandoz, Pharmaceuticals, Inc." with "Sandoz Inc." as a named defendant.

The amended complaint asserts that Momenta engaged in anti-competitive conduct by executing the Collaboration Agreement, failing to disclose **[**8]** conflicts to the USP and commencing a patent infringement suit against Amphastar for using the 207 Method selected by the USP and required by the FDA. The amended complaint alleges **[*227]** that the anti-competitive conduct kept the price of generic enoxaparin artificially high which, in turn, cost consumers "billions of dollars in overcharges".

Under Amphastar's theory of antitrust liability, 1) the relevant product market is defined as the United States market for generic enoxaparin or, alternatively, enoxaparin, 2) generic entry into the market results in substantial reductions in price, 3) price-sensitive consumers of generic enoxaparin treat different brands of generic enoxaparin as reasonable substitutes and 4) generic manufacturers consider the prices set by other generic manufacturers as directly affecting their own prices.

In December, 2015, Momenta filed a motion to dismiss this action and a separate motion to transfer it from the Central District of California to the District of Massachusetts based upon the "substantial overlap" of issues, claims, witnesses and evidence between the instant case and the prior patent case pending in this Court. The California court allowed the motion **[**9]** to transfer. The case was transferred to the District of Massachusetts and assigned to this Session in January, 2016 but Amphastar filed a writ of mandamus to the Ninth Circuit Court of Appeals ("the Ninth Circuit") to appeal that transfer on personal jurisdictional grounds. That petition was denied in May, 2016.

In July, 2016, this Court allowed Momenta's motion to dismiss, reasoning that Amphastar's claims were precluded by the Noerr-Pennington doctrine. Amphastar appealed that order to the First Circuit Court of Appeals which reversed and remanded the case in March, 2017, directing this Court to consider defendants' alternative arguments for dismissal. The parties submitted supplemental memoranda in that regard in April and May, 2017.

II. Momenta's Motion to Dismiss

A. Legal Standard

To survive a motion to dismiss for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*, a complaint must contain "sufficient factual matter" to state a claim for relief that is actionable as a matter of law and "plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 667, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible if, after accepting as true all non-conclusory factual allegations, the court can draw the reasonable inference that the defendant is liable for the **[**10]** misconduct alleged. *Ocasio-Hernandez v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011)*. A court may not disregard properly pled factual allegations even if actual proof of those facts is improbable. Id. Rather, the relevant inquiry focuses on the reasonableness of the inference of liability that the plaintiff is asking the court to draw. *Id. at 13*.

When rendering that determination, a court may not look beyond the facts alleged in the complaint, documents incorporated by reference therein and facts susceptible to judicial notice. *Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)*.

B. Sherman Act Violations

Amphastar alleges that defendants violated the Sherman Act by (1) entering into an agreement in restraint of trade which blocked it from selling generic enoxaparin and (2) wrongfully acquiring monopoly power by deceiving the USP into adopting a standard which they later claimed was covered by defendants' patent. Defendants respond that Amphastar has failed to plead facts establishing that their conduct caused Amphastar's injury. Furthermore, defendants suggest that Amphastar does not sufficiently allege a restraint of trade because (1) the 207 **[*228]** Method is not mandatory and (2) there are no plausible allegations that Momenta intended to induce the USP into approving the 207 Method.

1. Causation

First, defendants **[**11]** contend that the Amphastar has failed to plead facts sufficient to demonstrate that it suffered an antitrust injury as a result of defendants' conduct. They claim that Amphastar has not adequately alleged a causal connection between the USP proceedings and Amphastar's decision to adopt the 207 Method because Amphastar first filed its Abbreviated New Drug Application ("ANDA") in 2003 in which it was required to describe the quality control procedures it would use to confirm that its generic enoxaparin had the appropriate structural characteristics. Defendants note that Amphastar adopted the 207 Method before it was approved by the USP and did not amend its ANDA after the USP approved the 207 Method.

Amphastar emphasizes in its response that, although it submitted the ANDA in 2003, that initial application was "inconsequential" because the FDA did not approve the application until 2011. In the intervening years between the application and the approval, the USP adopted the 207 Method. As a result of that adoption, Amphastar suggests, the FDA conditioned its 2011 approval on Amphastar's compliance with the 207 Method. By contrast, had the USP not adopted Method 207, Amphastar would not **[**12]** have been required to comply with it for FDA approval and defendants would not have had the market power to exclude Amphastar.

A plaintiff in an antitrust case must demonstrate that there is a causal connection between the defendant's illegal practice and the antitrust injury. *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)*. A plaintiff need not prove that the antitrust violation was the "sole cause of their injury, but only that it was a material cause". Id. (citing *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 13 (1st Cir. 1979))*. An antitrust violation can constitute a material cause even where an injury has additional independent causes. See e.g., *In re Nexium (Esomeprazole) Antitrust Litig., 42 F. Supp. 3d 231 (D. Mass. 2014)* (internal citation omitted) (noting that the material cause condition has been interpreted as a proximate cause requirement). The First Circuit has noted that causation questions are "peculiarly within the competence of the factfinder" and should be left for the jury. *Peckham v. Cont'l Cas. Ins. Co., 895 F.2d 830, 837 (1st Cir. 1990)* ("Causation questions of this sort are normally grist for the jury's mill.").

Amphastar has sufficiently alleged that defendants' actions before the USP while that organization was considering the proposed standards for enoxaparin were a material cause of Amphastar's antitrust injury. Momenta's focus on the ANDA is misplaced. While defendants suggest that Amphastar must allege facts **[**13]** supporting an inference that Amphastar adopted the accused procedures as a result of the USP proceedings, the alleged antitrust injury need not have been caused by Amphastar's adoption of the 207 Method but rather by the FDA's approval made contingent on Amphastar's adoption of the USP's official test method to test for its enoxaparin.

Amphastar alleges that Momenta's deceptive conduct in front of the USP led to the approval of the 207 Method and the subsequent exclusion of Amphastar from the marketplace. The adoption of the 207 Method by the USP made the FDA's approval of the sale of enoxaparin by Amphastar conditional on its use of an infringing procedure. Accordingly, Amphastar has adequately pled that the defendants' conduct at the USP was a material cause of the antitrust injury.

[*229] 2. Restraint of Trade

Defendants contend that Amphastar fails to allege a restraint of trade sufficient to support an antitrust claim because the 207 Method is not mandatory and defendants do not demonstrate that Momenta intentionally deceived the USP. According to defendants, while all manufacturers of generic enoxaparin must use a process that assures that the drug has the structural characteristics in **[**14]** the Enoxaparin Monograph, the 207 Method was not included in that monograph and was therefore not mandatory. Defendants request that the Court take judicial notice of eight documents that purportedly show that the method was not mandatory.

As a preliminary matter, Amphastar quibbles with the introduction of extrinsic documents and contends that the Court cannot take judicial notice of the documents for the purpose of establishing the truth of the statements therein. As the Court stated in its July, 2016 Memorandum and Order in this case, it construes defendants' request as pertaining to the existence of the documents and the statements therein but not to acceptance of the truth of such statements.[1] The Court will take judicial notice of the existence of the documents identified by defendants.

[1] The First Circuit Court of Appeals did not address in its opinion this Court's ruling on defendants' request to take judicial notice. *Amphastar Pharms., Inc. v. Momenta Pharms., Inc., 850 F.3d 52 (1st Cir. 2017)*.

See e.g., *Torrens v. Lockheed Martin Servs. Grp., Inc., 396 F.3d 468, 473 (1st Cir. 2005)* (taking judicial notice of the existence of a document but not for the truth of the statements made therein).

> *Section 2 of the Sherman Act* makes it illegal to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.

15 U.S.C. § 2. To state a monopolization claim under *§ 2*, a plaintiff **[**15]** must adequately allege that defendant (1) has monopoly power in the relevant market and (2) has engaged in illicit "exclusionary practices" with "the design or effect of protecting or enhancing its monopoly position". *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 125 (1st Cir. 2011)* (quoting *Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 195 (1st Cir. 1996)* (internal citation omitted)).

Amphastar has articulated a cognizable claim that defendants wrongfully acquired monopoly power by deceiving the USP into adopting the 207 Method that defendants later asserted was covered by the '886 patent. The complaint contains allegations establishing that the USP adopts standards that are enforced by the FDA and plausibly alleges that the 207 Method is mandatory.

While defendants contend that the USP and the FDA made clear that some unspecified alternative to the 207 Method would be permitted, there remain fact-intensive questions about the feasibility, availability and even existence of such alternatives. See e.g., *Hosp. Auth. of Metro. Gov't of Nashville v. Momenta Pharms., Inc., 244 F. Supp. 3d 705, 716 (M.D. Tenn. 2017)* (finding that "the effect of the testing requirement on the market for enoxaparin depends on the relative feasibility of those other tests [and] the likelihood that they would be considered adequate alternatives to Method <207> under the USP standards"). Amphastar has plausibly alleged that it was required to use the 207 **[**16]** Method to obtain and maintain its generic enoxaparin approval from the FDA. The existence of alternatives is a factual question inappropriate for resolution on a motion to dismiss.

[*230] Defendants also suggest that Amphastar has failed to state an antitrust claim because Momenta opposed the adoption of the 207 Method and, therefore, Amphastar cannot demonstrate that Momenta intentionally deceived the USP. In the complaint, Amphastar alleges that defendants intentionally failed to disclose the '886 patent to the USP thereby contravening the conflict rules put in place by the USP. Those allegations are sufficient, if proven, to establish that defendants misrepresented their interest at the USP in order to secure market power.

Intentional misrepresentations designed to deceive a standard-setting organization can constitute an antitrust violation. See *Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 314 (3d Cir. 2007)*. The Third Circuit Court of Appeals outlined the contours of such a violation, holding that

> [d]eception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder. **[**17]**

Id. By incorporating patented technology into a standard, the patent-holder obtains market power because adoption of the standard eliminates alternatives to the patented techonolgy. Id. (citing *Am. Society of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 559, 102 S. Ct. 1935, 72 L. Ed. 2d 330 (1982))*. Amphastar has alleged facts sufficient to support its claim that Momenta intentionally deceived the USP to obtain market power.

C. Compulsory Counterclaim

Momenta contends that Amphastar's antitrust claims are compulsory counterclaims that Amphastar was required to raise in the patent infringement suit between the parties, Momenta Pharm., Inc. et al. v. Amphastar Pharm., Inc. et al., 11-cv-11681 (D. Mass.) ("the patent case"). Momenta suggests that because Amphastar's antitrust claims are predicated on Momenta's assertion of the '886 patent and its prosecution of the patent case, Amphastar was required to raise them in that action.

Under *Fed. R. Civ. P. 13*,

> [a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction.

Fed. R. Civ. P. 13(a). In *Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 671, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641 (1944)*, the Supreme Court held that **[**18]** a claim for antitrust damages was a permissive, rather than a compulsory, counterclaim to a prior claim of patent infringement. The Court determined that although the antitrust claim could have been asserted in the patent suit under *Fed. R. Civ. P. 13(b)*, it did not follow "that the failure to do so renders the prior judgment res judicata as respects it". Id. The First Circuit, applying Mercoid, has held that

> a counterclaim for treble damages is permissible in nature so that failure by a defendant to plead it in a prior patent suit does not bar a subsequent independent suit by him under the anti-trust laws.

Fowler v. Sponge Prods. Corp., 246 F.2d 223, 227 (1st Cir. 1957).

Momenta urges this Court to limit Mercoid to its facts and adopt methods of distinguishing its holding endorsed by two other circuit courts. The Second Circuit Court of Appeals has drawn a distinction between antitrust claims that rely on misuse of a valid patent as opposed to antitrust **[*231]** claims based on patent invalidity. *Critical-Vac Filtration Corp. v. Minuteman Intern., Inc., 233 F.3d 697, 703 (2d Cir. 2000)*. Because invalidity defenses in patent cases are generally related to the underlying patent infringement claims, the Court determined that the Mercoid exception to Fed. R. Civ. 13(a) did not apply because Mercoid involved an antitrust claim based on misuse of a valid patent. *Id. at 703-04*.

Amphastar's **[**19]** antitrust claims do not implicate the validity of the '886 patent. Instead, Amphastar claims that defendants conspired to deceive the USP and relies on a theory of misuse of a valid patent. Momenta's insistence that the patent misuse/patent validity distinction applies is, therefore, tenuous. But cf. *Eon Labs., Inc. v. Smithkline Beecham Corp., 298 F. Supp. 2d 175, 181 (D. Mass. 2003)* (finding that where an antitrust claim was based on patent invalidity the patent misuse/patent validity distinction from Critial-Vac applied). Although Momenta is correct that the facts underlying Amphastar's equitable defenses in the patent case are entwined in the antitrust claims in this case, the Court is bound by Fowler and, accordingly, the patent case does not bar a subsequent independent suit under the antitrust laws. *Fowler, 246 F.2d at 227*.

D. Conspiracy

Defendants contend that Counts 1 and 3 of the complaint must be dismissed because Amphastar fails to plead facts supporting a plausible inference that Sandoz joined an antitrust conspiracy. Instead, defendants suggest, Amphastar makes a conclusory statement that Sandoz entered into a collaboration agreement with Momenta and acted in concert during the USP proceedings. Amphastar responds by stressing that the complaint sufficiently alleges an unlawful conspiracy **[**20]** by describing the terms of a collaboration and license agreement which would provide financial incentive for defendants to remain the sole providers of generic enoxaparin in the market.

Section 1 of the Sherman Act prohibits, in relevant part, "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies] in restraint of trade or commerce". *15 U.S.C. § 1*. To state a claim under *Section 1*, an antitrust plaintiff must present either direct or circumstantial evidence of defendants' "conscious commitment to a common scheme designed to achieve an unlawful objective". *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 43 (1st Cir. 2013)* (citing *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*).

Amphastar plausibly alleges that the collaboration agreement between Sandoz and Momenta created financial incentives for the companies to exclude other producers of generic enoxaparin from the marketplace. It purportedly documented specific milestone payments for maintaining their status as the sole providers and Sandoz's participation in the USP meetings concerning the 207 Method. See e.g., *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc., 611 F.3d 495, 503 (9th Cir. 2010)* (finding that the plaintiff adequately pled the existence of a conspiracy by demonstrating that defendant had the intent to restrain trade by entering into a contract). Accordingly, Amphastar has alleged facts sufficient to support their **[**21]** claims under *Section 1* of the Sherman Act.

ORDER

For the foregoing reasons, defendants' motion to dismiss (Docket No. 17) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton

Nathaniel M. Gorton

United States District Judge

Dated March 19, 2018

End of Document

In re Certain Carbon & Alloy Steel Prods.

United States Court of International Trade

March 19, 2018, Issued

Inv. No. 337-TA-1002

Reporter
2018 Ct. Intl. Trade LEXIS 42 *; 2018-1 Trade Cas. (CCH) P80,318

In the Matter of CERTAIN CARBON AND ALLOY STEEL PRODUCTS

Core Terms

antitrust, Steel's, unfair act, unfair methods of competition, importation, Clayton Act, anti trust law, antitrust claim, Sherman Act, district court, articles, standing requirement, pricing, federal court, allegations, practices, antitrust violation, matter of law, parties, Notice, unfair trade practice, domestic, competitors, limitations, conspiracy, private party, trade secret, misappropriation, investigations, commerce

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

HN1[] **Sherman Act, Claims**

When a complaint alleges a violation of the Sherman Act as the basis for unfair methods of competition or unfair acts under § 337(a)(1)(A) of the Tariff Act of 1930, *19 U.S.C.S. § 1337(a)(1)(A)*, the complaint must also allege antitrust injury.

International Trade Law > US International Trade Commission Proceedings > Investigations

International Trade Law > US International Trade Commission Proceedings > Judicial Review

HN2[] **US International Trade Commission Proceedings, Investigations**

The U.S. International Trade Commission is a creature of statute, and must find authority for its actions in its enabling statute.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Tariff Act

HN3[] Scope, Monopolization Offenses

On the face of the statute, a violation of *19 U.S.C.S. § 1337(a)(1)(A)* requires that there be unfair methods of competition or unfair acts in the importation of articles. It also requires that the threat or effect of the unfair method of competition or unfair act be to destroy, substantially injure, or prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. *19 U.S.C.S. § 1337(a)(1)(A)(i)*-1337(a)(1)(A)(iii).

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Tariff Act

HN4[] Exports & Imports, Tariff Act

With certain narrow exceptions, *19 U.S.C.S. § 1337(c)* entitles respondents to present the same defenses in a *§ 1337* proceeding that are available in district court.

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Tariff Act

International Trade Law > US International Trade Commission Proceedings > Investigations

HN5[] Exports & Imports, Tariff Act

Over the years, the U.S. International Trade Commission has interpreted unfair methods of competition or unfair acts under *19 U.S.C.S. § 1337* to apply to a broad range of substantive law, such as trade secret misappropriation, common law trademark infringement, Lanham Act violations, and ***antitrust law***. Consistent with the recognition that any determination of unfair acts is dependent upon the private rights between parties, when the Commission is asked to look to a body of established federal statutory law for defining an unfair act, the Commission is guided by the express congressional limitations on the scope of that federal law as applied in district court.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN6[] Sherman Act, Claims

A private party seeking to establish an antitrust violation must also show that it has suffered an injury cognizable under the antitrust laws and this antitrust injury must be a result of the alleged anti-competitive conduct.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] **Sherman Act, Claims**

On its face, the language of the Sherman Act is very broad and could be interpreted to proscribe all contracts in restraint of trade. The Supreme Court has never taken such a literal approach to its language. Rather, in interpreting *15 U.S.C.S. § 1*, the Supreme Court has been guided by the principle that the antitrust laws were enacted for the protection of competition, not competitors, and that the Sherman Act should be applied consistent with its purpose of protecting competition. Thus, the Court has held that *§ 1* only addresses unreasonable restraints, i.e., whether its anticompetitive effects outweigh its pro-competitive effects.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN8[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Per se and rule-of-reason analysis are two methods of determining whether a restraint is unreasonable. The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *15 U.S.C.S. § 1* of the Sherman Act. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The per se rule, on the other hand, eliminates the need to study the reasonableness of an individual restraint in light of courts having considerable experience with the restraint at issue and knowing it to have manifestly anticompetitive effects. The per se rule is a presumption of unreasonableness based on business certainty and litigation efficiency. Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN9[] **Standing, Clayton Act**

Sections 4 (damages) and 16 (injunctive relief) of the Clayton Act provide the vehicle for private enforcement of the Sherman Act and other antitrust laws in district court. Section 4 provides a cause of action to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. *15 U.S.C.S. § 15*. It thus requires a plaintiff to allege that the unlawful antitrust conduct caused the plaintiff 's injury. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN10[] **Sherman Act, Claims**

The injury a private litigant seeking to enforce the Sherman Act must demonstrate cannot simply be harm to its business but must instead be an antitrust injury. Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Actions that are per se unlawful under the Sherman Act may nonetheless have some pro-competitive effects, even though the actions may disadvantage particular private parties. Therefore, consistent with ***antitrust law***'s statutory purpose of protecting competition, in order for a private party to have standing to bring an antitrust claim under the Sherman Act in district court, the plaintiff must allege that its injury stems from a competition-reducing aspect or effect of the defendant's behavior. This antitrust injury requirement ensures that harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and prevents losses that stem from competition from supporting suits by private plaintiffs for either damages or equitable relief. Pro-competitive or efficiency-enhancing aspects of practices that nominally violate antitrust laws should play no role with respect to providing relief based on that violation. Thus, antitrust injury is an essential substantive element to ensuring proper enforcement of antitrust laws.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN11[] **Attempts to Monopolize, Elements**

In the context of pricing practices, only predatory pricing has the requisite anticompetitive effect to satisfy the antitrust injury requirement. The Supreme Court has articulated a two-prong test for predatory pricing: first, a plaintiff must prove that the prices complained of are below an appropriate measure of its rival's costs (below-cost pricing); and the second prerequisite is a demonstration that the competitor had a dangerous probability, of recouping its investment in below-cost prices (recoupment).

Antitrust & Trade Law > Sherman Act > Claims

International Trade Law > US International Trade Commission Proceedings > Investigations

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN12[] Sherman Act, Claims

Given that antitrust injury is a requirement of an antitrust claim brought by a private plaintiff in district court, the U.S. International Trade Commission finds that for a Sherman Act claim to constitute "unfair methods of competition and unfair acts" under *19 U.S.C.S. § 1337(a)(1)(A)*, the private complainant must allege antitrust injury. As in district court, this requirement serves to ensure that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior since it is inimical to the antitrust laws to award damages—or in the case of a *§ 1337* violation, receive an exclusion order or cease and desist order—for losses stemming from continued competition.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Tariff Act

HN13[] Scope, Monopolization Offenses

19 U.S.C.S. § 1337(a)(1)(A) is not merely a statute to protect competitors but also a statute to preserve competition. The "threat or effect" prong of *§ 1337(a)(1)(A)(i)*, *1337(a)(1)(A)(ii)*, *1337(a)(1)(A)(iii)* may be satisfied by either injury to the domestic industry or by a showing of restraint or monopolization of trade. *Section 1337* directs the imposition of an exclusion order in a case where an unfair method or act has the effect or tendency to restrain or monopolize trade and commerce in the United States irrespective of whether a domestic industry is experiencing injury.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Tariff Act

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN14[] Sherman Act, Claims

The protectionist focus of *19 U.S.C.S. § 1337* is protection from the harm of an "unfair act" in the importation of goods, here an alleged antitrust violation. When that alleged act does not cause the type of harm required for a private party to establish an antitrust violation, the complaining party has not demonstrated that the act is an unfair act required to invoke *§ 1337*. Congress and courts have defined the elements necessary for a plaintiff to show an antitrust claim in district court under the Sherman Act.

Business & Corporate Compliance > ... > International Commerce & Trade > Exports & Imports > Tariff Act

HN15[] Exports & Imports, Tariff Act

"Unfair acts" and the "threat or effect" language are separate elements for showing a violation of *19 U.S.C.S. § 1337(a)(1)(A)*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > Federal Trade Commission Act

International Trade Law > US International Trade Commission Proceedings > Investigations

Antitrust & Trade Law > Federal Trade Commission Act > US Federal Trade Commission

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

International Trade Law > US International Trade Commission Proceedings > Judicial Review

***HN16*[] Deceptive & Unfair Trade Practices, Federal Trade Commission Act**

It is true that the U.S. International Trade Commission, like the Federal Trade Commission (FTC), has independent authority to institute and litigate investigations under *19 U.S.C.S. § 1337*. *19 U.S.C.S. § 1337(b)(1)*. However, unlike the FTC and the Department of Justice, which can exercise judgment akin to prosecutorial discretion (taking into consideration the effects on competition of the actions at issue), the Commission's discretion regarding whether to institute investigations based on properly-filed complaints is not unlimited. It is correct that a *§ 1337* proceeding is not purely private litigation between the parties but rather is an investigation by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States. Significantly, however, any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent. The 1975 amendment of the statute which added the provision in *§ 1337(c)*, "All legal and equitable defenses may be presented in all cases" was a major change which reflects a recognition that essentially private rights are being enforced in the proceeding.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

International Trade Law > US International Trade Commission Proceedings > Investigations

International Trade Law > US International Trade Commission Proceedings > Judicial Review

***HN17*[] Standing, Requirements**

19 U.S.C.S. § 1337 bifurcates the violation and remedy phases of an investigation. After a violation is found and as part of the remedy phase of the investigation, *§ 1337* requires the International Trade Commission to consider the effect of any exclusion order and/or cease and desist order upon the competitive conditions in the United States economy, and United States consumers. *19 U.S.C.S. § 1337(d)(1)*, *1337(e)(1)*. This "public interest" analysis addresses a different question from the antitrust injury requirement. In the case of an exclusion order, it asks the Commission to consider the effect of excluding the violative products from the United States on competition and U.S. consumers (along with the other public interest factors). On the other hand, the antitrust injury requirement asks a tribunal to assess what effect on competition the accused products are having while they are in the market. Thus, the statutory public interest factors considered during the remedy portion of the investigation do not substitute for the requirement of antitrust injury.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN18[] Sherman Act, Claims

As the federal courts have recognized, antitrust injury is a requirement for a private party to bring a claim under the Sherman Act, consistent with the statutory purpose of protecting competition.

Antitrust & Trade Law > Sherman Act > Claims

International Trade Law > US International Trade Commission Proceedings > Investigations

International Trade Law > US International Trade Commission Proceedings > Judicial Review

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN19[] Sherman Act, Claims

The antitrust injury requirement is not a bar to antitrust actions at the International Trade Commission. Rather, it ensures that antitrust claims asserted in *19 U.S.C.S. § 1337* are adjudicated in a manner that is not inconsistent with existing, clear federal ***antitrust law***.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN20[] Sherman Act, Claims

In federal district courts, every private antitrust plaintiff, including those challenging an agreement as unlawful under *15 U.S.C.S. § 1*, must include in its complaint allegations of antitrust injury.

Business & Corporate Compliance > ... > Types of Commercial Transactions > Negotiable Instruments > Recoupment

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN21[] Negotiable Instruments, Recoupment

To survive a motion to dismiss, a complaint must state a plausible claim for relief, which requires that the complaint show that the pleader is entitled to relief, *Fed. R. Civ. P. 8(a)(2)*. If proof of recoupment is required to succeed on the claim, allegations of recoupment must appear in the complaint to show an entitlement to relief. During discovery, the plaintiff must show that there is factual support for each component of the claim or it will be rejected as a matter of law on summary judgment.

International Trade Law > US International Trade Commission Proceedings > Investigations

International Trade Law > US International Trade Commission Proceedings > Judicial Review

HN22[] **US International Trade Commission Proceedings, Investigations**

Under the International Trade Commission's jurisprudence, complainants are typically allowed to amend the complaint for good cause. *19 C.F.R. § 210.14(b)(1)*.

Judges: [*1] Lisa R. Barton, Secretary to the Commission. DISSENTING OPINION OF COMMISSIONER MEREDITH M. BROADBENT.

Opinion by: Lisa R. Barton

Opinion

COMMISSION OPINION

On November 14, 2016, the presiding Administrative Law Judge ("ALJ") in the above-identified investigation issued Order No. 38, an initial determination ("ID") granting Respondents' motion to terminate Complainant's antitrust claim under *19 C.F.R. § 210.21* and, in the alternative, under *19 C.F.R. § 210.18*. The Commission has determined to affirm in part, as modified by our reasoning below, and reverse in part the ID (Order No. 38). Specifically, the Commission has determined that antitrust injury standing is required for antitrust claims before the Commission. Complainant does not argue that it meets this requirement and, to the contrary, represents on review that it will not amend the complaint to plead or prove antitrust injury as Complainant contends that it is unable to prove antitrust injury. Accordingly, for the reasons discussed below, we affirm the dismissal of Complainant's sole remaining claim, the antitrust claim. Commissioner Broadbent dissents and has filed a dissenting opinion.

I. BACKGROUND

By publication in the Federal Register on June 2, 2016, the Commission instituted this **[*2]** investigation based on a complaint filed by Complainant United States Steel Corporation of Pittsburgh, Pennsylvania ("U.S. Steel" or "Complainant"), alleging a violation of *section 337 of the Tariff Act of 1930*, as amended, *19 U.S.C. § 1337* ("section 337").[1] *See* *81 Fed. Reg. 35381*-2 (June 2, 2016). Specifically, the Notice of Investigation states that the Commission will determine whether there is a violation of *section 337(a)(1)(A)* in the importation, the sale for importation, or the sale after importation into the United States of certain carbon and alloy steel products by reason of: (1) a conspiracy to fix prices and control output and export volumes under *section 1 of the Sherman Act*, the threat or effect of which is to restrain or monopolize trade and commerce in the United States; (2) misappropriation and use of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States; or (3) false designation of origin or manufacturer, the threat or effect of which is to destroy or substantially injure an industry in the United States. *Id.* The Commission later terminated the investigation with respect to U.S. Steel's trade secret misappropriation allegations based on Complainant's withdrawal of those allegations. *See Certain **[*3]** Carbon and Alloy Steel Products*, Comm'n Notice (Mar. 24, 2017). The Commission also terminated the investigation with respect to the false designation of origin allegations against non-defaulting Respondents based on motions for summary determination by those Respondents. The ALJ granted the motions and neither

[1] U.S. Steel filed an amended complaint on September 22, 2016. EDIS Doc. No. 591156. U.S. Steel's amended complaint alleges, *inter alia*, a *section 337* violation through "a conspiracy to fix prices and control output and export volumes, in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*." Amended Complaint at ¶ 2.

Complainant nor any other party petitioned for review of her order. *See Certain Carbon and Alloy Steel Products*, Comm'n Notice (Nov. 1, 2017).

The notice of investigation identified forty (40) respondents who are Chinese steel manufacturers or distributors, as well as some of their Hong Kong and/or United States affiliates. *See* *81 Fed. Reg. 35381*-2 (June 2, 2016). The Commission found several of the distributor respondents to be in default.[2] *See* *Certain Carbon and Alloy Steel Products, Inv. No. 337-TA-1002, Comm'n Notice, 2016 ITC LEXIS 1539 (Oct. 14, 2016)*, *Comm'n Notice, 2016 ITC LEXIS 1250 (Oct. 18, 2016)*, *Comm'n Notice, 2016 ITC LEXIS 1365 (Nov. 18, 2016).* The notice of investigation also names the Office of Unfair Import Investigations as a party in this investigation. *See* *81 Fed. Reg. 35381*-2 (June 2, 2016).

A. Summary of ID (Order No. 38)

On August 26, 2016, the manufacturing respondents[3] (referred to, hereinafter, as "Respondents") filed a motion to terminate **[*4]** U.S. Steel's *Sherman Act* claim under *19 C.F.R. § 210.21*. Respondents argued that U.S. Steel's amended complaint does not satisfy antitrust pleading requirements and must therefore be dismissed. U.S. Steel and the Commission Investigative Attorney ("IA") each filed a response in opposition to the motion to terminate.[4]

On November 14, 2016, the ALJ issued the subject ID (Order No. 38), granting Respondents' motion under *19 C.F.R. § 210.21* and, in the alternative, under *19 C.F.R. § 210.18*. The ALJ reasoned that U.S. Steel is required to show antitrust standing in order to state an antitrust claim under *section 337(a)(1)(A)*. *See* Order No. 38 at 10. The ALJ found that "[b]y claiming an illegal restraint of trade . . . U.S. Steel merely satisfie[d] the pleading requirements under the threat or effect prong of *section 337(a)(1)(A)(iii)*, but it has not properly alleged that the practices complained of constitute an unfair method of competition or unfair act under *section 337(a)(1)(A)*." *Id.* at 10-11. The ALJ explained that "the limitations on private antitrust litigants must apply under *section 337* as they do in federal courts." *Id.* at 10 (citing *Tianrui Group Co. Ltd. v. Intl Trade Comm'n, 661 F.3d 1322, 1333 (Fed. Cir. 2011)* ("*Tianrui*")). The ALJ further explained that "[u]nder federal ***antitrust law***, it is firmly established that a private complainant must show antitrust standing." *Id.*

Having found that **[*5]** a showing of antitrust injury was required, the ALJ held that "[i]n the context of pricing practices challenged by rivals as depressing their profits, 'only predatory pricing has the requisite anticompetitive effect.'" *Id.* at 21 (citing *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("ARCO")). The All concluded that because "U.S. Steel's complaint does not allege predatory pricing or the facts necessary to show predatory pricing[,] . . . [t]he complaint therefore is fatally deficient as a matter of law."

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[2] In light of these defaults, and as it relates to the false designation of origin claim only, the issue of remedy remains. Simultaneously with this opinion, the Commission is issuing a notice requesting briefing on the public interest, remedy, and bonding in connection with the false designation of origin claim.

[3] The manufacturing respondents are: Baosteel America, Inc.; Shanghai Baosteel Group Corporation; Baoshan Iron & Steel Co., Ltd.; China Shougang International Trade & Engineering Corporation; Hebei Iron and Steel Group Co., Ltd.; Hebei Iron & Steel Group Hengshui Strip Rolling Co., Ltd.; Hebei Iron & Steel (Hong Kong) International Trade Co., Ltd.; Masteel Iron and Steel Co. Ltd.; Magang (Group) Holding Co. Ltd.; Anshan Iron and Steel Group; Angang Group International Trade Corporation; Angang Group Hong Kong Co. Ltd.; Wuhan Iron and Steel Group Corp.; Wuhan Iron and Steel Co., Ltd.; WISCO America Co., Ltd.; Jiangsu Shagang Group; and Jiangsu Shagang International Trade Co., Ltd. *See* Respondents' motion to terminate at 1 n.1, filed August 26, 2016, EDIS Doc. No. 589182.

[4] Although the IA agreed that antitrust injury should be required, the IA argued before the ALI that dismissal was not warranted as "U.S. Steel could allege facts that would establish predatory pricing and/or recoupment 'in the future.'" *See* Order No. 38 at 8 (citation omitted). In light of Complainant's representations to the Commission on review that it would not plead or prove antitrust injury, the IA ultimately took the position that no remand was necessary. *See, e.g.*, Transcript of Oral Argument (as corrected on May 5, 2017, EDIS Doc. No. 610791) at 224-25 (hereinafter, referred to as "Tr.").

Id. at 23. The ALJ found that "failure to plead antitrust injury is grounds for dismissal at the earliest possible stage of litigation." *Id.* at 28. The All concluded that "dismissal with prejudice is appropriate." *Id.* at 30.

B. Proceedings before the Commission Related to Review of the ID

On November 23. 2016, Complainant and the IA filed petitions for review of the ID. Complainant U.S. Steel also requested oral argument before the Commission. On December 1, 2016, Respondents filed a combined response to the petitions for review. Also on December 1, 2016, Complainant filed a response to the IA's petition for review.

On December 19, 2016, the Commission issued a Notice determining to review the ID and requesting written submissions in response to certain questions from **[*6]** the Commission. *See* 81 Fed. Reg. 94416-7 (Dec. 23, 2016). The parties filed initial written submissions and responsive submissions in response to the Commission's questions. On the same day that responsive submissions were filed, the International Center for Law & Economics, a non-party, filed comments regarding the Commission's determination to review the ID. On February 24, 2017, the Commission issued a notice setting the date for an oral argument to March 14, 2017. *See Certain Carbon and Alloy Steel Products, Inv. No. 337-TA-1002, Comm'n Notice, 2017 ITC LEXIS 289 (Feb. 24, 2017)*.

On March 3, 2017, the Commission decided to seek further written submissions from the public and to reschedule the oral argument for April 20, 2017. *See* 82 Fed. Reg. 13133-4 (Mar. 9, 2017). Four non-parties filed written submissions in response to the Commission's March 3, 2017, Notice, namely, Maxell Corporation of America and Hitachi Maxell, Ltd. (collectively, "Maxell"); AK Steel Corporation ("AK Steel"); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("USW"); and former Commissioner Daniel R. Pearson, then with the Cato Institute. The parties filed responses to the non-party **[*7]** submissions.

On April 20, 2017, the Commission heard oral arguments from the parties on the antitrust injury issue.

C. Summary of Party Arguments

As noted above, the Commission has received extensive briefing and oral argument on the issues under review.[5] U.S. Steel argues the ALJ eared because a complaint alleging a violation of *section 337* based on *section 1* of the Sherman Act does not need to allege antitrust injury. It argues that *section 337* is a protectionist statute and that "[t]he statutory history, Commission determinations, case law, and other authority show that the policy underlying *Section 337(a)(1)(A)(iii)* is to protect American companies and workers from any threatened or actual restrain of their trade and commerce in the United States caused by unfairly traded imports." U.S. Steel's Jan. 17, 2017 Br. at 3-4 (EDIS Doc. No. 601088); *id.* at 13, 20. It contends that antitrust injury is about harm to consumers; it is fundamentally different from *Section 337(a)(1)(A)* injury, which addresses harm to American companies and workers." *Id.* at 27. It further posits that any impact of an exclusion order on competitive conditions and consumers should be considered by the Commission "***after*** a violation is found," as part of the Commission's public interest analysis. *Id.* at 4 (emphasis in **[*8]** original); *id.* at 8-9, 37-38.

Respondents and the IA, on the other hand, argue that U.S. Steel's complaint must allege antitrust injury. Respondents argue that antitrust injury is required as a matter of law under Supreme Court precedent and that predatory pricing is required both to establish standing and to prove the substantive antitrust claim. Respondents assert that *section 337(a)(1)(A)(iii)* is "not merely a statute to protect competitors," *i.e.*, a trade statute, "but also a statute to preserve competition,'" *i.e.*, an antitrust statute. Respondents' Feb. 1, 2017 Resp. Br. at 2-3 (EDIS Doc. No. 602530) (citing *Certain Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29, 1978 ITC LEXIS 63, 1978 WL 50692, *1, 17 (Feb. 22, 1978)* ("*Steel Pipe*")[6]). Respondents assert that "*Section 337*, when used as an

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[5] Although the Commission briefly summarizes the party arguments here, as it does in all investigations, the Commission has fully considered all of the arguments in reaching its determination.

antitrust law, must not be allowed to be used by competitors to undermine the antitrust laws' fundamental purpose." Respondents' Jan. 17, 2017 Br. at 30 (EDIS Doc. No. 601087). Respondents further assert that antitrust injury standing is a substantive element of a private antitrust claim, not a public interest factor. Respondents' Feb. 1, 2017 Resp. Br. at 5 (EDIS Doc. No. 602530).

The IA asserts that Commission authority and the legislative history show that *section 337* "embodied the goal of promoting **[*9]** fair trade, as well as that of protecting American industry." IA's Jan. 17, 2017 Br. at 3-4 (EDIS Doc. No. 601084) (citations omitted). The IA asserts that antitrust injury is required in cases based on a complaint by a private party (such as U.S. Steel) but would not be a required element for an investigation self-initiated by the Commission. *Id.* at 28-29.

II. DISCUSSION

The central issue presented is whether Complainant must plead and establish antitrust injury in a *section 337* investigation predicated on *section 1* of the Sherman Act. As explained below, the Commission determines, as did the ALJ, that ***HN1***[] when a complaint alleges a violation of the *Sherman Act* as the basis for "[u]nfair methods of competition [or] unfair acts" under *section 337(a)(1)(A)*, the complaint must also allege antitrust injury.

A. Unfair Methods of Competition and Unfair Acts Under *Section 337(a)(1)(A)*

HN2[] Our analysis must begin with the language of *section 337* as our reviewing Court has held that the Commission "is a creature of statute, and must find authority for its actions in its enabling statute." *Kyocera Wireless Corp. v. Int'l Trade Comm'n, 545 F.3d 1340, 1355 (Fed. Cir. 2008)*. *Section 337(a)(1)(A)* provides:

> (a)(1) . . . [T]he following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
>
>> (A) Unfair **[*10]** methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is-
>>
>> (i) to destroy or substantially injure an industry in the United States;
>>
>> (ii) to prevent the establishment of such an industry; or
>>
>> (iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A). ***HN3***[] On the face of the statute, a violation of *section 337(a)(1)(A)* requires that there be "[u]nfair methods of competition [or] unfair acts in the importation of articles." It also requires that the "threat or effect" of the unfair method of competition or unfair act be to destroy, substantially injure, or prevent the establishment of a domestic industry, or to restrain or monopolize trade and commerce in the United States. *See 19 U.S.C. § 1337(a)(1)(A)(i)-(iii)*.

In this investigation, U.S. Steel alleges a violation of *section 337(a)(1)(A)* based on importation and sale of carbon alloy steel involving an unlawful conspiracy to fix prices and control output and exports between the respondents in breach of *section 1* of the Sherman Act. *See* Amended Complaint at ¶¶ 71-99. U.S. Steel's complaint identifies violation of the *Sherman Act* as the "[u]nfair methods of competition **[*11]** [or] unfair acts" under *section 337*. *See, e.g., id.* at ¶ ¶ 2, 71. Accordingly, the starting point of our analysis is the interpretation of "[u]nfair methods of competition [or] unfair acts," a term which is not defined in the statute.

What is now *section 337(a)(1)(A)* dates back to section 316 of the Tariff Act of 1922. Similar to current statutory language at issue, section 316 declared "unfair methods of competition and unfair acts in the importation of articles

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[6] President Carter disapproved the Commission's issuance of remedial orders on policy grounds. *See Steel Pipe, 43 Fed. Reg. 17789 (Apr. 26, 1978)*.

into the United States" to be unlawful. *19 U.S.C. § 174* (repealed 1930); *Pub. L. 67-318, 42 Stat. 943 (Sept. 21, 1922)*. The legislative history indicates that Congress did not explicitly prescribe what conduct qualifies as "unfair methods of competition and unfair acts" under the newly enacted provision. Instead, "Congress intended to allow [the Commission] wide discretion in determining what practices are to be regarded as unfair." *In re Von Clemm, 229 F.2d 441, 444, 43 C.C.P.A. 56 (C.C.P.A. 1955)*. Specifically, in describing this provision, the Senate Committee Report on the 1922 Act stated that, "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had." S. Rep. No. 67-595, at 3 (1922); **[*12]** *see also* H.R. Conf. Rep. No. 67-1223 at 146 (1922). Senator Reed Smoot, the 1922 Act's primary sponsor, explained that section 316 was intended to be "an antidumping law with teeth in it—one which will reach all forms of unfair competition in importation." 62 Cong. Rec. 5874, 5879 (1922). When Congress subsequently enacted the Tariff Act of 1930, section 316 of the 1922 Act became *section 337* of the new Act. While the legislative history of the 1922 Act reveals that "[u]nfair methods of competition [or] unfair acts" was intended to be a broad term, it does not resolve the issue currently before the Commission.[7]

Section 337 has been amended several times since 1930 but has maintained the "unfair methods of competition and unfair acts" language. Notably, "[p]rior to 1974 the Commission was barred, by judicial decision starting at least as early as 1930, from reviewing the validity of patents brought before it under *section 337*." *Lannom Mfg. CO. v. Int'l Trade Comm'n, 799 F.2d 1572, 1576 (Fed. Cir. 1986)*. The *Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975)*, removed this bar, and expressly authorized the Commission to consider "[a]ll legal and equitable defenses . . . in all cases." *19 U.S.C. § 1337(c)*. ***HN4***[] With certain narrow exceptions not relevant here, this provision entitles respondents to present the same defenses in a section 337 proceeding that are available in **[*13]** district court. *See* *Lannom, 799 F.2d at 1577-78*; *Kinik Co. v. Int'l Trade Comm'n, 362 F.3d 1359, 1362-63 (Fed. Cir. 2004)*. In *Young Engineers*, the Federal Circuit observed that the 1974 amendment of *section 337* permitting the presentation of all legal and equitable defenses in an instituted investigation reflected recognition by Congress that "essentially private rights are being enforced in the proceeding" and "any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent." *See* *Young Eng'rs Inc. v. Int'l Trade Comm'n, 721 F.2d 1305, 1315 (Fed. Cir. 1983)*.

HN5[] Over the years, the Commission has interpreted "[u]nfair methods of competition [or] unfair acts" under *section 337* to apply to a broad range of substantive law, such as trade secret misappropriation, common law trademark infringement, *Lanham Act* violations, and ***antitrust law***.[8] Consistent with the recognition noted above that "any determination of unfair acts is dependent upon the private rights between parties," when the Commission is asked to look to a body of established federal statutory law for defining an unfair act, the Commission is guided

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[7] Counsel for both Complainant and Respondents described the legislative history for *section 337* on this issue as "sparse." Tr. at 48 (Mr. Glass), 130 (Ms. Aranoff); *see also* Office of Unfair Import Investigations' Jan. 17, 2017 Br. at 11 (EDIS Doc. No. 601084) (noting that legislative history "does not shed much light" on the issue).

[8] The Commission has considered *section 337* in the context of antitrust allegations. The Commission has issued opinions in several cases. *See, e.g., Watches, Watch Movements, and Watch Parts*, Inv. No. 337-19, TC Pub. 177 (June 1966); Tractor Parts, Inv. No. 337-22, TC Pub. 443 (June 1971); *Electronic Audio and Related Equipment*, Inv. No. 337-TA-7, USITC Pub. 768 (Apr. 1976); *Chicory Root-Crude and Prepared*, Inv. No. 337-TA-27, 1977 WL 52340 (Mar. 30, 1977); *Steel Pipe, 1978 ITC LEXIS 63, 1978 WL 50692 (Feb. 22, 1978)*; *Certain Airtight Cast-Iron Stoves, Inv. No. 337-TA-69, USITC Pub. 1126, 1981 ITC LEXIS 228 (Jan. 1981)*; *Certain Electrically Resistive Monocomponent Toner, Inv. No. 337-TA-253, USITC Pub. 2069, 1988 ITC LEXIS 14 (Mar. 1988)*. The Commission has also declined to review (thereby adopting) ALJ decisions. *See, e.g.,* *Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same, Inv. No. 337-TA-413, USITC Pub. 3307, 2000 ITC LEXIS 490 (May 2000)*. At least three investigations were terminated pursuant to a consent order or settlement agreements between the parties. *Angolan Robusta Coffee*, Inv. No. 337-TA-16, ***41 Fed. Reg. 13418 (Mar. 30, 1976)***; *Color Television Receiving Sets*, Inv. No. 337-TA-23, ***42 Fed. Reg. 39492 (Aug. 4, 1977)***; *Certain Precision Resistor Chips*, Inv. No. 337-TA-63, *45 Fed. Reg. 16360 (Mar. 13, 1980)*. A finding of violation on an antitrust claim was made in one investigation and the recommended remedy was rejected by the President. *Steel Pipe*, Inv. No. 337-TA-29, *43 Fed. Reg. 17789 (Apr. 26, 1978)*. A violation finding was made in a second case but was rescinded upon reconsideration. ***Tractor Paris, Inv. No. 337-22, 36 Fed. Reg. 15077 (Aug. 12, 1971)***.

by the express congressional limitations on the scope of that federal law as applied in district court. *See* *Tianrui, 661 F.3d at 1333*. For example, when the Commission is asked to address an allegation of patent infringement in the importation **[*14]** of goods under *section 337*, the Commission follows substantive U.S. patent law.[9] *See Certain Crawler Cranes and Components Thereof*, Investigation No. 337-TA-887, Comm'n Op. at 17-18 (May 6, 2015) (public version).

In *Crawler Cranes*, the complainant asserted a violation of section 337 based on the future infringement of patent claims covering methods of operating a mobile lift crane. Although the accused cranes were imported into the United States, the complainant conceded that the record contained no proof that the steps of the asserted method claims were yet performed in the United States as required to find infringement under the Patent Act. Nonetheless, the complainant argued that the Commission has broad authority under section 337 to address unfair acts including unfair acts in their incipiency and therefore is not bound to follow the same limits on patent infringement as exist in district court. The Commission **[*15]** declined the invitation to create a right under section 337 not recognized under U.S. patent law. The Commission explained that "Congress in enacting section 337 of the Tariff Act of 1930 (*19 USCA § 1337*) [did not intend] to broaden the field of substantive patent rights." *Id.* at 17 (citation omitted). The Commission therefore found no violation of *section 337* based on the undisputed fact that there was no patent infringement under *35 U.S.C. § 271*.

Similar to the example with patent law, the Commission has been guided by the express congressional limitations on federal law in other substantive areas when determining the scope of unfair acts under *section 337(a)(1)(A)*. *In Certain Carbon Spine Board*, the Commission dismissed a *section 337(a)(1)(A)* claim predicated on trade dress infringement because the complaint failed to allege all necessary elements for trade dress infringement under the *Lanham Act*. *See* *Certain Carbon Spine Board, Cervical Collar, CPR Masks, and Various Medical Training Manikin Devices, and Trademarks, Copyrights of Product Catalogues, Product Inserts and Components Thereof, Inv. No. 337-TA-1008, Comm'n Op. at 10-11, 2017 ITC LEXIS 823 (June 14, 2017)*. In *Certain Hydroxyprogesterone Caproate*, the Commission declined to institute an investigation based on the Food, Drug and Cosmetic Act and stated **[*16]** that the "complaint does not allege an unfair method of competition or an unfair act cognizable under *19 U.S.C. § 1337(a)(1)(A)*." The Commission explained that "the Food and Drug Administration ('FDA') is charged with the administration of the Food, Drug and Cosmetic Act." *See Certain Hydroxyprogesterone Caproate and Products Containing the Same*, Docket No. 2919, Comm'n Correspondence (Dec. 21, 2012). And in *Certain Universal Transmitters for Garage Door Openers*, the Commission applied the statutory limitations of the *Digital Millennium Copyright Act (DMCA)* to a *section 337(a)(1)(A)* claim predicated on that Act. *See* *Certain Universal Transmitters for Garage Door Openers, Inv. No. 337-TA-497, Initial Determination, 2003 ITC LEXIS 673, 2003 WL 22811119, *12-13 (Nov. 4, 2003)*, *aff'd*, Comm'n Notice (Nov. 24, 2003). The Commission determined under *section 337(a)(1)(A)* that it had jurisdiction over a claim for an alleged violation of the *DMCA* but rejected the requested temporary relief because it was unlikely Complainant would succeed on the merits of its *DMCA* claim. *See Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497, Comm'n Order at 3-4 (Nov. 24, 2003).

The Federal Circuit has approved of the Commission's understanding of "[u]nfair methods of competition [or] unfair acts" as it relates to predicate federal **[*17]** substantive law. In *Tianrui*, the respondents argued on appeal that the Commission erred in finding that cognizable trade secret misappropriation under *section 337(a)(1)(A)* could take place overseas. *Tianrui, 661 F.3d at 1333*. The respondents argued against extraterritoriality by analogizing trade secret misappropriation to the domestic application of patent infringement under the Patent Act. The Federal Circuit rejected the analogy. The Court recognized that "the Commission's broad and flexible authority to exclude from entry articles produced using 'unfair methods of competition' cannot be used to circumvent express congressional limitations on the scope of substantive U.S. patent law." *Id.* But because there was "no parallel federal civil statute regulating trade secret protection," the Federal Circuit explained that "there is no statutory basis for limiting the Commission's flexible authority under *section 337(a)(1)(A)* with respect to trade secret misappropriation." *Id.* The

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[9] *19 U.S.C. § 1337(a)(1)(B)* expressly identifies the importation of "articles that . . . infringe" a valid U.S. patent as an unlawful act. This provision was added to section 337 in 1988. Prior to 1988, patent infringement was addressed under the general "[u]nfair methods of competition [or] unfair acts" language of the statute.

Court's discussion is consistent with our declining to interpret *section 337(a)(1)(A)* in a manner contrary to express proscriptions of federal ***antitrust law***.

The Commission has addressed the issue of antitrust injury in a *section 337* proceeding, albeit in a slightly different context. Specifically, the Commission **[*18]** has found antitrust injury to be a required element of a *Sherman Act* allegation raised by a respondent. In *Certain Rare-Earth Magnets*, the Commission found that ***HN6***[] "a private party seeking to establish an antitrust violation must also show . . . . that it has suffered an injury cognizable under the antitrust laws . . . [and this] 'antitrust injury' must be a result of the alleged anti-competitive conduct." *Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing Same, Inv. No. 337-TA-413, Final Initial Determination at 128, 132, 1999 ITC LEXIS 342, *194, *200 (Sept. 8, 1999) (Judge Luckem)*, *unreviewed*, Comm'n Notice (Oct. 25, 1999). Judge Luckem cited as support a Federal Circuit decision that "rejected an antitrust claim on the ground that any injury the antitrust claimant may have suffered was the result of . . . legitimate [activities] and not the result of conduct that violated the antitrust laws." *Id. at 132, 1999 ITC LEXIS 342 at *200* (citing *Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557 (Fed. Cir. 1997))*.[10]

The approach in *Rare-Earth Magnets* of looking to federal ***antitrust law*** in determining whether there is an antitrust violation is consistent with the Commission's general approach in prior investigations involving antitrust claims. *See, e.g., Chicory Root-Crude and Prepared*, 1977 WL 52340 at *4 ("The Commission has in previous investigations, both **[*19]** under the prior *section 337* and under *section 337* as it exists today, used the antitrust laws and the practice thereunder as a standard for 'unfair methods of competition and unfair acts.' [Footnote omitted.] The presiding officer recommends this in the instant investigation and we adopt such recommendation.").

In the current investigation, the predicate for U.S. Steel's claim under *section 337* is ***antitrust law***. Consistent with our approach in prior cases, we are guided by the express congressional limitations on the scope of that federal law as interpreted by federal courts. As explained below, we interpret "[u]nfair methods of competition and unfair acts" under *section 337(a)(1)(A)*, when predicated on the *Sherman Act*, to require antitrust injury.

B. The *Sherman Act* and Antitrust Injury

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[10] The only other Commission investigation in which antitrust injury doctrine was addressed was *Certain Electrically Resistive Monocomponent Toner, Inv. No. 337-TA-253, USITC Pub. 2069, 1988 ITC LEXIS 14 (Mar. 1988)*. In that case, the Commission found no *section 337* violation based on an antitrust claim. Writing separately, two Commissioners suggested the doctrine's applicability under *section 337* but did not decide whether the requirement was met on the record presented. *See id.*, *Additional Views of Vice Chairman Anne E. Brunsdale and Commissioner Ronald A. Cass at 16, 1988 ITC LEXIS 14 at *48* ("A second concern [with the final ID] is the possible absence of the sort of antitrust injury necessary to support an action under the antitrust laws."). The Commission views did not address this point -- for, against, or otherwise -- under the circumstances.

Complainant contends that the Commission implicitly decided that antitrust injury does not apply to *section 337* when it found a violation of *section 337* in the 1978 *Steel Pipe* investigation without mentioning antitrust injury. U.S. Steel's Jan. 17, 2017 Br. at 15 (EDIS Doc. No. 601088). This reading of the *Steel Pipe* decision strikes us as unreasonable. The Commission did not address antitrust injury in *Steel Pipe*, and there is no indication that the issue was even raised, which is not surprising given that the doctrine was still developing. The Supreme Court's *Brunswick* decision was handed down before *Steel Pipe* but *Brunswick* itself did not decide whether antitrust injury applied in district court to claims for injunctive relief (as opposed to damages actions) or to other substantive theories of antitrust violation. *Brunswick Corp. v Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Subsequent decisions confirmed its importance to damages claims irrespective of the theory of liability. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)* (*Robinson-Patman Act*); *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (*Sherman Act*); *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (*Sherman Act*). However, the Court did not address until nine years later whether the antitrust injury requirement applied in a district court action seeking injunctive relief. *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-10, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. *ARCO* in 1990 subsequently held that the antitrust injury requirement applied to per se violations of the *Sherman Act*. *ARCO, 495 U.S. at 341-45*. We are unpersuaded that the Commission's 1978 *Steel Pipe* decision, by not addressing antitrust injury, ruled on the issue before us.

As mentioned above, U.S. Steel alleges a violation of *section 337* predicated on *section 1* of the Sherman Act. *Section 1* of the Sherman Act, as amended, provides that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed **[*20]** guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1. ***HN7***[↑] On its face, the language of the *Sherman Act* is very broad and could be interpreted to proscribe all contracts in restraint of trade. *See* *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; *Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342-43, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. The Supreme Court has never taken such a literal approach to its language. Rather, in interpreting *Section 1*, the Supreme Court has been guided by the principle that "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*,'" *see* *ARCO, 495 U.S. at 338* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (emphasis in original)), and that the *Sherman Act* should be applied consistent with its purpose of protecting competition. *See* *Leegin, 551 U.S. at 885-86*; *Arizona, 457 U.S. at 342-43*. Thus, the Court has held that *section 1* only addresses "unreasonable" restraints, *i.e.*, whether its anticompetitive effects outweigh its pro-competitive effects. *Id.*

HN8[↑] *Per se* and rule-of-reason analysis are two methods of determining whether a restraint is "unreasonable." "The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1* [of the *Sherman Act*]." *Leegin, 551 U.S. at 885* (citation omitted). **[*21]** "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Id.* (citation omitted). The *per se* rule, on the other hand, eliminates the need to study the reasonableness of an individual restraint in light of courts having considerable experience with the restraint at issue and knowing it to have "manifestly anticompetitive effects." *Id. at 886*. "The *per se* rule is a presumption of unreasonableness based on 'business certainty and litigation efficiency.'" *ARCO, 495 U.S. at 342*. For example, the Supreme Court stated, "[r]estraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets." *See* *Leegin, 551 U.S. at 886* (citations omitted); *see also* *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

HN9[↑] *Sections 4* (damages) and *16* (injunctive relief) of the *Clayton Act* provide the vehicle for private enforcement of the *Sherman Act* and other antitrust laws in district court. *Section 4* provides a cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." *15 U.S.C. § 15*. It thus requires a plaintiff to allege that the unlawful antitrust conduct caused the plaintiff 's injury. **[*22]** [11]*See* *15 U.S.C. § 15*.

HN10[↑] The Supreme Court has held that the injury a private litigant seeking to enforce the *Sherman Act* must demonstrate cannot simply be harm to its business but must instead be an "antitrust injury." Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick, 429 U.S. at 489*. More specifically, the Supreme Court has explained that actions that are *per se* unlawful under the *Sherman Act* may nonetheless have *some* pro-competitive effects, even though the actions may disadvantage particular private parties. *ARCO, 495 U.S. at 342-43*. Therefore, consistent with ***antitrust law***'s statutory purpose of protecting competition, the Supreme Court has required that in order for a private party to have standing to bring an antitrust claim under the *Sherman Act* in district court, the plaintiff must allege that its injury "stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Id. at 344* (emphasis in original). This "antitrust injury" requirement "ensures that the harm claimed by the plaintiff corresponds to the rationale for

[11] A private plaintiff can seek an injunction under *section 16* of the Clayton Act "against threatened loss or damage by a violation of the antitrust laws." *15 U.S.C. § 26*. Antitrust injury is required in a private action seeking injunctive relief under *section 16* of the Clayton Act. *See* *Cargill, 479 U.S. at 116-18*.

finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition **[*23]** from supporting suits by private plaintiffs for either damages or equitable relief" *Id. at 342*. "Pro-competitive or efficiency-enhancing aspects of practices that nominally violate the antitrust laws . . . should play no role" with respect to providing relief based on that violation. *Id. at 344* (citation omitted). Antitrust injury, therefore, is an essential substantive element to ensuring the proper enforcement of the antitrust laws.[12] *See, e.g., ARCO, 495 U.S. at 339-40*; *Cargill, 479 U.S. at 109-12, 110 n.5*; *In re Aluminum Warehousing Antitrust Litig., 833 F.3d 151, 157 (2d Cir. 2016)*; *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*; *see generally*, IIA Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 337 (4th ed. 2014).

HN11[] The Supreme Court has explained that in the context of pricing practices, "only predatory pricing has the requisite anticompetitive effect" to satisfy the antitrust injury requirement. *ARCO, 495 U.S. at 339* (citation omitted). The Supreme Court has articulated a two-prong test for "predatory pricing": "[f]irst, a plaintiff . . . must prove that the prices complained of are below an appropriate measure of its rival's costs" ("below-cost pricing"); and "[t]he second prerequisite . . . is a demonstration that the competitor had . . . a dangerous probability, of recouping its investment in below-cost prices" ("recoupment"). *See Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (citations omitted). ***HN12***[] Given that antitrust injury **[*24]** is a requirement of an antitrust claim brought by a private plaintiff in district court, the Commission finds that for a *Sherman Act* claim to constitute "[u]nfair methods of competition and unfair acts" under *section 337(a)(1)(A)*, the private complainant must allege antitrust injury. As in district court, this requirement serves to "ensure[] that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior . . since it is inimical to the antitrust laws to award damages"—or in the case of a *section 337* violation, receive an exclusion order or cease and desist order—for losses stemming from continued competition." *See ARCO, 495 U.S. at 334, 344* (citations omitted). Without a need to show antitrust injury, complainants could use *section 337* to pursue results that are at cross purposes with the preservation of competition.

U.S. Steel argues that *section 337* is a "trade statute" with "a protectionist focus" and therefore antitrust injury required in district court should not be applied at the Commission. *See* U.S. Steel's Jan. 17, 2017 Br. at 3, 13, 20 (EDIS Doc. No. 601088). ***HN13***[] Contrary to U.S. Steel's argument, *section 337(a)(1)(A)* is "not merely a statute to protect competitors but also a statute to preserve competition." *See Steel Pipe, 1978 ITC LEXIS 63 , 1978 WL 50692, *17* **[*25]** . The "threat or effect" prong of *section 337(a)(1)(A)(i)*, *(ii)*, *(iii)* may be satisfied by either injury to the domestic industry *or* by a showing of restraint or monopolization of trade. For example, the Commission has explained that "[s]ection 337 directs the imposition of an exclusion order in a case where an unfair method or act has the effect or tendency 'to restrain or monopolize trade and commerce in the United States' *irrespective of whether a domestic industry is experiencing injury." Certain Tractor Parts, Inv. No. 337-22, USITC Pub. No. 443, A-45, 1971 ITC LEXIS 2 (Dec. 1971)* (emphasis added). Additionally, ***HN14***[] the protectionist focus of *section 337* to which U.S. Steel alludes is protection from the harm of an "unfair act" in the importation of goods, here an alleged antitrust violation. When that alleged act does not cause the type of harm required for a private party to establish an antitrust violation, the complaining party has not demonstrated that the act is an "unfair act" required to invoke *section 337*. Congress and courts have defined the elements necessary for a plaintiff to show an antitrust claim in district court under the *Sherman Act*. As explained herein, in this case we do not interpret *section 337* to exclude the limitations of the substantive law passed by Congress and/or interpreted by the courts.

Similarly, U.S. Steel suggests that because *section 337(a)(1)(A)* includes domestic industry injury language under *subsections (i)* and *(ii)* of the "threat or effect" prong there is no need to require a separate antitrust injury requirement for complaints based on ***antitrust law***. *See, e.g.*, U.S. Steel's Pet. at 16 (Nov. 23, 2016) (EDIS Doc. No. 595868); U.S. Steel's Jan. 17, 2017 Br. at 20-21 (EDIS Doc. No. 601088) (citing *Spansion Inc. v. Int'l Trade Comm'n, 629 F.3d 1331 (Fed. Cir. 2010))*. We do not agree. ***HN15***[] "Unfair acts" and the "threat or effect" language are separate elements for showing a violation of *section 337(a)(1)(A)*. Nor do we find that the omission of

[12] The Supreme Court also noted that "[t]he need for . . . showing [antitrust injury] is at least as great" in the context of *per se* violations. *ARCO, 495 U.S. at 344*. The Supreme Court explained that "insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored." *Id.*

the domestic industry injury language in subsection (iii) of the "threat or effect" prong reflects a choice by Congress that antitrust injury is not applicable to antitrust claims under section 337.[13] On the contrary, it would be "inimical to the antitrust laws" to award an exclusion order and/or cease and desist order for trade practices where the complainant's losses resulted from behavior that constituted continued competition rather than a reduction **[*26]** in competition. *See* ARCO, 495 U.S. at 334. U.S. Steel's approach would have the Commission create a new version of ***antitrust law*** for disputes between private parties that conflicts with established federal precedent and runs the risk of undermining the antitrust laws' fundamental purpose.

Without the requirement of antitrust injury, the risk of providing relief against the pro-competitive effects or efficiency enhancing behavior of particular respondents is more acute in the context of section 337 because the Commission does not possess as much enforcement discretion as is available to other federal agencies. ***HN16***[] It is true that the Commission, like the Federal Trade Commission (FTC), has independent authority to institute and litigate investigations under section 337. *See* 19 U.S.C. § 1337(b)(1); *see, e.g.,* Certain Apparatus for Flow Injection Analysis and Components Thereof, Inv. No. 337-TA-151, 1984 ITC LEXIS 158, 1984 WL 63180, *1 (Nov. 1, 1984).[14] However, unlike the FTC and the Department of Justice, which can exercise judgment akin to prosecutorial discretion (taking into consideration the effects on competition of the actions at issue), the Commission's discretion regarding whether to institute investigations based on properly-filed complaints is not unlimited. The Federal Circuit **[*27]** has noted the way in which private rights are at issue under section 337:

> It is correct that a § 1337 proceeding is not purely private litigation "between the parties" but rather is an "investigation" by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States. Significantly, however, any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent. The 1975 amendment of the statute which added the provision in § 1337(c), "All legal and equitable defenses may be presented in all cases" was a major change which reflects a recognition that essentially private rights are being enforced in the proceeding.

Young Eng'rs, 721 F.2d at 1315. Thus, we find the practices followed in the federal courts regarding antitrust injury to be a closer analogue to the current proceeding, rather than FTC practice as U.S. Steel has claimed.

U.S. Steel argues that the explicit requirement for the Commission to consider the effects on competition that is found in the public interest factors of section 337(d) means that the Commission should not also consider competitive effects under the rubric of antitrust injury. *See* U.S. Steel's Pet. at 16-17 (Nov. **[*28]** 23, 2016) (EDIS Doc. No. 595868). We do not agree. ***HN17***[] Section 337 bifurcates the violation and remedy phases of an investigation. Bally/Midway Mfg. Co. v. U.S. Int'l Trade Comm'n, 714 F.2d 1117, 1122-23 (Fed. Cir. 1983).[15] After a

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[13] On review, Complainant argues that under subsection (iii), "U.S. Steel must prove that the unfair act threatens to restrain or actually restrains U.S. Steel's trade or commerce." U.S. Steel's Jan. 17, 2017 Br. at 24 (EDIS Doc. No. 601088). In other words, U.S. Steel reads the restraint of trade and commerce in the United States to refer to the restraint of *U.S. Steel's* trade or commerce. But the plain language of subsection (iii) does not support this interpretation. It says nothing about injury either to a domestic industry or to a specific domestic company. The language of subsection (iii), which echoes that of the Sherman Act, further conveys an intention to protect competition and not simply competitors. *See* Steel Pipe, 1978 ITC LEXIS 63, 1978 WL 50692, *17.

More generally, we note the arguments in the parties' briefs and oral presentations on whether investigations based on the Sherman Act must be brought under subsection (iii), rather than subsections (i) or (ii), of section 337(a)(1)(A). Because we ground our decision in the meaning of "unfair methods of competition and unfair acts" in section 337(a)(1)(A), rather than the subsections thereof, we find it unnecessary to reach this question and therefore express no opinion on it.

[14] We do not here address the standards that would apply in a self-initiated investigation.

[15] We note that under Rule 210.50 (b)(1) the Commission may order the presiding ALJ to take evidence with respect to the public interest factors during the violation phase of a 337 investigation. *See* 19 C.F.R. § 210.50(b)(1). When the Commission has ordered the presiding ALJ to take evidence with respect to the public interest factors, the ALJ must issue a recommended determination containing findings of fact concerning the public interest. *See* 19 C.F.R. § 210.42(a)(1)(ii)(C).

violation is found and as part of the remedy phase of the investigation, section 337 requires the Commission to "consider[] the effect of [any] exclusion [order and/or cease and desist order] upon the . . . competitive conditions in the United States economy, . . . and United States consumers." *See* 19 U.S.C. §§ 1337(d)(1), (e)(1). This "public interest" analysis addresses a different question from the antitrust injury requirement. In the case of an exclusion order, it asks the Commission to consider the effect of excluding the violative products *from* the United States on competition and U.S. consumers (along with the other public interest factors). On the other hand, the antitrust injury requirement asks a tribunal to assess what effect on competition the accused products are having while they are *in* the market. Thus, the statutory public interest factors considered during the remedy portion of the investigation do not substitute for the requirement of antitrust injury.

We disagree that the Federal Circuit's decision in *Spansion* precludes the Commission from considering the effect on consumers **[*29]** and competition in the United States in the context of an antitrust injury inquiry, as U.S. Steel suggests. *See* Tr. at 32:25-33:14. Rather, *Spansion* provides that the Commission is not required to apply the *eBay* factors during the remedy phase of an investigation before issuing an exclusion order "[Oven the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement." Spansion, 629 F.3d at 1359 (citing eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)). *Spansion* says nothing about standing or the substantive law required to establish "[u]nfair methods of competition and unfair acts" under section 337(a)(1)(A) during the violation phase of the investigation.

We are not persuaded by the argument that antitrust injury is inapplicable to U.S. Steel's claim because antitrust injury arises in federal court actions under the Clayton Act and not the Sherman Act itself. *See, e.g.*, U.S. Steel Pet. at 15 (Nov. 23, 2016) (EDIS Doc. No. 595868); U.S. Steel's Jan. 17, 2017 Br. at 16-18, 41-42 (EDIS Doc. No. 601088); Order No. 38 at 6-7, 24; Tr. at 9:16-19, 31:1-19. As explained above, the Commission addresses in this opinion what is required to establish an unfair trade practice under section 337(a)(1)(A). We further note that **[*30]** section 7 of the Sherman Act[16] originally included similar "injury" language to section 4 of the Clayton Act. Specifically, section 7 of the Sherman Act formerly provided a private cause of action for persons injured by violations of the Sherman Act; whereas section 4 of the Clayton Act more broadly provides a private cause of action for persons injured by anything forbidden in the antitrust laws. *See* State of New Mexico v. Am. Petrofina, Inc., 501 F.2d 363, 364 n.3 (9th Cir. 1974). Section 7 of the Sherman Act was repealed in 1955 because it was deemed "redundant" and thus unnecessary in view of the broader provision of section 4 of the Clayton Act. *See* Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 311 n.8, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978). Section 7 was not removed because Congress intended to abolish an injury requirement for private causes of action under the Sherman Act. **HN18**[] As the federal courts have recognized, antitrust injury is a requirement for a private party to bring a claim under the Sherman Act, consistent with the statutory purpose of protecting competition. Therefore, for purposes of deciding what is required to establish an unfair trade practice under section 337(a)(1)(A), the fact that the Clayton Act provides the vehicle for private parties to bring suit under the Sherman Act does not alter our conclusion. There is also nothing in the text of the private right of action language in the Clayton Act and section 337 that leads **[*31]** us to understand that Congress did not want the Commission to apply antitrust injury standing to a section 337 claim predicated on the Sherman Act. If Congress intended to create a forum for private parties to litigate an antitrust claim at the Commission, whose prosecution would be barred in federal district court as inimical to the antitrust laws, we would expect a clarity of expression that is missing in our statute. Such congressional intent is not expressed in our statute.

Moreover, requiring antitrust injury standing comports with the Commission's approach in intellectual property cases under section 337. For example, in patent investigations, the Commission follows the patent standing requirement imposed by courts rather than create its own, inconsistent standing requirement. *See* 19 C.F.R. § 210.12(a)(7); SiRF Technology, Inc. v. Int'l Trade Comm'n, 601 F.3d 1319, 1326 n.4 (Fed. Cir. 2010) (affirming violation finding in patent infringement investigation; noting that the "Commission 'strictly reads the federal standing precedent' into its rules") (citation omitted). We agree with the. ID that "[t]here is no reason why showing standing would be excused

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[16] *See* Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210 (repealed 1955).

with respect to alleged antitrust violations when it is required with respect to other types of unfair practices subject to *section 337*." Order No. 38 at 15.

Finally, **[*32]** Complainant contends that other remedies are not available if the antitrust injury requirement applies in this context. U.S. Steel's Jan. 17, 2017 Br. at 1-2 (EDIS Doc. No. 601088). ***HN19***[] However, the antitrust injury requirement is not a bar to antitrust actions at the Commission. Rather, it ensures that antitrust claims asserted in *section 337* are adjudicated in a manner that is not inconsistent with existing, clear federal ***antitrust law***.

For the foregoing reasons, the Commission has determined to affirm the ALP's finding that "antitrust injury" is required for *section 337* investigations in which the alleged unfair method of competition or unfair act is based on a violation of the *Sherman Act*.[17]

C. Sufficiency of the Complaint

Having determined that U.S. Steel is required to show "antitrust injury," we find that U.S. Steel is also required to plead such "antitrust injury" in its complaint.[18]

HN20[] In federal district courts, "[e]very private antitrust plaintiff, including those challenging an agreement as unlawful under *[Sherman] § 1*, must include in its complaint allegations of 'antitrust injury.'" *Energy Conversion Devices, 833 F.3d at 689* (affirming dismissal under *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to allege antitrust injury) **[*33]** (citations omitted). *See also* *In re Aluminum Warehousing Antitrust Litig., 833 F.3d at 157* ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement[,] [it] must [be] dismiss[ed] [] as a matter of law. . . . To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that [] it suffered an antitrust injury.") (citation omitted). In *Energy Conversion*, the Sixth Circuit found that plaintiff failed to allege recoupment (one of the elements of predatory pricing), which was necessary to satisfy the antitrust injury requirement. *Energy Conversion, 833 F.3d at 689-91*. ***HN21***[] The Sixth Circuit explained that:

> To survive a motion to dismiss, a complaint must "state[] a plausible claim for relief," *Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, which requires that the complaint "show[ ] that the pleader is entitled to relief," *Fed. R. Civ. P. 8(a)(2)*. If proof of recoupment is required to succeed on the claim, allegations of recoupment must appear in the complaint to show an entitlement to relief. During discovery, the plaintiff must show that there is factual support for each component of the claim or it will be rejected as a matter of law on summary judgment.

Energy Conversion, 833 F.3d at 688. The district court did not allow the plaintiff to amend its complaint to allege recoupment. **[*34]** *Id. at 690-91*. In affirming the district court's denial of leave to amend, the Sixth Circuit reasoned that "plaintiff had ample notice of the issue"; "[i]ts lawyers were the same ones that pursued parallel litigation in the

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[17] U.S. Steel's claim that is has been harmed by a conspiracy to fix prices and control output and export volumes in violation of the *Sherman Act* is tied to underpricing by Chinese-produced carbon and alloy steel and to the impact it has had on U.S. Steel's trade, production, and financial performance. Amended Complaint ¶¶ 71-99, 223-241. The relevant antitrust injury U.S. Steel would need to allege and show is predatory pricing, as described above. *See, e.g.,* *Brooke, 509 U.S. at 222-26*; *ARCO, 495 U.S. 337-41*; *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd., 833 F.3d 680, 688-91 (6th Cir. 2016)*. U.S. Steel does not appear to contest this point, and in any event, represents that it will not amend its complaint to plead or prove antitrust injury. *See, e.g.*, Tr. at 42, 68-69 (Mr. Glass); U.S. Steel Feb. 1, 2017 Resp. Br. at 21. We do not opine on the form of antitrust injury that might be required if other types of claims are asserted under the antitrust laws.

[18] Consistent with the recent Commission Opinion relating to Complainant's false designation of origin claim, "we agree with the ID that the Commission's decision to institute an investigation does not preclude an ALJ from reexamining the sufficiency of a complaint," but "we do not adopt the ID's discussion of the ALJ's authority under the APA in the context of Commission *Rules 210.21(a)* and *210.18*." *See Certain Carbon and Alloy Steel Products*, Inv. No. 337-TA-1002, Comm'n Op. at 7 (Mar. 6, 2017) (citations omitted).

Northern District of California"; "[i]n that case, they filed a complaint that initially alleged recoupment"; and "[f]or reasons of their own, they amended the complaint and removed the allegation." *See* *id. at 691*.

Thus, the Commission holds that Complainant is required to plead, in the complaint, allegations of "antitrust injury" standing. ***HN22***[] Under the Commission's jurisprudence, complainants are typically allowed to amend the complaint for good cause. *19 C.F.R. § 210.14(b)(1)* ("After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation."). We would normally find that good cause exists under Commission *Rule 210.14(b)* to allow Complainant to amend its complaint. *See also* *Fed. R. Civ. Proc. 15* ("The court should freely give leave when justice so requires."). However, on review before the Commission, U.S. Steel has indicated **[*35]** that even if afforded the opportunity to amend its complaint to plead antitrust injury, it would not plead allegations of antitrust injury. Specifically, asked whether it would amend its complaint if the Commission applied the standard for antitrust injury required in federal court, U.S. Steel's counsel responded unequivocally, "No" twice. Tr. at 68. Elaborating, counsel stated that the "standard is virtually impossible to satisfy in Federal Court. ... And the reality is that we couldn't." Tr. at 69. Accordingly, we affirm the ALJ's dismissal of Complainant's antitrust claim as modified by our reasoning above.

Finally, the Commission has determined to reverse the ALJ's dismissal of Complainant's antitrust claim with prejudice (see Order No. 38 at 30). Specifically, we dismiss Complainant's antitrust claim for failure to allege a necessary element — antitrust injury — and without a determination of the merits of a properly pled claim. Accordingly, we dismiss without prejudice.

III. CONCLUSION

For the foregoing reasons, the Commission has determined to affirm in part, as modified by our reasoning, and reverse in part the ID (Order No. 38). The antitrust claim is dismissed.

By order of the **[*36]** Commission.

/s/ Lisa R. Barton

Lisa R. Barton

Secretary to the Commission

Issued: March 19, 2018

Dissent by: MEREDITH M. BROADBENT

Dissent

DISSENTING OPINION OF COMMISSIONER MEREDITH M. BROADBENT WITH RESPECT TO ORDER NO. 38

The Commission instituted this investigation based on a complaint filed by Complainant United States Steel Corporation ("U.S. Steel") to determine whether there is a violation of *Section 337(a)(1)(A)*, *19 U.S.C. § 1337(a)(1)(A)*, in the importation, the sale for importation, or the sale within the United States after importation of certain carbon and alloy steel products by reason of, *inter alia*, a conspiracy to fix prices and control output and export volumes, the threat or effect of which is to restrain or monopolize trade and commerce in the United States. *See* *81 Fed. Reg. 35381*-82 (June 2, 2016). U.S. Steel's complaint, as amended, alleges that the conspiracy to fix prices and control output and export volumes is an unfair method of competition or unfair act that violates *section 1* of the Sherman Act, *15 U.S.C. § 1* ("antitrust claim"). Compl. ¶ 71 (Sept. 22, 2016).

On November 14, 2016, the presiding Administrative Law Judge ("ALP) issued Order No. 38, an initial determination ("ID") granting Respondents' motion to terminate U.S. Steel's antitrust claim. The ID held that **[*37]** U.S. Steel's failure to plead antitrust injury as an element of its antitrust claim in its *Section 337* complaint required the Commission, as a matter of law, to terminate the antitrust claim under *Section 337(a)(1)(A)*. ID at 28-30. The Commission determined to review the ID on December 19, 2016. *See* Comm'n Notice (Dec. 19, 2016). Having considered the ID, the written submissions of the parties and non-parties, and the views of the parties expressed at the Commission oral argument, I have determined that the ID incorrectly holds that U.S. Steel was required, as a matter of law, to plead antitrust injury in its complaint with respect to its antitrust claim asserted in this *Section 337* investigation. Consequently, the ID should be reversed and vacated, and the antitrust claim remanded to the AU for further proceedings.

The ID noted two separate and independent requirements of *Section 337(a)(1)(A)* that are necessary to prove a violation, which were raised by Respondents' motion: (1) the unfair trade practice, *i.e.*, "unfair methods of competition and unfair acts in the importation of articles"; and (2) the "threat or effect" of that unfair trade practice under *subsection 337(a)(1)(A)(iii)*, *i.e.*, "the threat or effect of [the unfair trade practice] is ... to restrain **[*38]** or monopolize trade or commerce in the United States." ID at 8-9. As to the latter requirement, the ID found that U.S. Steel's allegation of an illegal restraint of trade was sufficient to satisfy "the pleading requirements under the threat or effect prong of *section 337(a)(1)(A)(iii)*...." *Id.* at 10-11. As to the former, however, the ID found U.S. Steel "has not properly alleged that the practices complained of constitute an unfair method of competition or unfair act under *section 337(a)(1)(A)*." *Id.* at 11. The ALJ stated that "[t]he unfair trade practice prong requires standing to sue." *Id.* Simply put, even if U.S. Steel's complaint sets forth unfair trade practice allegations that sufficiently plead all elements of a *per se* *Sherman Act* violation under controlling Supreme Court precedent, the ID nevertheless holds that such unfair trade practices cannot fall within the scope of the statutory term "unfair methods of competition and unfair acts" of *Section 337(a)(1)(A)*.

The ID reasoned that "the limitations on private antitrust litigants must apply under *section 337* as they do in federal courts." *Id.* at 10 (citing *TianRui Grp. Co. Ltd. v. Int'l Trade Comm'n, 661 F.3d 1322, 1333 (Fed. Cir. 2011)* ("*Tianrui*")). The ID further stated that "[u]nder federal ***antitrust law***, it is firmly established that a private complainant must show antitrust standing." *Id.* Thus, the ID held that "U.S. **[*39]** Steel must plead and prove (1) injury in fact to its business or property; (2) that the injury is proximate, *i.e.*, not too remote, and (3) that such injury is the kind that the antitrust laws were intended to prevent and 'flows from that which makes defendants' acts unlawful.'" *Id.* at 20 (citing 2A Areeda, ¶ 335a, at 76-77 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)))*.[1] Because "U.S. Steel's complaint does not allege predatory pricing or the facts necessary to show predatory pricing[,] . . . [t]he complaint therefore is fatally deficient as a matter of law." *Id.* at 23.

The ID rejected U.S. Steel's assertion that "the antitrust injury requirement 'does not come from *Section 1* of the Sherman Act, but from the private cause of action in *Section 4* of the Clayton Act.'" *Id.* at 24 (citation omitted). Instead, the ID found that "[f]or purposes of the standing requirement, it does not matter whether a complaint is brought under *section 1* or *2* of the Sherman Act or *section 4* of the Clayton Act." *Id.* The ID also rejected U.S. Steel's argument that "because horizontal price-fixing is a *per se* violation of *section 1*. of the *Sherman Act*,

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[1] Specifically, the ID found that "[a]ntitrust injury requires that the plaintiff be 'adversely affected by an *anticompetitive* aspect of the defendant's conduct," and that the context of pricing practices challenged by rivals as depressing their profits, 'only predatory pricing has the requisite anticompetitive effect.'" *Id.* at 20-21 (citing *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 339, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* ("*ARCO*") (emphasis in original)). "To prove predatory pricing." the ID continued, "a plaintiff must show that (1) the defendant's prices are below its costs and (2) there is a 'dangerous probability' that the defendants will 'recoup' their investment in 'below-cost prices' once they have succeeded in forcing competitors from the market." *Id.* at 22 (citing *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-25, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*.

standing to sue is not required." *Id.* at 25. The ID reasoned that "[w]hile a *per se* rule 'relieves plaintiff of the burden of demonstrating an anticompetitive **[*40]** effect, which is assumed, it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts.'" *Id.* at 26-27 (citing *Newman v. Universal Pictures, 813 F.2d 1519, 1522-23 (9th Cir. 1987)*, *cert. denied*, *486 U.S. 1059, 108 S. Ct. 2831, 100 L. Ed. 2d 931 (1988))*. The ID further stated that "[t]he Supreme Court in *ARCO* specifically rejected the contention that standing need not be alleged in a case involving a *per se* violation of the *Sherman Act*." *Id.* at 27. Rather, the ID continued, "insofar as the *per se* rule permits the prohibition of efficient practices in the name of simplicity, the need for the antitrust injury requirement is underscored." *Id.* at 28 (citing *ARCO, 495 U.S. at 344*). The ID therefore concluded that "U.S. Steel's complaint must be dismissed without further proceedings, as a matter of established ***antitrust law***." *Id.* at 19.

DISCUSSION

To resolve the question of whether U.S. Steel is required to plead antitrust injury as a matter of law in order to state a *Sherman Act § 1* claim constituting "unfair methods of competition and unfair acts" under *Section 337(a)(1)(A)*, it is necessary to focus on the controlling language of the relevant statutes and how the courts have interpreted these statutes. Statutes pertinent to the ID's holding are: *Section 337(a)(1)(A)* of the Tariff Act of 1930, *Section 1* of the Sherman Act, and *Sections 4* and *16* of the Clayton Act.

The Commission's authority to investigate **[*41]** and address unfairly traded imports stems from its enabling statute, Section 337 of the Tariff Act of 1930, as amended, *19 U.S.C. § 1337*. *Vastfame Camera, Ltd. v. Int'l Trade Comm'n, 386 F.3d 1108, 1112 (Fed. Cir. 2010)*; *Sealed Air Corp. v. U.S. Int'l Trade Comm'n, 645 F.2d 976, 987, 68 C.C.P.A. 93 (C.C.P.A. 1981)*. *Section 337(a)(1)(A)* declares unlawful "unfair methods of competition and unfair acts" in the importation or sale of articles, the threat or effect of which is, *inter alia*, to restrain or monopolize trade and commerce in the United States:

> **(a) Unlawful activities; covered industries; definitions**
>
> (1) Subject to *paragraph (2)*, the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
>
> (A) Unfair methods of competition and unfair acts in the importation of articles (other than articles provided for in subparagraphs (B), (C), (D), and (E)) into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is-
> (i) to destroy or substantially injure an industry in the United States;
> (ii) to prevent the establishment of such an industry; or
> (iii) to restrain or monopolize trade and commerce in the United States.

19 U.S.C. § 1337(a)(1)(A). As is clear from the language of this provision, a violation of *Section 337(a)(1)(A)* comprises two separate and independent elements: (1) "unfair methods of competition **[*42]** and unfair acts" in the importation or sale of articles; and (2) a "threat or effect" prong (also known as the injury requirement). *See 19 U.S.C. § 1337(a)(1)(A)(i)-(iii)*; *Akzo NV v. Int'l Trade Comm'n, 808 F.2d 1471, 1486 (Fed. Cir. 1986)* ("[T]o prove a violation of *§ 337*, the complainant must show both an unfair act and a resulting detrimental effect or tendency."); *Textron, Inc. v. Int'l Trade Comm'n, 753 F.2d 1019, 1028 (Fed. Cir. 1985)* ("*[S]ection 337* has consistently been interpreted to contain a distinct injury requirement of independent proof'). I agree with the AU, that the first element governs the issue of whether the statutory term "unfair methods of competition and unfair acts" requires that antitrust injury must be separately and specifically pleaded, in addition to U.S. Steel's substantive allegations of a violation of *Sherman Act § 1*, in order to state an actionable claim under *Section 337(a)(1)(A)*.

Courts have held that the language of this provision - "unfair methods of competition and unfair acts" -- is broad and flexible. For example, soon after the passage of the *Tariff Act of 1930*, the Court of Customs and Patent Appeals confronted the issue of whether this statutory phrase required a showing of two separate elements before injurious imports could be stopped: an "unfair method of competition" as defined by the courts to require passing off, as well as an "unfair **[*43]** act in importation." The Court rejected this construction stating:

> We are of the opinion that when Congress used the phrase, in section 337(a) of the Tariff Act of 1930, 19 USCA 1337(a), "unfair methods of competition and unfair acts in the importation of articles into the United States," it did not intend that before such methods or acts could be stopped, the act had to fall within the technical definition of unfair methods of competition as it has been defined in some of the decisions, but we think that if unfair methods of competition or unfair acts in the importation of articles into the United States are being practiced or performed by any one, they are to be regarded as unlawful, and this section was intended to prevent them.

In re N. Pigment Co., 71 F.2d 447, 455, 22 C.C.P.A. 166, Treas. Dec. 47124, T.D. 47124 (C.C.P.A. 1934). *See also* *In re Von Clemm, 229 F.2d 441, 443-44, 43 C.C.P.A. 56 (C.C.P.A. 1955)* ("As was noted in our decision in *In re Northern Pigment Co.*, . . . the quoted language ['unfair methods of competition and unfair acts in the importation of articles'] is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions.").

The *Northern Pigment* Court quoted extensively from its prior decision in *Frischer*, which examined the legislative history of Section 316 of the Tariff **[*44]** Act of 1922, the predecessor to *Section 337*, in finding that "it was the purpose of the law to give to industries of the United States, not only the benefit of the favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same and permit them to grow and develop." *N. Pigment, 71 F.2d at 454* (quoting *Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 17 C.C.P.A. 494, T.D. 43964 (C.C.P.A. 1930))*. Given both the "broad and inclusive term," the context of the provision, and the purposes for which the statute was enacted, the Court concluded that the acts of the respondents in importing iron pigment manufactured abroad using a patented method clearly fell within the term.[2] *Id. at 455*. *See also* *Tianrui, 661 F.3d at 1331-32* (noting the "broad and flexible meaning" of the statutory term "unfair methods of competition" consistent with the purpose and legislative background of the statute supports the Commission's interpretation of the scope of *Section 337* to reach trade secret misappropriation occurring abroad); *Von Clemm, 229 F.2d at 443-44* (citing *N. Pigment, 71 F.2d. at 447*)). The *Northern Pigment* Court observed that "[o]bviously one of the purposes of the enactment of the section, as well as the whole act, was for the encouragement of American industry. The proper application of the legislation here in controversy certainly would encourage **[*45]** and help a great many American industries." *N. Pigment, 71 F.2d at 456*.

In construing the scope of the "unfair methods of competition and unfair acts" language, the Court relied upon the oft-cited 1922 Senate Report concerning the Commission's newly conferred authority to investigate unfair methods of competition and unfair acts in the importation and sale of articles in the United States. The Court stated that "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had." *N. Pigment, 71 F.2d at 454* (quoting *Frischer, 39 F.2d at 259*) (quoting S. Rep. No. 67-595 at 3 (1922))).

The broad scope of the unfair acts covered by the provision is also supported by statements of Senator Smoot, the 1922 Act's primary sponsor, who explained that section 316 was intended to be "an antidumping law with teeth in

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[2] As discussed in *Tianrui*, the Court of Customs and Patent Appeals later held in *In re Amtorg* that the use and sale of a product made by a patented process did not constitute infringement of a process patent because *section 337* did not enlarge the substantive scope of U.S. patent law. *Tianrui, 661 F.3d at 1333-34* (citing *In re Amtorg Trading Corp., 75 F.2d 826, 22 C.C.P.A. 558, T.D. 47583 (C.C.P.A. 1935))*. The *Amtorg* decision had the effect of reversing *Frischer, Orion*, and *Northern Pigment* only with respect to infringement of the process patents involved therein. However, the *Tianrui* Court noted that "[t]o the extent Amtorg construed the scope of the Commission's jurisdiction over unfair methods of competition, Congress has subsequently rejected that construction in response to criticism by the Tariff Commission. . . . *Amtorg* thus has no effect on the scope of the Commission's authority to regulate trade secret misappropriation relating to the production of goods imported into this country." *Tianrui, 661 F.3d at 1334*.

itone which will reach all forms of unfair competition in importation." 62 Cong. Rec. 5874, 5879 (1922). He stated that section 316 "not only prohibits dumping in the ordinary accepted meaning of that word; that **[*46]** is, the sale of merchandise in the United States for less than its foreign market value or cost of production; but also bribery, espionage, misrepresentation of goods, full-line forcing, and other similar practices frequently more injurious to trade than price cutting." *Id.*

Courts have recognized that the broad and inclusive scope of "unfair methods of competition and unfair acts" was intended by Congress to combat the myriad unfair practices in international trade that may involve materially different questions than those arising in domestic competition:

> The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.

Von Clemm, 229 F.2d at 444. *See also* Frischer, 39 F.2d at 259-60 (noting that the conditions complainants face in combatting unfairly traded imports may be quite different from domestic competition); In re Orion, 71 F.2d 458, 466-67, 22 C.C.P.A. 149, Treas. Dec. 47123, T.D. 47123 (C.C.P.A. 1934).

Modern court decisions continue to recognize that Congress vested the Commission with "broad enforcement authority" to "prevent a diverse array of unfair methods of competition in the importation of goods." Suprema, Inc. v. Int'l Trade Comm'n, 796 F.3d 1338, 1350 (Fed. Cir. 2015 **[*47]** (*en banc*). "Recognizing the challenges posed by the wide array of unfair methods of competition, Congress emphasized the broad scope of the enforcement powers granted to the Tariff Commission when it passed the 1922 Tariff Act." *Id.* Tracing the history of Congress's vigilance to encourage and protect U.S. domestic interests from unfairly traded imports since 1789, the Federal Circuit observed that Congress has addressed the menace of unfairly traded imports in a unique enforcement statute in Section 337 that is distinct from the statutory schemes designed to address domestic commercial unfair practices:

> While Congress has addressed domestic commercial practices under various statutory regimes, such as antitrust (15 U.S.C. §§ 1-38), patent (35 U.S.C. §§ 1-390), and copyright 19 U.S.C. §§1-1332), it has established a distinct legal regime in Section 337 aimed at curbing unfair trade practices that involve the entry of goods into the U.S. market via importation. In sum, Section 337 is an enforcement statute enacted by Congress to stop at the border the entry of goods, *i.e.*, articles, that are involved in unfair trade practices.

Suprema, 796 F.3d at 1344-45.

The Federal Circuit in *Tianrui* further explained that although the scope of the Commission's authority to remedy unfair acts in the importation **[*48]** of articles is "broad and flexible," that authority must respect "express congressional limitations" when a federal statute forms the legal basis for the unfair acts under Section 337, such as substantive U.S. patent law applied under Section 337(a)(1)(B). 661 F.3d at 1333. In *Tianrui*, however, because there was no federal civil statute regulating trade secret misappropriation at the time of the decision, "there [was] no statutory basis for limiting the Commission's flexible authority under section 337(a)(1)(A) with respect to trade secret misappropriation." *Id.* Thus, *Tianrui* teaches that when a substantive statute is relied upon to establish the "unfair methods of competition and unfair acts" at issue, the scope of Section 337(a)(1)(A) cannot circumvent an "express congressional limitation" set forth in that substantive statute. Absent such express Congressional limitation, restricting the Commission's consideration of unfair methods of competition and unfair acts in international trade "would be inconsistent with the congressional purpose of protecting domestic commerce from unfair competition in importation such as trade secret misappropriation." Id. at 1335. *See also* Suprema, 796 F.3d at 1352 ("Congress enacted a legal regime for enforcement against unfair trade acts by directing the Commission to **[*49]** base Section 337 relief on goods and the issuance of exclusion orders to bar their importation. Absent unconstitutionality, we must defer to that regime.") (citing Beck v. Sec 'y ofDep't of Health & Human Servs., 924 F.2d 1029, 1034 (Fed. Cir. 1991) ("Our duty is limited to interpreting the statute as it was enacted . . . .")).

The language of the statute, legislative history, and court decisions, inform my view that Section 337 is a broad and flexible international unfair competition statute designed to provide American industries with a powerful tool to combat a broad array of international unfair practices and schemes in the importation of articles that harm domestic commerce. Congress employed the broad and inclusive language of "unfair methods of competition and unfair acts" in *Section 337(a)(1)(A)*, without providing a limiting definition, in order. to capture within its scope any nefarious practices that distort domestic competition, whether or not such unfair practices are familiar to domestic courts, as for example involving state-owned enterprises or government-driven non-market economies. In the case at bar, U.S. Steel's complaint alleges a massive and complex conspiracy among Chinese producers, orchestrated by the Chinese government, to control prices and regulate production **[*50]** of carbon and alloy steel in the Chinese steel industry through the China Iron and Steel Association, including coordinated enterprise restructuring, standard-setting, oversight and coordination of pricing and production, information-sharing concerning competitively-sensitive data such as production schedules, raw material costs and other financial data, and invoking the power of the Chinese government to discipline and enforce compliance. Compl. ¶¶ 72-99. U.S. Steel's allegations reflect what the Administration has identified as a "statist economic model with a large and growing government role" and that "China has appeared to be moving further away from market principles in recent years."[3] The Chinese economy is heavily distorted by the close relationship between government and business, which has persisted even as the country has become more globally oriented. In many Chinese markets, the quantity of goods sold and price levels are affected as much by changes in central and regional government policy as by the supply and demand dynamics For this reason, industries in China frequently behave in ways that may seem to defy common sense from a U.S. perspective. As U.S. Steel explained **[*51]** at the oral argument, "when you have a state sponsored industry the costs [of production] can be zero." Oral Arg. Tr. at 242 (as corrected on May 5, 2017, EDIS Doc. No. 610791). As these complaint allegations illustrate, international competition can be much more complex than domestic commerce. In the rapidly evolving world of international trade, it is particularly important that *Section 337*, through its prohibition against "unfair methods of competition and unfair acts" in importation and sale, remain a powerful and flexible tool to protect American industries and workers as Congress intended, unless the federal statute establishing the unfair trade practice contains "express Congressional limitations" that restrict Commission action. Where, as here, no such express limitation in the *Sherman Act* has been shown, I find no legal justification for imposing the insurmountable hurdle of demonstrating antitrust injury upon a typical U.S. company that is grappling with imports that benefit from the international unfair methods of competition that have been alleged in this case.[4]

I find that none of the authorities cited by the ID or in the submissions of the parties and non-parties compel the conclusion **[*52]** that the statutory term "unfair methods of competition and unfair acts" in *Section 337(a)(1)(A)* is restricted, as a matter of law, to a complaint that pleads "antitrust injury" where the "unfair methods of competition and unfair acts" alleged by U.S. Steel are prohibited by *section 1* of the Sherman Act.[5] Nor have the parties, or the ID, identified any "express congressional limitation" contained in *section 1* of the Sherman Act that constrains Commission action on U.S. Steel's complaint.

In this investigation, because U.S. Steel's complaint alleges that the unfair acts of the Chinese respondents violate *section 1* of the Sherman Act, the language of *section 1* of the Sherman Act, and federal case law interpreting the

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[3] USTR, 2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program, at 4 (March 2018).

[4] U.S. Steel explained at the hearing that in this state sponsored industry, where "costs can be zero," it is difficult if not impossible for "an American company to prove that they are pricing below zero and it may be negative" and therefore no member of the U.S. steel industry, the United Steelworkers, or consumers could have standing to challenge these unfair practices. Oral Arg. Tr. at 241-43.

[5] To be sure, Section 337 expressly provides for the Commission's consideration of public interest concerns, including the public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States and U.S. consumers, after a violation is found in the context of the Commission's determination of an appropriate remedy to prevent further unfair acts in connection with subject imports. *19 U.S.C. § 1337(d)*, *(f)*, *(g)*. However, the statutory scheme shows that these public interest considerations do not play a role in the determination of the elements of "unfair methods of competition and unfair acts" underlying a violation of *Section 337(a)(1)(A)*. Moreover, the statutory framework provides that policy considerations relating to Commission action in Section 337 investigations are within the province of the President. *19 U.S.C. § 1337(j)(2)*.

text of this statute, provide the substantive legal standard for determining what constitutes "a conspiracy, in restraint of trade or commerce" sufficient to establish an "unfair method of competition" or "unfair act" under Section 337. *Section 1* of the Sherman Act, as amended, declares illegal agreements in restraint of trade or commerce, and imposes criminal penalties for violations:

> *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is* ***[*53]*** *declared to be illegal*. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

See *15 U.S.C. § 1* (emphasis added). Horizontal price-fixing trade practices, as alleged here by U.S. Steel, are *per se* illegal under *Section 1* of the Sherman Act. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets.") (citations omitted); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)* ("Under the *Sherman Act* a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

Pertinent to the ID's determination that "antitrust injury" is required as a matter of law to sustain U.S. Steel's antitrust claim, is the *Clayton Act*. Specifically, *Sections 4* and *16* of the Clayton Act are remedial statutes that authorize private parties to sue in federal court for **[*54]** treble damages or an injunction when they have been harmed by a violation of the antitrust laws, such as conduct that violates the *Sherman Act* or other sections of the *Clayton Act*. *See, e.g.*, *15 U.S.C. §§ 15*, *26*; *ARCO, 495 U.S. at 331-32* (action brought under *§ 4* of the Clayton Act, *15 U.S.C. § 15*, and complaint alleged an unlawful maximum price-fixing scheme in violation of *§ 1* of the Sherman Act); *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (action brought under *§ 16* of the Clayton Act, *15 U.S.C. § 26*, and complaint alleged an unlawful merger in violation of *Section 7* of the Clayton Act, *15 U.S.C. § 18*). Under *section 4* of the Clayton Act, "any person who shall be *injured in his business or property* by reason of *anything forbidden in the antitrust laws* may sue therefor . . . and shall recover *threefold the damages* by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15* (emphasis added). Under *section 16* of the Clayton Act, "[a]ny person, firm, corporation, or association shall be entitled to sue for and have *injunctive relief* . . . against *threatened loss or damage by a violation of the antitrust laws* . . . ." *15 U.S.C. § 26* (emphasis added).[6]

The "antitrust injury" standing requirement stems, not from the substantive antitrust statutes like the *Sherman Act*, but rather from the Supreme Court's interpretation of the injury elements **[*55]** that must be proven under *sections 4* and *16* of the Clayton Act. *See* *ARCO, 495 U.S. at 334* ("A private plaintiff may not recover damages under *§ 4* of the Clayton Act merely by showing 'injury causally linked to an illegal presence in the market.' Instead, a plaintiff must prove the existence of 'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.") (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*; *Cargill, 479 U.S. at 117-18* (requiring antitrust injury in a private action seeking injunctive relief under *section 16* of the Clayton Act); *id. at 110 n.5* ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing under *§ 4* [of the *Clayton Act*] . . . ."); *Brunswick, 429 U.S. at 489, 489 n.14* (requiring antitrust injury in a private action seeking treble damages under *section 4* of the Clayton Act). The Supreme Court further explained that "[t]he antitrust laws were enacted for the protection of *competition*, not *competitors*" and that "[t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *ARCO, 495 U.S. at 338, 344* (citations omitted) (emphasis in original).

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[6] The definition of "antitrust laws" appears in *15 U.S.C. § 12(a)*, and does not include *Section 337* of the Tariff Act of 1930, as amended.

Importantly, the Supreme Court has explained the critical distinction between **[*56]** antitrust injury, which derives from the injury language in the private remedy provisions of *sections 4* and *16* of the Clayton Act, and the substantive antitrust statutory prohibitions (such as the unfair acts alleged in U.S. Steel's complaint, *i.e.*, a horizontal price-fixing conspiracy among Chinese competitors, and enforced by the Chinese government in violation of *section 1* of the Sherman Act). *See* *ARCO, 495 U.S. at 344* ("[P]roof of [an antitrust] violation and of antitrust injury are distinct matters that must be shown independently.") (citation omitted); *see also* *In re Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 59 (1st Cir. 2016)* ("[T]he FTC's amicus brief highlights the importance of straightening out the conflation of antitrust violation and antitrust injury that crept into the district court's post-trial opinion and into some of the parties' arguments on appeal."); *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd., 833 F.3d 680, 689 (6th Cir. 2016)* ("Th[e] [antitrust injury] requirement is not an element of a specific substantive prohibition such as *[Sherman] § 1*, but instead derives from the general antitrust damages right of action in *§ 4* of the Clayton Act.") (citations omitted); *id.* ("The requirement ensures that private plaintiffs bring claims 'of the type the antitrust laws were intended to prevent and that flow from that which makes defendants' acts unlawful.' And **[*57]** it ensures the plaintiff is a 'proper' enforcer of those laws.") (citations omitted).

To recover treble damages or to obtain injunctive relief under *section 4* or *16* of the Clayton Act, respectively, in Article III federal courts, a private litigant must prove both antitrust injury, as a separate standing requirement under Clayton Act *Sections 4* and *16*, as well as the requisite elements of the underlying substantive antitrust statute. *See, e.g., ARCO, 495 U.S. at 339-40* (antitrust injury under *Section 4* of the Clayton Act is a separate requirement from the antitrust claim involved); *Cargill, 479 U.S. 107-113* (extending antitrust injury requirement of *Section 4* of the Clayton Act, which is the source of this requirement, to *Section 16* of the Clayton Act); *Blue Shield of Virginia v. McCready, 457 U.S. 465, 482, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* (requiring antitrust injury to establish standing to maintain an action under *section 4* of the Clayton Act for defendants' alleged violation of *Sherman Act*); *Garshman v. Universal Res. Holding Inc., 824 F.2d 223, 234 (3d Cir. 1987)* ("If the complaint fails to allege violations of the underlying substantive prohibitions—in this case *sections 1* and *2* of the Sherman Act—standing under *sections 4* and *12* [*sic*, *16*] of the *Clayton Act* is irrelevant."); *Eastman Kodak Co. v. Goodyear Tire & Rubber Co., 114 F.3d 1547, 1557-58 (Fed. Cir. 1997)*, *abrogated on other grounds,* *Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448 (Fed. Cir. 1998)* (affirming district court's grant of summary judgment on antitrust claims where Goodyear failed to allege sufficient antitrust injury under **[*58]** *sections 4* and *16* of the Clayton Act).

For example, in *ARCO*, the complaint was brought under *section 4* of the Clayton Act but also alleged the existence of a "vertical, maximum price-fixing scheme" in violation of *section 1* of the Sherman Act. *See* *ARCO, 495 U.S. at 332*. The Supreme Court noted that "*[s]ection 4 of the Clayton Act* is a remedial provision that makes available treble damages to 'any person who shall be injured in his business or property by reason of *anything forbidden in the antitrust laws*.'" *Id. at 331 n.1* (emphasis added); *see also* *Brunswick, 429 U.S. at 485* ("*Section 4*, in contrast, is in essence a remedial provision."). The Supreme Court distinguished the antitrust violation from the requisite showing of antitrust injury, explaining that "a firm . . . [that] loses sales to a competitor charging nonpredatory prices pursuant to a vertical, maximum-price-fixing scheme . . . does not suffer an 'antitrust injury' and that it therefore cannot bring suit under *§ 4* of the Clayton Act [], as amended, *15 U.S.C. § 15*." *See* *ARCO, 495 U.S. at 332*.

Thus, while *sections 4* and *16* of the Clayton Act provide private remedies for antitrust violations in Article III federal courts, they do not limit or define the substantive elements of a violation of an antitrust statute. Rather, those private remedy provisions encompass "anything **[*59]** forbidden in the antitrust laws" or any "violation of the antitrust laws." *See* *15 U.S.C. §§ 15*, *26* (*i.e.*, *sections 4* and *16* of the Clayton Act). Similarly, *Section 337(a)(1)(A)* requires underlying "unfair methods of competition" or "unfair acts," for example, an antitrust violation. Under the *Section 337(a)(1)(A)* statutory scheme, a violation of *section 1* of the Sherman Act for horizontal price-fixing among competitors that is orchestrated by the Chinese government, as alleged in this investigation, can alone qualify as the underlying "unfair method of competition" or "unfair act."[7]

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[7] The ID notes that the alleged horizontal price-fixing among competitors is *per se* illegal under *section 1* of the Sherman Act. *See* ID at 26 ("For the purpose of deciding this motion, I assume that the *Socony-Vacuum per se* rule is in effect and that the conduct alleged in the complaint constitutes an unreasonable restraint of trade that would be actionable under *section 337* if

Further, *Section 337(a)(1)(A)* does not include the language of *section 4* or *16* of the Clayton Act which forms the basis for the Supreme Court's jurisprudence with respect to the "antitrust injury" requirement, i.e., "injury 'by reason of anything *forbidden* in the antitrust laws' (under *section 4*) or "threatened loss or damage by a violation of the antitrust laws" (under *section 16*). *See* *Cargill, 479 U.S. at 112*. As explained in *Cargill*:

> Like *§ 16*, *§ 4* provides a vehicle for private enforcement of the antitrust laws. Under *§ 4*, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States, and shall recover threefold **[*60]** the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *15 U.S.C. § 15*. In [*Brunswick*], *supra*, we held that plaintiffs seeking treble damages under *§ 4* must show more than simply an "injury causally linked" to a particular merger; instead, "plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id., 429 U.S., at 489*.
> . . .
>
> The wording concerning the relationship of the injury to the violation of the antitrust laws in each section is comparable. *Section 4* requires proof of injury "by reason of anything forbidden in the antitrust laws"; *§ 16* requires proof of "threatened loss or damage by a violation of the antitrust laws." It would be anomalous, we think, to read the *Clayton Act* to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

Cargill, 479 U.S. at 109, 112 (emphasis in original). Thus, while the "antitrust injury" standing requirement is directly tethered to the express language of *Sections 4* and *16* of the Clayton Act regarding injury to business or property (*Section 4*) or threatened loss or damage (*Section 16* **[*61]**), there is no parallel or similar language set forth in *Section 337(a)(1)(A)*. Respondents failed to cite any statutory authority or controlling precedent linking or tracking the injury language of *Sections 4* and *16* of the Clayton Act to the substantive violation language of *Section 337(a)(1)(A)*, *i.e.*, "unfair methods of competition and unfair acts."[8] Thus, respondents' argument for an antitrust

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U.S. Steel could demonstrate standing."); *see also* *Socony-Vacuum, 310 U.S. at 223* ("Under the *Sherman Act* a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.").

[8] Respondents have likewise failed to cite any Commission precedent construing the scope of "unfair methods of competition and unfair acts" of *Section 337(a)(1)(A)* to mandate engrafting the injury language of *Sections 4* and *16* of the Clayton Act onto this statutory term as a matter of law. In their opening brief on review of the ID, Respondents mention only one Commission decision that was issued after the Supreme Court's decisions in *Brunswick* and *Cargill* in which the Court construed the injury language of *Sections 4* and *16* of the Clayton Act. *See, e.g.*, Respondent's Opening Br. on Review of Order 38 Terminating Complainant's Antitrust Claim, at 21-23 (Jan. 17, 2016) ("Resp. Opening Br.") (noting the Commission's only decision post-*Cargill* is *Electrically Resistive Monocomponent Toner*, 0088 WL 1572171, where the Commission "resolved the investigation in the respondents' favor without addressing antitrust injury" and two Commissioners provided additional views in which they raise a concern that the ID did not address the issue of antitrust injury). The Views of the Commission in the *Toner* investigation, however, did not address this point. In their reply submission, Respondents note that "[i]n the context of an affirmative defense, one ALJ has recognized that a party must demonstrate antitrust injury to prove a violation of the *Sherman Act*." Respondents' Response on Review of Order 38 Terminating Complainant's Antitrust Claim, at 9 n.1 (Feb. 1, 2017) (Resp. Reply Br.") (citing ***Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing the Same, Inv. No. 337-TA-413, Final ID, 1999 ITC LEXIS 342, 1999 WL 961281, at *67, 69 (Sept. 8, 1999)*** ("*Certain Rare Earth Magnets*")). The record of the *Magnets* case, however, shows that the ALJ misunderstood the respondents' equitable defense. At closing argument, in response to the ALJ's questions, counsel for the NEOCO respondents tried to clear up the AU's misconception of their affirmative defense stating that "this is not a case in which NEOCO has affirmatively asserted, either privately, through an Attorney General or the Department of Justice, that they have suffered an antitrust injury such that they would be entitled to prevail under the antitrust laws. This is the context of antitrust and patent misuse being asserted as an affirmative defense, which, as a principle of equity, should prohibit this court from enforcing the rights of the Complainants." Closing Arg. Tr. at 2183 (July 27, 1999) (EDIS Doc. No. 49537). The NEOCO Respondents' attempt to clarify their equitable defense was not successful, inasmuch as the ALT mistakenly treated it as an antitrust counterclaim, finding that NEOCO had not established a *Section 1* Sherman Act violation (*see* ***Certain Rare-Earth Magnets, 1999 ITC LEXIS 342, 1999 WL 961281, at *69)***, contrary to the mandatory removal

injury requirement in *Section 337(a)(1)(A)*, severed from its statutory moorings in *Sections 4* and *16* of the Clayton Act, is unsupported. As such, in my view, respondents have failed to establish, as a matter of law, that the *Clayton Act's* "antitrust injury" standing requirement must be engrafted onto the "unfair methods of competition and unfair acts" language of *Section 337(a)(1)(A)*.

The "antitrust injury" standing requirement is also distinct from prudential standing which was essentially undermined by the Supreme Court's *Lexmark* decision. *See* *Lexmark Intl, Inc. v. Static Control Components, Inc., 572 U.S. 118, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (Mar. 25, 2014)*. As stated in *Lexmark*, standing under *section 4* of the Clayton Act, *i.e.*, antitrust injury, "rest[s] on statutory, not 'prudential,' considerations." *Id. at 1386*. The Supreme Court explained that:

> [In *Associated General Contractors*,] we sought to "ascertain," as a matter of statutory interpretation, the "scope of the private remedy created by" Congress in *§ 4* of the Clayton Act, and the "class of persons who [could] maintain a private damages action under" that legislatively conferred cause of action. We held that the statute limited the class to plaintiffs whose injuries were proximately caused by a defendant's antitrust violations. Later decisions confirm that *Associated General Contractors* rested on statutory, not "prudential," considerations.

Id. (quoting *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 529, 532, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*.

The Supreme Court further explained that the proper inquiry to ascertain the class of plaintiffs whom Congress has authorized to sue is "to determine the meaning **[*62]** of the congressionally enacted provision creating a cause of action" and "Nil doing so, [the Court] appl [ies] traditional principles of statutory interpretation." *Lexmark, 134 S. Ct. at 1387-88*.[9] Thus, "antitrust injury," *i.e.*, the specific standing requirement as articulated by the Supreme Court, is distinct from the injury requirement under *Section 337(a)(1)(A)(i)-(iii)* that is applicable to "unfair methods of competition and unfair acts" under *section 337(a)(1)(A)*. For private actions in federal district courts under *Sections 4* and *16* of the Clayton Act alleging antitrust violations, the Supreme Court's interpretation of the nature and extent of injury required in *sections 4* and *16* of the Clayton Act controls the class of plaintiffs authorized to sue in federal courts. In contrast, for complaints filed in the USITC under *Section 337(a)(1)(A)*, the "threat or effect" standard delineated in *subsections (i) through (iii)* of this provision controls the nature and extent of injury or restraint of trade and commerce in the United States that complainants must show in order to pursue a *Section 337(a)(1)(A)* claim alleging "unfair methods of competition and unfair acts," such as a *Sherman Act* claim. *See* *Textron, 753 F.2d at 1028-29* (*Section 337* contains "a distinct injury requirement of independent proof' albeit there is "no precise and all-inclusive definition of 'injury' under *section 337*," which "stems **[*63]** in large part from the diversity of practices covered by the statute.").[10]

Furthermore, the "antitrust injury" requirement is an additional standing requirement for private plaintiffs asserting antitrust claims in federal courts under *sections 4* or *16* of the Clayton Act; it is separate and distinct from "injury-in-fact" or Article III constitutional standing.[11]*See* *Associated Gen. Contractors, 459 U.S. at 535 n. 31* ("[T]he focus of

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provision applicable to counterclaims under *19 U.S.C. § 1337(c)*. No party petitioned for review of these errors, and the Commission did not address them in its notice of non-review. *See* Comm'n Notice (Oct. 25, 1999).

[9] The *Lexmark* Court clarified that "[they] have on occasion referred to this inquiry as 'statutory standing' and treated it as effectively jurisdictional." *Lexmark, 134 S. Ct. at 1387 n.4* (citations omitted). But while "[the statutory standing] label is an improvement over the language of 'prudential standing,' since it correctly places the focus on the statute . . . it, too, is misleading, since 'the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction. . . . '" *Id.* (citations omitted).

[10] Because antitrust injury standing is a separate requirement that is distinct from the substantive "unfair methods of competition and unfair acts" itself, neither Tianrui nor Young Engineers would mandate reading "antitrust injury" into the substantive violation under *section 337(a)(1)(A)* as the ID finds.

the doctrine of 'antitrust standing'[12] is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.") (citations omitted); *ARCO, 495 U.S. at 339 n.8* (distinguishing injury in fact from antitrust injury); *Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 121 (2d Cir. 2007)* ("Antitrust standing is distinct from constitutional standing, in which a mere showing of harm in fact will establish the necessary injury.") (citation omitted); In re Cardizem CD Antitrust *Litig., 332 F.3d 896, 909 (6th Cir. 2003)* ("A private antitrust plaintiff, in addition to having to show injury-in-fact and proximate cause, must allege, and eventually prove, 'antitrust injury.") (citation omitted).

Typically, the Commission **[*64]** is not constrained by the standing requirements of Article III district courts.[13]*See* *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 74, 338 U.S. App. D.C. 282 (DC Cir. 1999)* ("Agencies . . . are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts.") (citation omitted); *Ecee, Inc. v. Fed. Energy Regulatory Comm'n, 645 F.2d 339, 349 (5th Cir. 1981)* ("Administrative adjudications, however, are not an article III proceeding to which either the 'case or controversy' or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court.") (citations omitted). Thus, while "antitrust injury" is necessary to demonstrate "injury" or "damage" under *section 4* or *16* of the Clayton Act (separate from a substantive antitrust violation), as indicated by *Lexmark*, those statutory provisions are not at issue in this investigation. Rather, the statutory authority for the Commission to hear U.S. Steel's antitrust claim stems from *Section 337(a)(1)(A)* and Complainant's alleged antitrust claim or unfair act is based on *section 1* of the Sherman Act.[14]*See* *Ritchie v. Simpson, 170 F.3d 1092, 1095 (Fed. Cir. 1999)* ("[T]he starting point for a standing determination for a litigant before an administrative agency is not Article III, but is the statute that **[*65]** confers standing before that agency.").

Moreover, that the "antitrust injury" standing requirement for private antitrust actions in district court under *sections 4* and *16* of the Clayton Act is not required as a matter of law in *Section 337* investigations is also consistent with the distinction, as recognized by the Federal Circuit, between the remedies available at the Commission and district courts.[15]*See, e.g.,* *Spansion Inc. v. Int'l Trade Comm'n, 629 F.3d 1331, 1359 (Fed. Cir. 2010)* (holding that the

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[11] "'Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy' required by Article III. [T]he irreducible constitutional minimum of standing' consists of 'three elements.' An appellant 'must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the [appellee], (3) that is likely to be redressed by a favorable judicial decision.'" *Phigenix, Inc. v. Immunogen Inc., 845 F.3d 1168, 1171 (Fed. Cir. 2017)* (quoting *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*; *Hollingsworth v. Perry, 570 U.S. 693, 133 S. Ct. 2652, 2661, 186 L. Ed. 2d 768 (2013)*; *Lujan v. Deft. of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992))* (alteration in original).

[12] Antitrust injury and antitrust standing are closely related but not identical. "[A]ntitrust injury [is] a 'necessary, but not always sufficient,' component of antitrust standing." *CBC Cos., Inc. v. Equifax, Inc., 561 F.3d 569, 571 (6th Cir. 2009)* (quoting *Cargill, 479 U.S. at 110 n.5*); *see also* *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997)* ("Antitrust injury is a necessary but insufficient condition of antitrust standing.") (citation omitted).

[13] On appeal before a federal court, however, a party seeking review of an agency's final action must always supply the requisite proof of the "injury-in-fact" to establish standing, but other requirements of standing, including immediacy and redressability, may be relaxed. *See* *Phigenix, 845 F.3d at 1171, 1172 n.2*.

[14] No party has argued, nor does the ID hold, that U.S. Steel's antitrust claim under *Section 337(a)(1)(A)* must be brought under *Section 4* or *16* of the Clayton Act. *See, e.g.*, Oral Arg. Tr. at 47-48 (noting that *Clayton Act* does not apply to U.S. Steel's complaint); *Id.* at 119 (agreeing that U.S. Steel's substantive claim that the antitrust laws have been violated is a *Sherman Act* claim, not *Section 4* or *16* of the Clayton Act). Nor has any party argued that there is any textual basis in Sherman Act *Section 1* for requiring antitrust injury. *See, e.g.*, Oral Arg. Tr. at 47 (noting that no party has made any argument that there is a textual basis in *Section 1* of the Sherman Act for antitrust injury).

[15] Respondents acknowledge important distinctions regarding the treatment of imports in *Section 337* investigations compared to district court actions that pertain to a *Sherman Act* antitrust claim. Namely, *Section 337* "creates a different potential remedy"

Commission is not required to apply the eBay factors before issuing an exclusion order "[g]ven the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement") (citing eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)). As noted *supra*, section 4 of the Clayton Act is a remedial provision that makes treble damages available to private litigants in district courts. *See* ARCO, 495 U.S. at 331 n.1; *see also* Brunswick, 429 U.S. at 485 ("Section 4, in contrast, is in essence a remedial provision."). Respondents have cited no authority for the proposition that the Commission is legally constrained to import the antitrust injury requirement derived from the Clayton Act's remedial statutory provisions (section 4 and 16) into the Commission's substantive violation determination or to displace the existing standing **[*66]** requirement of Section 337(a)(1)(A).[16]

In sum, I find that the ID incorrectly imports the "antitrust injury" standing requirement for private causes of action in district courts, under section 4 and section 16 of the Clayton Act, into the Section 337 (a)(1)(A) unfair trade practices provision, *i.e.*, "unfair methods of competition and unfair acts," of Section 337(a)(1)(A). *See* ID at 10-11, 23. Antitrust injury is a separate and distinct standing requirement derived from, and restricted as a matter of statutory interpretation to, section 4 or 16 of the Clayton Act in Article III district courts. It is not a required element of a Sherman Act section 1 violation alleged in U.S. Steel's complaint to constitute "unfair methods of competition and unfair acts" under the **[*67]** Section 337(a)(1)(A) as the ID finds. *See* ID at 9, 19. Inasmuch as antitrust injury standing is not required as a matter of law in this section 337 investigation, the ID's findings that hold otherwise should be reversed and vacated and the matter remanded to the ALI for further proceedings.

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and in district court "you would have to get personal jurisdiction over the parties, as well, which may not be possible" whereas in the ITC there is *in rem* jurisdiction and personal jurisdiction is not required. While these would not "create a new sort of cause of action in a new substantive area of law, ... what it does do is create a different way of getting at a violation that might be more attractive in certain circumstances than going into district court." Oral Arg. Tr. at 166. A further distinction, as noted at the oral argument, is that a government attorney from the USITC Office of Unfair Import Investigations participates in the investigation as a neutral third party to assist the AU and the Commission to fully develop the record, including serving discovery, filing motions, appearing at trial, questioning witnesses, and filing briefs before the AU and the Commission. *Id.* at 194.

[16] I find unpersuasive respondents' policy argument that antitrust injury required by Sections 4 and 16 of the Clayton Act should be adopted for the same reasons that in patent-based investigations, the Commission, as a policy matter, looks to fedeial law regarding patent standing to determine patent ownership required by Commission Rule 210.12(a)(7). Resp. Opening Br. at 9 (citing *Certain Catalyst Components and Catalysts for the Polymerization of Olefins*, Inv. No. 337-TA-307, Views of the Commission, 1990 WL 710614, at *15) (June 7, 1990) ("*Catalyst Components*"). In *Catalyst Components*, the Commission noted that its Rules of Practice and Procedure require that every intellectual property complaint must show that at least one complainant is the owner or exclusive licensee of the subject property and determined that there was no reason for the Commission to interpret this rule in a way contrary to judicial precedent governing patent ownership. *See* 1990 WL 710614, at *14. The Federal Circuit has approved the Commission's practice of reading federal patent standing requirements into this rule. *See* SiRF Tech., Inc. v. Int'l Trade Comm'n, 601 F.3d 1319, 1326 n.4 (Fed. Cir. 2010). Respondents, however, fail to cite any Commission procedural rule governing complaint requirements for Sherman Act Section 1 antitrust claims that would require the Commission to read into such rule the antitrust injury requirement of the Clayton Act Sections 4 and 16. *See* Resp. Opening Br. at 9-10. Moreover, respondents have failed to cite any unfair act investigations in which the Commission was required to, or chose to, adopt the same standing requirements as in federal district courts, apart from the Commission's interpretation of its own procedural rule in the patent context. *See* Resp. Opening Br. at 9-10; Oral Arg. Tr. at 117-18.

Turner v. Va. Dep't of Med. Assistance Servs.

United States District Court for the Eastern District of Virginia, Richmond Division

March 19, 2018, Decided; March 19, 2018, Filed

Civil Action No. 3:17cv527-HEH

Reporter

301 F. Supp. 3d 637 *; 2018 U.S. Dist. LEXIS 45050 **; 2018-1 Trade Cas. (CCH) P80,319; 2018 WL 1383845

DR. MARK G. TURNER, DDS, PC, and DR. MARK G. TURNER, DDS in his Individual capacity, Plaintiffs, v. VIRGINIA DEPARTMENT OF MEDICAL ASSISTANCE SERVICES, et al., Defendants.

Subsequent History: Motion denied by, Motion granted by *Dr. Mark G. Turner, DDS, PC v. Dentaquest, LLC, 2018 U.S. Dist. LEXIS 98531 (E.D. Va., June 11, 2018)*

Dismissed by, in part, Dismissed without prejudice by, in part *Turner v. Dentaquest, LLC, 2018 U.S. Dist. LEXIS 134866 (E.D. Va., Aug. 9, 2018)*

Prior History: *Turner v. Va. Dep't of Med. Assistance Servs., 230 F. Supp. 3d 498, 2017 U.S. Dist. LEXIS 20402 (W.D. Va., Feb. 14, 2017)*

Core Terms

termination, immunity, alleges, Sherman Act, antitrust, supervision, dental, issue preclusion, conspiracy, motion to dismiss, patients, state action, articulated, providers, anti trust law, Defendants', contracts, contends, reasons, stems, anticompetitive conduct, antitrust violation, factual allegations, medical assistance, Additionally, conclusory, violations, dentists, Ethics, advice

Counsel: **[**1]** For Dr. Mark G. Turner, DDS, PC, Dr. Mark G. Turner, DDS, in his individual capacity, Plaintiffs: Vincent Mark Amberly, LEAD ATTORNEY, Amberly Law, Leesburg, VA.

For Virginia Department of Medical Assistance Services ("DMAS"), a quasi-public and quasi-private agency under the laws of the Commonwealth of Virginia, Dr. Tonya Parris-Wilkins, DDS, in her individual capacity as a competitor with dentists in Virginia, Defendants: Rita Poindexter Davis, LEAD ATTORNEY, Office of the Attorney General (Richmond), Richmond, VA; Sarah Oxenham Allen, Office of the Attorney General, Richmond, VA; Tyler Timothy Henry, Office of the Attorney General (Richmond), Richmond, VA.

For Dr. David Black, DDS, in his individual capacity as a competitor with dentists in Virginia, Dr. Terry Dickinson, in his individual capacity as a competitor with dentists in Virginia, and in his capacity as executive director of the Virginia Dental Association, Defendants: Harold David Gibson, LEAD ATTORNEY, Gentry Locke Rakes & Moore, Roanoke, VA; Scott Andrew Stephenson, Gentry Locke, Roanoke, VA.

For Dr. Greg Harvey, DDS, in his individual capacity as a competitor with dentists in Virginia, and in his capacity as an owner of **[**2]** Commonwealth Dental Clinic, Roanoke, VA, Defendant: John Benjamin Rottenborn, Justin Ephraim Simmons, Michael John Hertz, LEAD ATTORNEYS, Woods Rogers PLC (Roanoke), Roanoke, VA.

Judges: Henry E. Hudson, United States District Judge.

Opinion by: Henry E. Hudson

Opinion

[*639] MEMORANDUM OPINION

(Granting Defendants' Motions to Dismiss; Denying Motion to Transfer as Moot)

This matter is before the Court on three Motions to Dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* and a Motion to Transfer Venue in accordance with *28 U.S.C. § 1404*.[1] The Complaint contains one count alleging a violation of the *Sherman Act* and several counts alleging violations of state law.

All parties have filed memoranda supporting their respective positions. The Court will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court, and oral argument would not aid in the decisional process. E.D. Va. *Local Civ. R. 7(J)*.

For the reasons stated herein, the Court will grant the Motions to Dismiss. Count One will be dismissed with prejudice. The remaining state law counts will be dismissed without prejudice. The Motion to Transfer Venue will be denied as moot.

I. Background

As required by *Rule 12(b)(6) of the Federal Rules of Civil Procedure*, the Court assumes Plaintiff's well-pleaded allegations to be true **[**3]** and views all facts in the light most favorable to him. *T.G. Slater & Son **[*640]** v. Donald P. & Patricia A. Brennan LLC, 385 F.3d 836, 841 (4th Cir. 2004)* (citing *Mylan Labs, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993))*. Viewed through this lens, the facts are as follows.

Plaintiff Dr. Mark G. Turner, DDS[2] ("Plaintiff") was a dentist in the Roanoke, Virginia area during the period relevant to the Complaint. (Compl. ¶ 1.) From 2008 to 2014, Plaintiff treated Medicaid patients in the Smiles for Children ("SFC") program pursuant to an agreement with Defendant Dentaquest, LLC.[3] (*Id.* ¶¶ 2-3.)

Defendant DMAS is the Virginia agency tasked with overseeing the SFC program and contracted Defendant Dentaquest to administer and supervise the program. (*Id.* ¶ 6.) DMAS is managed by the Secretary of Human Resources and a Director of Medical Assistance Services, who is appointed by the Governor and subject to confirmation by the General Assembly. *Va. Code Ann. § 32.1-323*. Additionally, DMAS has an eleven-member board ("DMAS Board"), which is comprised of five members who are health care providers and six members who are not health care providers. *Va. Code Ann. § 32.1-324(A)*. The DMAS Board formulates and submits a plan for the provision of medical assistance services to the U.S. Secretary of Health and Human Services in accordance with *Title XIX of the Social Security Act*. *Va. Code Ann. § 32.1-325(A)*. The Director of Medical Assistance **[**4]** Services is empowered to administer this plan and to "enter into all contracts necessary or incidental to the

[1] Defendants Virginia Department of Medical Assistance Services ("DMAS") and Dr. Tonya Parris-Wilkins, DDS ("Parris-Wilkins") filed a joint motion on August 25, 2017. (DMAS, Parris-Wilkins Mot. to Dismiss, ECF No. 11.) Defendants Dr. David Black, DDS ("Black") and Dr. Terry Dickinson, DDS ("Dickinson") also filed a joint motion on August 25, 2017. (Black, Dickinson Mot. to Dismiss, ECF No. 9.) Defendant Dr. Greg Harvey, DDS ("Harvey") filed a Motion to Dismiss and a Motion to Transfer Venue on September 6, 2017. (Harvey, Mot. to Dismiss, ECF No. 17; Harvey, Mot. to Transfer, ECF No. 19.)

[2] This action is brought by Plaintiff "both in his individual capacity and through his corporation that he did business" with. (Compl. ¶ 20.)

[3] Defendant Dentaquest is the successor of Doral Dental USA, LLC, which is the party with whom Plaintiff originally entered into an agreement. Defendant Dentaquest is not a party to the motions presently before the Court.

performance of the Department's duties and execution of its powers as provided by law." *Va. Code Ann. § 32.1-325(D)(1)*.

The SFC program is split into two parts: one component of the program is dedicated to treating patients up to the age of twenty one and the other component focuses on treating patients that are over the age of twenty one. (*Id.* ¶ 4.) Plaintiff "worked exclusively with the Over 21 portion" of the SFC program. (*Id.*) During his involvement with the SFC program, Plaintiff operated what was likely "the largest safety net adult Medicaid practice in Virginia" and "was treating at least 75% of the eligible Medicaid adults receiving treatment in the Roanoke Valley." (*Id.* ¶ 10.) The patients Plaintiff treated under the SFC program formed the entirety of his practice. (*Id.* ¶ 3.)

The Roanoke-based Mission of Mercy Clinic ("MOM") was a project of the Virginia Dental Association ("VDA") that provided "free, volunteer traveling dental" services to the same segment of the population as Plaintiff. (*Id.* ¶¶ 13-14.) Defendant Dickinson, the Executive Director of the VDA, and Defendant Black, a VDA board member, **[**5]** are Founders of MOM, and Defendant Black serves as its Dental Director. (*Id.* ¶¶ 13, 27.) Plaintiff claims that competition with the MOM was detrimental to his practice, but he also credits his dental practice as a "contributing factor [to] the Roanoke Mission of Mercy going out of business." (*Id.* ¶ 42.) The MOM's financial model proved unworkable, and, sometime after September 2012, the program was reorganized into a Mini-MOM concept, which was "fully endorsed" by the VDA. (*Id.* ¶¶ 14, 42, 44.)

In January 2014, Defendant Dentaquest ended Plaintiff's eligibility under the SFC program by terminating Plaintiff's contract **[*641]** "without cause." (*Id.* ¶¶ 21, 45.) Starting in 2014, Commonwealth Dental Clinic ("CDC"), which is owned by Defendant Harvey, became the only "provider[] for Adult (Over 21) Medicaid dental services in Western Virginia." (*Id.* ¶ 66.)

Plaintiff alleges that the "defendant dentists exercised their market power to push the Plaintiff out of his dental market niche, and out of business" and that DMAS and Dentaquest "knew there was antitrust activity" and took action that led to "further cover up and concealment of Defendants' actions against [Plaintiff]." (*Id.* ¶¶ 18, 54-55.) Specifically, **[**6]** Plaintiff claims that, in downsizing from the financially inviable MOM, Defendants agreed to provide treatment to non-Medicaid-eligible patients at the Mini-MOMs and funnel all Medicaid-eligible patients to Defendant Harvey's CDC. (*Id.* ¶¶ 14, 18, 43.) Plaintiff further alleges that "Defendant Greg Harvey agreed to absorb the Over 21 Medicaid practice of Plaintiff on the condition that he would not have to compete directly with Plaintiff." (*Id.* ¶ 48.) As such, Plaintiff alleges that Defendants Dickinson, Black and Harvey "joined together . . . to put [Plaintiff] out of business in the Medicaid [SFC] program." (*Id.* ¶ 18.)

As mentioned above, Defendant Dentaquest terminated Plaintiff's contract, ending his eligibility under the SFC program. (*Id.* ¶¶ 21, 45.) Plaintiff does not contend that Defendant Dentaquest lacked the contractual right to terminate his contract.[4] Instead, Plaintiff alleges that Defendant Dentaquest "did not act independently," that "DMAS sought the Plaintiff's termination based upon the advice of Defendants Terry Dickinson, David Black and/or Greg Harvey," and that Defendant Dentaquest notified Plaintiff's patients of his termination before the deadline for his appeal **[**7]** had passed. (*Id.* ¶¶ 45 , 46, 61.)

Plaintiff alleges that Defendant Dickinson communicated the progress of Plaintiff's termination to Defendant Black; that Defendants Black and Harvey purchased a building to house CDC prior to Plaintiff's termination "***with the knowledge and intent*** . . . that one of their main competitors ([Plaintiff]) would be eliminated by Defendant Dentaquest;" and that the VDA, led by Defendant Dickinson, supported the CDC despite "not support[ing] the Over 21 Benefit in the past." (*Id.* ¶¶ 24, 35, 47.)

In January 2015, Plaintiff filed an ethics complaint ("2015 complaint") against Defendants Harvey and Black with the VDA Ethics Committee regarding ethics violations surrounding the naming and advertising of CDC. (*Id.* ¶ 27; Exhibit D, ECF No. 1-4.) Plaintiff states that the VDA "likely did not conduct a review of [Plaintiff]'s Ethics Complaint, as, if they did, David Black would have been found blatantly guilty." (Compl. ¶ 27.) Further, Plaintiff alleges that

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[4] Plaintiff's asserted cause of action in the fifth count of the Complaint indicates that Plaintiff's contract with Defendant Dentaquest was "terminable at will." (Compl. 31.)

Defendant Parris-Wilkins, a member of the VDA and the VDA Ethics Committee, "presumably" ruled against this complaint. (*Id.* ¶ 31.)

In April 2016, Plaintiff was the subject of an inquiry by the Virginia Board of Dentistry **[**8]** ("BOD") and was ultimately sanctioned for violations stemming from the closure of his dental practice in 2014. (*Id.* ¶ 31; Exhibit N, ECF No. 1-17.) Defendant Parris-Wilkins was on the BOD panel that ruled against Plaintiff. (Compl. ¶ 31.) Plaintiff contends that Defendant Parris-Wilkins' service on this panel was a clear conflict of interest, due to her "close relationship" with Defendant Dickinson and her role in ruling against the 2015 complaint. (*Id.* ¶ 33.) In sum, Plaintiff claims that "Defendant Parris-Wilkins was involved in the Defendants' attempts to **[*642]** cover up their actions against Plaintiff." (*Id.*)

Plaintiff asserts a cause of action under *Section One* of the Sherman Act and alleges that the relevant service market is:

> (1) adult (over 21) dental services recognized under the Medicaid approved *Smiles For Children* program; (2) tooth extractions and related services, as identified under Medicaid approved Over 21 *Smiles For Children* program; and (3) Medicaid approved services for the Over 21 members of the *Smiles For Children* program in Western Virginia, and within a two hour drive of Roanoke, Virginia.

(*Id.* ¶ 56.) Plaintiff claims that, as a result of Defendants' anticompetitive actions, **[**9]** dentists have been deterred from entering the market and there has been a significant reduction in the availability of dental services. (*Id.* ¶ 64.) Further, CDC will continue to exercise its "influence" to maintain a "monopoly" over the market. (*Id.*) Plaintiff also claims that he has been "directly harmed" by Defendants' anticompetitive conduct and continues to suffer "significant economic and financial loss." (*Id.* ¶ 67.)

Plaintiff previously brought a nearly identical action against a nearly identical cast of defendants in the United States District Court for the Western District of Virginia. *See* *Turner v. Va. Dep't of Med. Assistance Servs., 230 F. Supp.3d. 498 (W.D. Va. 2017)* (hereinafter "Western District Case"). After considering Plaintiff's arguments, the Honorable Judge Jackson L. Kiser granted the defendants motions to dismiss and dismissed the action without prejudice.

II. Standard of Review

Generally, a court considering a motion to dismiss is both informed and constrained by the four corners of a complaint. The court, however, may properly consider documents that are attached to the complaint, *Fed. R. Civ. P. 10(c)*, and take judicial notice of matters of public record, *Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007)*. The task at hand is to determine the sufficiency of the Complaint, "not resolve contests surrounding the **[**10]** facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*. In considering a motion to dismiss, plaintiff's well-pleaded allegations are taken as true and the complaint must be viewed in the light most favorable to the plaintiff. *T.G. Slater & Son, Inc., 385 F.3d at 841*.

Nevertheless, "in the event of conflict between the bare allegations of the complaint and any exhibit attached . . . the exhibit prevails." *Fayetteville Inv'rs v. Commercial Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991)*. The so-called exhibit-prevails rule is only applicable when a plaintiff relies on an exhibit to form part of its claim, such that a court can presume plaintiff "has adopted as true the contents of the document." *Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166-67 (4th Cir. 2016)*.

A court "need not accept the legal conclusions drawn from the facts," nor must the court "accept as true unwarranted inferences, unreasonable conclusions or arguments." *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000)*. To survive *Rule 12(b)(6)* scrutiny, a plaintiff must provide more than merely "labels and conclusions" or a "formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citations omitted). Instead, a plaintiff must allege facts sufficient "to raise a right to relief above the speculative level," stating a claim that is "plausible on its face," rather than merely "conceivable." *Id. at 555, 570* (citations omitted). "A claim has facial plausibility when the plaintiff **[**11]** pleads factual **[*643]** content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*).

III. Discussion

Each of the Defendants that are parties to the Motions presently before the Court have challenged the sufficiency of the factual allegations made in Plaintiff's Complaint under the *Twombly* and *Iqbal* standard. In addition, Defendant DMAS argues that the doctrine of issue preclusion bars re-litigating Judge Kiser's determination that it is immune from liability for violations of the Sherman Act. Alternatively, Defendant DMAS argues that it is immune from liability under the Sherman Act for the same reasons enunciated in the Western District Case. Because the immunity determination would preclude liability regardless of the sufficiency of the factual allegations to state a claim under the Sherman Act, the Court will address the issue preclusion and state action immunity arguments first.

1. Issue Preclusion

First and foremost, the Court may properly consider whether the doctrine of issue preclusion bars re-litigation of the immunity issue at this stage of litigation. The doctrine of issue preclusion, also known as collateral estoppel, **[**12]** is an affirmative defense. It is well-settled in the Fourth Circuit that a court ruling on a motion to dismiss may properly consider affirmative defenses when such defenses "clearly appear on the face of the complaint." *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993)*. Further, "a district court may properly 'take judicial notice of facts from a prior judicial proceeding when the [collateral estoppel] defense raises no disputed issue of fact.'" *Ashe v. PNC Fin. Servs. Grp., 652 F. App'x 155, 157 (4th Cir. 2016)* (quoting *Andrews v. Daw, 201 F.3d 521, 524 n.1 (4th Cir. 2000))*.

Plaintiff contends that "DMAS . . . may not invoke state-action immunity." (Compl. ¶ 70.) As discussed below, in making this claim, Plaintiff is attempting to re-litigate the determination in the Western District Case that DMAS is immune from this action. Because the question of issue preclusion clearly appears on the face of the Complaint, the Court can appropriately consider the preclusive effects of Judge Kiser's opinion in the present case.

The burden is on the party seeking the preclusive effect of a determination to show that issue preclusion is applicable. Issue preclusion is only appropriate when the proponent demonstrates:

> (1) the issue or fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue **[**13]** or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding.

Kloth v. Microsoft Corp., 355 F.3d 322, 326 (4th Cir. 2004). Plaintiff does not address the issue preclusion argument in his memorandum opposing DMAS's Motion. For the reasons below, the Court finds that issue preclusion does not apply.

The first, second, fourth and fifth elements are satisfied in the present case. The state action immunity issue presently before the Court is identical to the one decided by Judge Kiser in the Western District Case. *Turner, 230 F. Supp.3d. at 505-07*. Judge Kiser resolved the immunity issue, and his dismissal of Plaintiff's action against DMAS was based in part on that immunity determination. *Id. at 507*. Moreover, **[*644]** Plaintiff clearly had a full and fair opportunity to be heard, as the dismissal came after the court heard arguments from both parties. *Id. at 505-07*. Lastly, the dismissal operates as a final and valid order.

With regard to the third element, the Court must consider whether the determination that state action immunity applied to DMAS was critical and necessary **[**14]** to the dismissal of the complaint against DMAS. In *Ritter v. Mount St. Mary's College*, the Fourth Circuit found that "where the court in the prior suit has determined two issues, either of which could independently support the result, then neither determination is considered essential to the judgment. Thus, collateral estoppel will not obtain as to either determination." *814 F.2d 986, 993 (4th Cir. 1987)*; *see also* *Kloth, 355 F.3d at 328*. In pertinent part, Judge Kiser's opinion states: "Because DMAS has immunity against claims under the Sherman Act, Plaintiff has failed to state a claim against DMAS." *Turner, 230 F. Supp. 3d at 507*. While clearly relying on DMAS's immunity as one basis for his dismissal of Plaintiff's action against it, Judge Kiser went on to determine that dismissal was also warranted because Plaintiff failed to meet the plausibility standard under *Twombly* and *Iqbal*. *Turner, 230 F. Supp. 3d at 508-09*.

Because two independent reasons for dismissal of the claim against DMAS exist, collateral estoppel will not attach to the immunity determination from the Western District Case.

2. State Action Immunity

Defendant DMAS contends that the doctrine of state action immunity bars Plaintiff's claim against it for alleged violations of *Section One* of the Sherman Act. State action immunity, or *Parker* Immunity, makes **[**15]** clear that states are not bound by the strictures of the Sherman Act regime when operating in their sovereign capacity. *See* *Parker v. Brown, 317 U.S. 341,350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. As described below, the state action immunity doctrine is applicable to DMAS, and therefore DMAS is exempt from liability under the Sherman Act.

In *Parker*, the Supreme Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by the legislature." *Id. at 351*. Subsequently, the Court adopted a two-part test to better establish the boundaries of this immunity. *See* *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. The Court clarified in *Midcal* that "a challenged restraint" is only immune from suit if it is "clearly articulated and affirmatively expressed as state policy . . . [and that] policy must be actively supervised by the State itself." *Midcal, 445 U.S. at 105*. Importantly, however, the Court has carved out an exception to the active supervision component of the *Midcal* test. *See* *Hallie v. Eau Claire, 471 U.S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*. In *Hallie*, the Court held that municipalities are exempt from the active supervision requirement and suggested in dicta that state agencies are as well. *471 U.S. at 47*. The Court explained that the motivation for this exemption is the limited concern that **[**16]** a municipality will engage in anticompetitive conduct based upon purely private interests. *Id.*

Most recently, the Court addressed the applicability of the active supervision requirement to state agencies in *North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*. The State of North Carolina entrusted the regulation of the practice of dentistry to the North Carolina **[*645]** State Board of Dental Examiners (the "Board"), and a majority of the Board's members were actively engaged in the practice of dentistry. *Id. at 1107-08*. The Board was sued after it sought to prevent non-dentists from providing teeth-whitening services. *Id.* The Court downplayed the significance of the names or labels supplied by the State and instead focused on the composition of the entity that allegedly engaged in anticompetitive conduct. *Id. at 1114*. Specifically, the Court held that an entity is subject to the active supervision requirement when "a controlling number of decisionmakers are active market participants in the occupation the board regulates." *Id.*

In order for DMAS to be protected by *Parker* Immunity, its actions must have been based upon a clearly articulated state policy and either actively supervised by the state or exempted from the active supervision requirement.

DMAS was acting pursuant **[**17]** to a clearly articulated state policy when it directed Dentaquest to terminate its contract with Plaintiff. The clearly articulated policy standard is satisfied when "the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1112* (internal citations omitted). The Code of Virginia authorizes DMAS to develop a plan for administering medical assistance services and further entrusts the Director of DMAS with the authority to enter into contracts that are "necessary or incidental" to DMAS performing the duties and executing the power it is invested with by law. *Va. Code. Ann. § 32.1-325(A)*, *(D)(1)*. Implicit in the authority to enter into contracts is the power to terminate them. Further, the displacement of some competition is the natural consequence of DMAS exercising its administrative authority.

Plaintiff does not appear to contest that the Commonwealth of Virginia has conferred this specific authority to DMAS or that the exercise of this authority would necessarily have an impact on the competitive market. Instead, he contends that Virginia has not articulated a clear policy allowing DMAS to engage in anticompetitive conduct. (*See* Compl. **[**18]** ¶¶ 52-54, 70.) As detailed above, however, there is no requirement that a state explicitly endorse the anticompetitive effects of a clearly articulated policy. Rather, those effects need only be the inherent, logical, or ordinary result of exercising the delegated authority. In this case, the exclusion or inclusion of various service providers is the obvious and foreseeable result of the exercise of the administrative authority that the Virginia General Assembly delegated to DMAS.

For these reasons, DMAS has satisfied the clearly articulated policy prong of the *Parker* Immunity analysis.

DMAS is not subject to the active supervision requirement. The primary mission of DMAS is the provision of medical assistance services and not the regulation or licensure of members of the dental profession. *See* *Va. Code Ann. §§ 32.1-323, et seq.* Moreover, DMAS is politically accountable. It is overseen by the Secretary of Human Resources and the Director of DMAS, who is appointed by the Governor and subject to confirmation by the General Assembly. To the extent the DMAS Board is relevant to the actions underlying this case, only a minority of its members are health care providers. *Cf.* *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1114*. Plainly put, the concern animating the Court's **[**19]** active supervision line of cases—that private actors cloaked in the authority of the state will subvert public priorities to private self-interest—is not present with DMAS, which functions as a prototypical state agency.

[*646] Plaintiff's arguments that DMAS requires active supervision are unavailing. Plaintiff essentially contends that in making its decision to terminate him DMAS relied on the opinions and suggestions of active market participants and therefore "ceased to maintain an objective approach to Plaintiff." (Compl. ¶ 55.) Conspicuously absent from the Complaint is any allegation that DMAS—the entity which ultimately made the decision to terminate Plaintiff—is controlled by market participants. Plaintiff instead alleges that DMAS "conspired" or "agreed" with the other Defendants to exclude him from the Medicaid market. (*See* Compl. ¶¶ 29, 59.) However, even if the Court were to accept these conclusory allegations as true, "[t]here is no such conspiracy exception" to *Parker* Immunity. *City of Columbia v. Omni Outdoor Advert., 499 U.S. 365, 374-79, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*; *see also* *N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1114*.

DMAS operates as a prototypical state agency and is not controlled by active market participants, and therefore the active supervision component of the *Midcal* test is inapplicable. For these reasons, DMAS **[**20]** is immune from suit under the Sherman Act. Therefore, Plaintiff's claim against DMAS for violating *Section 1* of the Sherman Act will be dismissed.

3. Failure to State a Claim for Violation of the Sherman Act

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *15 U.S.C. § 1*. "To establish a *§ 1* antitrust violation, a plaintiff must prove '(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint on trade.'" *N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 371 (4th Cir. 2013)* (quoting *Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002))*. Additionally, once a plaintiff demonstrates a violation of *§ 1*, he must prove that he suffered an antitrust injury: the type of injury that "the anti-trust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

At the outset, the Court notes that it is unclear how any of the individuals named as Defendants could have possibly excluded Plaintiff from the Over 21 SFC program. Plaintiff essentially contends that DMAS ordered Dentaquest to terminate its contract with Plaintiff only after agreeing with Defendants Dickinson, Parris-Wilkins, Black and Harvey **[**21]** that Defendant Harvey would fill the gap created by Plaintiff's termination. It is undisputed, however, that Plaintiff's contract allowed for termination without cause. It is also undisputed that DMAS and Dentaquest were the only entity with the authority to terminate Plaintiff's contract. That the individual Defendants may have lobbied for Plaintiff's termination or even agreed with DMAS that Plaintiff should be removed from the Smiles for Children program does not change the fact that the power to exclude Plaintiff from the program rested with DMAS and Dentaquest. As the Court stated in *Omni*, "it is both inevitable and desirable that public officials [will] agree to do what one or another group of private citizens urges upon them." *499 U.S. at 374*.

Also noticeably absent from the Complaint is any explanation as to how the individual Defendants could have conceivably excluded Plaintiff from the SFC program market wielding powers that they did not have. Plaintiff broadly claims that "[DMAS], Dentaquest . . . and the [i]ndividual **[*647]** Defendants have exercised the power to exclude dentists from competing in the relevant service markets. These Defendants have the power and perceived power to provide contracts, **[**22]** issue finds, and order dentists to take or refrain from certain conduct." (Compl. ¶ 58.) Plaintiff, however, provides no indication as to how or when the private individual Defendants exercised this authority. Further, the only allegation of misconduct against Defendant Parris-Wilkins occurred in April of 2016, more than two years after Plaintiff's contract with Dentaquest was terminated.

A. Plaintiff Fails to Plausibly Allege a Contract, Combination or Conspiracy

Because *§ 1* of the Sherman Act only restricts contracts, combinations and conspiracies that restrain trade, the relevant inquiry "is whether the challenged anticompetitive conduct "stem[s] from independent decisions or from an agreement, tacit or express." *Twombly, 550 U.S. at 553* (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L. Ed. 273 (1954))*. In *Twombly*, the Court clarified that mere conclusory claims of an agreement, even when paired with allegations of parallel conduct, are insufficient to satisfy the contract, combination or conspiracy aspect of a *§ 1* antitrust claim. *550 U.S. at 553-55*. "Without *more*, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id. at 556-57* (emphasis added).

The Fourth Circuit has found that "[a]ntitrust **[**23]** complaints . . . 'that include detailed factual allegations as to the who, what, when and where of the claimed antitrust misconduct not surprisingly survive dismissal.'" *SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 430 (4th Cir. 2015)* (quoting William Holmes & Melissa Mangiaracina, ***Antitrust Law*** Handbook § 9:14 (2014 supp.). Communications between alleged conspirators can help raise an inference of agreement, as they afford the "means and opportunity to conspire." *Id. at 432*. In essence, additional details that indicate a meeting of the minds are required to "allay[] suspicion that the plaintiff is merely speculating a conspiracy into existence from coincidentally similar action." *Id. at 430*.

Plaintiff falls well short of alleging the requisite meeting of the minds. The Complaint contains nothing more than conclusory allegations of an agreement between the Defendants. Moreover, those allegations are directly controverted by several other statements in the Complaint that allege DMAS sought the advice of the Defendants. (*Compare* Compl. ¶ 29 ("Defendant Dr. Greg Harvey, DDS formed and funded CDC after agreeing with Defendants DMAS, Dickinson and Black that Plaintiff would be terminated from the Virginia Medicaid program."), *with* Compl. ¶ 55 ("DMAS sought the opinion of **[**24]** Defendant Dickinson in regard to the decision to terminate Plaintiff, and discussed this decision with Defendants Dickinson, Black and Harvey . . . [t]hus, DMAS ceased to maintain an objective approach to Plaintiff.").)[5] **[*648]** One party seeking the advice, opinion or consultation of another party as

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[5] As evidence of the communication amongst the Defendants with regard to Plaintiff's termination, Plaintiff attaches Exhibit T. ("Ex. T," ECF No. 1-23.) This exhibit shows that Defendant Dickinson was in an email thread in which he was informed of Plaintiff's impending termination; however, the thread does not show him advising, encouraging, agreeing or otherwise ordering

to a decision does not imply that the two entered into an agreement. This is no less true when the party seeking advice ultimately follows that advice.

Even if the Court were willing to disregard this glaring inconsistency in Plaintiff's Complaint, the remaining allegations do not provide the "more" necessary to satisfactorily allege a *§ 1* antitrust violation. The fact that Defendant Dickinson communicated with Defendant Black on the progress of Plaintiff's termination does not suggest that the two were working together to bring the termination about. The fact that Defendant Harvey had advanced knowledge of Plaintiff's termination and took steps to fill the gap created by his termination does not suggest that he was active in causing the termination. These examples at best represent parallel conduct which alone is not actionable.

In its best light, the Complaint contains conclusory allegations **[**25]** of an agreement and a few instances of parallel conduct. Under *Twombly*, additional factual allegations are necessary in order to plausibly claim that an agreement was reached. Therefore, Plaintiff has failed to sufficiently allege a meeting of the minds.

B. Plaintiff Fails to Allege that He Suffered an Antitrust Injury

The requirement of demonstrating an antitrust injury stems from the enduring principle that antitrust laws were enacted for "the protection of *competition*, not *competitors*." *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. As such, a plaintiff's injuries must be "of the type that the antitrust statute was intended to forestall." *Assoc. Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 540, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Not all harms that flow from an antitrust violation are compensable under the antitrust laws.

Though an injury may be "causally related to an antitrust violation, [it] nevertheless will not qualify as antitrust injury unless it is attributable to an anticompetitive aspect of the practice under scrutiny." *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (internal quotations omitted). In essence, "a plaintiff must show that the net effect of a challenged restraint is harmful to competition." *Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508 (4th Cir. 2002)*. Identifying an antitrust injury is a necessary component of demonstrating standing to bring an antitrust action. *Kloth v. Microsoft Corp., 444 F.3d 312, 323 (4th Cir. 2006)*.

Plaintiff's antitrust claim founders **[**26]** at the starting gate because he fails to allege an antitrust injury. Plaintiff's loss of his "niche" practice due to the decision by DMAS to terminate his contact and to contract with a replacement service provider is not the type of injury that the antitrust laws were designed to prevent. The Complaint contains no plausible allegations that this decision by DMAS will produce anticompetitive results in the relevant market. Plaintiff's contention that his termination will serve as a deterrent to others seeking to enter the market is a conclusion that is not tethered to any specific factual allegations. Moreover, while DMAS's decision to remove Plaintiff as a service provider may have had the effect of **[*649]** shutting him out of the Medicaid market, that is the natural consequence of substituting one contractor for another. *Drs. Steuer & Latham, P.A. v. Nat'l Med. Enters., 672 F. Supp. 1489, 1502 (D.S.C. 1987)*. "Merely changing exclusive contractors, however, cannot constitute a violation of the antitrust laws." *Id.* The core of Plaintiff's alleged injury is that he was previously able to provide service to the vast majority of Medicaid eligible patients through his contract with Dentaquest; "he may not now complain that someone else enjoys a similar position." *Shafi v. St. Francis Hosp., Nos. 90-3107, 90-3117, 1991 U.S. App. LEXIS 15232, *10 (4th Cir. July 16, 1991)*.

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that the termination occur. Additionally, another email in the thread from a DMAS official reveals that Plaintiff was terminated due to concern that Plaintiff presented a "liability given his staffing situation, [and] 17 complaints in 5 years." (Ex. T at 5.) In accordance with the exhibit-prevails rule, it is likely that this statement can be relied on for its truth to the detriment of any contrary allegations in the Complaint. *See* *Goines, 822 F.3d at 166-67*. That said, given the clear deficiencies of Plaintiff's Sherman Act claims, the Court need not rely on this statement in its analysis.

Additionally, **[**27]** in *Brunswick* the Court made clear that a plaintiff cannot claim an antitrust injury if his alleged loss would have resulted even without an antitrust violation. *429 U.S. 477, 488-89, 97 S. Ct. 690, 50 L. Ed. 2d 701*. In this case, Plaintiff's contract was terminable by either party without cause. Plaintiff's alleged injury stems from the termination of his contract and Defendant Harvey's practice filling the coverage gap created by his termination. According to Plaintiff, this has had the effect of shutting him out of the relevant market. But, because Plaintiff narrowly defines the relevant market as participation in the Over 21 SFC program, any termination by Dentaquest would have resulted in Plaintiff's exclusion from the relevant market. In essence, he is attempting to use the Sherman Act to make an end-run around his at-will contract. The antitrust laws were not created to protect against this type of injury.

Plaintiff failed to allege the requisite agreement to restrain trade and failed to demonstrate that he suffered an antitrust injury. As such, the Sherman Act claim will be dismissed with prejudice

4. State Law Claims

In addition to his claim under the Sherman Act, Plaintiff alleges five counts under various state laws. The Court's **[**28]** original jurisdiction over this action stems from the presence of a federal question based upon the Sherman Act count. *28 U.S.C. § 1331*. Now that the sole federal question presented in this case has been dismissed, the Court will decline to exercise its supplemental jurisdiction pursuant to *28 U.S.C. § 1367(c)*. As such, the remaining state law counts will be dismissed without prejudice.

IV. Conclusion

For the foregoing reasons, the Complaint will be dismissed. Consequently, Defendant Harvey's Motion to Transfer Venue will be denied as moot.

The Court additionally notes that it gave serious consideration to imposing sanctions in this case. The protracted history of this litigation reveals that Plaintiff has had ample opportunity to have his Sherman Act claims heard. Rather than address the deficiencies identified with particularity by Judge Kiser, Plaintiff re-filed a nearly identical Complaint in this District. The most substantive change by Plaintiff was the addition of Defendant Parris-Wilkins, whom he alleges engaged in a conspiracy that occurred more than two years before he alleges any conduct on her part.

Plaintiff's filings in Opposition to the Motions to Dismiss are similarly, if not more egregiously, inadequate. **[**29]** Plaintiff quite apparently copied wholesale from filings he made in the Western District Case, often with limited applicability. For instance, the second page of his Opposition to Defendants DMAS and Parris-Wilkins's Motion contains a paragraph that references a "First Amended Complaint" and the "Blue Ridge Defendants." Plaintiff has not defined any group of Defendants by **[*650]** that term in this case and the Complaint in this case has not been amended. Instead, this paragraph appears verbatim in a Response in Opposition to a Motion to Dismiss filed by Plaintiff in the Western District Case. (*See* Civil Case No. 4:16-cv-43 (W.D. Va. 2017), ECF No. 52.) Additionally, Defendants DMAS and Parris-Wilkins point out that several of the arguments advanced by Plaintiff's Opposition appear to stem from an entirely different case. (*See* Defendants DMAS and Parris-Wilkins Reply 3, n. 1, ECF No. 22.) And Plaintiff generally failed to address several of the points raised by all the Defendants.

In spite of these questionable tactics, the Court does not feel that imposing sanctions is appropriate at this time. However, subsequent filings by Plaintiff attempting to rehash this same claim against these same **[**30]** Defendants will be viewed by this Court as an attempt to harass and will not engender a favorable response. Plainly put, if Plaintiff again charts the same course he has in this case, his path will likely include penalties under *Rule 11 of the Federal Rules of Civil Procedure*.

An appropriate Order will accompany this Memorandum Opinion.

/s/ Henry E. Hudson

Henry E. Hudson

United States District Judge

Date: March 19, 2018

Richmond, VA

In re Niaspan Antitrust Litig.

United States District Court for the Eastern District of Pennsylvania

March 20, 2018, Decided

MDL NO. 2460, MASTER FILE NO. 13-MD-2460

Reporter
2018 U.S. Dist. LEXIS 55298 *

IN RE: NIASPAN ANTITRUST LITIGATION, THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: *In re Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 2014 U.S. Dist. LEXIS 124818 (E.D. Pa., Sept. 5, 2014)*

Core Terms

discovery, premiums, discovery request, costs, purchaser, insureds, products

Judges: **[*1]** JAN E. DuBOIS, J.

Opinion by: JAN E. DuBOIS

Opinion

ORDER

AND NOW, this 20th day of March, 2018, upon consideration of the joint letter brief of the parties related to a discovery dispute concerning defendants' efforts to obtain discovery from Kaiser Health Foundation ("Kaiser"), University of Pittsburg Medical Center ("UPMC"), UnitedHealth Group ("United"), the United States Department of Veterans Affairs ("VA"), and BCBS Michigan (Doc. No. 508, filed February 28, 2018), following a telephone conference with the parties, through counsel, on March 16, 2018, **IT IS ORDERED** that the requested discovery is appropriate, and that, as a consequence, plaintiffs' request for entry of a protective order with respect to Kaiser, UPMC, United, the VA, and BCBS Michigan is **DENIED**. The parties shall proceed in accordance with the guidelines provided by the Court during the telephone conference.

IT IS FURTHER ORDERED that defendants' request to amend the First Amended Scheduling Order (Doc. No. 251, filed August 21, 2015) to permit defendants to take up to twenty-eight (28) depositions is **GRANTED**.

The decision of the Court is based on the following:

Defendants seek discovery from two groups of entities; End Payor Plaintiffs **[*2]** ("EPPs") ask the Court to enter a protective order barring discovery from both groups. First, defendants seek discovery from Kaiser, UPMC, United, and the VA regarding the interchangeability of other products with Niaspan. Jt. Letter, Doc. No 508 at 2-3, exs. 7-9. Defendants contend that this discovery is relevant to the issue of the interchangeability of other products with Niaspan and, thus, to market definition. *Id.* at 3. In response, the End Payor Plaintiffs ("EPPs") argue the "relevant market [is] based on practical indicia of the presence or absence of cross-price elasticity of demand" and that "stray documents produced by absent class members" are therefore irrelevant. *Id.* at 12. The Court agrees with defendants.

The Third Circuit has relied on similar evidence of the interchangeability of products to establish market definition. In *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 436 (3d Cir. 2016)*, that court affirmed the district court's finding of interchangeability for various acne products based on evidence that:

> Managed care organizations have sought to constrain patients to substitute Doryx with other, less costly tetracyclines to treat acne. Some organizations have removed Doryx as a reimbursable medication; others have limited any reimbursement. A number **[*3]** of managed care organizations sent notices to healthcare providers urging them to substitute other oral tetracyclines for Doryx.

Defendants in this case now seek these same types of documents from Kaiser, UPMC, United, and the VA.

Second, defendants seek documents from BCBS Michigan related to the "effect of prescription drug costs, including the costs of Niaspan, on the premiums charged by BCBS Michigan for its insurance plans." Doc. No. 508 at 5. Defendants argue that, unlike federal law, the *Michigan Antitrust Reform Act ("MARA")* permits a "pass on" defense.[1] Under a "pass on" defense, a defendant argues that an antitrust plaintiff has recouped damages by passing overcharges on to its customers through higher prices — or, in this case, to its insureds through higher premiums. *See* *In re Niaspan Antitrust Litig., No. 13-md-2460, 2015 U.S. Dist. LEXIS 92534, at *3 n.4 (E.D. Pa. July 9, 2015)* (DuBois, J.). According to defendants, the MARA permits the "pass on" defense because it requires indirect purchasers such as EPPs to make a showing of "actual damages" and Michigan courts have interpreted this provision as requiring a "rigorous analysis" of the damages suffered by a plaintiff. *A & M Supply Co. v. Microsoft Corp., 252 Mich. App. 580, 654 N.W.2d 572, 603 (Mich. Ct. App. 2002)*.

EPPs respond with two contentions. First, they argue that this **[*4]** Court already concluded by Order dated July 9, 2015, that defendants cannot obtain discovery from the EPPs related to the "pass on" defense. Order, Doc. No. 233 at 4. Second, EPPs contend that even if the MARA permitted defendants to raise a "pass on" defense, the raising of premiums would not constitute a "pass on." To the contrary, they argue that the raising of premiums "is a forward-looking projection of future costs based on countless variables and actuarial projections." Jt. Letter at 11; *see, e.g.,* *United Wis. Servs. v. Abbott Labs., 220 F.R.D. 672, 690 (S.D. Fla. 2004)*.

The Court agrees with defendants on this issue. In applying the "rigorous analysis" required by the MARA's "actual damages" provision, Michigan courts have conducted detailed factual assessments that consider factors such as the number of products involved, the rate of overcharge for each product, the rate of overcharge to each indirect purchaser, and variations in the overcharges over time. *A & M, 654 N.W.2d at 600, 603*. Two federal courts have concluded that Michigan law permits defendants to raise the "pass on" defense "in order to give proper effect to the term 'actual damages' under the MARA." *In re Vitamins Antitrust Litig., 259 F. Supp. 2d 1, 8-9 (D.D.C. 2003)*; *accord* *In re TFT-LCD (Flat Panel) Antitrust Litig., No. 07-md-1827, 2012 U.S. Dist. LEXIS 182373, at *1 (N.D. Cal. Dec. 26, 2012)* (citing *In re Vitamins Antitrust Litig., 259 F. Supp. 2d 1*). This Court agrees.

EPPs' two arguments are unavailing. **[*5]** First, in its July 9, 2015, Order, this Court denied defendants' request for discovery related to the "pass on" defense on the assumption that "the state laws involved in this case follow federal ***antitrust law***," expressly stating that it was not ruling "on the propriety of the requested discovery in the event that applicable state law does not follow federal ***antitrust law***."[2] *In re Niaspan Antitrust Litig., 2015 U.S. Dist. LEXIS 92534, at *6-7*. According to Michigan courts, however, the assessment of actual damages required by the MARA in indirect purchaser suits differs from "the presumptions or inferences that might otherwise prevail in direct

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[1] Federal law generally does not permit defendants to raise the "pass on" defense. *Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*.

[2] This caveat was required because the parties did not brief the law of the numerous states at issue in the case. *In re Niaspan Antitrust Litig., 2015 U.S. Dist. LEXIS 92534, at *6*.

purchaser federal antitrust cases." *Ren v. Philip Morris Inc., No. 00-004035-CZ, 2002 Mich. Cir. LEXIS 1, 2002 WL 1839983, at *5 (Mich. Ct. App. June 11, 2002)*. Because the MARA requires a showing of actual damages suffered by indirect purchasers that has no analog in federal cases, this Court concludes that Michigan law differs from federal law and its July 9, 2015, Order is no bar to defendant's requested discovery.

Likewise, on the present state of the record, the Court rejects EPPs' second contention that the raising of premiums does not constitute a "pass on" for purposes of the "pass on" defense. EPPs' argument does not adequately account for the fact that insurance companies' decisions **[*6]** to raise premiums are based on actuarial analyses to "enable[e] the insurer to collect [the costs of coverage] in advance from insureds." *Int'l Bhd. of Teamsters v. Philip Morris, 196 F.3d 818, 824 (7th Cir. 1999)*. Based on this rationale, two courts of appeals have concluded that insurance companies did not have standing to bring antirust claims, in part because they may pass on higher medical costs through higher premiums. *Id. at 825*; *accord* *SEIU Health & Welfare Fund v. Philip Morris Inc., 249 F.3d 1068, 1074, 346 U.S. App. D.C. 74 (D.C. Cir. 2001)*. The Seventh Circuit, for example, concluded that because insurance companies may raise premiums to cover higher costs, insurers "are just financial intermediaries. They collect the premiums and spend them to provide the contracted-for care; their books balance whether the costs of care are high or low." *Int'l Bhd. of Teamsters, 196 F.3d at 824*. Similarly, in this case, the discovery requested by defendants is relevant to the question whether the insurer members of the putative EPP class recouped their losses by charging higher premiums.

Finally, EPPs argue with respect Kaiser, UPMC, United, and BCBS Michigan that defendants may not obtain discovery from absent members of the putative EPP class.[3] The Court disagrees. Discovery may be obtained from absent class members "(1) where the information requested is relevant to the decision of common questions, (2) when the **[*7]** discovery requests are tendered in good faith and are not unduly burdensome and (3) when the information is not available from the class representative." *Kline v. First W. Gov't Secs., No. 83-1076, 1996 U.S. Dist. LEXIS 3329, at *9 (E.D. Pa. Mar. 11, 1996)*. As noted above, defendant's requested discovery is relevant to market definition and the "pass on" defense, questions common to the class. Further, the requests are targeted at four major "market player[s]," as opposed to the entire putative class, and are not unduly burdensome. Finally, as defendants argue, the information is not available from the named plaintiffs because they are not managed care organizations and do not analyze costs and benefits of prescription drugs. Jt. Letter at 4.

The Court thus denies EPPs' request for a protective order with respect to Kaiser, UPMC, United, the VA, and BCBS Michigan. With respect to these entities, the requested discovery is appropriate. Plaintiffs have not shown good cause for entry of a protective order.

BY THE COURT:

/s/ **Hon. Jan E. DuBois**

DuBOIS, JAN E., J.

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[3] The EPPs' proposed definition of the putative EPP class in their Class Complaint expressly excludes "[a]ll federal or state government entities other than cities, towns or municipalities with self-funded drug plans." Doc. No. 46, ¶ 148. The VA is thus not an absent member of the putative EPP class. Defendants also dispute whether UMPC is a member of the putative EPP class, but the Court concludes that it is not necessary to reach that issue at this time.

Toranto v. Jaffurs

United States District Court for the Southern District of California

March 20, 2018, Decided; March 21, 2018, Filed

Case No.: 16cv1709-JAH (NLS)

Reporter

297 F. Supp. 3d 1073 *; 2018 U.S. Dist. LEXIS 46696 **; 2018-1 Trade Cas. (CCH) P80,320; 2018 WL 1410736

JASON TORANTO, an individual, Plaintiff, v. DANIEL JAFFURS, et. al. , Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Sanctions disallowed by, Motion granted by *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 88511 (S.D. Cal., May 24, 2018)*

Motion granted by *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 123885 (S.D. Cal., July 24, 2018)*

Motion granted by, in part, Motion denied by, in part *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 133001 (S.D. Cal., Aug. 6, 2018)*

Motion denied by *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 158299 (S.D. Cal., Sept. 17, 2018)*

Motion granted by, in part, Motion denied by, in part *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 165672 (S.D. Cal., Sept. 26, 2018)*

Motion granted by, in part, Motion denied by, in part *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 229176 (S.D. Cal., Sept. 27, 2018)*

Motion granted by, in part, Motion denied by, in part *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 198050 (S.D. Cal., Nov. 20, 2018)*

Motion granted by, in part, Motion denied by, in part *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 198918 (S.D. Cal., Nov. 20, 2018)*

Motion granted by *Toranto v. Jaffurs, 2018 U.S. Dist. LEXIS 230224 (S.D. Cal., Nov. 29, 2018)*

Sanctions allowed by, in part *Toranto v. Jaffurs, 2019 U.S. Dist. LEXIS 21017 (S.D. Cal., Feb. 8, 2019)*

Motion granted by, Summary judgment denied by, As moot *Toranto v. Jaffurs, 2019 U.S. Dist. LEXIS 170646 (S.D. Cal., Mar. 4, 2019)*

Costs and fees proceeding at *Toranto v. Jaffurs, 2019 U.S. Dist. LEXIS 48313 (S.D. Cal., Mar. 22, 2019)*

Motion granted by, in part, Motion denied by, in part *Toranto v. Jaffurs, 2019 U.S. Dist. LEXIS 140184 (S.D. Cal., Aug. 19, 2019)*

Summary judgment denied by *Toranto v. Jaffurs, 2019 U.S. Dist. LEXIS 161209 (S.D. Cal., Sept. 13, 2019)*

Motion granted by, Dismissed by *Toranto v. Jaffurs, 2020 U.S. Dist. LEXIS 51314 (S.D. Cal., Mar. 25, 2020)*

Prior History: *Toranto v. Jaffurs, 2016 U.S. Dist. LEXIS 197049 (S.D. Cal., Nov. 23, 2016)*

Core Terms

alleges, argues, privileges, fails, conspiracy, contends, motion to dismiss, craniofacial, pediatric, relevant market, patients, defamatory statement, Sherman Act, restraint of trade, defamation, tortious interference, cause of action, antitrust, reply, plastic surgery, immunity, private right of action, geographic, peer review, quasi-judicial, proceedings, conspired, prospective economic relations, administrative remedy, peer review process

Counsel: **[**1]** For Jason Toranto, an individual, Plaintiff: Kenneth M. Fitzgerald, LEAD ATTORNEY, Howard C. Wu, Robert G Knaier, Fitzgerald Knaier LLP, San Diego, CA.

For Daniel Jaffurs, an individual, Defendant: Sandra Lynn McDonough, LEAD ATTORNEY, Joanne Alnajjar Buser, Paul, Plevin, Sullivan & Connaughton LLP, San Diego, CA; Marilyn R Moriarty, Lewis Brisbois Bisgaard and Smith, San Diego, CA.

For Amanda Gosman, an individual, Rady Children's Hopsital-San Diego, a California corporation, Rady Children's Medical Staff, an unincorporated association, Rady Children's Specialists of San Diego, Defendants: Marilyn R Moriarty, Lewis Brisbois Bisgaard and Smith, San Diego, CA.

For Children's Hospital of Orange County, a California corporation, CHOC Medical Staff, an unincorporated association, Defendants: Larry T. Pleiss, LEAD ATTORNEY, Pleiss Sitar McGrath Hunter & Hallack, Irvine, CA; Marilyn R Moriarty, Lewis Brisbois Bisgaard and Smith, San Diego, CA.

Judges: JOHN A. HOUSTON, United States District Judge.

Opinion by: JOHN A. HOUSTON

Opinion

[*1082] ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS TO DISMISS [Doc. Nos. 32, 37]

INTRODUCTION

Plaintiff, Jason Toranto, originally filed a complaint on July 1, 2016, and filed a First **[**2]** Amended complaint ("FAC") on August 15, 2016, for conspiracy in restraint of trade (claim 1), monopoly (claim 2), bad faith professional review (claim 3), retaliation (claims 4 and 5), defamation (claim 6), violation of the Labor Code (claim 7), tortious interference with prospective economic advantage (claim 8), and unfair competition (claim 9). He names Daniel Jaffurs, Amanda Gosman, The Regents of the University of California, Rady Children's Hospital-San Diego, Rady Children's Specialists, Rady Children's Medical Staff, Children's Hospital of Orange County ("CHOC") and CHOC Medical Staff as defendants. Plaintiff alleges Defendants conspired to engage in and engaged in illegal, retaliatory, defamatory and anti-competitive conduct against Plaintiff, a pediatric plastic and craniofacial surgeon. See Doc. No. 21. Defendant CHOC and CHOC Medial Staff ("CHOC Defendants") filed an answer to the FAC on August 31, 2016. See Doc. 29. Rady Children's Hospital-San Diego, Rady Children's Specialist of San Diego, Rady Children's Medical Staff and Gosman ("Rady Defendants") filed a motion to dismiss the FAC on September 1, 2016. See Doc. No. 32. On September 13, 2016, The Regents filed a motion **[**3]** to dismiss the FAC and a joinder in the co-defendants' motions to dismiss, and Jaffurs filed a motion to dismiss the FAC. See Doc. Nos. 36, 37. On October 14, 2016, the Rady Defendants and Defendant Jaffurs filed separate motions to strike ("anti-SLAPP motions"). See Doc. No. 41, 42. Thereafter, Defendant The Regents filed a notice of joinder in the motions to strike and Defendant Jaffurs filed a notice of joinder in the Rady Defendants' motion to dismiss. See Doc. Nos. 43, 45. On October 24, 2016, Plaintiff voluntarily dismissed The Regents from the action without prejudice. See Doc. No. 48.

On October 28, 2016, Plaintiff filed an application seeking leave to conduct discovery relevant to Defendants' anti-SLAPP motions and to continue the hearing and dates to file his opposition. See Doc. No. 49. In light of the application, the Court vacated the hearing date and briefing schedule. See Doc. No. 51. Plaintiff's application for leave to conduct discovery was referred to the Honorable Nita L. Stormes, United States Magistrate Judge.

[*1083] Plaintiff filed a response to Defendant Jaffurs' motion to dismiss and the Rady Defendants' motion to dismiss on November 2, 2016. See Doc. Nos. 58, 59. Defendants **[**4]** filed replies in support of their motions. See Doc. No. 61, 62. Thereafter, the Court vacated the hearing date on the motions to dismiss. See Doc. No. 63.

On November 23, 2016, Judge Stormes issued an order denying Plaintiff's request not to stay general discovery and granting his request to conduct limited, specific discovery with respect to the claims raised in the anti-SLAPP motions. See Doc. No. 64. On January 23, 2017, Defendant filed an application seeking an order setting the motions to dismiss and anti-SLAPP motions for hearing which Plaintiff opposed. See Doc. Nos. 65, 66. The Court denied the motion. See Doc. No. 67.

On February 3, 2017, Judge Stormes held a status conference regarding discovery and issued an order, following the conference, lifting the stay on discovery and setting a scheduling order for discovery relating to the anti-SLAPP motions. See Doc. No. 71. Plaintiff filed a motion to compel which Judge Stormes granted. See Doc. No. Judge Stormes also set a briefing schedule on the pending motions to dismiss and anti-SLAPP motions. See Doc. No. 77. Defendant Jaffurs and the Rady Defendants objected to Judge Stormes' order granting the motion to compel and requested **[**5]** this Court reverse Judge Stormes' order. See Doc. Nos. 81. The parties briefed the issue upon order of the Court. See Doc. Nos. 84, 85, 86, 87.

On May 2, 2017, Plaintiff filed an application seeking an order vacating the briefing schedule and hearing date on the anti-SLAPP motions pending the resolution of Defendant's objections. See Doc. No. 88. The Rady Defendants opposed the application. See Doc. No. 89. This Court granted Plaintiff's application and vacated the briefing schedule and hearing date for Defendants' anti-SLAPP motions. Thereafter, the Court vacated the hearing on Defendants' motion to dismiss and took the motions under submission without oral argument. See Doc. No. 97.

LEGAL STANDARD

The Rady Defendants and Defendant Jaffurs seek dismissal of the FAC pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. *Rule 12(b)(6)* tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. Dismissal is warranted under *Rule 12(b)(6)* where the complaint lacks a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984)*; see *Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)* ("*Rule 12(b)(6)* authorizes a court to dismiss a claim on the basis of a dispositive issue of law."). Alternatively, a complaint may be dismissed where it presents a cognizable legal theory yet fails to plead essential facts under that theory. *Robertson, 749 F.2d at 534*. While a plaintiff need not give "detailed factual **[**6]** allegations," he must plead sufficient facts that, if true, "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Twombly, 550 U.S. at 547*). A claim is facially plausible when the factual allegations permit "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. In other words, "the non-conclusory 'factual content,' and reasonable inferences from that content, must be **[*1084]** plausibly suggestive of a claim entitling the plaintiff to relief. *Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009)*. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679*.

In reviewing a motion to dismiss under *Rule 12(b)(6)*, the court must assume the truth of all factual allegations and must construe all inferences from them in the light most favorable to the nonmoving party. *Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002)*; *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. However, legal conclusions need not be taken as true merely because they are cast in the form of factual allegations. *Ileto v. Glock, Inc., 349 F.3d 1191, 1200 (9th Cir. 2003)*; *Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981)*. When ruling on a motion to dismiss, the Court **[**7]** may consider the facts alleged in the complaint, documents attached to the complaint, documents relied upon but not attached to the complaint when authenticity is not contested, and matters of which the Court takes judicial notice. *Lee v. City of Los Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001)*. If a court determines that a complaint fails to state a claim, the court should grant leave to amend unless it determines that the pleading could not possibly be cured by the allegation of other facts. See *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*.

DISCUSSION

I. Rady Defendants' Motion to Dismiss

Defendants move to dismiss all causes of action asserted against them, namely, the first, second, third, sixth, eighth and ninth claims. Defendants argue (A) the state law causes of action are premature, (B) Plaintiff fails to allege sufficient facts to support a claim for conspiracy in restraint of trade, (C) Plaintiff fails to allege sufficient facts to support a claim for monopoly, (D) the cause of action for bad faith professional review is not viable, (E) Plaintiff fails to allege sufficient facts to support a claim for defamation, (F) Plaintiff fails to allege sufficient facts to support a claim for tortious interference with prospective economic relations, and (G) Plaintiff fails to allege sufficient **[**8]** facts to support a claim for unfair competition.

A. Premature

Doctors must exhaust available administrative remedies and succeed in setting aside the decision denying or withdrawing privileges in a *mandamus* action prior to initiating suit against the hospital and individuals involved in the decision. See *Mir v. Little Co. of Mary Hosp., 844 F.2d 646 (9th Cir. 1988)*; *Westlake Community Hospital v. Superior Court of Los Angeles County, 17 Cal.3d 465, 131 Cal. Rptr. 90, 551 P.2d 410 (1976)*.

Defendants argue Plaintiff's state law causes of action are premature because he failed to exhaust administrative remedies. Defendants contend Plaintiff only alleges his application for privileges has been presumptively denied. They maintain, if the application is ultimately denied, Plaintiff must seek relief through an administrative hearing, and after the administrative process is completed, he must successfully have the decision set aside in a *mandamus* action before bringing a tort action for damages. Because he does not allege any facts to show a final decision was reached or that he complied with the administrative process, they argue, the state law causes of action, bad faith professional review, defamation, tortious interference with prospective economic relations and unfair competition, are premature and must be dismissed.

[*1085] In opposition, Plaintiff contends he is not required **[**9]** to exhaust his administrative remedies because he was not provided a reason for his rejection or an opportunity to respond and, thereby, was denied basic procedural protections to which he was entitled when his application was presumptively denied. Even if he were required to exhaust administrative remedies, Plaintiff argues, he is excused from doing so because any pursuit would be inadequate and futile. He maintains, at the time his opposition was filed, over a year had passed since his application and nine months since it was presumptively denied, and he has received no adequate explanation for the presumptive denial and no opportunity to respond. Any further attempts to exhaust the remedies would, therefore, be futile. Additionally, he maintains pursuit of administrative remedies would result in irreparable harm because complex pediatric craniofacial plastic surgery procedures must be performed regularly for a surgeon to maintain qualifications to perform them, and Defendants' administrative process has harmed the health and safety of patients with longer wait times and higher costs.

In reply, Defendants argue Plaintiff's claims do not fall under any exception to the exhaustion requirement. **[**10]** Defendants contend Plaintiff cannot allege his application was denied because his application is still pending. They maintain the presumptive denial demonstrates the peer review process has begun and he has not been denied a fair procedure. Even if Plaintiff could allege presumptive denial entitled him to relief, he is still required to bring a writ of mandate to challenge the decision. Additionally, Defendants argue the administrative remedies available are not inadequate or futile because he has not received a final disposition and could possibly receive privileges. They also argue he has adequate remedies after a decision is made and he could provide services to children at other hospitals at which he has privileges.

Plaintiff alleges he received a call from the chair of Rady Children's department of surgery, and was told his application for admitting privileges would presumptively be denied and Rady Children's failed to grant him an interview or hearing despite repeated requests. FAC ¶¶ 33, 87, 88, 94. He further alleges he was advised he would be presumptively reported to the California Medical Board if he did not withdraw his application. Id. ¶ 87. Plaintiff did not withdraw his **[**11]** application and, instead, supplemented it in March and July 2016. Id. ¶¶ 90, 91, 93. Defendants contends the peer review process is ongoing and, therefore, Plaintiff has failed to exhaust his administrative remedies, and, can only do so when he receives a denial and is successful in a *mandamus* action. Plaintiff maintains he is not required to exhaust prior to bringing a tort action pursuant to the exception in Westlake. The court in Westlake held that a hospital that denies a doctor privileges without basic procedural protection to which he is entitled can be immediately sued in a tort action. *17 Cal.3d at 478*. Plaintiff's allegations that Defendants denied him a hearing or interview after being informed his application was "presumptively denied" and threats to report him to the Medical Board if he does not withdraw his application demonstrate he was denied basic procedural protections. As such, Plaintiff is not required to exhaust the administrative remedies prior to filing suit. Additionally, the court in Westlake specifically rejected the same argument raised by Defendants here, that, under these circumstances, Plaintiff must still obtain *mandamus* relief prior to filing suit. While the court determined **[**12]** that a doctor must initially succeed in a *mandamus* action when a hospital excludes or **[*1086]** dismisses a doctor pursuant to quasi-judicial proceedings, it found the hospital's conduct in dismissing the doctor without basic procedural protections was not "undertaken pursuant to a quasi-judicial proceeding." Id.

This Court finds Plaintiff's action is not barred for failure to exhaust administrative remedies. As such, Defendants' motion to dismiss the state law claims as premature is denied.

B. Conspiracy in Restraint of Trade

Plaintiff's first claim for relief asserts a violation of *Section 1* of the Sherman Act. *Section 1* prohibits "[e]very contract, combination. . .or conspiracy, in restraint of trade or commerce among the several States, or with foreign nationals." *15 U.S.C. § 1*. To state a claim under *Section 1* of the Sherman Act, a plaintiff must allege "not just ultimate facts but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

Defendants argue Plaintiff fails **[**13]** to allege a conspiracy in restraint of trade because the FAC does not properly allege a conspiracy or agreement, Plaintiff fails to allege facts to support an unreasonable restraint of trade, they have the unilateral right to deny Plaintiff privileges and Plaintiff fails to state facts to support an antitrust injury.

1. Conspiracy

Defendants argue Plaintiff fails to properly allege a conspiracy because *Section 1* of the Sherman Act requires a contract, combination or conspiracy between two or more legally distinct persons. They maintain the relationships between the Rady Defendants demonstrate they are a single entity, and, thus, legally incapable of concerted action. They further maintain the allegations of the FAC make clear the Rady Defendants acted as agents of each other. Defendants further argue Dr. Gosman cannot conspire with the Rady Defendants because she is an employee of

Rady Children's Specialists of San Diego and an employee cannot conspire with her employer. They also contend the FAC alleges she and the Rady Defendants acted as agents of each other.

Additionally, Defendants argue the FAC contains no allegations that support any specific discussion between Gosman and any other person **[**14]** related to the Rady Defendants, and there are no specific facts supporting the content of the conspiratorial exchanges between Defendants Gosman and Jaffurs.

In opposition, Plaintiff argues he sufficiently alleges a conspiracy. Plaintiff contends the FAC makes clear that each of the Rady entities is a separate and distinct corporate entity and the Rady foundation is Gosman's only employer. Plaintiff further argues the issue of whether the various Rady Defendants are a single entity is fact specific and cannot be decided in a *Rule 12(b)(6)* motion. Even if the Rady Defendants and Gosman cannot conspire among themselves, Plaintiff contends the FAC clearly alleges the conspirators include Jaffurs, who is not affiliated with the Rady Defendants. Plaintiff maintains the FAC contains numerous specific facts creating a reasonable inference that Defendants engaged in a conspiracy to deny him privileges at Rady Children's.

In the FAC, Plaintiff alleges Defendant Jaffurs, the chief of plastic surgery of the CHOC medical staff and an employee of University of California, Irvine ("UCI"), **[*1087]** made false and defamatory statements about Plaintiff to the Rady Defendants and in concert with Gosman, "who was eager to conspire. **[**15]** . .because in 2015 she became the sole pediatric craniofacial plastic surgeon at Rady Children's" and she viewed Plaintiff as a competitive threat. FAC ¶¶ 5, 38, 39. He also alleges Gosman is a surgeon and chief of plastic surgery at Rady Children's Hospital, and chief of the Rady Medical Staff and an employee of Rady Children's Specialists. Id. ¶¶ 40-42. Additionally, Plaintiff alleges Defendant Rady Children's Hospital is a California corporation that grants privileges for the performance of medical services through the Rady Children's Medical Staff, a separate unincorporated association composed of physicians and other healthcare providers whom provide medical services to Rady Children's Hospital; Rady Children's Specialists is an unincorporated medical practice foundation closely affiliated with Rady Children's and UCSD who jointly employ the majority of the physicians who have privileges at Rady Children's Hospital; The Regents is a California corporation that governs the University of California systems and jointly with Rady Children's Specialists employs the majority of physicians who have admitting privileges at Rady Children's Hospital. Id. ¶¶ 11-15, 40. The FAC also alleges **[**16]** "[a]ll of the Rady Children's Defendants acted as the agent of each other. Id. ¶ 43.

Additionally, Plaintiff alleges Defendant Jaffurs "commenced an outrageous and vicious campaign against [Plaintiff]" when Plaintiff sought employment at CHOC, including making false and defamatory statements to multiple persons, telling several physicians Plaintiff refused to accept Hispanic and low-income patients, taunting Plaintiff with hostile emails, attempting to prohibit Plaintiff from seeking patients at outpatient clinics, and entering an operating room several times to harass Plaintiff as Plaintiff was performing surgeries. Id. ¶ 70. The FAC also alleges Jaffurs wrote to Plaintiff telling him Plaintiff was not hired by CHOC at Jaffurs' request. Id. ¶ 72. Further, Plaintiff alleges Jaffurs and Gosman made contact, and combined and conspired to prevent him from obtaining privileges at Rady Children's. Id. ¶ 80. The FAC specifically alleges Gosman improperly shared information contained in Plaintiff's confidential application with Jaffurs including the names of physicians whom Plaintiff listed as references and Jaffurs submitted a letter to Rady Children's that disparaged and attacked those physicians. **[**17]** Id. ¶ 82. The FAC also alleges Gosman used her influence to prevent Plaintiff from receiving fair consideration, and both Gosman and Jaffurs made defamatory statements with the intent to professionally harm Plaintiff and prevent him from obtaining employment and privileges. Id. ¶¶ 83, 84, 85.

While the allegations surrounding the relationships between the various Rady Defendants and Gosman suggest an agency relationship which supports Defendants arguments of a single entity, considering the facts in the light most favorable to Plaintiff, Plaintiff clearly alleges an agreement and conspiracy between Gosman and Jaffurs, two distinct individuals. Accordingly, Plaintiff sufficiently alleges a conspiracy to support his claim for conspiracy in restraint of trade claim.

2. Unreasonable Restraint of Trade

Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade. *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. Reasonableness is evaluated under either *per se* analysis or the rule of reason. Id. The *per se* rule applies to a practice that "facially appears to be one that would always or almost always tend to restrict competition and **[*1088]** decrease output." *National Collegiate Athletic Association v. Board of Regents of Univ. of Oklahoma, 468 U.S. 85, 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Restraint is presumed unreasonable for practices **[**18]** subject to the *per se* rule. Id. Other practices are subject to a rule of reason analysis which requires injury to competition in the relevant market. *Alliance Shippers, Inc. v. Southern Pacific Trasp. Co., 858 F.2d 567, 570 (9th Cir. 1988)*.

Defendants contend there is no plainly anti-competitive agreement restraining trade here, so Plaintiff is required, under the rule of reason, to demonstrate anti-competitive harms of the alleged agreement do not outweigh the pro-competitive benefits. Defendant maintains Plaintiff attempts to circumvent this burden by alleging Defendants engaged in a conspiracy to exclude him from Rady Children's Hospital. Even if a conspiracy existed, they argue, it does not restrain trade and Plaintiff's narrow identification of competition and conclusory allegations of wait times and costs leave out other competitive markets in Southern California. They contend Plaintiff fails to allege any agreement that would restrain trade of pediatric craniofacial plastic surgery in Southern California.

Citing *Summit Health, Ltd v. Pinhas, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)*, Plaintiff maintains a conspiracy to exclude a physician from a hospital through misuse of the peer review process is an illegal agreement in restraint of trade. Plaintiff further contends the definition of the relevant market is a question of fact that should **[**19]** not be decided in a 12(b)(6) motion. Plaintiff contends the geographic market defined in the FAC, which spans two large Counties is not facially unsustainable, particularly when the Ninth Circuit has recognized far smaller relevant geographic markets.

To the extent Plaintiff asserts Summit Health holds the misuse of the peer process is subject to the *per se* rule, the Court disagrees. The Court in *Summit Health* addressed whether a claim alleging a conspiracy among members of a peer review committee to abuse the process and deny the plaintiff access to the relevant market has a sufficient nexus to interstate commerce to support federal jurisdiction. *500 U.S. at 333*. Plaintiff's allegations do not suggest Defendants engaged in "manifestly anticompetive" conduct to support a *per se* analysis. *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. As such, the rule of reason analysis is appropriate and requires Plaintiff to allege the "relevant market." See *Newcal Industrics, Inc. v. Ikon Office Solution, 513 F.3d 1038, 1044 (9th Cir. 2008)*. The "relevant market" need not be alleged with specificity and will survive a 12(b)(6) motion to dismiss unless it is facially unsustainable. *Id. at 1045*.

In the FAC, Plaintiff alleges the anti-competitive conduct has harmed patients in the relevant market and the plastic surgery department at Rady Children's Hospital **[**20]** is among the worse for patient wait times. FAC ¶ 8, 29. He further alleges presumptively denying him privileges wrongly deprives children, babies and their families of physician choice and also prolongs their waits in San Diego and Imperial Counties. Id. Additionally, he asserts Defendants conspired to deny him entry into the market for pediatric craniofacial plastic surgery services in San Diego and Imperial Counties, and, are preventing highly complex pediatric craniofacial plastic surgery from being available to all children in San Diego and Imperial Counties. Id. ¶¶ 100, 102. He alleges his skills and techniques could reduce postoperative stays, and thereby reduce medical costs. Id. ¶ 101.

[*1089] The Court finds no facial or other defect in Plaintiff's relevant market. Therefore, the FAC's allegations surrounding the relevant market survives the motion to dismiss.

3. Unilateral Right to Deny Plaintiff Privileges

Citing Leegin, Defendants argue they have the unilateral right to decide with whom to do business, and the terms and conditions of its business arrangements without violating *Section 1*.

In opposition, Plaintiff argues Defendants do not have a right to unilaterally deny him privileges. He contends **[**21]** the case cited by Defendants involved retail pricing policies by manufacturers for their retailers. Relying on *Sadeghi*

v. Sharp Memorial Medical Center Chula Vista, 221 Cal.App.4th 598, 164 Cal. Rptr. 3d 420 (2013), Plaintiff maintains the peer review process for physicians seeking admitting privileges exists to protect the health and welfare of the people of California and competent practitioners from being barred for arbitrary or discriminatory reasons, and the unwarranted denial of privileges denies a physician a property interest connected to his livelihood.

The only case cited by Defendants in support of their contention addresses manufacturer's ability to set suggested resale prices and to refuse to deal with retailers that do not follow those prices. They cite to no case suggesting a plaintiff may not assert a claim against a defendant for the allegedly arbitrary denial of privileges that results in a restraint of trade. Accordingly, Defendant's motion to dismiss based upon its unilateral power to deny privileges is denied.

4. Antitrust Injury

To state a claim under *section 1* of the Sherman Act, a plaintiff must allege facts showing he was "harmed by the defendant's anti-competitive contract, combination or conspiracy, and that this harm flowed from an 'anti-competitive aspect of the practice **[**22]** under scrutiny.'" *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1197 (9th Cir. 2012)* (quoting *Atlantic Richfield Company v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

Defendants contend because Plaintiff fails to plead sufficient facts to support a plausible claim under *Section 1*, none of Plaintiff's alleged injuries flow from *Section 1*.

Plaintiff argues the facts in the FAC sufficiently demonstrate an antirust injury. He maintains he alleges Defendants' unlawful conduct caused him to be denied procedurally fair consideration of his application for admitting privileges, thus causing him to be restrained from practicing his medical specialty anywhere in San Diego or Imperial Counties. Additionally, Plaintiff maintains he also alleges Defendants' exclusionary conduct resulted in longer patient wait times and higher costs, and prevented certain "highly complex pediatric craniofacial surgery procedures from being available at all" in San Diego and Imperial Counties because Plaintiff is an expert in certain procedures that Gosman does not perform. Pla's Opp. at 13 (citing FAC ¶ 102).

In reply, Defendants argue Plaintiff presents no facts to support his own injury let alone an injury to competition. They contend he cites no case law to support the position that staffing decisions affecting a single hospital can result in antitrust injury. Instead, they contend **[**23]** Plaintiff merely states excluding him from the market has prevented highly complex pediatric craniofacial surgery procedures from being available at all and Defendants' conduct has resulted in longer patient wait times and higher costs. They maintain the allegations **[*1090]** are conclusory, and only opinions of Plaintiff. They further maintain the allegations are based upon Plaintiff's incorrect description of the relevant market. Defendants further argue the FAC contains no allegations that other competing hospitals in the alleged geographic market have been prevented from establishing facilities to serve patients.

In the FAC, Plaintiff alleges Defendants Jaffurs and Gosman conspired to prevent him from obtaining privileges to suppress competition to Gosman's professional and economic benefit. FAC ¶ 96. He further alleges the Rady Defendants agreed to support Defendant Gosman because the revenue Defendant Gosman would otherwise generate for them would be diverted to Plaintiff if he were granted privileges. Id. ¶ 97. He further alleges, as a result of the conspiracy, "the public has been deprived of free and open competition in pediatric craniofacial plastic surgery services at Rady Children's **[**24]** and in San Diego and Imperial Counties, and there are longer patient wait times and longer postoperative patient hospital stays and higher payer costs. Id. ¶¶ 100, 101. Plaintiff also alleges his skills and techniques as a pediatric craniofacial plastic surgeon could potentially reduce post-operative length of hospital stays, resulting in reduced medical costs. Id. ¶ 102. Additionally, Plaintiff alleges the conspiracy prevents highly complex pediatric craniofacial plastic surgery procedures from being available to all children of San Diego and Imperial Counties. Id. ¶ 102.

Contrary to Defendants' contention, Plaintiff does more than merely recite bare legal conclusions. He includes factual allegations demonstrating injury to competition sufficient to "raise a reasonable expectation that discovery will reveal evidence of an injury to competition." *Brantley, 675 F.3d at 1198* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. at 556*). Plaintiff sufficiently alleges antitrust injury.

C. Monopoly

Plaintiff seeks relief for violation of *Section 2* of the Sherman Act in his second claim for relief. To state a claim for monopolization in violation of *Section 2* of the Sherman Act, a plaintiff must allege facts showing the defendants "(1) possessed monopoly power in the relevant market, **[**25]** (2) willfully acquired or maintained that power through exclusionary conduct and (3) caused antitrust injury." *MetroNet Services Corp. v. Quest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004)*.

Defendants argue Plaintiff fails to state a claim for monopolization because he fails to allege a relevant market, monopoly power, exclusionary conduct and facts to support antitrust injury.

1. Relevant Market

Claims under *Section 2* of the Sherman Act require a definition of the relevant market. *Thurman Industries, Inc. v. Pay'N Pak Stores, Inc., 875 F.2d 1369, 1373 (9th Cir. 1989)*. Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim. *Tanaka v. University of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001)*. "The term 'relevant market' encompasses notions of geography as well as product use, quality, and description." *Ortiz v. S. Peter's Community Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)* (Citing *Moore v. James H. Matthews & Co., 550 F.2d 1207, 1218 (9th Cir. 1977))*. Determination of the relevant market is generally a factual inquiry. Id. However, a claim may be dismissed if the relevant market definition is facially unsustainable. *Newcal, 513 F.3d at 1045*.

Defendants contend Plaintiff identifies the relevant product/service market as pediatric plastic and craniofacial surgery, and **[*1091]** identifies the relevant geographic market as San Diego and Imperial counties. Assuming the relevant product/service market is appropriate, Defendants argue Plaintiff fails to allege a relevant geographic market. Specifically, Defendants argue Plaintiff does not plead any facts to support **[**26]** the conclusion that San Diego and Imperial Counties are the only areas where buyers of pediatric plastic and craniofacial surgery would travel to obtain such specialized services. They maintain nothing in the FAC supports the notion that Los Angeles County, Orange County, Riverside County and San Bernardino County should not be included in the geographic market.

Plaintiff maintains the question of the relevant geographic market does not turn on whether a patient would either obtain the surgery in San Diego and Imperial Counties or go without, as suggested by Defendants, but whether patients in San Diego and Imperial Counties would tolerate a small but significant nontransitory increase in price by the Rady pediatric craniofacial plastic surgery group. Plaintiff maintains this is a question of fact that implicates complicated issues of insurance coverage and in-network benefits versus out-of-network benefits, and cannot be resolved at the pleading stage. He contends the question before the Court is whether a geographic market of San Diego and Imperial Counties is "facially" sustainable, and argues the relevant market defined in the FAC clears this low threshold.

Plaintiff defines the **[**27]** relevant market as pediatric and craniofacial surgery medical services in San Diego and Imperial Counties. FAC ¶¶ 110, 113. For purposes of the motion to dismiss, Defendants do not challenge the product market. They argue Plaintiff fails to plead facts to support the identified geographic market. "The relevant geographic market is the 'area of effective competition' defined in terms of where buyers can turn for alternative sources of supply." *Moore, 550 F.2d at 1218*. It must "correspond to the commercial realities of the industry and be economically significant" and may be limited to a single metropolitan area. *Brown Shoe Co. v. United States, 370 U.S. 294, 366, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. These determinations are factual in nature and are better tested by a summary judgment motion or at trial. *Newcal, 513 F.3d at 1045*. At this stage, the Court need only determine whether the market is facially sustainable. The Court finds no fatal legal defect in Plaintiff's alleged market of San Diego and Imperial Counties.

2. Monopoly Power

Defendants argue Plaintiff suggests the Rady Defendants have 100% of the market power by artificially narrowing the geographic market. They further argue the FAC is silent as to any barriers to entry erected by the Rady Defendants to prevent the practice of pediatric plastic and craniofacial **[**28]** surgery throughout San Diego and Imperial Counties.

Plaintiff contends, pursuant to the direction of Newcal, the Court should look to the geographic market actually alleged in the FAC for purposes of a 12(b)(6) motion. He argues Defendants do not dispute their monopoly power in the geographic market as defined in the FAC. Plaintiff also alleges the practice of pediatric craniofacial plastic surgery is viable only for medical facilities dedicated to pediatric patients and Rady Children's is the only hospital serving San Diego and Imperial Counties that offers the practice environment necessary for pediatric craniofacial plastic surgery. Additionally, he maintains, all three major hospital systems in San Diego refer all pediatric craniofacial plastic surgery candidates to Rady Children's.

[*1092] Monopoly power is "the power to control prices or exclude competition." *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)* (quoting *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 399, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. Defendants' challenge to Plaintiff's allegations of monopoly power are based upon their argument that the alleged geographic market is improper. As discussed above, Plaintiff's identified market is facially sustainable, and Plaintiff clearly alleges Defendants have 100% of the market within San Diego and Imperial counties. **[**29]** Accordingly, Plaintiff sufficiently alleges monopoly power to state a claim for monopolization.

3. Exclusionary Conduct

"Anticompetitive conduct is behavior that lends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*.

Defendants contend Plaintiff appears to allege Defendants used a conspiracy as the exclusionary device to monopolize the relevant market. Defendants maintain the conspiracy theory fails for many of the same reasons it argues the conspiracy claim fails under *Section 1* including: (1) the Rady Defendants are part of a single entity, incapable of conspiring with one another under antitrust laws; (2) Dr. Gosman was an employee and/or agent of the Rady Defendants, and therefore, cannot conspire with the Rady Defendants for antitrust purposes; and (3) there are no factual allegations to support any conspiratorial communications between Dr. Gosman and the Rady Defendants. Defendants also maintain Plaintiff alleges different participants for the conspiracy of the *Section 2* claim and Defendant Jaffurs had no involvement in the *Section 2* claim. Defendants argue this difference calls into question the plausibility of **[**30]** both conspiracy theories.

Plaintiff argues the FAC contains numerous factual allegations that, taken as true, sufficiently allege a conspiracy among Jaffurs, Gosman, and the Rady defendants to deny Plaintiff procedurally fair consideration of his application for privileges at Rady Children's and alleges that Gosman and the Rady defendants acted with the specific intent to monopolize, and sets forth their economic rationale for doing so. Plaintiff further argues Defendants misread the FAC and/or misapprehend the Sherman Act. He maintains he alleges a single conspiracy among all Defendants who assisted with Defendants Jaffurs' and Gosman's coordinated efforts to have his application for privileges denied. He contends all Defendants are included in the first claim for relief because *Section 1* of the Sherman Act prohibits restraint of trade. Additionally, he contends the second claim for relief details how Gosman and the Rady defendants conspired to maintain their monopoly on pediatric craniofacial plastic surgery in the relevant market. He maintains Defendant Jaffurs is not named in that claim because, athough he is one of the primary actors behind the conspiracy, he is not the monopolist. Plaintiff **[**31]** argues the first and second claims do not allege two separate and independent conspiracies, but rather set forth separate causes of action arising from the same conspiracy.

A review of the FAC supports Plaintiffs contention that he seeks two separate causes of action, restraint of trade and monopoly, against different defendants based upon the same conspiracy. As discussed above in section I.B.1., Plaintiff sufficiently alleges a conspiracy amongst the various defendants.

[*1093] 4. Antitrust Injury

Defendants contend Plaintiff has not alleged any facts to show consumer welfare has been harmed. Additionally, they contend, Plaintiff fails to plead facts supporting a plausible claim under *Section 2* and, therefore, none of his alleged injuries flow directly from that provision of the antitrust laws. Thus, Defendants argue, Plaintiff has not suffered antitrust injury under *Section 2* and the second claim for relief must be dismissed.

Plaintiff maintains he alleges Defendants' exclusionary conduct prevents certain highly complex pediatric craniofacial surgery procedures from being available at all in San Diego and Imperial Counties because he is an expert in certain procedures that Gosman does not perform, and their **[**32]** exclusionary conduct has resulted in longer patient wait times and higher costs. Taken as true, he argues, these factual allegations show harm to competition.

In reply, Defendants argue Plaintiff's mere frustration to gain access to a hospital does not amount to an antitrust injury. Defendants also argue Plaintiff's allegations of longer patient wait times and higher costs are nothing more than conclusory allegations without any factual support and are based on Plaintiff's incorrect description of the relevant market.

As discussed in section I.B.4. above, Plaintiff's factual allegations sufficiently plead antitrust injury.

D. Bad Faith Professional Review

Defendants seek dismissal of Plaintiff's claim for the alleged violation of *California Business & Professions Code 809.05* arguing there is no separate right for civil remedies. They further contend, even if a viable cause of action did exist, any attempt to invoke this section is premature because Plaintiff only alleges his privileges have presumptively been denied.

Plaintiff argues Defendants provide no authority for their contention that a physician cannot bring a civil claim to enforce rights included in *section 809*. Plaintiff contends *section 809* expressly recognizes that physicians are harmed by **[**33]** peer review that is not conducted fairly, and provides the right to a review process that is not arbitrary or capricious and a specific procedure to safeguard the rights of physicians. He maintains the legislation provides for administrative remedies but does not provide a means to enforce the rights contained therein. Citing *Jacobellis v. State Farm Fire & Cas. Co., 120 F.3d 171, (9th Cir. 1997)*, he argues, a private right of action may be implied because it is needed to protect the purpose and assure the effectiveness of *section 809*. Plaintiff contends he alleges sufficient facts to support a claim for relief for violation of *section 809*.

In reply, Defendants argue Plaintiff misrepresents Jacobellis and the Restatement test to artificially create an implied private right of action. They contend there is no support for a private right of action under *section 809*, and plaintiff has provided no authority to show otherwise. They also contend the legislative history confirms the intent of the statute was to provide minimum statutory procedural rights and protections to physicians subject to adverse action in a peer review system.

In Jacobellis, the Ninth Circuit found that "California courts have implied a private right of action where such a right was necessary to enforce a statute that **[**34]** was intended to protect the aggrieved party." *120 F.3d at 174* (citing *Faria v. San Jacinto United School Dist., 50 Cal.App.4th 1939, 59 Cal. Rptr. 2d 72 (1996)*. The court determined that the Restatement test for deciding whether a private right of action could be implied is useful in cases where the statute evidences a legislative intent to **[*1094]** provide a right to a class of persons and "in the absence of the concerns avoided by the *Moradi-Shalal* court." *Id. at 175*. According to the court, the California Supreme Court in *Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal.3d 287, 250 Cal. Rptr. 116, 758 P.2d 58 (1988)*, looked to the text of the statute, legislative analyst and counsel reports, alternative methods of enforcement, adverse consequences of implying a private cause of action and analytical difficulties defining the scope of the cause of action when finding the statute provided no private right of action. *Id. at 174*. In determining the Earthquake Insurance Act had a private cause of action in Jacobellis, the Ninth Circuit noted that the Earthquake Insurance Act differed from the statute addressed in Moradi-Shalal, the Unfair Practices Act, in that the text of the Unfair Practices Act provided for administrative enforcement while the Earthquake Insurance Act did not provide any administrative remedies. See Id.

Section 809 is the statutory scheme providing a peer review system to preserve high standards for **[**35]** the practice of medicine. *Cal. Bus. & Prof. Code § 809(a)(2)-(3)*. It recognizes "[p]eer review that is not conducted fairly results in harm to both patients and healing arts practitioners by limiting access to care" and defines the minimum due process requirements of the process. *§ 809(a)(4)*; *Unnamed Physician v Board of Trustees of Saint Agnes Medical Center, 93 Cal.App.4th 607, 622, 113 Cal. Rptr. 2d 309 (2001)*. The legislation provides administrative remedies. Accordingly, a private right of action is not necessary to enforce the statute. Looking to the guidance provided by the Ninth Circuit in *Jacobellis*, the Court finds no implied private right of action in *section 809*.

E. Defamation

Defendants argue plaintiff's allegations supporting his claim for defamation are devoid of the requisite specificity and are privileged.

1. Specificity

To state a claim for defamation, a plaintiff must allege "intentional publication of a statement of fact that is false, unprivileged, and has natural tendency to injure or which causes special damage." *Smith v. Maldonado, 72 Cal. App. 4th 637, 645, 85 Cal. Rptr. 2d 397 (1999)*. "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made." Id.

Defendants argue Plaintiff alleges Defendants forwarded, conveyed, or repeated Defendant Jaffurs' false and defamatory statements but fails to identify which **[**36]** of Jaffurs' statements were forwarded, conveyed, or repeated, which Defendant allegedly made the statements, to whom these statements were made, when these statements were made, and the context of the statements. Thus, they argue, the allegations lack the specificity required to support a defamation cause of action.

Plaintiff argues Defendants contention that he must plead defamation with a high degree of specificity is wrong. He maintains a plaintiff need only allege the substance of the defamatory statement. He further maintains he alleges both libel and slander with sufficient specificity. He contends he identifies the alleged statement, a publication, and defamatory meaning and that each Defendant repeated the statements to others. Plaintiff also maintains he need not identify the specific third person to whom the allegedly defamatory statement was directed and he sufficiently alleges Defendants' wrongful conduct began in approximately July 2015, and continued at least into early 2016.

[*1095] In reply, Defendants argue Plaintiff fails to identify which false statements were repeated by Defendants and to whom the statements were repeated. They contend he alleges no facts showing they were **[**37]** responsible for any publication to other healthcare providers.

The FAC contains numerous conclusory allegations that Dr. Jaffurs made false oral and written statements to Defendant Gosman and other Rady Defendants "relating to [Plaintiff's] profession, to [Plaintiff's] detriment" which he maintains constitute libel and slander *per se*. FAC ¶¶ 153-157, 160-161. However, Plaintiff also alleges Defendant Jaffurs made false written statements to Defendant Gosman relating to Plaintiff's profession, including that Plaintiff "is not fit to operate on children." Id. ¶ 152. He further alleges Defendants "forwarded, conveyed, or repeated" Jaffur's allegedly false and defamatory statements to others and knew the statements were false and failed to take reasonable care to determine the truth or falsity of the statements. Id. ¶¶ 162, 163.

While libel requires pleading the exact words, slander may be alleged by asserting the substance of the defamatory statement. *Okun v. Superior Court, 29 Cal.3d 442, 458, 175 Cal. Rptr. 157, 629 P.2d 1369 (1981)*. The alleged defamatory statement that Plaintiff was not fit to operate on children is sufficiently specific to state a claim. Plaintiff also alleges Defendant Jaffurs, in concert with Defendant Gosman, made defamatory statements from October **[**38]** 2015 through January 2016. FAC ¶ 84. He further alleges, Defendants Jaffurs and Gosman conspired to spread false information to various physicians. Id. ¶ 85. While Plaintiff fails to allege specifics as to the time and the third parties to whom Defendants repeated the statements, he provides a timeframe and alleges the statements were repeated to other physicians. "Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense." *Okun, 29 Cal.3d at 458*. Plaintiff's allegations give sufficient notice of the claim for slander to permit the Rady Defendants to prepare a defense. Plaintiff, however, fails to sufficiently allege libel against the Rady Defendants. As such, the motion is granted as to Plaintiff's claims for libel and denied as to his claims for slander.

2. Privilege

Defendants argue the statements are privileged under *California Civil Code section 47(b)*. *43.8* and *47(c)*.

a. *Section 47(b)*

According to *section 47(b)*, a publication or broadcast made "[i]n any (1) legislative proceedings, (2) judicial proceedings, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceedings authorized **[**39]** by law and reviewable pursuant to Chapter 2 (commencing with *Section 1084*) of Title 1 of Part 3 of the Code of Civil Procedure" is privileged. "[T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relations to the action." *Silberg v. Anderson, 50 Cal.3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365 (1990)*.

Defendants argue the alleged statements are privileged under *California Civil Code section 47(b)* because the California legislature has accorded hospital peer review decisions a status comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate. They contend the entirety **[*1096]** of Plaintiff's lawsuit involves the alleged presumptive denial of privileges at Rady Children's, and therefore, any alleged statements were made as part of the peer review process used to evaluate Plaintiff's application for privileges. They maintain this peer review process must be considered a judicial proceeding, and therefore, any alleged defamatory statements by Defendant Gosman or anyone representing the Rady Defendants during the evaluation of Plaintiff's application for privileges are absolutely **[**40]** privileged under *section 47(b)*.

Plaintiff argues, as a threshold matter, determining whether a defendant is entitled to immunity under *Section 47(b)* is generally a question of fact. He further argues, even if the Court considers Defendants' fact-based argument now, Defendants are not entitled to immunity under *Section 47(b)*, because defendants have not engaged in the kind of quasi-judicial proceeding that courts have recognized as subject to *Section 47(b)*, and because Gosman's statements were not made in connection with a legitimate peer review process. Plaintiff maintains there was no administrative hearing, much less one conducted in a manner similar to a judicial proceeding, including notice, informal pleading and hearing. Instead, he maintains his application was "screened out." Pla's Opp. at 19. He argues Defendants' cursory screening out of his application, without any legitimate peer review, is not protected activity. He further argues, even if Defendants' conduct could be considered a quasi-judicial process subject to *section 47(b)*, Gosman's unlawful conduct was not entirely related to or connected with that process. He maintains Defendant Gosman's conduct preceded any colorable peer review by several months.

In reply, Defendants argue Plaintiff too narrowly **[**41]** limits the scope and purpose of the litigation privilege. They maintain *section 47(b)* applies to statements made in the course of, and preparatory to, official proceedings authorized by law. Defendants contend Plaintiff's email inquiring about employment and privileges at Rady Children's, alone, effectively triggers the start of the peer review process. They argue the allegedly defamatory statements are absolutely protected by the litigation privilege of *section 47(b)*, because they were made in connection with an official proceeding that started when Plaintiff emailed Gosman in July 2015.

As discussed above, Plaintiff's allegations demonstrate there have been no quasi-judicial proceedings. It is clear the privilege is not limited to statements made during judicial or quasi-judicial proceedings, and "may extend to steps taken prior thereto, or afterwards." *Rusheen v. Cohen, 37 Cal.4th 1048, 1057, 39 Cal. Rptr. 3d 516, 128 P.3d 713 (2006)*. However, "[a] prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." *Action Apartment Association, Inc. v. City of Santa Monica, 41 Cal.4th 1232, 1251, 63 Cal. Rptr. 3d 398, 163 P.3d 89 (2007)*. Plaintiff's allegations support the inference his application was "screened out."

The determination of whether the statements were made to achieve the objects of the quasi-judicial proceedings and **[**42]** have a logical relation to the action is a question of fact not suitable for disposition on a motion to dismiss.

b. *Sections 43.8* and *47(c)*

Section 43.8 provides immunity for communications made "to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing or veterinary arts." The privilege is qualified and "may be defeated by proof that the person or entity asserting **[*1097]** the privilege, when it made the communication, knew the information was false or otherwise lacked a good faith intent to assist in the medical practitioner's evaluation." *Hassan v. Mercy American River Hosp., 31 Cal.4th 709, 724, 3 Cal. Rptr. 3d 623, 74 P.3d 726 (2003)*.

Under *section 47(c)*, "a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information" is privileged.

Defendants argue the statements are privileged under *California Civil Code section 43.8*, because the statements directly concern Plaintiff's qualification for his application for privileges at Rady Children's. They contend Plaintiff has not and cannot show they lacked a good faith intent to aid in Plaintiff's **[**43]** evaluation. Additionally, they contend the allegation that Plaintiff received a call from Dr. Carvalho who told Plaintiff his application was being presumptively denied shows the Rady Defendants and Defendant Gosman were in the process of reviewing Plaintiff's application, and, thus, the alleged defamatory statements fall within the protections of *section 43.8*.

Defendants also argue the alleged statements are privileged under *California Civil Code section 47(c)* because the statements were made in the interest of the operation of Rady Children's. Defendants maintain the Rady Defendants and Defendant Gosman, as the Chief of Plastic Surgery at Rady Children's, have a common interest in Plaintiff's application for privileges as a craniofacial plastic surgeon at Rady Children's. Additionally, they contend Plaintiff failed to plead any facts alleging they acted with malice. Instead, they maintain, Plaintiff merely speculates Defendants acted with malice, and, they argue, Plaintiff's conclusory speculation is not supported by any facts. They maintain, if they did make or repeat a statement regarding Plaintiff's job performance with a former employer, it would fall squarely within the scope of common interest under *section 47(c)*.

Plaintiff argues Defendants **[**44]** are not immune under *section 43.8* and *47(c)* because Defendants' statements were not intended to aid in his evaluation and were made with malice. He maintains *section 43.8* provides no immunity if the person asserting the privilege lacked a good faith intent to assist in the evaluation. Plaintiff asserts he extensively pleads Defendants' true intent by alleging Defendant Jaffurs harbored malice toward Plaintiff and viewed Plaintiff as an economic threat to his pediatric plastic and craniofacial surgery practice in Orange County, and Defendant Gosman viewed Plaintiff's arrival as a competitive threat to her status as the sole practicing pediatric craniofacial plastic surgeon at Rady Children's. Thus, he argues, in making the defamatory statements alleged, neither Jaffurs nor Gosman acted with the subjective purpose or goal to assist in Plaintiff's evaluation. Rather, he maintains. Defendant Gosman acted with the purpose of denying him fair consideration of his application for admitting privileges at Rady Children's, and preserving her position as the sole pediatric craniofacial plastic surgeon at Rady Children's. Additionally, the other Rady Defendants similarly acted with the purpose of preventing Plaintiff from **[**45]** obtaining privileges at Rady Children's, to further their economic incentive to exclude physicians who are not employed by the Rady Foundation. Thus, he argues, no defendant acted with the purpose protected by *section 43.8*.

Plaintiff further maintains *sections 43.8* and *47(c)* provide only qualified immunities. **[*1098]** He contends Defendants are not entitled to immunity under either *section 43.8* or *47(c)*, because they acted with malice, and without reasonable grounds for belief in the truth of their statements. Plaintiff maintains he alleges all Defendants, including the Rady defendants, knew the statements were false, and the evidence available to them proved the statements were false, and he specifically alleges the Rady defendants failed to take reasonable care to determine the truth or falsity of the statements at issue, as they did not contact Plaintiff or the numerous physicians who sent letters to Rady Children's refuting Defendant Jaffurs' statements and offering support to Plaintiff's application for admitting privileges. He argues Defendants' defamatory and anti-competitive purposes, combined with their deliberate falsehoods and false statements made without reasonable grounds to believe them true, take their conduct outside the **[**46]** scope of the qualified protections otherwise provided by *sections 43.8* and *47(c)*.

In reply, Defendants argue the alleged statements are privileged because they were made in order to evaluate Plaintiff for staff privileges and Defendants would have a strong interest in receiving such information. They further argue there is nothing in the FAC setting forth facts that the alleged statements were motivated by hatred or ill will towards Plaintiff.

In the FAC, Plaintiff alleges

> Defendants knew the statements to be false, and the evidence available to defendants proved the statements false. Defendants Dr. Gosman, Rady Children's, Rady Foundation, UCSD and Rady Children's Medical Staff failed to take reasonable care to determine the truth or falsity of the statements, as they did not, for example, contact Dr. Toranto or the numerous physicians who sent letters to Rady Children's refuting Dr. Jaffur's statements and offering unconditional support to Dr. Toranto's application for admitting privileges.

FAC ¶ 163.

Plaintiff also alleges Defendant Gosman viewed Plaintiff as a competitive threat to her status as the sole practicing pediatric craniofacial plastic surgeon at Rady Children's and was motivated by her desire **[**47]** to suppress competition in her local market to her benefit. Id. ¶¶ 5, 96, 116. Assuming the truth of Plaintiff's allegations, Defendants knew the statements were false or lacked the intent to assist in the evaluation, and acted with malice. Accordingly, the statements are not privileged under *sections 43.8* or *47(c)*.

F. Tortious Interference with Prospective Economic Relations

To state a claim for tortious interference with prospective economic advantage, Plaintiff must allege

> (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant.

Korea Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003) (quoting *Westside Center Associates v. Safeway Stores 23, Inc., 42 Cal.App.4th 507, 521-22, 49 Cal. Rptr. 2d 793 (1996))*.

Defendants argue Plaintiff fails to state a claim for tortious interference with prospective economic relations because Plaintiff did not have a known economic relationship with an identifiable third party, and the Rady Defendants did not engage in any intentional acts designed to disrupt the relationship. Specifically, **[**48]** they argue **[*1099]** Plaintiff makes conclusory allegations that an economic relationship was established between Plaintiff and the Rady Defendants or Plaintiff and Dr. Gosman based on speculation. They maintain Plaintiff's allegation that Defendant Gosman's response to his email that there was enough craniofacial coverage at Rady Children's regarding his interest in potentially relocating to San Diego shows that a relationship was not established or intended to be established between Plaintiff and Dr. Gosman or the Rady Defendants. They further maintain Defendant Gosman as an alleged employee or agent of the Rady Defendants, represents the interests of the Rady Defendants and it is nonsensical that the Rady Defendants can engage in an action to disrupt an economic relationship with itself.

Defendants also argue Plaintiff fails to sufficiently allege defamatory statements to support an intentional wrongful act, and without an underlying independent wrongful act this cause of action fails.

Plaintiff fails to address these arguments.

In the FAC, Plaintiff asserts a relationship with Rady Children's that "was likely to have resulted in economic benefit to [Plaintiff]." FAC ¶ 193. However, the other **[**49]** allegations of the FAC contradict the existence of such a relationship. Furthermore, given the allegations that the Rady Defendants were agents of each other, Plaintiff's allegations suggest Defendants interfered with a relationship with itself. Accordingly, Plaintiff fails to allege a relationship with a third party that the Rady Defendants disrupted. The motion is granted as to this claim.

G. Unfair Competition Business and Professions Code *Section 17200* Claim

"The UCL prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.'" *Kwikset Corp. v. Superior Court, 51 Cal.4th 310, 320, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)* (quoting *Cal. Bus. & Prof. Code § 17200*). To state a claim under the "fraudulent" prong, a plaintiff must allege "members of the public are likely to be deceived" by the defendant's business practice. *Schnall v. Hertz Corp., 78 Cal.App.4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)*. The "unlawful" prong "borrows" violations of other laws and makes them independently actionable under the UCL. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. An "unfair" business practice is one that "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws, or otherwise significantly threatens or harms competition." *Id. at 187*.

Defendants argue Plaintiff fails to **[**50]** allege an unlawful, unfair or fraudulent business practice because the alleged violations involve one individual, and does not include any violations affecting anyone other than Plaintiff. Therefore, they argue, Plaintiff fails to allege a business practice that amounts to unfair competition under the UCL. They further argue without a claim upon which to base the UCL claim, the UCL cause of action fails. Additionally, they argue alleged conduct is privileged under *sections 47(b)* and *43.8* of the California Civil code, and the claim is premature for failure to exhaust administrative remedies.

Plaintiff argues Defendants' contention that he does not sufficiently allege a UCL claim by asserting harm only to him fails because an act may violate *section 17200* even if the unlawful practice **[*1100]** affects only an individual. Even if he was required to allege harm more broadly, Plaintiff argues, he has done so by alleging Defendants' unlawful actions "injure competition to the detriment of seriously disabled infants and children, and the insurers and government sources of funding that pay for their medical care." Opp. at 23 (quoting FAC ¶¶ 8, 29). He also argues *section 47(b)* does not apply to his claims because it is preempted by federal statutes, it **[**51]** only protects communicative acts not non communicative conduct alleged by Plaintiff and the "screening out" of his application takes the conduct outside the protections of *section 47(b)*. He further argues he has no obligation to exhaust administrative remedies as to his antitrust claims and he is excused from exhausting administrative remedies as to his state law claims.

In reply, Defendants argues because Plaintiffs' Sherman Act, defamation and *section 809* claims fails, he fails to allege a predicate business act or practice that is forbidden by law.

As noted by Plaintiff, an unlawful practice that affects only one victim may still violate the UCL. See *Blanks v. Shaw, 171 Cal.App.4th 336, 364, 89 Cal. Rptr. 3d 710 (2009)*. To the extent Defendant is asserting Plaintiff fails to sufficiently allege a claim under the "unfair" prong, the Court finds Plaintiff sufficiently alleges harm to competition. The Court further finds Plaintiff's alleges a predicate act in support of his UCL claim for an unlawful business practice. As discussed above, Plaintiff sufficiently alleges claims under the Sherman Act and for defamation. Additionally, as discussed in section E.2.a., Defendant fails to demonstrate the privilege of *section 47(b)* applies. Defendant's contention that the UCL claim must be dismissed **[**52]** for failure to exhaust fails as Plaintiff is excused from exhaustion of administrative remedies as discussed above.

II. Defendant Jaffurs' Motion to Dismiss

Defendant Jaffurs moves to dismiss the FAC arguing (A) Plaintiff's claims are premature, (B) he is immune from liability as to all the state law claims, (C) the Sherman Act claims are barred and fail to state a claim, (D) the fourth and seventh causes of action have no private right of action, (E) individuals are not liable under Labor Code *section 1102.5*, (F) the UCL claim is insufficiently pled, and (G) the tortious interference claim fails as a matter of law.

A. Premature

Defendant argues Plaintiff's claims for conspiracy, defamation, tortious interference with prospective economic relations and unfair competition are not ripe because his application is still pending and he has failed to exhaust his administrative remedies. For the reasons discussed in detail above, this Court finds Plaintiff's action is not barred for failure to exhaust administrative remedies. As such, Defendant's motion to dismiss the state law claims as premature is denied.

B. Immunity Under State Law

Defendant contends he is immune from suit pursuant to *California Civil Code sections 43.8*, *47(b)*, *47(c)*, and *California Government Code sections 821.6* and *822.2*.

1. *Sections 43.8*, *47(c)* [53] and *822.2***

The immunity provided by *sections 43.8* and *47(c)* are laid out in section I.E.2.b. above and are incorporated by this reference. Under *California Government Code section 822.2*, "[a] public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice."

[*1101] Defendant argues he is entitled to the immunity provided by *section 43.8* because his statements were made with the intent to aid Rady and CHOC in evaluating Plaintiff's qualifications. Additionally, he argues he is entitled to immunity provided by *section 47(c)* because his statements were made in the context of employment and peer review credentialing decisions. Defendant contends Plaintiff presents only vague allegations of ill will and malice.

Plaintiff argues the statements at issue were not intended to aid in his evaluation. Plaintiff maintains he pleads Defendant's true intent by alleging Defendant Jaffurs viewed Plaintiff as an economic threat to his practice, and acted out of a deep-seated animosity for Plaintiff with the goal of denying him employment. He further contends he alleges Defendant made false written and oral statements **[**54]** relating to Plaintiff's profession, including that Plaintiff is not fit to operate on children. Plaintiff maintains Defendant acted with malice, and without reasonable grounds for belief in the truth of the statements at issue.

In the FAC, Plaintiff alleges Defendant perceived him as competitive threat, began making false and defamatory statements to potential employers about Plaintiff, and boasted about destroying Plaintiff's employment opportunity. FAC ¶¶ 2, 3. He further alleges Defendant "continued on his vendetta" by making false and defamatory statements to Rady Children's and The Regents. Id. ¶ 4. The FAC also alleges Defendant developed a deep-seated personal animosity towards Plaintiff when Plaintiff refused to act as an accomplice to Defendant's personal vendettas against other surgeons. Id. ¶¶ 65-66. Additionally, the Plaintiff alleges Defendant made defamatory statements he knew to be untrue to Rady Children's with the intent to professionally harm Plaintiff and Plaintiff obtained letters from other physicians which described Defendant's allegations against Plaintiff as false, unprofessional and having no basis in fact. Id. ¶¶ 84, 92.

Assuming the truth of Plaintiff's non-conclusory **[**55]** allegations, Defendant's statements were knowingly false, made with malice and lacked the intent to assist the peer review or credentialing decisions. As such, the statements are not privileged under *sections 43.8*, *47(c)*, and *822.2*.

2. *Sections 47(b)* and *821.6*

The immunity provided by *section 47(b)* is laid out in section I.E.2.a. Under *section 821.6*, "a public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously or without probable cause."

Defendant argues he is entitled to immunity under *section 47(b)* and *section 821.6* because the alleged statements arose during a medical peer review process.

Plaintiff contends Defendant's arguments in support of immunity under *sections 47(b)* and *821.6* are not appropriate at this stage of the proceedings because entitlement to immunity under these sections is usually a question of fact. Even if the Court considers the arguments, Plaintiff contends Defendant is not protected by *section 821.6* because he did not institute or prosecute anything, and his statements were made to serve his own purposes and out of deep-seated personal animosity towards Plaintiff. He further contends Defendant is not entitled to immunity under these sections because the defamatory **[**56]** statements were made outside the context of a peer review process and long before peer review began. Additionally, he argues Defendant continued his wrongful conduct by making false statements to the Rady Defendants after Plaintiff submitted his application outside the kind of formal or quasi-judicial proceeding that courts have **[*1102]** recognized as protected. Plaintiff maintains there has been no such formal or quasi-judicial proceeding, but, instead, the Rady Defendants conducted a cursory screening out of his application.

Defendant argues, in reply, the statements were made in anticipation of or during the peer review process, and therefore, are absolutely protected. He further argues he acted in his professional capacity as an employee of UCI, so Plaintiff's claim that he was acting to serve his own purposes is not plausible. Defendant also argues Plaintiff's application has not been screened out because it has not yet been denied.

As discussed above, Plaintiff's allegations demonstrate there have been no quasi-judicial proceedings and the question of whether the statements were made to achieve the objects of a quasi-judicial proceeding is a question of fact not suitable for disposition **[**57]** on a motion to dismiss.

C. Sherman Act Claim

Defendant argues Plaintiff's Sherman Act Claim fails because he is entitled to *Eleventh Amendment* immunity and Plaintiff fails to allege evidentiary facts to support his claim.

1. *Eleventh Amendment* Immunity

"The *Eleventh Amendment* has been authoritatively construed to deprive federal courts of jurisdiction over suits by private parties against unconsenting States." *Seven Up Pete Venture v. Schweitzer, 523 F.3d 948, 952 (9th Cir. 2008)* (citing *Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996)*). An unconsenting state is also immune from suits brought against a state by its own citizens. See *Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004)*. State officials acting in their official capacity enjoy similar immunity under the *Eleventh Amendment*. *Hafer v. Melo, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991)*. However, a suit seeking damages against a state official in his individual capacity is not barred by the *Eleventh Amendment*. See id.; *Blaylock v. Schwinden, 862 F.2d 1352, 1353-54 (9th Cir. 1988)*.

Defendant maintains Plaintiff alleges he was acting as an employee of The Regents, and, as a public employee, he is entitled to immunity.

Plaintiff argues he sued Defendant Jaffurs in his personal capacity and the allegations show Defendant engaged in vindictive and abusive behavior, and made false and defamatory statements about Plaintiff in the service of both a personal vendetta and an anti-competitive campaign. He maintains his allegations that Defendant is an employee of The Regents, for purposes of pleading the predicate **[**58]** for *respondeat superior*, does not preclude his claim for damages against Defendant in his personal capacity.

In reply, Defendant argues the allegations show he was acting, at all times, within the course and scope of his employment as a Regents employee, and as such, all claims against him should be dismissed under *Eleventh Amendment* immunity.

Plaintiff alleges Defendant engaged in personal vendettas against surgeons, including Plaintiff. FAC ¶¶ 2, 4, 65, 70. He further alleges Defendant's actions were conducted in his professional capacity as an employee. Id. ¶ 37. The allegations of the complaint demonstrate Plaintiff seeks relief against Defendant in both his official and individual capacities. Defendant is entitled to immunity to the extent the claim is asserted against him in his official capacity. However, the *Eleventh Amendment* does not bar the claim to the extent it is asserted against Defendant in his individual capacity.

[*1103] 2. Failure to State a Claim

Defendant argues Plaintiff fails to allege sufficient facts to demonstrate a conspiracy, antitrust injury, and a plausible market. He further argues the state action doctrine bars the claim.

a. Insufficient Facts

The Court thoroughly reviewed the allegations of the FAC **[**59]** and, as discussed in detail above, finds Plaintiff sets forth sufficient allegations demonstrating a conspiracy, antitrust injury and a plausible market to support a claim for violation of the Sherman Act.

b. State Action Doctrine

Defendant argues the state action immunity from antitrust liability under *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)* applies to the Sherman Act claims against The Regents and its employees. Under the state action doctrine, federal antitrust laws do not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* (quoting *Parker, 317 U.S. at 352*). Immunity under Parker applies if (1) "the challenged restraint is 'clearly articulated and affirmatively expressed as state policy'" and (2) the policy is "'actively supervised by the State itself." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978))*.

Defendant sets forth no argument in his motion and instead joins in The Regents' argument set forth in its motion to dismiss.[5] In its motion, The Regents cited to a case out of the Western District of New York in which it found The Regents exempt from federal antitrust laws under the state action doctrine.

Plaintiff contends the state action doctrine does not bar his claims because Defendants' action were not the product of state regulation and the **[**60]** state action doctrine does not protect peer review proceedings from application of antitrust laws. Specifically, Plaintiff argues Defendants' conduct was not a product of state regulation in that they conducted a sham peer review. Citing *Pinhas v. Summit Health, Ltd, 894 F.2d 1024 (1989)*, he further argues the Ninth Circuit has specifically found the judiciary does not actively supervise the peer review process.[6]

In Pinhas, the plaintiff asserted claims under the Sherman Act for the removal of staff privileges at Midway Hospital Medical Center. Id. He appealed the district court's dismissal of his antitrust claim pursuant to the state action doctrine. *Id. at 1028*. The court concluded the California judiciary does not actively supervise peer review, and, therefore, the state action doctrine did not apply to peer review proceedings. *Id. at 1030*.

Applying the reasoning and holding of *Pinhas*, the Court finds the state action doctrine does not bar the Sherman Act claim against Defendant Jaffurs.

D. Fourth and Seventh Causes of Action

Defendant argues Plaintiff's claim for retaliation under *California Business and Professions Code sections 510-512*, and **[*1104]** *2056*, and claim for violation of the *California Labor Code section 1050* fail because there is no private right of action.

Plaintiff contends the language of *section 1050* authorizes civil actions for treble damages. **[**61]** He further argues there is an implied private right of action under *510 et. seq.* because the statute's express purpose is to provide protection against retaliation for health care practitioners who advocate for appropriate health care for their patients. It specifically provides that the penalizing of a health care practitioner for advocating for appropriate care violates that policy and it does not expressly provide a means to enforce the right of those health care practitioners. Plaintiff also contends courts have recognized claims brought under *section 510* by aggrieved physicians.

In reply, Defendant contends Plaintiff abandons his claim under *section 2056*. He further argues the cases relied upon by Plaintiff in support of his contention that courts recognize claims brought under *section 510* merely assumed, without analysis, that *section 510* could support a private right of action. Even if there is a private right of action, Defendant contends, Plaintiff fails to allege he advocated for medical care to support such a claim.

Defendant appears to abandon his argument that *section 1050* does not provide for a private right of action, as he does not address it in his reply. As noted by Plaintiff, *California Labor Code section 1054* clearly states, in addition to the criminal **[**62]** penalty provide, "any person or agent or officer thereof, who violates any provisions of *section*

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[5] Because The Regents was dismissed from this action, the motion is no longer pending.

[6] In his reply, Defendant states Plaintiff does not address the state action doctrine argument and offers no reply to Plaintiff's arguments.

1050 and *1052*, inclusive, is liable to the party aggrieved, in a civil action, for treble damages." *Cal. Labor Code § 1054*.

Plaintiff fails to address *section 2056* in his opposition. Accordingly, the court finds Plaintiff abandons the claim. See *Jenkins v. County of Riverside, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005)* (dismissing causes of action as abandoned where plaintiff did not oppose dismissal in her opposition); *Shull v. Ocwen Loan Servicing, LLC, 2014 U.S. Dist. LEXIS 50686, 2014 WL 1404877, *2 (S.D.Cal. 2014)* ("Where a party fails to address arguments against a claim raised in a motion to dismiss, the claims are abandoned and dismissal is appropriate."); *Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006)* (Holding that plaintiff forfeited his right to raise an issue on appeal where his opposition to a motion to dismiss failed to address the arguments because plaintiff failed to suggest a continuing interest in pursuing the claim and "effectively abandoned" it.).

Section 510 et. seq. provides protection against retaliation for physicians who advocate for medically appropriate health care for their patients. *Cal. Bus. & Prof. Code § 510(a)*. "Advocating for medically appropriate health care" is defined as:

> to appeal a payor's decision to deny payment for a service pursuant to the reasonable grievance or appeal procedure established by a medical group, independent practice association, preferred provider **[**63]** organization, foundation, hospital medical staff and governing body, or payer, or to protest a decision, policy, or practice that the physician, consistent with that degree of learning and skill ordinarily possessed by reputable physicians practicing according to the applicable legal standard of care, reasonably believes impairs the physician's ability to provide medically appropriate health care to his or her patients.

Cal. Bus. & Prof. Code § 510(b). The statute evidences an intent to provide a right to physicians who advocate for medically appropriate health care for their patients and does not provide administrative remedies or other means to enforce the rights recognized therein. The Court further **[*1105]** finds Plaintiff sufficiently alleges he advocated for medically appropriate health care by protesting Defendant's "decision and attempts to discredit two competent physicians" that Plaintiff believed "would impair CHOC's ability to provide appropriate health care to its patients." FAC ¶¶ 135, 134.

Accordingly, Defendant's motion to dismiss is granted as to *section 2056* and denied as to *section 510 et. seq.* and *1050*.

E. Labor Code *Section 1102.5*

Defendant seeks dismissal of Plaintiff's claim for relief under Labor Code *section 1102.5*. He argues, as an individual, he cannot be liable **[**64]** under *section 1102.5* as a matter of law.

In opposition, Plaintiff argues his claim under *section 1102.5* is viable because the plain language of the statute imposes individual liability. He maintains no California court has addressed the issue of individual liability since the language of the statute was amended in 2014 to state "any person acting on behalf of [an] employer" may not retaliate. Pla's Opp. at 22. Prior to the amendment, the language of the statute read, an "employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation [of law]." Id. (citing *Cal. Labor Code § 1102.5* (effective Jan. 1, 2004 to Dec. 31, 2013)). He contends at least one district court found the statute ambiguous.

Defendant argues, in reply, Plaintiff admits no court has found individual liability in a civil action under *section 1102.5*.

No California court has addressed the issue of individual liability since the amendment to the language. All district courts, but one, that have addressed the issue have found no individual liability. See *Tillery v. Lollis, 2015 U.S. Dist. LEXIS 106845, 2015 WL 4873111 (E.D.Cal. 2015* (Looking to California Supreme Court discussion of language similar to the language of *section 1102.5* and finding no individual liability.); *Vera v. Con-way Freight, Inc., 2015*

U.S. Dist. LEXIS 45424, 2015 WL 1546178 (C.D.Cal. 2015) (Finding the "statutory text, structure and legislative **[**65]** history all indicate that only employers-no individual employees-are liable for violations of the statute.") *Conner v. Aviation Services of Chevron, U.S.A., 2014 U.S. Dist. LEXIS 156662, 2014 WL 5768727 (N.D.Cal. 2014)* (Finding the plaintiff failed to point to any language establishing individual liability and that *section 1104* of the Labor Code expressly stated, in all prosecutions under the pertinent chapter, employers are responsible for acts of its manager, officers, agents and employees.). While the court in *De La Torre v. Progress Rail Servs. Corp., 2015 U.S. Dist. LEXIS 100784, 2015 WL 4607730 (C.D.Cal. 2015)* found the language ambiguous, it made no determination as to whether the statute permitted individual liability when it remanded the action to state court. This Court is persuaded by the district courts' distillation of the statutory language and, similarly, finds no individual liability under *section 1102.5*. As such, Defendant's motion is granted as to the claim for retaliation under *section 1102.5*.

F. Unfair Competition Claim

Defendant argues Plaintiff's claim under the UCL is insufficiently pled and fatally vague. Specifically, he argues Plaintiff fails to allege a claim under the unfair prong because he does not allege harm to the victim outweighs any benefit, and he fails to allege a claim under the fraudulent prong because he does not allege conduct that is likely to deceive members of the public. He further argues **[**66]** Plaintiff fails to state a claim under the unlawful prong because he has not identified a pattern or practice of specific unlawful conduct and only asserts harm to himself.

Plaintiff argues he alleges Defendant engaged in unlawful and unfair conduct by violating the Sherman Act, retaliating **[*1106]** against Plaintiff, engaging in defamation, violating *section 1050* and interfering with Plaintiff's prospective economic relations. Plaintiff also contends an act may violate the UCL even if the practice only affects one victim. Additionally, he contends he alleges Defendant's conduct injured competition to the detriment of seriously disabled infants and children. Plaintiff also maintains he alleges Defendant acted for anti-competitive purposes.

In reply, Defendant argues Plaintiff fails to allege how Defendant's conduct in Orange County impacted children in San Diego and fails to allege Defendant worked in San Diego/Imperial counties to permit an inference of anticompetitive motive to keep Plaintiff off Rady Children's staff.

Plaintiff does not address Defendant's contention that he does not assert a claim under the fraudulent prong. Furthermore, there are no allegations the Defendant's conduct is likely to deceive **[**67]** members of the public. See *Schnall, 78 Cal.App.4th at 1167*.

As stated above, an unlawful practice that affects only one victim may still violate the UCL. *Blanks, 171 Cal.App.4th at 364*. Additionally, as discussed above, Plaintiff sufficiently asserts violations of the Sherman Act, defamation and retaliation to support a claim under the unlawful prong. The Court also finds Plaintiff alleges Defendant's conduct in making defamatory statements harmed competition. FAC ¶¶ 8, 29. Accordingly, the motion is denied as to the UCL claim under the unfair and unlawful prongs, and is granted under the fraudulent prong.

G. Tortious Interference with Prospective Economic Relations Claim

Defendant argues Plaintiff's tortious interference with economic relations claim fails because Defendant engaged in protected speech not actionable as defamation. He further argues he fails to state sufficient facts showing a relationship with CHOC or Rady Children's that was harmed by the alleged wrongful conduct. Additionally, Defendant argues Plaintiff sets forth conclusory assumptions to support his claim that he was not hired as a result of Defendant's statements. Defendant also contends Plaintiff fails to allege harm because he resigned from UCI and he still treats patients **[**68]** at CHOC, and Plaintiff's application is still pending at Rady Children's.

In opposition, Plaintiff argues he sufficiently alleges a claim for tortious interference with prospective economic relations. He maintains the FAC alleges he joined the medical staff at CHOC, and thus, had an existing relationship with it when he sought employment with the CHOC Foundation, and, given his relationship with CHOC, he had a reasonable expectation that his relationship with the CHOC Foundation would develop into an employment relationship. He further maintains he alleges Defendant made false and defamatory statements to the CHOC Foundation in order to prevent his employment. Additionally, he maintains he establishes harm by alleging the CHOC Foundation did not hire him.

In reply, Defendant argues his statements to the CHOC Foundation were protected as part of its employment application process and Plaintiff fails to allege Defendant caused the denial of his application. He also contends Plaintiff's presumption that he had some economic relationship with the CHOC Foundation is not plausible.

In support of his claim for tortious interference with prospective economic relations, Plaintiff alleges he was **[**69]** in a relationship with the CHOC Foundation, an entity closely affiliated with CHOC, with whom Plaintiff worked during his employment at UCI. FAC ¶ 183. He further alleges the **[*1107]** CHOC Foundation employed many physicians who had admitting privileges at CHOC. Id. Additionally, Plaintiff alleges he entered into employment discussions with the CHOC Foundation in 2015, and Defendant intended to disrupt the relationship between Plaintiff and the CHOC Foundation and made false and defamatory statements to the CHOC Foundation about Plaintiff. Id. ¶¶ 185-187. Plaintiff alleges Defendant disrupted the relationship and Plaintiff was not hired by the CHOC Foundation. Id. ¶¶ 70, 71, 72, 188. He alleges he was harmed because he was unable to continue his medical practice at UCI/CHOC outside the administrative purview of Defendant. Id. ¶ 189.

The Court finds Plaintiff sufficiently alleges a claim for tortious interference with prospective economic advantage against Defendant Jaffurs based upon the relationship with the CHOC Foundation. As discussed above, Plaintiff's allegations based upon economic relations with Rady Children's does not support a claim.

CONCLUSION AND ORDER

Based on the foregoing, IT IS **[**70]** HEREBY ORDERED:

1. The Rady Defendant's motion to dismiss is GRANTED IN PART AND DENIED IN PART.

    a. The motion is GRANTED as to Bad Faith Professional Review (Third Claim); Defamation for libel (Sixth Claim); and Tortious Interference with Prospective Economic Relations (Eighth Claim).

    b. The motion is DENIED as to Conspiracy in Restraint of Trade (First Claim); Monopoly (Second Claim); Defamation for slander (Sixth Claim); and Unfair Competition (Ninth Claim).

2. Defendant Jaffur's motion to dismiss is GRANTED IN PART AND DENIED IN PART.

    a. The motion is GRANTED as to Conspiracy in Restraint of Trade (First Claim) only to the extent it is asserted against him in his official capacity; Retaliation under *section 2056* only (Fourth Claim); Retaliation (Fifth Claim); Tortious Interference with Prospective Economic Relations (Eighth Claim) only to the extent it seeks relief based upon a relationship with Rady Children's.

    b. The motion is DENIED as to Conspiracy in Restraint of Trade (First Claim) to the extent it is asserted against him in his personal capacity; Retaliation under *section 510 et. seq.* (Fourth Claim); Defamation (Sixth Claim); *California Labor Code section 1050* (Seventh Claim); Tortious Interference with Prospective Economic Relations (Eighth **[**71]** Claim) to the extent it seeks relief based upon a relationship with CHOC; and Unfair Competition (Ninth Claim).

DATED: March 20, 2018

/s/ John A. Houston

JOHN A. HOUSTON

United States District Judge

Ragner Tech. Corp. v. Berardi

United States District Court for the District of New Jersey

March 22, 2018, Decided; March 22, 2018, Filed

No. 1:15-cv-7752 (NLH/AMD)

Reporter

324 F. Supp. 3d 491 *; 2018 U.S. Dist. LEXIS 46862 **; 2018 WL 1420490

RAGNER TECHNOLOGY CORP. and TRISTAR PRODUCTS INC., Plaintiffs, v. MICHAEL BERARDI, CHERYL BERARDI, GREG JANSON, NATIONAL EXPRESS, INC., and ESTATE OF EDWARD KELLEY, Defendants.

Prior History: Ragner Tech. Corp. v. Berardi, 2015 U.S. Dist. LEXIS 185343 (S.D. Fla., June 11, 2015)

Core Terms

patent, personal jurisdiction, amended complaint, antitrust, allegations, relevant market, Technology, hose, Products, geographic, anti trust law, competitors, monopolize, Defendants', manufacture, fraudulently obtain, motion to dismiss, non-disclosure, infringement, contacts, interchangeability, pleaded, transferred, immune, prong, antitrust violation, specific intent, anticompetitive, probability, prototypes

Counsel: **[**1]** For Plaintiffs: EDWARD P. BAKOS, NOAM J. KRITZER, BAKOS & KRITZER, FLORHAM PARK, NEW JERSEY.

For Defendants: THOMAS R. CURTIN, GEORGE C. JONES, GRAHAM CURTIN, MORRISTOWN, NEW JERSEY.

Judges: NOEL L. HILLMAN, UNITED STATES DISTRICT JUDGE.

Opinion by: NOEL L. HILLMAN

Opinion

[*500] HILLMAN, District Judge

This is a Walker Process action related to other patent infringement litigation pending in the District of New Jersey. This Opinion addresses two separate but partially overlapping motions: Defendant National Express, Inc.'s Motion to Dismiss for Failure to State a Claim and Defendants Michael Berardi ("Mr. Berardi") and Cheryl Berardi ("Mrs. Berardi") (collectively the "Berardi Defendants")'s Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue, and Failure to State a Claim. For the reasons that follow, the Court will grant both motions. The Court will dismiss the claims against Defendants without prejudice and with leave to amend. The Court will dismiss Mrs. Berardi as a party defendant for lack of personal jurisdiction.

I. Relevant Facts

The following facts come from Plaintiffs' April 29, 2016 Second Amended Complaint.[1] On September 25, 2005, U.S. Patent No. 6,948,527 ("the '527 patent") entitled "Pressure-Actuated Linearly Retractable and Extendible Hose" **[**2]** was issued to Gary Dean Ragner and Robert Daniel deRochemont, Jr. On June 23, 2009, U.S. Patent No. 7,549,448 ("the '448 patent") entitled "Linearly Retractable Pressure Hose" was issued to Ragner. Ragner Technology is the owner and assignee of all rights to the '527 and '448 patents, subject only to exclusive licenses granted to Tristar Products.

In May 2011, Ragner Technology was introduced to Greg Janson, who appeared to be interested in investing in Ragner Technology or bringing Ragner Technology to the attention of potential investors. Janson was hired as a broker to recruit investors for Ragner Technology's patented products.

Janson informed Defendants that Ragner Technology was seeking to meet with investors. Janson scheduled a meeting between Ragner Technology and Defendants for August 23, 2011. On August 23, 2011, Ragner, deRochemont, and Margaret Combs, CEO of Ragner Technology, arrived in Jupiter, Florida for the scheduled meeting. At that time, they learned they were at the home of the Berardi Defendants. Also at the meeting was Edward Kelly, CEO of Defendant National Express. Janson and Vince Simonelli, a business broker, were also present at the meeting. The Berardi Defendants were introduced as Kelly's producers for his television **[**3]** commercials.[2]

At the start of the meeting, Ragner Technology made clear it was seeking investors and not licensing opportunities. Prior to disclosing any confidential information, Combs informed the Berardi Defendants and Kelly that non-disclosure agreements had not been prepared because they had been unaware of whom they were meeting with. Nonetheless, Combs insisted on a non-disclosure agreement before commencing the meeting. The Berardi Defendants and Kelly verbally agreed to terms of confidentiality and non-disclosure for the meeting. They also agreed to execute written non-disclosure agreements to be sent by Combs following the meeting.

After the oral agreement, Ragner Technology "disclosed information relating to **[*501]** Ragner Technology, the scope of its patents, product specifications, and target market of the Microhose product." They further disclosed

> specific engineering diagrams, ideas, materials of manufacture, including but not limited to, prior iterations of prototype hoses and prototype hoses constructed of more than one layer, more than one material, at least one fabric layer, various materials of manufacture including but not limited to, vinyl, nylon, rubber, polyester, and/or **[**4]** polypropylene, at least one layer with cord reinforcement including a hose wherein the biasing was performed by elastic material such as polymers made of thermoplastic polyurethane to provide retracting force, manufacture know-how, concepts, etc. related to its prototypes of the Microhose product.

Ragner Technology also demonstrated one of the patented prototypes of the Microhose product. Mr. Berardi was able to use one of the patented prototypes and saw it expand and retract.

During the meeting, National Express articulated its interest in licensing the patented technology and an intent for the product to be manufactured in Taiwan. Ragner Technology reiterated its request was solely for investors, but also conveyed its hesitancy to use a foreign manufacturer. After reassuring Ragner Technology of the capabilities of its foreign manufacturing contact, Kelly requested permission to contact the foreign manufacturer to address its ability to manufacture the product using the patented technology, subject to the terms of the non-disclosure agreement. Ragner Technology agreed to that limited disclosure. Kelly indicated he would contact the manufacturer as discussed.

The morning following the **[**5]** meeting, August 24, 2011, Combs prepared the non-disclosure agreements, all dated August 23, 2011. The non-disclosure agreements were never executed by Defendants. Ragner Technology was similarly never contacted regarding Kelly's communications with the manufacturer in Taiwan.

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[1] This Court has subject matter jurisdiction pursuant to *28 U.S.C. § 1337* and *28 U.S.C. § 1331*.

[2] The Second Amended Complaint states the Berardi Defendants own Berardi Productions, a video production company. Berardi Productions has an exclusive agreement to produce television and online advertisements for National Express's Xhose product.

A little over two months later, on November 4, 2011, Mr. Berardi filed a patent application entitled "Expandable and contractible hose," which Plaintiffs allege "claim[ed] novel features of the prototypes of the Microhose product demonstrated by Ragner Technology at the August 23, 2011 meeting." Mr. Berardi obtained U.S. Patent No. 8,291,941 ("the '941 patent"), entitled "Expandable and contractible hose," U.S. Patent No. 8,291,942 ("the '942 patent") entitled "Expandable hose assembly," and U.S. Patent No. 8,479,776 ("the '776 patent").[3]

Blue Gentian, LLC is the owner of all the rights in the '941, '942, and '776 patents. Mr. Berardi is a managing member of Blue Gentian. Blue Gentian, in turn, granted National Express the exclusive right under the '941, '942, and **[**6]** '776 patents to market and sell the expandable hose product.

Plaintiffs filed their initial complaint on May 30, 2014 in the United States District Court for the Southern District of Florida, which was set before the Honorable William **[*502]** P. Dimitrouleas, U.S.D.J. On June 11, 2015, the Southern District of Florida granted Defendants' Motion for Judgment on the Pleadings and granted leave to file an amended complaint. This Order was followed by a First Amended Complaint on June 25, 2015. This matter was then transferred, sua sponte, from the Southern District of Florida to the District of New Jersey on October 28, 2015. This case was originally assigned to the Honorable Kevin McNulty, U.S.D.J. before being reassigned to the undersigned on December 2, 2016 because of the pendency of related matters.

Plaintiffs' April 29, 2016 Second Amended Complaint brings three counts against Defendants: conspiracy to monopolize (in the alternative, attempt to monopolize) (Count I); common law fraud (Count II); and breach of contract (Count III).

This Court's Opinion proceeds as follows. The Court first addresses the arguments made that this Court lacks personal jurisdiction over the Berardi Defendants and that venue **[**7]** is improper in the District of New Jersey. The Court then addresses the different jurisdictions' laws it is required to apply in considering these motions, of which there are several. The Court then addresses Count I of the Second Amended Complaint, asserting conspiracy to monopolize and, alternatively, attempt to monopolize. This requires consideration, first, of whether Plaintiffs have antitrust standing and, second, whether Defendants are immune from antitrust liability. The antitrust immunity issue requires consideration of whether there was fraud on the PTO and, if so, the merits of whether Plaintiffs have a monopolization claim. As the Court finds it must dismiss Count I, the Court chooses not to exercise supplemental jurisdiction over Plaintiffs' state law claims for common law fraud and breach of contract. Lastly, the Court considers Plaintiffs' request for leave to amend.

II. Personal Jurisdiction and Venue

In its February 7, 2018 Opinion, this Court extensively considered whether it had personal jurisdiction over the Berardi Defendants. The Court determined it had personal jurisdiction over Mr. Berardi but lacked personal jurisdiction over Mrs. Berardi. The Court asked for **[**8]** supplemental briefing on the personal jurisdiction issue, which the Court timely received on March 9, 2018. The Court summarizes its February 7, 2018 personal jurisdiction analysis here, incorporating the input of the parties from the supplemental briefing before reaching its ultimate decision.

As this case was transferred from the Southern District of Florida, the Court began by considering any decisions made by that court with regard to personal jurisdiction. In its order transferring this case to the District of New Jersey, the Southern District of Florida did not specifically address whether this Court has personal jurisdiction over Defendants. Its order found transfer "would serve the interest of justice . . . as the claims in this action may be

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[3] The Second Amended Complaint further alleges that, on August 3, 2012, the Patent Office issued an Office Action with regard to the applications for what eventually issued as the '941 and '942 patents. The Second Amended Complaint pleads:

> The Office Actions demonstrate[d] that the patent examiner (1) rejected a subset of pending claims as anticipated by the '527 patent, (2) rejected various subsets of pending claims as obvious in light of the '527 patent, and (3) rejected various subsets of pending claims as obvious in light of a combination of the '527 patent and other references.

affected by, and are intricately related to, several pending actions in the District of New Jersey." The court acknowledged that, while Plaintiffs and National Express consented to transfer (and National Express to jurisdiction in the District of New Jersey), the Berardi Defendants contended that the District of New Jersey did not have personal jurisdiction over them. The court concluded: "Plaintiffs acknowledge that Michael Berardi and **[**9]** Cheryl Berardi may attempt to challenge personal jurisdiction in the District of New Jersey. Nonetheless, Plaintiffs are willing to face that potentiality and request that the Court transfer the action to the District of New Jersey pursuant to *§ 1404(a)*."

Noting that "[a]n action can be brought only where the court has personal jurisdiction **[*503]** over defendants" and that "a court does not have authority to transfer a case to a court that lacks personal jurisdiction," *Hunt v. Global Incentive & Meeting Mgmt., No. 09-4921, 2010 U.S. Dist. LEXIS 98828, 2010 WL 3740808, at *8 (D.N.J. Sept. 20, 2010)* (citing *Sunbelt Corp. v. Noble Denton & Assocs., Inc., 5 F.3d 28, 31-33 (3d Cir. 1993))*, the Court found the Southern District of Florida necessarily and implicitly concluded that the District of New Jersey had personal jurisdiction over all Defendants in determining it was appropriate to transfer the case to the District of New Jersey. Thus, this Court concluded that the law of the case was that this Court has personal jurisdiction over Defendants.

Noting that "[a] district court may reconsider a previous decision that has become law of the case . . . where the decision was clearly erroneous and would work a manifest injustice," *Ulferts v. Franklin Resources, Inc. (In re Alexander), Nos. 07-848, 07-1309, 2007 U.S. Dist. LEXIS 49289, 2007 WL 2021787, at *2 (D.N.J. July 9, 2007)*, the Court visited the issue of personal jurisdiction solely to determine whether the decision was clearly erroneous and would work a manifest injustice.

After concluding that the Berardi **[**10]** Defendants did not waive their argument that this Court does not have personal jurisdiction, the Court considered whether the Berardi Defendants "have certain minimum contacts" with New Jersey "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* (quoting *Milliken v. Meyer, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940))*.

The Court determined that nearly all of the allegations asserted in Plaintiffs' Second Amended Complaint regarding Mr. Berardi's contacts with the forum state relate to his contacts in his capacity as Managing Member of Blue Gentian and as an officer of Berardi Productions. Similarly, Mrs. Berardi's contacts with the forum state relate solely to her contacts in her capacity as an officer of Berardi Productions. Accordingly, this Court turned to whether it was proper for the Court to consider the Berardi Defendants' contacts with the forum state while acting on behalf of either Blue Gentian or Berardi Productions. The Court determined that, if the Second Amended Complaint sufficiently alleged the Berardi Defendants could be subject to individual liability, it was proper to consider actions taken by the Berardi Defendants in their corporate capacities in its personal jurisdiction **[**11]** analysis to the extent those actions were done within New Jersey.

The Second Amended Complaint alleges Mr. Berardi, "as the sole managing member of Blue Gentian," "direct[ed] Blue Gentian, LLC to restrain competition in part in the State of New Jersey by suing competitors claiming infringement and threatening their customers." The complaint specifically pinpoints two 2013 law suits filed in the District of New Jersey: dockets 13-481 and 13-7099. As to both Berardi Defendants, the Second Amended Complaint states the Berardi Defendants direct Berardi Productions to produce anticompetitive commercials "which air in the State of New Jersey." It further states the Berardi Defendants "write, produce, direct, and edit" the anticompetitive advertisements that air in New Jersey.

At this point, the parties' supplemental briefing becomes relevant. The Court's February 7, 2018 Opinion found the Second Amended Complaint sufficiently supported personal jurisdiction over Mr. Berardi based on his contacts through Blue Gentian. The Court based this decision on the 13-481 action and the 13-7099 action, of which Blue Gentian and National Express are both Plaintiffs. The Court found **[*504]** the filing of these **[**12]** actions constituted the minimum contacts necessary for this Court to assert personal jurisdiction over Mr. Berardi, finding Mr. Berardi took specific action and directed the filing of these lawsuits in his capacity as managing member. The Court found that in using the federal court system in New Jersey to allegedly conspire or attempt to monopolize a market with fraudulently obtained patents, Mr. Berardi purposefully availed himself of the privilege of conducting activities in the State of New Jersey. Mr. Berardi was invoking the benefits and protections of the District of New Jersey, located in the forum state. If such use was fraudulent or constituted a conspiracy or attempt to monopolize, Mr. Berardi could reasonably expect to be haled into court in the state in which he filed the lawsuits. The Court also found exercising personal jurisdiction over Mr. Berardi comported with fair play and substantial justice.

In its supplemental briefing, Defendants informed the Court that the 13-481 action was originally filed in the Southern District of Florida before it was transferred to the District of New Jersey on Defendant Telebrands Corp.'s Motion to Transfer. The Court thus will not base **[**13]** a finding of personal jurisdiction on the filing of the 13-481 action. However, the Court finds the filing of the 13-7099 action supports a finding of personal jurisdiction. Defendants' supplemental briefing provides as follows on this issue:

> The 13-7099 action was filed by Blue Gentian and National Express in the District of New Jersey, alleging infringement of U.S. Patent No. 8,479,776 ("the '776 patent"), and to add a retail defendant to infringement allegations already pending in the 13-1758 action. The 13-7099 action was filed as, and was identified as, related to the 13-1758 action that was pending in the district. The 13-1758 action alleged Tristar's infringement of the '941, '942, and '213 patents — the '776 patent is a continuation-in-part of those patents. . . . Because many of the same issues from the 13-7099 action were already pending in the 13-1758 action, 13-7099 action needed to be filed in the district where the 13-1758 action was pending. The 13-1758 action, however, was not directed to New Jersey by Blue Gentian and Mr. Berardi, but rather by Defendants Tristar Products, Inc. . . .
>
> Blue Gentian filed the lawsuit that became the 13-1758 action in the Southern District of Florida on October 23, 2012. . . . On March 19, 2013, however, Judge Seitz **[**14]** granted Tristar's Motion and transferred the action to New Jersey, where it was reassigned to District Judge Hochberg and Magistrate Judge Shwartz as the 13-1758 action. . . .
>
> The 13-1758 action had been transferred to New Jersey based on Tristar's motion, and was pending for just over six (6) months when the 13-7099 action was filed. Because the issues under *28 U.S.C. § 1404(a)* had been litigated and ruled upon with respect to the 13-1758 action, and because the 13-7099 action had the same issues for a court to address, it was not a decision by Blue Gentian and Mr. Berardi that directed the 13-7099 action to New Jersey, but plaintiffs abiding by the Florida court's prior ruling. Having already ruled on the issue relating to where the infringement issues should be heard, it would have been improper for Blue Gentian to then file a new action with substantially the same claims in the Southern District of Florida.[4]

[*505] The Court confirms the following. On November 21, 2013, Blue Gentian and National Express filed a complaint in the District of New Jersey, bringing claims for direct patent infringement and indirect patent infringement against Tristar Products. This was docketed as the 13-7099 matter. In the Complaint's **[**15]** *Local Civil Rule 11.2* Certification,[5] the 13-7099 Complaint stated:

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[4] In Plaintiffs' Motion for Leave to File Reply, Plaintiffs request the Court ignore Defendants' supplemental briefing, arguing that it "amounts to re-argument of the issues already briefed and decided" and "is improper in the absence of a Motion for Reconsideration." The Court notes that the supplemental briefing contains arguments that might have been more appropriate for a motion for reconsideration, considering that the Court determined in its February 7, 2018 Opinion the personal jurisdiction issue and was merely asking for briefing on how to proceed. However, given that the arguments do not change this Court's analysis, and given the unique question this Court presented the parties with for supplemental briefing, the Court finds it proper to address Defendants' concerns here.

Plaintiffs also ask for the opportunity to oppose Defendants' supplemental briefing if the Court chooses to consider it. Given that the Court is not persuaded by Defendants' briefing, the Court denies that request.

[5] *Local Civil Rule 11.2* requires, in pertinent part, as follows: "The initial pleading . . . in any case in this Court . . . shall be accompanied by a certification . . . as to whether the matter in controversy is the subject of any other action pending in any court . . . and, if so, the certification . . . shall identify each such action . . . ."

> Plaintiffs, by their undersigned counsel, hereby certify pursuant to *L.Civ.R. 11.2* that the matters in controversy are not the subject of any other action pending in any court or of any pending arbitration or administrative proceeding, with the exception of the following:
>
> (1) Telebrands Corp. v. National Express, Inc., et al., Civil Action No. 12-cv-06671-FSH-JBC;
>
> (2) Blue Gentian, LLC v. Telebrands Corp., Civil Action No. 13-00481-FSH-JBC;
>
> (3) Blue Gentian, LLC, et al. v. Tristar Prods., Inc., Civil Action No. 13-cv-01758-FSH-JBC; and
>
> (4) Blue Gentian, LLC, et al. v. Telebrands Corp., et al, Civil Action No. 13-cv-04627-FSH-JBC.
>
> On November 15, 2013, counsel for the parties participated in a scheduling and status conference with United States Magistrate Judge James B. Clark for the above-indicated related actions. During the conference undersigned advised the Court of the impending filing of the present Complaint. Judge Clark specifically instructed undersigned to file this action as a related case to the actions indicated above, to facilitate the Court's consolidation thereof for pretrial scheduling.

(emphasis added).

The Court understands Blue Gentian's **[**16]** rationale in filing the 13-7099 action in the District of New Jersey. Plaintiffs' perception that the same transfer analysis and action would occur if the 13-7099 action were filed in the Southern District of Florida is both understandable and logical. Nonetheless, the Court does not find it shields Mr. Berardi from personal jurisdiction in New Jersey. The Court sees no indication from Defendants' briefing that is was required or instructed, either by this Court or the Southern District of Florida, to file the 13-7099 action in the District of New Jersey. Even understanding that Blue Gentian interpreted its prior interactions with the Southern District of Florida and the District of New Jersey to indicate that the 13-7099 action "needed to be filed" in New Jersey or "it would have been improper for Blue Gentian to . . . file a new action with substantially the same claims [as the 13-1758 action] in the Southern District of Florida," the Court still finds Mr. Berardi, through Blue Gentian, invoked the benefits and protections of the District of New Jersey and thus purposefully **[*506]** availed himself of the privilege of conducting business in New Jersey. The Court thus finds Mr. Berardi is **[**17]** subject to personal jurisdiction in this state.

As to Mrs. Berardi, all parties agreed the claims against her should be severed and dismissed. As this Court explained in its February 7, 2018 Opinion, Berardi Productions' advertisements are insufficient to satisfy the minimum contacts necessary for this Court to assert personal jurisdiction over her. As the content disseminated through Berardi Productions is the only contact Mrs. Berardi is alleged to have with the forum state, the Court found it could not assert personal jurisdiction over Mrs. Berardi. The Court found the Southern District of Florida's implicit conclusion that this Court has personal jurisdiction over Mrs. Berardi clearly erroneous. The Court further found asserting personal jurisdiction over Mrs. Berardi simply to comply with the law of the case would result in manifest injustice. It is fundamentally unfair to require a defendant to litigate a matter in a district in which the defendant lacks sufficient contacts. Further, the Court found that upon "conclud[ing] that the prior decision was 'clearly erroneous,'" this Court is "oblig[ated] to decline jurisdiction." *Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817, 108 S. Ct. 2166, 100 L. Ed. 2d 811 (1988)*. Accordingly, the Court will dismiss the claims against **[**18]** Mrs. Berardi without prejudice. The Court will now consider the merits of the claims against Mr. Berardi and National Express.[6]

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[6] The Court similarly considered whether the Southern District of Florida's implicit conclusion that venue was proper in the District of New Jersey was clear error. The Court found sufficient allegations in the Second Amended Complaint regarding "events or omissions giving rise to the claim" occurring in New Jersey that it could not conclude the Southern District of Florida's implicit decision that venue was proper constituted clear error.

The Court focused on the conspiracy to monopolize count, as that is what allows this case to proceed in federal court. The Court thus considered the nature of the dispute to be a conspiracy to monopolize or an attempt to monopolize. As noted above, at least one lawsuit was brought by Mr. Berardi in the State of New Jersey, which is part of Plaintiffs' monopolization claim. While there were other significant events occurring in the State of Florida as well, the Court found there were enough contacts in New

III. Governing Law

Having determined that the Court has subject matter jurisdiction and personal jurisdiction over the remaining defendants, and that venue is proper in the District of New Jersey, the Court now briefly addresses the law it applies in considering the various issues before it on these motions to dismiss. In addressing whether Defendants are immune from antitrust liability, "the requirement that the patent be obtained through actual fraud upon the PTO . . . is governed by Federal Circuit law." *Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337, 1346 (Fed. Cir. 2007)* (citing *Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998))*. The second element, satisfying "the basic elements of an antitrust violation," is governed "by the regional circuit's law." *Id. at 1348*. This Court will thus apply relevant circuit law in determining whether there was an antitrust violation, id., and to all other questions of federal law. See *In re Korean Air Lines Disaster, 829 F.2d 1171, 265 U.S. App. D.C. 39 (D.C. Cir. 1987)*; see also *In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 n.8 (3d Cir. 1993)*. This Court will apply Third Circuit law, not Eleventh Circuit law. See *Desiano v. Warner-Lambert & Co., 467 F.3d 85, 91 (2d Cir. 2006)* ("[E]ven **[*507]** in the transfer context, a court of appeals must develop its own circuit law on federal questions; it cannot mechanically adopt the reasoning and conclusions of its sister circuits **[**19]** . . . ."); accord *Szulik v. Tagliaferri, 966 F. Supp. 2d 339, 361 n.16 (S.D.N.Y. 2013)*; *In re Gawker Media LLC, 571 B.R. 612, 626-27 (S.D.N.Y. Bankr. 2017)* ("Second Circuit law governs the interpretations of federal law even when the case is transferred from a court sitting in another circuit.").[7]

This Court applies Florida law to the state law claims. "Van Dusen v. Barrack, established that when a civil action is transferred from one district court to another pursuant to *§ 1404(a)* on motion of the defendant, the transferee forum must apply the law of the initial forum." *Amica Mut. Ins. Co. v. Fogel, 656 F.3d 167, 171 (3d Cir. 2011)* (citing *Van Dusen v. Barrack, 376 U.S. 612, 639, 84 S. Ct. 805, 11 L. Ed. 2d 945 (1964))*. "Ferens v. John Deere Co. . . . makes plain that the Van Dusen rule applies to sua sponte transfers . . . ." Id.

IV. Standard of Review

When considering a motion to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to *Federal Rule of Civil Procedure 12(b)(6)*, a court must accept all well-pleaded allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Evancho v. Fisher, 423 F.3d 347, 351 (3d Cir. 2005)*. It is well settled that a pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*.

Under the liberal federal pleading rules, it is not necessary to plead evidence, and it is not necessary to plead all the facts that serve as a basis for the claim. *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977)*. However, "the Federal Rules of Civil Procedure **[**20]** . . . do require that the pleadings 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Baldwin Cty. Welcome Ctr. v. Brown, 466 U.S. 147, 149-50 n.3, 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984)* (quoting *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))*.

A district court, in weighing a motion to dismiss, asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Bell Atl. v. Twombly, 550 U.S. 544, 563 n.8, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (quoting *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974))*; see also *Ashcroft v. Iqbal, 556 U.S. 662, 684, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* ("Our decision in Twombly expounded the pleading standard for 'all civil actions' . . . ."); *Fowler v. UPMC Shadyside, 578 F.3d 203,*

Jersey that prevented this Court from concluding that it was clear error to determine venue was proper in the District of New Jersey. This Court stands by that ruling.

[7] The parties in their briefing largely apply Third Circuit law in addressing antitrust standing and conspiracy and attempt to monopolize.

210 (3d Cir. 2009) ("Iqbal. . . provides the final nail in the coffin for the 'no set of facts' standard that applied to federal complaints before Twombly.").

V. Antitrust Standing

The Court first addresses whether Plaintiffs have antitrust standing. Both motions allege lack of standing as a basis for dismissing this action.

"Article III constitutional standing, a principal moored in the notion 'that the judiciary's power only extends to cases or controversies,' constitutes a threshold requirement in all actions in federal court." Otsuka Pharm. Co. v. Torrent Pharms. Ltd., 118 F. Supp. 3d 646, 652 (D.N.J. 2015) **[*508]** (quoting Ethypharm S.A. Fr. v. Abbott Labs., 707 F.3d 223, 232 (3d Cir. 2013)). "The principles of constitutional standing are, however, 'augmented' by prudential considerations aimed at preserving the effective enforcement of the antitrust laws." Id. "[T]he Supreme Court has specifically recognized that **[**21]** 'Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.'" Id. (quoting Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)). Accordingly, where a plaintiff brings suit under federal antitrust laws, the plaintiff must meet the prudential requirement of antitrust standing.

The following factors "are relevant in an antitrust standing challenge":

> (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Barton & Pittinos v. Smithkline Beecham Corp., 118 F.3d 178, 181 (3d Cir. 1997) (quoting In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993)). "The second factor, antitrust injury, 'is a necessary but insufficient condition of antitrust standing.'" Ethypharm, 707 F.3d at 233 (quoting Barton & Pittinos, 118 F.3d at 182). "If it is lacking [the court] **[**22]** need not address the remaining . . . factors." Id. (emphasis omitted). Accordingly, this Court begins by considering whether Plaintiffs have sufficiently pleaded an antitrust injury.

> Generally, antitrust injury - that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful," "is limited to consumers and competitors in the restrained market and to those whose injuries are the means by which the defendants seek to achieve their anticompetitive ends."

Id. (alteration in original) (first quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977); and then quoting W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 102 (3d Cir. 2010)); accord Otsuka, 118 F. Supp. 3d at 652-53 ("[I]n order to plead an antitrust injury, the party must allege facts showing (1) that it suffered an injury of the type the antitrust laws seek to prevent, e.g., anticompetitive behavior, and (2) that the injury resulted from the adversary's unlawful or anti-competitive acts.").

Further, "a plaintiff must generally show that he is a competitor or a consumer in the relevant product and geographic markets in which competition was adversely impacted." Novak v. Somerset Hosp., 625 F. App'x 65, 67 (3d Cir. 2015); Bocobo v. Radiology Consultants of S. Jersey, P.A., 305 F. Supp. 2d 422, 425 (D.N.J. 2004) ("To determine if Plaintiff has suffered an antitrust injury, the Court must determine if competition in the relevant market has been impermissibly **[**23]** affected, which, of course, requires the Court to define the relevant market or markets."). The Court thus begins its assessment of whether an antitrust injury, and consequently whether antitrust standing, has been pleaded adequately by considering **[*509]** the relevant product market and geographic market.

A. Relevant Product Market

Plaintiffs plead the relevant product market is the "expandable hose market." The Court finds the relevant product market has not been sufficiently defined, as explained below, and is grounds for dismissal.

"The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Queen City Pizza v. Domino's Pizza, 124 F.3d 430, 436 (3d Cir. 1997)* (quoting *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*; accord *Novak, 625 F. App'x at 67* ("The relevant 'product market' is comprised of 'commodities reasonably interchangeable by consumers for the same purposes.'" (quoting *United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)))*. "Interchangeability 'implies that one product is roughly equivalent to another . . . [and] while there might be some degree of preference for the one over the other, either would work effectively.'" Id. (alteration in original) (quoting *Allen-Myland, Inc. v. Int'l Bus. Machs. Corp., 33 F.3d 194, 206 (3d Cir. 1994))*.

"[I]n most cases, proper market definition can be determined only after a factual inquiry **[**24]** into the commercial realities faced by consumers." *Queen City Pizza, 124 F.3d at 436*. However,

> [w]here the plaintiff fails to define its proposed market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Id.

Plaintiffs' Second Amended Complaint did not "define its proposed market with reference to the rule of reasonable interchangeability or cross-elasticity of demand." Id. The Court thus finds the relevant market as pleaded to be legally insufficient.[8]

The Court recognizes that this conclusion differs from the Southern District of Florida's decision. The Southern District **[*510]** of Florida found the allegations in the initial complaint "adequately define[d] the relevant market at this stage in the litigation" as the expandable hose market. The court stated that, "[a]t the pleading stage, Plaintiffs are not required to plead facts regarding the level of product interchangeability, or the cross-elasticity of demand pertaining to **[**25]** the expandable hose market." The Southern District of Florida cited a case from that district for that proposition. This Court, however, applies Third Circuit law. The Third Circuit has explicitly rejected the argument that a plaintiff is not required to plead the relevant market with reference to product interchangeability or cross-elasticity in pleading the relevant product market. Id. ("Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all

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[8] This Court questions whether the relevant product market pleaded in the Second Amended Complaint is defined too narrowly. "The test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes.'" *Queen City Pizza, 124 F.3d at 438* (quoting *E.I. Du Pont de Nemours & Co., 351 U.S. at 395*). "A court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general." Id. ("Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there may be some degree of preference for the one over the other, either would work effectively. A person needing transportation to work could accordingly buy a Ford or a Chevrolet automobile, or could elect to ride a horse or bicycle, assuming those options were feasible." (quoting *Allen-Myland, Inc, 33 F.3d at 206*)). "The key test for determining whether one product is a substitute for another is whether there is a cross-elasticity of demand between them: in other words, whether the demand for the second good would respond to changes in the price of the first." *Allen-Myland, 33 F.3d at 206*. Plaintiffs' have not pleaded or explained why a regular, non-expandable hose, is not included in the relevant product market.

factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.").

B. Relevant Geographic Market

As for the relevant geographic market, Plaintiff's Second Amended Complaint alleges "Defendants are engaged in interstate commerce in the United States, and the vast majority of their past, present, and future sales in the relevant market has and will occur in such commerce." "The relevant geographic market is the area in which a potential buyer may rationally **[**26]** look for the goods or services he or she seeks." *Novak, 625 F. App'x at 68* (quoting *Pa. Dental Ass'n v. Med. Serv. Ass'n of Pa., 745 F.2d 248, 260 (3d Cir. 1984))*.

Plaintiffs plead the relevant geographic market in terms of where Defendants are engaged in interstate commerce. "The law is clear that the relevant geographic market is not defined by the market in which the defendant conducts its business, or even where the injury is felt." *Synthes, Inc. v. Emerge Med., Inc., No. 11-1566, 2012 U.S. Dist. LEXIS 140251, 2012 WL 4473228, at *7 (E.D. Pa. Sept. 28, 2012)*. "Rather, the relevant geographic market is where customers would rationally look for the goods or services he or she seeks." *2012 U.S. Dist. LEXIS 140251, [WL] at *22*. "The mere delineation of a geographical area, without reference to a market as perceived by consumers and suppliers, fails to meet the legal standard necessary for the relevant geographic market." *Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 727 (3d Cir. 1991)*. The Second Amended Complaint fails to properly plead the relevant geographic market. Simply pleading where Defendants are engaged in commerce is completely insufficient to establish the relevant geographic market, even at the pleading stage.

Further, earlier in the Second Amended Complaint, Plaintiffs plead that "Defendant National Express and Blue Gentian, LLC have used the fraudulently obtained '941, '942, and '776 patents to fraudulently obtain international patents to further restrain competition internationally in part by suing Plaintiff Tristar **[**27]** Products and other competitors claiming infringement and threatening their customers in various international jurisdictions." This statement of the possible international scope of Defendants complicates the analysis. "The relevant geographic market may be local, regional, national or international in origin." *Syncsort Inc. v. Sequential Software, Inc., 50 F. Supp. 2d 318, 331 n.10 (D.N.J. 1999)*. However, "the boundaries of the relevant market must be drawn with sufficient breadth to . . . recognize competition where, in fact, competition exists." *Brown Shoe, 370 U.S. at 326*. The Second Amended Complaint alludes to an international presence and **[*511]** international competition but does not include it in the relevant market or explain its absence from the relevant market. See generally *Synthes, 2012 U.S. Dist. LEXIS 140251, 2012 WL 4473228, at *7* ("Emerge has made no effort to explain why the relevant market is limited to the United States, particularly where Synthes is alleged to be a 'multi-national corporation.'"); *Dicar, Inc. v. Stafford Corrugated Prods., No. 05-5426, 2010 U.S. Dist. LEXIS 23667, at *33 (D.N.J. Mar. 12, 2010)* ("Where . . . there is no indication that a consumer would be unable to purchase a product abroad, the Court will not arbitrarily limit the geographical market to the U.S.").

Given these deficiencies in pleading the relevant product and geographic markets, the Court will grant both motions to dismiss. However, as the Court will be granting leave to **[**28]** amend the Second Amended Complaint, the Court continues its analysis in the interest of completeness and guiding Plaintiffs in amending their complaint.

C. Antitrust Injury

The Court finds the injury alleged is of the type the antitrust laws were intended to prevent. Plaintiffs plead Defendants have used the fraudulently obtained '941, '942, and '776 patents to restrain competition in part by suing Plaintiff Tristar Products and other competitors claiming infringement and threatening their customers.

National Express argues "Plaintiffs' factual allegations only address injury to the Plaintiffs," when "[t]he injury alleged must be to competition in general, and not to the specific competitor." National Express argues *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)* stands for this proposition.

The Supreme Court in that case stated: "The antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Id. at 488* (quoting *Brown Shoe, 370 U.S. at 320*); *Otsuka, 118 F. Supp. 3d at 653* ("[T]he pleaded facts must show 'that "the challenged action has had an actual adverse effect on competition as a whole in the relevant market,"' rather than just an adverse effect on the particular competitor." (quoting *Irish v. Ferguson, 970 F. Supp. 2d 317, 365 (M.D. Pa. 2013))*).

The Court finds the injury complained of here is directly tied to the anticompetitive conduct alleged **[**29]** and is of the type the antitrust laws intended to prevent. The allegation that Defendants are using a fraudulently obtained patent to bring lawsuits against those with valid patents is, to this Court, an attempt to drive out competition. While it also would inflict a direct injury against Plaintiffs, as they have been the subject of some of these lawsuits, the scope of the alleged injury is broader in that, if Plaintiffs' allegations are true, all competition in the relevant market is impacted.

For instance, in Otsuka, the District of New Jersey found an allegation of the initiation of "meritless infringement actions in order to 'stifle and eliminate competition and competitors,' to exclude or prevent competitors' entry in the . . . market, and to maintain its exclusive monopoly over the . . . market" plausibly alleged an antitrust injury. *118 F. Supp. 3d at 653*. The court found "the pursuit of litigation that forestalls entry into the generic market . . . constitutes 'anti-competitive behavior' of the type the antitrust laws seek to prevent." *Id. at 654*.[9]

[*512] The Court finds these allegations sufficient to satisfy the "antitrust injury" factor in the factor test for antitrust standing.

D. Other Antitrust Standing Factors

As for the other factors - causal connection and intent to cause harm, directness of the injury, the existence of more direct victims, and the potential for duplicative recovery or complex apportionment of damages - the Court finds these elements satisfied by the Second Amended Complaint.

The causal connection factor requires us to consider whether the antitrust violation was a but-for cause. *Allegheny Gen. Hosp. v. Philip Morris, 228 F.3d 429, 439 (3d Cir. 2000)*. There is clearly a causal connection alleged between the antitrust violation and the harm to competition and Plaintiffs as market participants. As to intent, this factor, along with causation, is "not . . . dispositive on the issues of antitrust standing." *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, 171 F.3d 912, 925 (3d Cir. 1999)*. Nonetheless, the Court finds sufficient allegations that the injury alleged is the predictable, direct, and intended result of the anticompetitive conduct.[10]

As to the directness of the injury **[**31]** and whether there exist "more direct victims of the alleged antitrust violations," this "involves two inquiries: (1) the appropriate party, and (2) remoteness." *Allegheny Gen. Hosp., 228 F.3d at 440*. "Subsumed in the 'directness' factor is also the issue of whether other, more directly injured parties could vindicate the policies underlying the antitrust laws . . . ." *Steamfitters Local Union, 171 F.3d at 927*.

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[9] Other courts have found similarly.

> In [*Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979)*] and [*Novo Nordisk of N. Am., Inc. v. Genentech, Inc., 885 F. Supp. 522 (S.D.N.Y. 1995)*], the courts held that the enforcement of a patent obtained by fraud may constitute a violation of the *Sherman Act*, provided the other elements of a claim **[**30]** are established.
>
> This Court reads these cases as conferring antitrust standing upon those who sufficiently plead an antitrust injury based upon the prosecution of a fraudulently obtained patent.

Amgen, Inc. v. F. Hoffmann-La Roche, Ltd., 480 F. Supp. 2d 462, 469 (D. Mass. 2007) (citations omitted).

[10] Plaintiffs' Second Amended Complaint also highlights information disseminated into the marketplace which allegedly "evinces the anticompetitive nature of the fraudulently obtained patents," which the Court finds circumstantial evidence of intent.

The Court finds that while other entities exist in the expandable hose market, and while others have been subject to patent infringement suits by Defendants (such as Telebrands), Plaintiffs' injury is sufficiently direct. While the Second Amended Complaint seems to suggest that Telebrands could be a more "directly injured" party, the Court's focus in determining violations of ***antitrust law*** is in harm to the competition, not to a specific competitor. At the pleading stage, the Court finds this factor sufficiently pleaded. Finally, the Court cannot identify a substantial potential for duplicative recovery or complex apportionment of damages at this stage of the litigation.

VI. Antitrust Immunity

The Court next addresses whether Defendants are immune from antitrust liability. Both motions claim Defendants are immune from an antitrust claim as a basis for dismissal. **[**32]** "As a general rule, behavior conforming to the patent laws oriented towards procuring or enforcing a patent enjoys immunity from the antitrust laws." *Unitherm Food Sys. v. Swift-Eckrich, Inc., 375 F.3d 1341, 1356 (Fed. Cir. 2004)*, rev'd on other grounds, *546 U.S. 394, 126 S. Ct. 980, 163 L. Ed. 2d 974 (2006)*. "But this immunity is [not] absolute." Id. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247* ***[*513]*** *(1965)*, "[t]he Supreme Court recognized that an inventor who obtains a patent by defrauding the patent office deserves no immunity." *Unitherm Food, 375 F.3d at 1356*.

"In Walker Process, the Supreme Court held that a plaintiff could bring an action under *§ 2 of the Sherman Act* based on the alleged maintenance and enforcement of a fraudulently-obtained patent." *Transweb, LLC v. 3M Innovative Props. Co., 812 F.3d 1295, 1306 (Fed. Cir. 2016)* (citing *Walker Process, 382 U.S. at 173-74*). "In order to prevail on a Walker Process claim, the antitrust-plaintiff must show two things: first, that the antitrust-defendant obtained the patent by knowing and willful fraud on the patent office and maintained and enforced the patent with knowledge of the fraudulent procurement; and second, all the other elements necessary to establish a Sherman Act monopolization claim." Id. (citing *Ritz Camera & Image v. SanDisk Corp., 700 F.3d 503, 506 (Fed. Cir. 2012))*.[11]

A. First Prong of Walker Process: Knowing and Willful Fraud

"[A] finding of Walker Process fraud . . . must be based on independent and clear evidence of deceptive intent together with a clear showing of reliance, i.e., that the patent **[**33]** would not have issued but for the misrepresentation or omission." *Nobelpharma, 141 F.3d at 1071*. The following elemental test has been provided by the Federal Circuit to govern the finding of Walker Process fraud: "(1) that a false representation of a material fact was made, (2) with the intent to deceive, (3) which induced the deceived party to act in justifiable reliance on the misrepresentation, and (4) which caused injury that would not otherwise have occurred." *C.R. Bard, Inc. v. M3 Sys., 157 F.3d 1340, 1364 (Fed. Cir. 1998)*; accord *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997, 2015 U.S. Dist. LEXIS 177541, 2015 WL 9589217, at *11 (D.N.J. Oct. 29, 2015)*.

The Southern District of Florida found the original complaint in this case did not state a plausible Walker Process fraud claim. The court found as follows:

> Here, in the Complaint, Plaintiffs allege generally that Defendant Mr. Berardi failed to disclose to the PTO "proper identification of inventorship and key prior art" when it was known that the "claimed features were from the prototypes presented by Ragner Technology." However, as plainly indicated on the face of the '941, '942, and '776 patents issued to Defendant Mr. Berardi, Plaintiff Ragner's '527 and '448 patents were considered during the prosecution of Defendant Mr. Berardi's patents. As such, Plaintiffs cannot establish that had the PTO been aware of Ragner's patents, Defendant Mr. Berardi's **[**34]** patents would not have issued.
> Further, Plaintiffs do not identify with particularity what other "key prior art" Defendant Mr. Berardi omitted. Although Plaintiffs allege that Plaintiff Ragner disclosed to Defendants "specific engineering diagrams, ideas . . . manufacture knowhow, concepts related to its prototypes of Microhose product," Plaintiffs do not identify what

[11] As stated above, the Court applies Federal Circuit law to the fraud prong and Third Circuit law to the monopolization prong.

> those concepts were or which, if any, were withheld from the PTO. Likewise, Plaintiffs have not presented particularized allegations that but for omission of these unidentified ideas, the PTO would not have granted the patents to Defendant Mr. Berardi.

[*514] (citations omitted). The Court finds the Second Amended Complaint cured those defects highlighted by the Southern District of Florida. The Court will address each element of a Walker Fraud claim in turn.

1. False Representation of a Material Fact

The Court finds Plaintiffs sufficiently alleged a false representation of a material fact. Plaintiffs' Second Amended Complaint alleges Mr. Berardi failed to disclose the proper identification of inventorship and key prior art. Plaintiffs highlight the following specific misrepresentations in the Second Amended Complaint:

- "Mr. Berardi **[**35]** filed an Oath and Declaration with the United States Patent and Trademark Office on November 4, 2011 representing that he was the inventor of the expandable and retractable hose that is the subject of the '941 patent, despite knowing that Mr. Ragner was the inventor of the subject of the '941 patent."
- "Mr. Berardi filed an Oath and Declaration with the United States Patent and Trademark Office on June 6, 2012 representing that he was the inventor of the expandable and retractable hose that is the subject of the '942 patent, despite knowing that Mr. Ragner was the inventor of the subject of the '942 patent."
- "On August 15, 2012, Mr. Berardi, during an in-person conference, 'presented a video showing how Mr. Berardi initially manufactured the hose' without informing the examiner that he obtained such information from Mr. Ragner regarding creation of the hose under terms of non-disclosure."

- "Mr. Berardi further 'pointed [to] differences between the [pending claims] and the Ragner et al. reference, mainly the fact that the inner and outer layers of the Ragner et al. hose are bonded together and that the outer layer is plastic material, wherein the [pending claims'] outer layer is formed of a fabric material.'" (alterations in **[**36]** original).
- "Mr. Berardi failed to inform the patent examiner that Mr. Ragner explained, under terms of non-disclosure, that the outer cover of the '527 invention could include a fabric cover, and that the inner and outer layer need not be bonded."

The Court finds these allegations sufficient to show a false representation of a material fact. It is also obvious to the Court that such false representations were with regard to a material fact, i.e., the proper identification of inventorship and prior art, which is clearly a predominant concern in approving a patent. See, e.g., *PerSeptive Biosystems, Inc. v. Pharmacia Biotech, Inc., 225 F.3d 1315, 1322-23 (Fed. Cir. 2000)* (finding a district court did not abuse its discretion in finding inequitable conduct based on "falsehoods, misrepresentations and omissions . . . directed towards a central issue - whether the named inventors were the sole inventors" and based on the inventorship being material).

2. Intent to Deceive

"Walker Process intent may be inferred from the facts and circumstances of a case . . . ." *Dippin' Dots, 476 F.3d at 1347*. "[A] misrepresentation or omission must evidence a clear intent to deceive the examiner and thereby cause the PTO to grant an invalid patent." *Nobelpharma, 141 F.3d at 1070*.

The Court finds the allegations contained in Plaintiffs' Second Amended Complaint **[**37]** make a plausible showing of Defendants' intent to deceive. Assuming Plaintiffs' allegations regarding the content of the August 23, 2011 meeting and **[*515]** the above allegations to be true, as this Court must in considering a motion to dismiss, the Court finds sufficient circumstantial evidence of intent, as Defendants, from their attendance at the August 23, 2011 meeting, could not claim ignorance of the disclosures made by Plaintiffs at the August 23, 2011 meeting.

3. Reliance and Injury

The Court similarly finds Plaintiffs have made a plausible showing of both reliance by the Patent Office and that the injury would not have otherwise occurred but for Defendants' fraudulent actions. Plaintiffs' Second Amended Complaint alleges "[t]he USPTO relied on Defendant Mr. Berardi's material false statements and omission as a principal reason for allowing Defendant Mr. Berardi's patent claims to issue." It further alleges that, "[b]ut for these material misrepresentations regarding the scope of the invention disclosed in the '527 patent . . . the '941 and '942 patents would not have issued."

Specifically, Plaintiffs focus on the Office Action initially rejecting the claims based on consideration of the '527 patent. Plaintiffs indicate that, **[**38]** after this initial rejection, Defendants made their alleged fraudulent representations, which resulted in the issuance of the patents to Mr. Berardi. The Court finds these allegations sufficient at this pleading stage.

B. Second Prong of Walker Process: Sherman Act Monopolization Claim

1. Conspiracy to Monopolize

Plaintiffs' monopolization claim arises under *§ 2 of the Sherman Act* as a "conspiracy to monopolize."[12] Both motions argue Plaintiffs fail to state a claim for conspiracy to monopolize.

"A *Section 2* conspiracy claim has four elements: (1) an agreement to monopolize; (2) an overt act in furtherance of the conspiracy; (3) a specific intent to monopolize; and (4) a causal connection between the conspiracy and the injury alleged." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 253 (3d Cir. 2010)*.

The Court starts with the first prong - an agreement to monopolize. "[A] plaintiff must establish the existence of an agreement, sometimes also referred to as a 'conspiracy' or 'concerted action.'" *W. Penn Allegheny Health Sys., 627 F.3d at 99*. "An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." Id. "A plaintiff may plead an agreement by alleging direct or circumstantial evidence, or a combination of the **[**39]** two." Id.

The Court finds Plaintiffs pleaded sufficient circumstantial evidence of an agreement to monopolize. Defendants were all present at the August 23, 2011 meeting - National Express by way of Kelly. All Defendants failed to execute written non-disclosure agreements, despite all agreeing to execute such agreements at the August 23, 2011 meeting. Mr. Berardi allegedly obtained the '941, '942, and '776 patents and then Blue Gentian, of which Mr. Berardi is a managing member, granted National Express the exclusive license to market and sell the '941, '942, and '776 patents. The Court finds this sufficient, non-conclusory, circumstantial evidence of an agreement between Defendants. The Court finds these events also satisfy the second prong, as they similarly show an overt act - in fact, several overt acts - in **[*516]** furtherance of the conspiracy on the part of all Defendants.

The Court now turns to the specific intent prong. "Specific intent is an essential element of a conspiracy to monopolize claim." *Howard Hess Dental Labs., 602 F.3d at 257* (citing *Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 807 (3d Cir. 1984))*. "It means 'an intent which goes beyond the mere intent to do the act.'" Id. (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985))*. "In other words, the defendant must have 'intended to achieve an illegal monopoly.'" Id. (quoting Joseph P. Bauer & William H. Page, **[**40]** II, Kintner's Federal ***Antitrust Law*** § 14.40, at 423 (2002)). "Specific intent in the antitrust context may be inferred from a defendant's unlawful conduct." Id.

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[12] Alternatively, Plaintiffs' Second Amended Complaint brings a claim for attempt to monopolize, which this Court also addresses below.

Plaintiffs' Second Amended Complaint pleads that

> Defendants have conspired to monopolize the expandable hose market . . . with specific intent to monopolize by knowingly and willfully omitting and misrepresenting facts in contradiction of the terms of confidentiality and non-disclosure and in connection with the filing and prosecution of the patent applications which ultimately issued as the '941, '942, and '776 patents.

The Court finds specific intent can be inferred from Defendants' alleged unlawful conduct. The filing of these lawsuits, which Plaintiffs' contend are fraudulent and consequently meritless, evinces an intent to drive others out of the marketplace.

The Court similarly finds the third prong - a causal connection between the conspiracy and the injury alleged - has been satisfied for the same reasons identified with regard to antitrust standing.[13]

2. Attempt to Monopolize

The Court also addresses Plaintiffs' alternative claim for attempt to monopolize. "To prevail on an attempted monopolization claim under *§ 2 of the Sherman Act*, 'a plaintiff must **[**41]** prove that the defendant (1) engaged in predatory or anticompetitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power.'" *Queen City Pizza, 124 F.3d at 442* (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

The Court finds the first prong - engagement in predatory or anticompetitive conduct - satisfied by the Second Amended Complaint's allegation that Defendants "have used the fraudulently obtained '941, '942, and '776 patents to restrain competition in part by suing Plaintiff Tristar Products and other competitors claiming infringement and threatening their customers." As for the second prong of specific intent, the Court adopts the same conclusion as under the conspiracy to monopolize claim.

[*517] Finally, the Court addresses the third prong - a dangerous probability of achieving monopoly power. "[P]rov[ing] a dangerous probability of actual monopolization . . . has generally required a definition of the relevant market and examination of market power." *Spectrum Sports, 506 U.S. at 456*; accord *Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir. 1992)* ("[A] dangerous probability of monopoly may exist where the defendant firm possesses a significant market share when it undertakes the challenged anticompetitive conduct." (quoting *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 790 (2d Cir. 1987)))*. While "[d]emonstrating a particular market share alone is not the only yardstick **[**42]** by which courts measure a dangerous probability of success, . . . courts have found that a demonstration of 35 % market share is sufficient to demonstrate a dangerous probability of success." *Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 891 (D. Del. 1987)* (citing *Outboard Marine Corp. v. Pezetel, 461 F. Supp. 384, 404-406 (D. Del. 1978))*.

Without properly pleading the relevant market, the Court is unable to determine whether there is a dangerous probability of success. However, the Court addresses its concerns regarding the current allegations to guide Plaintiffs in a possible amendment of their complaint.

The following allegations in the Second Amended Complaint are relevant to this analysis:

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[13] The Southern District of Florida found the initial complaint did not allege a plausible conspiracy claim "because Plaintiffs have not alleged sufficient facts showing an 'anticompetitive effect' in the relevant market." The court found only "conclusory allegation[s] that competition ha[d] been harmed." However, this decision was reached by a court in the Eleventh Circuit, which applies the following test: (1) an agreement to restrain trade, (2) deliberately entered into with the specific intent of achieving a monopoly rather than a legitimate business purpose, (3) which could have had an anticompetitive effect, and (4) the commission of at least one overt act in furtherance of the conspiracy. As stated above, the Court applies its own Circuit's interpretation of the governing law.

The Southern District of Florida did, however, find "Plaintiffs ha[d] sufficiently alleged an agreement to conspire, overt acts, and Defendants' intent," as this Court finds here.

> Defendant National Express and Defendant Berardi (through Blue Gentian, LLC, an entity of which Defendant Berardi is the sole member) have used the fraudulently obtained '941, '942, and '776 patents to restrain competition in part by suing Plaintiff Tristar Products and other competitors claiming infringement and threatening their customers. . . . Indeed, various New Jersey cases between Telebrands, Inc. and Blue Gentian, LLC over the fraudulently obtained patents have settled, which evinces an additional restraint on competition, as, upon information and belief, Telebrands, Inc. currently occupies over 70% of the relevant expandable and contractible **[**43]** hose marketshare. Defendant National Express and Blue Gentian, LLC have used the fraudulently obtained '941, '942, and '776 patents to fraudulently obtain international patents to further restrain competition internationally in part by suing Plaintiff Tristar Products and other competitors claiming infringement and threatening their customers in various international jurisdictions.
> . . . . In addition, by purporting to license the fraudulently obtained patents to Telebrands, Inc., Defendants have committed another anticompetitive act which, due to Telebrands, Inc. substantial position in the marketplace, carries a dangerous probability that Defendants will succeed in their attempt to achieve "monopoly power."

Plaintiffs argue in their opposition brief that the Second Amended Complaint pleads that, "with the settlement announced by Defendants, Defendants control in excess of 70% of the marketplace, with additional lawsuits pending to control the remaining market share. Indeed, according to Defendants, Telebrands claimed to occupy 90% of the marketplace, perhaps securing a monopoly when added to Defendants' own market share."

In its reading of the Second Amended Complaint, the Court finds no indication that **[**44]** Defendants control seventy percent of the marketplace. The Court fails to see how pleading Telebrands' marketshare as seventy percent is equivalent with pleading that Defendants' marketshare is seventy percent. That a settlement exists in a related patent infringement suit says very **[*518]** little, if anything, about Defendants' market power and resulting ability to injure competition. Even with the allegation that these cases with Telebrands have settled, this alone does not tell us the effect such settlements had on Defendants' marketshare.

This failure to sufficiently plead marketshare is significant, but not necessarily fatal to the claim.

> In a determination of dangerous probability - and remembering that we are only considering "the face of the complaint" - factors such as significant market share coupled with anticompetitive practices, barriers to entry, the strength of competition, the probable development of the industry, and the elasticity of consumer demand may be considered.

Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 318 (3d Cir. 2007). "No single factor is dispositive." Id. This is a "fact-sensitive inquiry, in which market share is simply one factor." *Id. at 319*.

The Court does not find the Second Amended Complaint sufficiently pleads these other factors. **[**45]** "Courts typically should not resolve this question at the pleading stage 'unless it is clear on the face of the complaint that the "dangerous probability" standard cannot be met as a matter of law.'" *Id. at 318* (quoting *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 (3d Cir. 1995))*. While the Court already finds this claim must be dismissed due to failure to sufficiently plead the relevant market, these additional concerns should be addressed in any amended complaint.[14]

VII. Conclusion

In light of the Court's dismissal of the antitrust claim, the Court declines at this time to address the arguments for dismissal of the state law claims. Defendants will be granted leave to seek the dismissal of those claims in the event Plaintiffs adequately plead a federal claim.

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[14] The Southern District of Florida found Plaintiffs did not allege harm to competition sufficiently: "Here, Plaintiffs allege harm to themselves by having to defend against allegedly baseless infringement suits, but there are no factual allegations addressing how this conduct has harmed competition in the market or could lead to monopolization of the market." The Court further found Plaintiffs "failed to allege sufficient facts to demonstrate a dangerous probability that Defendants might have succeeded in their attempt to achieve monopoly power."

In their opposition briefs, Plaintiffs request that, if the Court finds dismissal of any of the claims appropriate, that the Court grant leave to file an Amended Complaint.[15] The Court will grant that request.

Unless amending as a matter of course, *Federal Rule of Civil Procedure 15* provides "a party may amend its pleading only with the opposing party's written consent or the court's leave," which the court should "freely give . . . when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. The Third Circuit dictates that amendments should "be granted freely," stating **[**46]** a preference for decisions made "on the merits rather than on technicalities." *Dole v. Arco Chem. Co., 921 F.2d 484, 486-87 (3d Cir. 1990)*.

"[A] refusal of a motion for leave to amend must be justified. Permissible justifications include: (1) undue delay; (2) bad faith or dilatory motive; (3) undue prejudice to the opposition; (4) repeated failures to correct deficiencies with previous amendments; and (5) futility of the amendment." *Riley v. Taylor, 62 F.3d 86, 90 (3d Cir. 1995)* (citation omitted).

[*519] The Court will grant Plaintiffs leave to amend to attempt to cure the pleading deficiencies identified above. The Court does not find undue delay or bad faith by Plaintiffs. The Court further does not find undue prejudice will befall Defendants in allowing another amendment. While Plaintiffs have twice amended their complaint in this matter already, the first amendment was under Eleventh Circuit ***antitrust law***, and the second amendment was for the purpose of pleading personal jurisdiction in New Jersey.[16] The Court further does not find amendment futile. Plaintiffs will be granted leave to amend.[17]

An appropriate Order will be entered.

Date: March 22, 2018

At Camden, New Jersey

/s/ Noel L. Hillman

NOEL L. HILLMAN, U.S.D.J

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[15] Alternatively, Plaintiffs request that the Court dismiss the cause of action without prejudice, arguing that "[t]he causes of action listed necessarily involve secrecy and intent to deceive, and therefore finding specific facts of such causes of action has proven difficult."

[16] This Court's conclusions differed from the Southern District of Florida's in many respects due to the different law being applied. While the parties are expected to apply and understand how Third Circuit law applies to these facts, the unique procedural posture of this case could have left Plaintiffs unaware of the importance of re-pleading certain elements of their claims such that allowing leave to amend is appropriate.

[17] In the event Plaintiffs refile their amended complaint with their state law claims and a similar motion to dismiss is filed, the parties are directed to brief the issues of Florida law's treatment of a breach of contract claim concerning an oral contract and whether, under Florida law, an implicit representation based on a party's actions is sufficient for common law fraud, as opposed to an explicit statement.

Additionally, the Court notes there is a split of authority as to whether a Walker Process claim is a compulsory counterclaim which must be pled in a patent infringement suit. See *Critical-Vac Filtration Corp. v. Minuteman Int'l Inc., 233 F.3d 697 (2d Cir. 2000)* (compulsory counterclaim); *FilmTec Corp. v. Hydranautics, 67 F.3d 931 (Fed. Cir. 1995)* (compulsory counterclaim); *Med. Mut. of Ohio, Inc. v. Braintree Labs., 2011 U.S. Dist. LEXIS 74996 (D. Del. July 12, 2011)* (compulsory counterclaim); *Am. Packaging Corp. v. Golden Valley Microwave Foods, 1995 U.S. Dist. LEXIS 5918 (E.D. Pa. Apr. 28, 1995)* (compulsory counterclaim) aff'd without opinion by *1996 U.S. App. LEXIS 12061 (3d Cir. 1996)*. But see *Tank Insulation Int'l, Inc. v. Insultherm, Inc., 104 F.3d 83 (5th Cir. 1997)* (permissive counterclaim); *Hydranautics v. FilmTec Corp., 70 F.3d 533 (9th Cir. 1995)* (permissive counterclaim). The Court need not resolve the split but observes that if, consistent with the rulings of other districts within this Circuit, the Court were to hold that the Walker Process claim is a compulsory counterclaim, such holding would further support dismissal of the claim. If the complaint is amended, the parties are further directed to brief this issue in any motions to dismiss that might follow.

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in F. Supp. 3d.]

[*none] ORDER

HILLMAN, District Judge

For the reasons expressed **[**47]** in the Court's Opinion filed today,

IT IS on this 22nd day of March, 2018

ORDERED that Defendants Cheryl Berardi and Michael Berardi's Motion to Dismiss [74] is hereby **GRANTED** pursuant to *Federal Rule of Civil Procedure 12(b)(6)*; and it is further

ORDERED that Mrs. Berardi is dismissed as a party defendant and the claims against her are dismissed without prejudice for lack of personal jurisdiction; and it is further

ORDERED that Defendant National Express, Inc.'s Motion to Dismiss [75] is hereby **GRANTED** pursuant to *Federal Rule of Civil Procedure 12(b)(6)*; and it is further

ORDERED that Plaintiffs' Motion for Leave to File Reply [132] is **GRANTED**; and it is further

ORDERED that Plaintiffs' claims are dismissed without prejudice and Plaintiffs are granted leave to file an amended complaint within thirty days of this Order; and it is further

ORDERED that failure to file an amended complaint within thirty days of this Order will result in the dismissal of the claims with prejudice.

/s/ Noel L. Hillman

NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

[Innovation Marine Protein, LLC v. Pac. Seafood Grp.](#)

United States District Court for the District of Oregon

March 23, 2018, Decided; March 23, 2018, Filed

Case No. 6:17-cv-00815-MC

Reporter
2018 U.S. Dist. LEXIS 48296 *; 2018-1 Trade Cas. (CCH) P80,332; 2018 WL 1461501

INNOVATION MARINE PROTEIN, LLC, an Oregon limited liability company; and FRONT ST. MARINE LLC, an Oregon limited liability company,, Plaintiff, v. PACIFIC SEAFOOD GROUP; TRIDENT SEAFOODS CORPORATION, a Washington corporation; CALIFORNIA SHELLFISH COMPANY, INC. a California corporation; FRANK DULCICH; DULCICH, INC., an Oregon corporation; CS PROPERTIES HOLDING COMPANY, LLC, a Delaware limited liability company; and TNMP PROPERTIES, LLC, a Delaware limited liability compnay, Defendants,

Core Terms

seafood, Trident, antitrust, processing, plant, relevant market, competitor, acquire, conspiracy, conspired, Protein, negotiations, crewmembers, subsidiary, markets, fish, management group, fishmeal, processing facility, anti trust law, infrastructure, groundfish, waterfront, shrimp, alleged injury, vessel owner, Sherman Act, fishermen, processor, tuna

Counsel: **[*1]** For Innovation Marine Protein, LLC, an Oregon limited liability company, Front St. Marine LLC, an Oregon limited liability company, Plaintiffs: Michael E. Haglund, LEAD ATTORNEY, Eric J. Brickenstein, Haglund Kelley LLP, Portland, OR; Michael K. Kelley, Haglund Kelley, LLP, Portland, OR.

For Frank Dulcich, Pacific Seafood Group, Dulcich, Inc., an Oregon corporation, TNMP Properties, LLC, a Delaware limited liability company, CS Properties Holding Company, LLC, a Delaware limited liability company, Defendants: Rachel C. Lee, Randolph C. Foster, Timothy W. Snider, Stoel Rives LLP, Portland, OR.

For Trident Seafoods Corporation, a Washington corporation, Defendant: Brian P. Samuelson, Thomas R. Johnson, LEAD ATTORNEYS, Perkins Coie, LLP, Portland, OR; David J. Burman, LEAD ATTORNEY, PRO HAC VICE, Perkins Coie, LLP (Seattle), Seattle, WA.

For California Shellfish Company, Inc., a California corporation, Defendant: Nicholas H. Pyle, LEAD ATTORNEY, Dennis P. Rawlinson, Miller Nash Graham & Dunn LLP, Portland, OR.

Judges: Michael McShane, United States District Judge.

Opinion by: Michael McShane

Opinion

OPINION AND ORDER

MCSHANE, Judge:

Plaintiffs Innovation Marine Protein, LLC, an Oregon limited liability company (Innovation **[*2]** Marine), and Front St. Marine LLC, an Oregon limited liability company (Front Street) bring this antitrust action under *Sections 1* and *2* of the Sherman Act against defendants Pacific Seafood Group (Pacific Seafood)[1], California Shellfish Company (Cal-Shell), and Trident Seafoods Corporation (Trident). Defendants move to dismiss for, among other reasons, lack of standing. ECF No. 21, 24-25. Because Innovation Marine and Front Street lack standing, and because leave to amend would be futile, this action is DISMISSED, with prejudice.

BACKGROUND[2]

Plaintiff Front Street is owned by Stephen and Janet Webster, two long-term residents of Newport, Oregon. "The corporate mission of Front St. Marine, LLC is to *acquire and develop* Newport waterfront industrial property *for the express purpose of building the infrastructure* that will diversify the seafood processing sector on the central Oregon Coast, thus bringing the benefits of robust competition in the form of value-added seafood processing, increased ex vessel prices paid to fishermen and more family wage jobs to Lincoln County." FAC ¶ 18 (emphasis added). "On December 21, 2013, in an effort to secure adequate industrial property on Yaquina Bay in Newport **[*3]** *to build seafood processing infrastructure*, Stephen Webster of plaintiff Front St. Marine LLC forwarded an offer to purchase two parcels owned by [Cal-Shell]." FAC ¶ 49 (emphasis added). Webster made a cash offer of $900,000 for either parcel or $1.8 million for both parcels. FAC ¶49. Included with the offer was "a proposed form of purchase and sale agreement to facilitate a speedy closing of the transaction." FAC ¶ 49. On February 24, 2014, Cal-Shell informed Webster that "'We currently are not interested in the sale' of the two properties." FAC ¶ 50.

15 months later, without contacting Webster, "Cal-Shell sold its former seafood processing facility and operational ice plant to [Pacific Seafood] for just $1,037,500, a 42% discount to the December 2013 offer from Front St. Marine." FAC ¶ 52. "Cal-Shell and Pacific Seafood Group conspired to avoid selling the property to Front St. Marine in order to eliminate the potential for new seafood processor competition at the site." FAC ¶ 52.

For its claim under *Section 1* of the Sherman Act, plaintiffs allege:

> As part of the Pacific Seafood Group led conspiracy to acquire all available seafood processing facilities from its existing competitors on the West **[*4]** Coast when any particular competitor is interested in disposing of such assets, [Pacific Seafood and Cal-Shell] conspired to deprive [Front Street] *of the opportunity to develop seafood processing infrastructure in Newport* in 2014-15.

FAC 81 (emphasis added).

"But for the illegal conspiracy to restrain trade implemented by [defendants, Front Street] would have acquired the Cal-Shell waterfront property in Newport *and successfully created the infrastructure for new seafood processor competition* in Newport by the end of 2015." FAC ¶ 87 (emphasis added).

For its claim under *Section 2* of the Sherman Act, plaintiffs allege that defendants "conspired to monopolize the Newport seafood input markets for trawl caught groundfish, onshore whiting and pink shrimp by conspiring to transfer Trident and Cal-Shell's seafood processing assets in Newport to Pacific Seafood." FAC ¶ 91.

Front Street neither alleges nor seeks any economic damages. Instead, on both claims:

> Plaintiff Front St. Marine seeks an order from this Court requiring Pacific Seafood Group to divest itself of the Cal-Shell property that it acquired pursuant to an illegal conspiracy and to transfer that property to plaintiff for the same price paid **[*5]** by [Pacific Seafood] to Cal-Shell. Plaintiff Front St. Marine further seeks interim injunctive relief prohibiting Pacific Seafood from altering the Cal-Shell property during the pendency of this case.

FAC ¶¶ 88, 98.

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[1] Pacific Seafood, engaged in seafood processing, sales, and distribution, consists of more than 55 entities owned by defendants Frank Dulcich and Dulcich, Inc. First Am. Comp (or "FAC"). ¶ 19.

[2] In resolving the pending motions, I assume the truth of all factual allegations in the complaint and FAC.

Turning to the other plaintiff:

> Plaintiff Innovation Marine Protein, LLC is an Oregon limited liability company formed for the purpose of acquiring and operating Trident's seafood processing assets in Newport, Oregon including a fishmeal plant and seafood processing facility. Innovation Marine Protein is owned by Richard Carroll and Edward Backus. Prior to organizing Innovation Marine Protein in 2017, Richard Carrol and Edward Backus formed a partnership in 2016 for the purpose of acquiring a fishmeal plant and associated seafood processing facilities. It was always contemplated by Mr. Carroll and Mr. Backus that their partnership would be converted into a limited liability company which would own and operate the fishmeal plant and seafood processing facilities.

FAC ¶ 13.

Carrol and Backus have extensive experience in the fishing industry. "Richard Carroll has over 40 years of experience in the design, construction and operation of whiting and surimi processing plants and fishmeal **[*6]** plants." FAC ¶ 14.[3] "Edward Backus has 20 years of experience in fisheries policy and conservation, economic development, and community fisheries finance." FAC ¶ 16.[4]

Trident "*refused to negotiate* with a principal of plaintiff Innovation Marine Protein, LLC to sell its Newport seafood processing facilities and then conspired with Pacific Seafood to develop a two-step scheme to transfer those assets to Pacific Seafood." FAC ¶ 3 (emphasis added). The FAC proceeds to outline Innovation Marine's attempt to enter the Newport seafood processing market in order to potentially compete with Pacific Seafood:

> 32. On two occasions in November 2016, Richard Carroll met with Trident COO Mike Luchino *to express interest in and pursue the potential purchase of Trident's Seafood processing assets* in Newport including both the meal plant and the surimi processing plant. These discussions continued into December 2016 and were of such a serious nature that Mr. Carroll disclosed that he had experience with an advanced technology that would dramatically increase the profitability of the meal plant by enabling it to produce food grade or nutraceutical protein rather than being limited to fishmeal products used **[*7]** in aquaculture.
>
> 33. In January 2017, Mr. Carroll told Mr. Luchino that he was *interested in discussing a price for the trident assets in Newport and negotiating a final deal as soon as possible*. Mr. Luchino promised to contact Trident's [President] and CEO, Joe Bundrant to determine whether Trident was seriously interested in selling these assets. In an email dated January 9, 2017, Mr. Luchino advised Mr. Carroll that he had talked with Mr. Bundrant, who is defendant Frank Dulcich's brother-in-law, that Trident was not interested in selling its assets and "things are at status quo for now."
>
> 34. The "status quo" did not last long. Shortly after rebuffing Mr. Carroll, *who would have formed plaintiff Innovation Marine Protein at that time if Trident had been willing to negotiate a deal*, Trident and Pacific Seafood Group conspired to develop a two-step plan to transfer Trident's assets to Pacific Seafood Group in a manner that was designed to evade antitrust scrutiny. First, Trident secretly sold its meal plant to Pacific Seafood Group and the co-conspirators concocted the theory that this transaction was necessary for PSG to support its seafood processing operations in Newport and therefore **[*8]** did not raise antitrust concerns. In fact, with the acquisition of Trident's fishmeal plant, Pacific Seafood Group increased its share of the fishmeal plant processing capacity on the West Coast to over 90%. Second, the co-conspirators developed a plan under which PSG would acquire the surimi processing plant under ***antitrust law***'s "failing business exception."

FAC (emphasis added).

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[3] One could read the FAC as portraying Carroll as perhaps having more experience in the design and construction of seafood processing plants as opposed to experience actually operating such plants. For the purpose of this opinion, I assume Carroll has extensive experience actually operating seafood processing plants.

[4] The FAC is silent as to any experience Backus has in operating seafood processing plants. One assumes Backus' role was to secure financing. However, as discussed below, there are no allegations Backus secured any financing for either the partnership or Innovation Marine.

Plaintiffs allege Trident sold the fishmeal plant to Pacific Seafood in a secret sale on April 10, 2017, FAC ¶ 3, at price below market value, FAC ¶ 38. Pacific Seafood and Trident then used the May 15, 2017 start of the pacific whiting season (and the 100 or so seasonal jobs that go with it), "to pressure fishermen, the local community, Oregon legislators and regulators into approving an obviously anti-competitive takeover of the surimi plant by monopolist Pacific Seafood." FAC ¶ 3. A shell company owned by Pacific Seafood "either holds an option to acquire the Trident surimi processing plant assets or has already closed on that deal and owns those assets outright." FAC ¶ 2. After Pacific Seafood closed the transactions with Cal-Shell and Trident, it held over 95% of the seafood markets for trawl caught groundfish, **[*9]** onshore whiting and pink shrimp in the Newport market. FAC ¶ 8.

On its Sherman Act *Section 1* claim, Innovation Marine alleges:

> 80. As part of the Pacific Seafood Group led conspiracy to acquire all available seafood processing facilities from its existing competitors on the West Coast when any particular competitor was interested in disposing of such assets, defendants Pacific Seafood Group and Trident Seafoods Corporation conspired to deprive plaintiff Innovation Marine Protein, LLC of the opportunity to enter the seafood processing and meal plant business in Newport in time to commence operations during the 2017 whiting season.
>
> * * * *
>
> 83. But for the illegal conspiracy to restrain trade implemented by PSG and Trident, and Cal-Shell, plaintiff Innovation Marine Protein LLC would have acquired the Trident processing plant and meal plant assets and successfully entered the seafood processing business in Newport prior to the beginning of the 2017 whiting season. The loss of that opportunity has caused damages to plaintiff Innovation Marine Protein estimated at $2 million in lost net profits in 2017.
>
> 84. Plaintiff Innovation Marine Protein seeks an order from this Court requiring Pacific Seafood Group **[*10]** to divest itself of the Trident property that it acquired pursuant to an illegal conspiracy and to transfer that property to plaintiff for the same price paid by PSG to Trident. Plaintiff Innovative Marine Protein further seeks interim injunctive relief prohibiting Pacific Seafood from altering the Trident property during the pendency of this case.

FAC.

Plaintiffs allege the relevant product markets are the west coast seafood markets for groundfish, pacific onshore whiting and pacific coldwater shrimp. FAC § IV. Plaintiffs describe Pacific Seafood's expansion of monopoly power over the past decade through numerous anti-competitive acquisitions and vertical integrations. FAC ¶¶ 29-30. As relevant here:

> In early 2014, Pacific Seafood Group established a conspiracy designed to facilitate the acquisition by Pacific Seafood Group of any available seafood processing facility from its existing competitors on the West Coast when any particular competitor was interested in disposing of such assets. Pacific Seafood Group promoted this conspiracy as advancing the common interests of the seafood processing plant seller and Pacific Seafood Group by avoiding the potential for a new market entrant that **[*11]** would disrupt the highly concentrated West Coast markets for trawl-caught groundfish, shoreside-delivered whiting and pink shrimp. During the period of 2014-2017, this conspiracy included at least Ocean Gold Seafoods, Inc. and its affiliates in the Westport Market, California Shellfish Company in the Newport market and Trident Seafoods in the Newport market.

FAC ¶ 31.

As noted, defendants moved to dismiss the complaint on multiple grounds. In response, plaintiffs sought leave to file the FAC.[5] As all antitrust plaintiffs must establish antitrust standing, I turn first to the question of whether Front Street and Innovation Marine have standing to bring these claims.

STANDARD OF REVIEW

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[5] Plaintiffs originally alleged the two transactions were separate conspiracies, each involving Pacific Seafood. In the FAC, plaintiffs allege each transaction is one part of a single conspiracy between all three defendants to transfer all available seafood processing facilities of Trident and Cal-Shell to Pacific Seafood. FAC ¶ 31.

To survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a complaint must contain sufficient factual matter that "state[s] a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A claim is plausible on its face when the factual allegations allow the court to infer the defendant's liability based on the alleged conduct. *Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The factual allegations must present more than "the mere possibility of misconduct." *Id. at 678*.

When considering a motion to dismiss, the court must accept all allegations of material fact as true and construe those facts **[*12]** in the light most favorable to the non-movant, *Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)*, but the court is "not bound to accept as true a legal conclusion couched as a factual allegation," *Twombly, 550 U.S. at 555*. If the complaint is dismissed, leave to amend should be granted unless the court "determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995)*.

DISCUSSION

Section 4 of the Clayton Act provides for a seemingly broad entitlement to damages, allowing treble damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." *15 U.S.C § 15*.[6] Analyzing the legislative history of the Act, however, the Supreme Court concluded Congress did not intend to cast as wide a net as that implied by *Section 4*'s plain language. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (citing *Blue Shield of Virginia v. McCready, 457 U.S. 465, 467-77, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982))*. "Therefore, courts have constructed the concept of antitrust standing, under which they 'evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them,' to determine whether a plaintiff is a proper party to bring an antitrust claim." *American Ad Mgmt., Inc. v. Gen. Tel. Co. of California, 190 F.3d 1051, 1054 (9th Cir. 1999)* (quoting *Associated Gen., 459 U.S. at 535*).

In evaluating whether a plaintiff has antitrust standing, courts examine: (1) the nature of the plaintiff's alleged injury; that is, whether it was the type the antitrust **[*13]** laws were intended to forestall; (2) the directness of the injury; (3) the speculative measure of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *American Ad, 190 F.3d at 1054*. Although this determination involves a balancing of all the factors, the first factor, i.e., the nature of the plaintiff's alleged injury, is generally given the greatest weight. *Id. at 1055*.

I. Front Street is not a Market Participant

Defendants argue that because Front Street is not a participant in the markets for groundfish, pacific whiting, or pacific shrimp, it lacks antitrust standing. I agree. Nowhere does the FAC allege Front Street is engaged in seafood processing. Instead, the FAC reveals Front Street merely seeks waterfront property it can develop and lease to an actual seafood processor. Even read liberally, the FAC makes clear that Front Street is merely a potential landlord seeking a tenant who will compete in the relevant market.

The alleged conspiracy "prevented [Front Street] from *redeveloping a partially blighted property* with a working ice plant *into modern seafood processing facilities operated by new entrants*." FAC ¶ 2 (emphasis added). Front Street's "corporate mission" is not to **[*14]** process seafood or compete itself in the relevant market, but "to *acquire and develop* Newport waterfront industrial property *for the express purpose of building the infrastructure* that will diversify the seafood processing sector[.]" FAC ¶ 18 (emphasis added). Front Street sought Cal-Shell's waterfront parcels because those parcels provided an opportunity "to secure adequate industrial property on Yaquina Bay in Newport *to build seafood processing infrastructure*[.]" FAC ¶ 49 (emphasis added). Nowhere does Front Street allege defendants prohibited Front Street from processing seafood. Rather, defendants deprived Front Street only

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[6] As discussed below, plaintiffs also seek injunctive relief under *Section 16*.

"*of the opportunity to develop seafood processing infrastructure* in Newport in 2014-15." FAC ¶ 81 (emphasis added). In fact, the FAC clearly states that Front Street does not process seafood on two other waterfront lots it owns. Instead, it leases those lots to Seawater Seafoods Company, a seafood processor. FAC ¶¶ 67-68. Front Street is not a market participant in the relevant markets.

Therefore, the question is whether a potential landlord or developer such as Front Street, who does not participate in the relevant market, has antitrust standing to bring claims **[*15]** challenging a conspiracy to exclude potential new entrants into the relevant market. Another Ninth Circuit case involving fishermen and seafood processors provides helpful guidance. *Eagle v. Star-Kist Foods, Inc., 812 F.2d 538 (9th Cir. 1987)*. In *Eagle*, crewmembers on vessels fishing for tuna brought antitrust claims against the canneries that purchased the tuna caught by the fishermen. "The central argument is that the canneries conspired to set tuna prices at artificially low levels resulting in a reduction of the wages paid to crewmembers and a loss of employment opportunities by them." *Id. at 539*. In looking at the nature of the alleged injury, the court noted "The requirement that the alleged injury be related to anticompetitive behavior requires, as a corollary, that the injured party be a participant in the same market as the alleged malefactors." *Id. at 540* (quoting *Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985))*.

> In the present case, in order to be a participant in the relevant market, the class members must have been either buyers or sellers of raw tuna. Both sides agree that the class members were not buyers. The alleged malefactors (the canneries) were the buyers. Thus, in order for the alleged injury to be of the type that antitrust laws were intended to forestall, the class members must prove **[*16]** that they were sellers in the raw tuna market. The district court held that the crewmembers were neither consumers nor competitors in the relevant market because they did not directly sell or purchase the tuna. Instead, they were employees of the vessel owners who negotiated and set the prices for the fish. The crewmembers argue that the method by which they were compensated made them sellers. They contend that "share" crewmembers actually own a percentage of the fish caught on a fishing voyage and are thereby sellers along with the vessel owners. Furthermore, the method by which "per tonnage" crewmembers' wages and the union's dues were calculated was so intertwined with the selling process that they, too, should be considered at least "indirect" sellers.
> The district court pointed out, however, after examining the union contract agreements between the union and fishing vessel owners, that:
>
> > "[n]either the crew of any such vessel nor the union have any rights to control or direct the operation of said vessel or the selling price of fish caught by said vessel. The owner shall have the sole and exclusive authority to determine where and at what price and under what terms and conditions **[*17]** fish caught by said vessel shall be sold and where catches shall be delivered."
>
> The crewmembers did not negotiate the prices with the canneries, the vessel owners did. The vessel owners are the requisite "sellers" in the relevant market, not the crewmembers or the union. Thus, the class members have not alleged the type of injury antitrust laws were intended to forestall, because the alleged anticompetitive conduct was directed at the vessel owners, not the crewmembers or the union.

Id. at 540-41 (alterations in original).

Front Street's relationship to the markets for groundfish, pacific whiting, or pacific shrimp is much more tenuous and indirect than that of the fishermen in *Eagle* to the tuna market. Front Street merely seeks to own the land (and future infrastructure) on which its prospective tenant will someday potentially compete with Pacific Seafood in the Newport markets for groundfish, pacific whiting, or pacific shrimp. Relevant markets are, of course, at the heart of any antitrust claim. After all, "the Sherman Act was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of participants **[*18]** in the relevant market." *Associated Gen. Contractors, 459 U.S. at 538*.

Here, plaintiffs allege that defendants "conspired to monopolize the Newport seafood input markets for trawl caught groundfish, onshore whiting and Pacific shrimp by conspiring to transfer Trident and Cal-Shell's seafood processing assets in Newport to Pacific Seafood." FAC ¶ 91. The fishermen selling into those "input markets," forced to sell to Pacific Seafood, are the "customers" the Sherman Act was enacted to protect. *Associated Gen. Contractors, 459*

U.S. at 538. The other market participants are the processors who purchase that fish, i.e., Pacific Seafood and Front Street's future tenant. In its role as developer and future landlord to a seafood processor, however, Front Street will neither buy nor sell any fish.

Plaintiffs argue, "The nut of this case is that Plaintiffs' lost business opportunity was a consequence of defendants' illegal conspiracy." ECF No. 33 at 20. While that may be true, it is largely irrelevant to whether Front Street suffered any antitrust injury. *See* Eagle, 812 F.2d at 540 (noting the entire point behind the antitrust standing evaluation is "to determine whether a plaintiff, *who has suffered an injury which bears a causal connection to the alleged antitrust violation*, also satisfies the more demanding **[*19]** antitrust standing standard."). Plaintiffs appear to confuse the requirements for Article III standing with the "more demanding standard for antitrust standing." Lucas Automotive Eng'g v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 (9th Cir. 1998) (quoting Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1997) (emphasis omitted)). But no one disputes that Front Street has Article III standing. Plaintiffs continue, "Put another way, unlike in *Lucas*, but for defendants' conspiracy to violate the antitrust laws, plaintiffs would not have been injured." ECF No. 33 at 20. In addition to flowing from defendants' conduct, however, Front Street's injury must be "of the type the antitrust laws were intended to prevent." American Ad, 190 F.3d at 1057.

> The Supreme Court's cases have also "emphasized the central interest [of the Sherman Act] in protecting the economic freedom of participants in the relevant market." Associated General, 459 U.S. at 538, 103 S.Ct. 897. We have derived from this principle the "corollary" that the injured party be a participant in the same market as the alleged malefactors." Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985). Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained. Parties whose injuries, though flowing from that which makes the defendants' conduct unlawful, are experienced in another market do not suffer antitrust injury.

American Ad, 190 F.3d at 1057 (alterations in original). **[*20]**

Front Street's injury, if any, occurred in the Newport waterfront real estate market. *See* FAC ¶ 87 (But for conspiracy, Front Street "would have acquired the Cal-Shell waterfront property in Newport and successfully created the infrastructure for new seafood processor competition"). But Front Street would have suffered an identical alleged injury had Cal-Shell simply moth-balled the blighted plant, "redevelop[ed its own] partially blighted property . . . into a modern seafood processing facility[y]," FAC ¶ 2, or sold the property to a bowling alley developer. Because Front Street would have suffered the same alleged injury in those instances, its injury is not "of the type antitrust laws were intended to prevent." American Ad, 190 F.3d at 1057.

Front Street argues that even if it is not a market participant, it has standing because its injury is "'inextricably intertwined' with the injury defendants sought to inflict through their conspiracy, and it therefore falls 'within the area of congressional concern.' McCready, 457 U.S. at 484." ECF No. 33 at 25. I disagree. McCready had standing because that conspiracy targeted psychologists and McCready was "a consumer of psychotherapy services entitled to financial benefits under" her health plan **[*21]** and therefore "within the area of the economy . . . endangered by [that] breakdown of competitive conditions' resulting from" her health plan's refusal to reimburse. McCready, 457 U.S. at 480-81. Unlike cases finding a plaintiff's injury "inextricably intertwined" with an antitrust injury sought to be inflicted upon market participants, Front Street is not "a customer [] directly damaged by an act alleged to be in violation of the antitrust laws." Glen Holly Entm't Inc. v. Tektronix Inc., 352 F3d 367, 376 (9th Cir. 2003). No matter Front Street's "corporate mission," its lost opportunity to develop waterfront property it hoped to lease to a market participant is not "inextricably intertwined" with the harm defendants sought to impose on the west coast seafood markets for groundfish, pacific onshore whiting and pacific coldwater shrimp.[7]

[7] "While [landlords] have standing to challenge illegal restraints in *their* licensing or renting market, they generally lack standing to challenge restraints in other markets, including that served by their licensees or tenants." Phillip E. Areeda, Herbert Hovenkamp, et al., Anitrust Law, Vol. IIA, ¶ 351a (4th ed. 2013).

The second factor in evaluating a plaintiff's antitrust standing requires the court "to examine the directness or indirectness of the causal connection between the alleged injury and the alleged violation." *Eagle, 812 F.2d at 541*. "The chain of causation between the injury and the alleged restraint in the market should lead directly to the 'immediate victims of any alleged violation.'" *Id.* In *Eagle*, the court concluded that because the vessel owners control the negotiations **[*22]** with the canneries over the price of the tuna, the crewmembers were ordinary employees and any loss of wages of the crewmembers "is derived from any injury suffered by the vessel owners during the sale of the fish." *Id.* Although Front Street does not allege any economic damages—likely because any such damages would be far too speculative and derivative to recover—the policy considerations behind the antitrust laws demonstrates Front Street's injury, in antitrust terms, is indirect.

"[T]he existence of an identifiable class of persons whose self interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the [plaintiffs] to perform the office of a private attorney general." *Id.* (quoting *Associated Gen. Contractors, 459 U.S. at 542*) (second alteration in original). The vessel owners who suffered the direct antitrust injury in *Eagle* pursued their own antitrust action against the canneries "alleging the same antitrust violations alleged" by the crew members. *Id. at 542 n.2*. Here, the fishermen forced to sell into Pacific Seafood's alleged monopoly in Newport are the direct victims of the alleged conspiracy and could bring their own antitrust **[*23]** action against these defendants. Therefore, declining to allow a more remote party such as Front Street standing to challenge this alleged conspiracy "is not likely to leave a significant antitrust violation undetected or unremedied." *Id.* (quoting *Lucas Automotive, 800 F.2d at 846*).

Finally, Front Street argues that because it seeks only injunctive relief in the form of divestiture, and because antitrust standing requirements are relaxed for those seeking injunctive relief, it may proceed here. This argument is meritless. While Front Street is correct that certain standing requirements—such as the remoteness or speculative nature of the plaintiff's injury[8]—are relaxed for a plaintiff seeking divestiture, "threatened antitrust injury [is] a prerequisite to equitable relief." *Lucas Automotive, 140 F.3d at 1234* (citing *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 113, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986))*. Because Front Street did not suffer any antitrust injury, it may not seek divestiture. *See* *Cargill, 479 U.S. at 112* ("*Section 16* affords plaintiffs injunctive relief only for those injuries cognizable under *Section 4*.").

II. Innovation Marine did not take Substantial Steps to Enter Relevant Market

Unlike Front Street, there is no dispute that Innovation Marine was a prospective participant in the relevant market. The dispute instead centers on whether Innovation Marine took "substantial **[*24]** steps" to enter that market. A "potential competitor" such as Innovation Marine "has standing if he can show a genuine intent to enter the market and a preparedness to do so." *Bubar v. AMPCO Foods, Inc., 752 F.2d 445, 450 (9th Cir. 1995)*. When considering a potential competitor's preparedness to enter a market, courts consider:

1. The background and experience of plaintiff in his prospective business;
2. Affirmative action on the part of plaintiff to engage in the prospective business;
3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business; and

4. The consummation of contracts by plaintiff.

Id. at 451-52.

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[8] Because Front Street seeks only injunctive relief, I need not examine other antitrust standing factors such as the speculative nature of the harm, the risk of duplicative recovery, or the complexity in apportioning damages. That said, the specific remedy of divestiture in favor of each relative plaintiff (while excluding any other potential bidders) at a price admittedly below market value would seemingly violate the main goal of antitrust laws, i.e., increased competition.

Other than the fact that the plaintiffs in *Bubar* were much more prepared (when compared to Mr. Carrol and Mr. Backus) to enter that intended market, the facts of *Bubar* are remarkably similar to the facts here. Plaintiffs there were former top management employees of a wholly-owned potato, garlic, and onion processing subsidiary of A & B. A & B wanted to sell the subsidiary and eventually sold to Ampco foods, a competitor of the subsidiary. Plaintiffs brought antitrust claims under *Sections 1* and *2* of the Sherman Act, alleging Ampco, A & B, and the subsidiary conspired to prevent plaintiffs from **[*25]** purchasing the subsidiary.

Over the course of several months, plaintiffs and Ampco made several "proposals" to purchase the subsidiary. Plaintiffs proposed buying the subsidiary for $10 million. A & B countered with $15 million and plaintiffs responded with a proposal for $12.5 million. Ampco then offered $10 million for only the potato processing portion, at which point A & B proposed a sale of $13.5 million to plaintiffs for the entire subsidiary. "At this time, all of the proposals were preliminary negotiations, with no firm offers having been made." *Id. at 446*. The *Bubar* plaintiffs took several preliminary steps any prospective purchaser would make:

> During this period of negotiations, the management group had held discussions with several venture capital organizations, seeking their participation as equity investors, and also had held discussions with several banks concerning a line of credit for operating expenses. No firm commitments had been made.

Id. at 447.

The management group met with several banks to secure an $8 million line of credit, and despite interest from the banks, no commitments had been made. The group held discussions with multiple venture capital groups, who determined a new corporation **[*26]** would have to be formed to acquire the subsidiary. The management group never finalized the different financial commitments, stock interests, or voting rights of the new corporation. *Id. at 447-48*. The leaders of the management group, along with the lead equity group, met with A & B and proposed buying the subsidiary for $13.5 million and ultimately requested six weeks to complete the financial package. A & B's representative stated he would speak to the president of the company and respond to the plaintiffs, but refused to end discussions with other potential buyers. "No written agreements or letters of intent were signed and no oral commitments to buy or to sell were made." *Id. at 448*. A & B met with Ampco later that day and, over the course of the next few days, agreed to sell the potato division to Ampco for $11,350,000. Like Innovation Marine, the management group alleged their yet-to-be-formed corporation was "frozen out" of the market by defendants' concerted failure to deal. The court concluded:

> Plaintiffs were potential minority stockholders in a corporation yet to be formed, which sought to enter the processed potato market. The venture capital groups who were to be the seventy-five to ninety percent **[*27]** stockholders had not determined whether they were going to invest in the project. Even with the prospective participation of the venture capital groups, another $500,000 to $800,000 would yet have to be raised, either by debt or additional equity financing, and there were no commitments for such financing. The plaintiffs never had a binding contract or commitment or option to acquire the assets necessary to enter the market. We agree with the district court that the plaintiffs in this posture did not have standing to bring this private treble damage antitrust action.

Bubar, 752 F.2d at 454.

As the full extent of the negotiations between Mr. Carroll and Trident are outlined in two brief paragraphs of the FAC, and because those paragraphs reveal the stark contrast between steps taken by the partnership and the plaintiffs in *Bubar*, I include Innovation Marine's entire description of these "serious" discussions:

> 32. On two occasions in November 2016, Richard Carroll met with Trident COO Mike Luchino *to express interest in and pursue the potential purchase of Trident's Seafood processing assets* in Newport including both the meal plant and the surimi processing plant. These discussions continued into December 2016 **[*28]** and were of such a serious nature that Mr. Carroll disclosed that he had experience with an advanced technology that would dramatically increase the profitability of the meal plant by enabling it to produce food grade or nutraceutical protein rather than being limited to fishmeal products used in aquaculture.

> 33. In January 2017, Mr. Carroll told Mr. Luchino that he was *interested in discussing a price for the trident assets in Newport and negotiating a final deal as soon as possible*. Mr. Luchino promised to contact Trident's [President] and CEO, Joe Bundrant to determine whether Trident was seriously interested in selling these assets. In an email dated January 9, 2017, Mr. Luchino advised Mr. Carroll that he had talked with Mr. Bundrant, who is defendant Frank Dulcich's brother-in-law, that Trident was not interested in selling its assets and "things are at status quo for now."

FAC (emphasis added).

Utterly lacking within this description is any allegation that the partnership had the financial commitments necessary to even make a firm offer (to say nothing of actually completing the purchase). Despite Mr. Backus' apparent background in securing financing, he appears to have done nothing **[*29]** in advance of Mr. Carroll's "discussions" with Trident. The FAC is silent as to any discussions regarding a line of credit for operating expenses of the new company. There are no allegations detailing contracts, let alone discussions, between the proposed company and the fishermen it would need to secure product from. There are no allegations regarding the ownership percentages or control of Innovation Marine, the yet-to-be-formed company. Instead, the FAC reveals Mr. Carrol informed Mr. Luchino he knew of "advanced technology" that would help make the company profitable, and "express[ed] interest in [] pursu[ing] the potential purchase of Trident's Seafood processing assets[.]" FAC ¶ 32. "In January 2017, Mr. Carroll told Mr. Luchino that he *was interested in discussing a price for the Trident assets* in Newport *and negotiating a final deal as soon as possible*." FAC ¶ 33. These were not serious discussions. Mr. Carrol had yet to even discuss a price with Trident, let alone make a "proposal" to Trident.[9] These steps pale in comparison to the steps the management group in *Bubar* took to purchase the subsidiary. "This is pie in the sky, not 'substantial demonstrable steps to enter an industry.'" **[*30]** *In re Dual-Deck Video Cassette Recorder Antitrust Litigation, 11 F.3d 1460, 1466 (9th Cir. 1993)*.

Defendants argue that because Innovation Marine did not file Articles of Organization with the Oregon Secretary of State until after Trident sold its assets to Pacific Seafood, it could not suffer any antitrust injury. Innovation Marine filed Articles of Organization on April 21, 2017.[10] Snider Decl., Ex. 1; ECF No. 27. By law, April 21, 2017 is the date Innovation Marine's "corporate existence beg[an]." *Or. Rev. St. § 60.051(1)*. Trident sold the fishmeal plant to Pacific Seafood on April 10, 2017. FAC ¶ 3. Innovation Marine makes no argument, and points to no case, demonstrating a corporation can suffer an injury that occurs before the corporation exists. Instead, Innovation Marine argues that fact it did not incorporate until after the sale is a "trivial" point because, "[h]ad negotiations progressed, Mr. Carroll could easily have formed Innovation Marine at that time." ECF No. 33 at 18 n.4. But this admission simply demonstrates Mr. Carroll's discussions with Trident never progressed to a serious level. After all, Mr. Carroll formed Innovation Marine "for the purpose of acquiring and operating Trident's seafood processing assets in Newport, Oregon including [the very assets Mr. Carroll **[*31]** spoke to Trident about during November 2016 through January 2017]." FAC ¶ 13. That the discussions never advanced to the point where Mr. Carroll formed the company whose only purpose was to purchase Trident's assets demonstrates neither Innovation Marine nor the preexisting partnership took substantial steps to complete the sale.[11] In fact, it appears the most

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[9] Even a "proposal" from Mr. Carroll would fall well short of the affirmative steps necessary to provide antitrust standing to a potential competitor. *See* *Bubar, 752 F.3d at 453* (discussing multimillion dollar proposals management group made, followed by counter proposals from A & B, stood "in contrast" to other situations involving "firm offers.").

[10] Plaintiffs do not object to the Court taking judicial notice of public documents related to Innovation Marine held by the Corporation Division of the Oregon Secretary of State. *Fed. R. Evid. § 201(d)*; *Lee v. County of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001)*.

[11] Innovation Marine argues that even if the fact that it did not exist at the time of the sale bars its claim, amending the complaint and naming the prospective partnership would cure this problem. Ordinarily, shareholders lack standing to bring a claim for an injury suffered by the corporation. *Bubar, 752 F.2d at 450-51*. The same holds true for prospective shareholders of a prospective corporation. *Id. at 451*. Because the rule could potentially be relaxed if "a person had all the resources to enter a market and intended to form a solely-owned corporation rather than an individual enterprise," for the purpose of this opinion I assume plaintiffs could amend the complaint naming the partnership. *Id.* Although I assume the partnership could potentially proceed as

"substantial step" taken by Innovation Marine towards acquiring Trident's Newport assets was the filing of this antitrust action seeking divestiture of those assets to Innovation Marine.

Innovation Marine argues, "Indeed, the only *Bubar* factor that plaintiffs do not meet is the consummation of contracts which, of course, Pacific Seafood and its co-conspirators colluded to prevent." ECF No. 33 at 23. Innovation Marine is correct that the consummation of contracts is one factor courts look to when evaluating whether a potential competitor was prepared to enter a market. *Bubar, 752 F.2d at 451-52*. As demonstrated above, however, Innovation Marine failed to allege that it either: (1) took any real "substantial steps" to enter the market; or (2) possessed the financial ability to purchase the equipment or facilities necessary to enter the market. **[*32]** Additionally, the court in *Bubar* rejected Innovation Marine's argument that the lack of a consummated contract with the alleged conspirator should not factor against it:

> All agree that the only way the management group could have become a competitor was to acquire Rogers or its assets. The first obstacle to establishing preparedness is that the management group did not have a binding contract to acquire the assets necessary to compete. The management group asserts that this should not be a factor because the contract that was necessary was to be made with one of the alleged antitrust conspirators. Yet, on the other hand, when our inquiry at this stage of the proceeding is one of standing, and one element is to determine how close the management group was to becoming a competitor, the lack of a contract to obtain the assets necessary to compete is surely a relevant factor, as the district court properly determined.

Id. at 452.

While I assume at this stage that Mr. Carroll and Mr. Backus had the background and experience to operate the prospective seafood processing company, they did not take the requisite affirmative actions to engage in the prospective business, did not allege the financial ability **[*33]** to engage in the business, and failed to consummate any contracts necessary of any prospective competitor.[12] Therefore, Innovation Marine lacks antitrust standing.

CONCLUSION

Defendants' motions to dismiss for lack of standing, ECF No. 21, 24-25, are GRANTED. No amount of repleading will turn Front Street into a participant in the relevant market. And no amendment will backdate Innovation Marine's filings with the Secretary of State. As explained above, amending to add the preexisting partnership as a plaintiff will not somehow turn the initial talks Mr. Carrol had with Trident into the "substantial steps" necessary for antitrust standing. Because Innovation Marine and Front Street lack standing, and because leave to amend would be futile, this action is DISMISSED, with prejudice.

IT IS SO ORDERED.

DATED this 23rd day of March, 2018.

/s/ Michael McShane

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plaintiffs, I do not overlook the perhaps insurmountable hurdles the partnership would face going forward. *See* *Solinger v. A & M Records, 718 F.2d 298, 299 (9th Cir. 1983)* (per curiam) (Denying antitrust standing in failure to deal case brought by prospective shareholder in prospective company because, "The conveniences and immunities that arise from doing business through corporate entities carry with them the costs of having these corporate entities seek their remedies in court for injuries to their business or property interests. A shareholder of a corporation injured by antitrust violations has no standing to sue in his or her own name, and *a fortiori*, a prospective shareholder ordinarily would have no standing."). Because neither the partnership nor Innovation Marine took substantial steps to enter the market, neither party has standing.

[12] At oral argument, Innovation Marine stated that if granted leave to file an amended complaint, it would include allegations regarding steps taken to secure financing. But Innovation Marine included no such allegations in the proposed FAC, filed in response to defendants' arguments that it lacked standing as a prospective participant. The time to include such allegations was in the FAC. Second, even assuming Innovation Marine secured financing, the allegations reveal it never engaged in serious discussions to purchase the assets.

Michael McShane

United States District Judge

Phila. Taxi Ass'n v. Uber Techs.

United States Court of Appeals for the Third Circuit

November 14, 2017, Argued; March 27, 2018, Opinion Filed

No. 17-1871

Reporter

886 F.3d 332 *; 2018 U.S. App. LEXIS 7606 **; 2018-1 Trade Cas. (CCH) P80,331; 2018 WL 1474373

PHILADELPHIA TAXI ASSOCIATION, INC; AAMIR TRANS., INC.; AANYIA TRANS., INC.; ABAAS TRANS., INC.; ABNIK INC.; AMRAAN TRANS., INC.; ATMA CAB INC.; AUMBREEN; AVINITH BROTHERS CORP.; BAINS TRANSPORTATION, INC.;BALAN CAB CO.; BAM ARG INC.; BILLA CAB CO.; B&M TRANSPORT INC.; CHAUDHRY CAB INC.; C.S. CAB CO.; DASHMESH CAB CORP.; DAYA ENTERPRISES INC.; DAYA TRANSPORTATION INC.; DHAMTHAL TRANS INC.; DHESI CAB CO.; E&S TRANS INC.; GOLDEN TEMPLE CORP.; GURU CAB CO.; GURU TRANS., INC.; GURVEER CAB CO.; HARRY DILLION CAB CO.; H BHATTI; H&J CAB CO.; HSP CAB CO.; INDER TRANSPORT INC.; I&S, MAGASSA INC.; JAI LUXMI INC.; JEN-KHO TRANS.; JFK TRANSIT INC.; JRK CAB CO.; J.K.P. TRANSPORT, INC.; J&H CAB CO.; KAMAL D INC.; KASHIF CORP.; KEJSI & AU LONA CAB CO.; KHADIM TRANS INC.; KHAYYAM INC.; KHKHOAR TAXI CAB; KHOKHA GROUP USA; KM TAXI, INC.; K SINGH CAB, INC.; MAHER CAB CO.; MANNA S. INC.; M&M TRANS INC.; NASRIN TRANS INC.; NAVID INC.; NAVJOT CAB COMPANY; NJJAR CAB CO.; ONE CAB INC.; PARVEEN TRANSPORT INC.; PRABH INC.; PUN JAB CORP.; P.K. CAB; RAJA CAB CO.; RAJDEEP CAB INC.; RAMTIN INC.; RASUL CORP.; SAAS CAB CO.; SAHOTA CAB CO.; SANAZ, INC.; SARDAR CAB CO.; SETAREH CAB CO.; SHAAD CAB INC.; SHAWN LIMO; SHIVAM CAB CORP.; SINGH MAAN INC.; T.S. MALHI CAB CO.; ZADEH INC.; ZAHD TRANS INC.; ZARI CAB CO.; PANTHEA, INC.; PARS TRANSPORT, INC.; CITY CAR TRANSPORT, INC.; PHILA TRANSPORT, INC., Appellants v. UBER TECHNOLOGIES, INC.

Subsequent History: US Supreme Court certiorari denied by *Phila. Taxi Ass'n v. Uber Techs., Inc., 2018 U.S. LEXIS 5311 (U.S., Oct. 1, 2018)*

Prior History: [1]** On Appeal from the United States District Court for the Eastern District of Pennsylvania. (District Court No.: 2-16-cv-1207). District Judge: Honorable Juan R. Sánchez.

Phila. Taxi Ass'n v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 219688 (E.D. Pa., Mar. 20, 2017)

Core Terms

antitrust, medallion, taxicab, monopolization, drivers, anti trust law, anticompetitive, anticompetitive conduct, probability, competitors, monopoly power, allegations, consumers, specific intent, market share, taxicab company, regulations, harms, achieving, prices, Sherman Act, predatory, alleys, rival, taxis, lower price, vehicles-for-hire, certificates, convenience, barriers

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] **Motions to Dismiss, Failure to State Claim**

When an appeal arises from the grant of a motion to dismiss, the factual allegations set forth below are taken from the second amended complaint are accepted as true.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN2[] **Complaints, Requirements for Complaint**

The appellate court exercises plenary review of the district court's dismissal of the second amended complaint and may affirm the judgment below on any basis that is supported by the record. The appellate court accepts as true the factual allegations in the complaint, and draws all reasonable inferences in the plaintiff's favor.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Procedural Matters

HN3[] **Sherman Act, Claims**

Competition is at the heart of the antitrust laws; it is only anticompetitive conduct, or a competition-reducing aspect or effect of the defendant's behavior, that antitrust laws seek to curtail. It is inimical to the antitrust laws to award damages for losses stemming from continued competition. This comports with the principle underlying antitrust laws: to protect competition, not competitors. If the challenged conduct has an effect on prices, quantity or quality of goods or services, the court will find a violation of antitrust laws only when that effect harms the market, and thereby harms the consumer.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN4[] **Scope, Monopolization Offenses**

To prevail on a claim under *Sherman Act*, *15 U.S.C.S. § 2*, for attempted monopolization, a plaintiff must prove: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. Moreover, to survive a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, the claim must be plausible on its face, allowing the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Liability hinges on whether valid business reasons, as part of the ordinary competitive process, can explain the defendant's actions that resulted in a dangerous probability of achieving monopoly power.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN5[] **Scope, Monopolization Offenses**

Allegations of purportedly anticompetitive conduct are meritless if those acts would cause no deleterious effect on competition. To determine whether conduct is anticompetitive, courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN6[] **Scope, Monopolization Offenses**

It is well established that lower prices, as long as they are not predatory, benefit consumers, regardless of how those prices are set. Cutting prices in order to increase business often is the very essence of competition. Thus, lost business alone cannot be deemed a consequence of anticompetitive acts by the defendant.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] **Scope, Monopolization Offenses**

To allege predatory pricing, a plaintiff must first demonstrate that prices are set below costs, and that the competitor had a dangerous probability of recouping those lost profits after it had driven other competitors out of the market.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN8[] **Scope, Monopolization Offenses**

Running a business with greater economic efficiency is to be encouraged, because that often translates to enhanced competition among market players, better products, and lower prices for consumers. Even unlawful conduct is of no concern to the antitrust laws unless it produces an anticompetitive effect.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN9[] Scope, Monopolization Offenses

In a traditional Sherman Act, 15 U.S.C.S. § 2 claim, a plaintiff would have to point to specific, egregious conduct that evinced a predatory motivation and a specific intent to monopolize. Some courts have inferred specific intent from anticompetitive or exclusionary conduct, for instance, when business conduct is not related to any apparent efficiency.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN10[] Scope, Monopolization Offenses

The United States Court of Appeals for the Third Circuit has held in Broadcom Corp. v. Qualcomm Inc. that because the dangerous probability standard is a complex and fact-intensive inquiry, courts typically should not resolve this question at the pleading stage unless it is clear on the face of the complaint that the dangerous probability standard cannot be met as a matter of law. The court may consider factors such as significant market share coupled with anticompetitive practices, barriers to entry, the strength of competition, the probable development of the industry, and the elasticity of consumer demand to determine whether dangerous probability was alleged in the pleadings. Entry barriers include regulatory requirements, high capital costs, or technological obstacles that prevent new competition from entering a market. No single factor is dispositive.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN11[] Scope, Monopolization Offenses

Because the elements of attempted monopolization are often interdependent, proof of one element may provide permissible inferences of other elements.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN12[] Standing, Requirements

Antitrust standing, which is a threshold requirement in any antitrust case. Rooted in prudential principles, antitrust standing is distinct from U.S. Const. article III standing, which is rooted in the Constitution. While harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, courts must also consider whether the plaintiff is a proper party to bring a private antitrust action. Because antitrust standing is prudential, a court is not bound to address it first, because it does not affect the subject matter jurisdiction of the court, as Article III standing does. Of the requirements for antitrust standing, antitrust injury is a necessary but insufficient condition.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] **Standing, Requirements**

The test for antitrust standing is: (1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN14[] **Scope, Monopolization Offenses**

In Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., the United States Supreme Court has rejected the notion that antitrust injury could be alleged by a private plaintiff averring that it would have fared better without the defendant's alleged conduct. Rather, the plaintiff must prove the existence of an antitrust injury, which is an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury must reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN15[] **Scope, Monopolization Offenses**

The United States Supreme Court has held that even if the acquisition was unlawful because it provided the manufacturer with monopoly power, the plaintiffs failed to prove that there were anticompetitive effects of that acquisition in order to establish an antitrust injury.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN16[] **Scope, Monopolization Offenses**

At its most fundamental level, the antitrust injury requirement precludes any recovery for losses resulting from competition, even though such competition was actually caused by conduct violating the antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN17[] **Scope, Monopolization Offenses**

Conduct that merely harms competitors, while not harming the competitive process itself, is not anticompetitive.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN18[] **Scope, Monopolization Offenses**

A plaintiff who wants less competition or higher prices, that would injure consumers, does not suffer antitrust injury.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN19[] **Scope, Monopolization Offenses**

The United States Supreme Court has squarely rejected illegal conduct as a basis for antitrust injury. A competitor's illegal presence in a market is not a per se antitrust violation, and any resulting injury is alone insufficient for a private plaintiff to state an antitrust injury.

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN20[] **Standing, Third Party Standing**

To have associational standing, the organization must meet three requirements: (1) the organization's members must have standing to sue on their own; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires individual participation by its members.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN21[] **Standing, Requirements**

U.S. Const. art. III standing is a constitutional requirement, separate from antitrust standing, and Article III standing could be satisfied if a plaintiff presents a case or controversy.

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Judges: Before: AMBRO, KRAUSE, and RENDELL, Circuit Judges.

Opinion by: RENDELL

Opinion

[*336] RENDELL, *Circuit Judge*:

Philadelphia taxicab drivers, aggrieved by the influx of taxis hailed at the touch of an app on one's phone, brought this antitrust action to protest the entry of Appellee Uber Technologies, Inc. ("Uber") into the Philadelphia taxicab market. The Philadelphia Taxi Association ("PTA"), along with 80 individual taxicab companies (collectively, "Appellants"), appeal the District Court's dismissal of their Second Amended Complaint ("SAC") alleging one count of attempted monopolization under *Section 2* of the Sherman Act, *15 U.S.C. § 2*, and seeking injunctive relief and treble damages under *Section 4* of the Clayton Act, *15 U.S.C. § 15*.

Appellants urge us to reverse the District Court's Order, contending **[**2]** that Uber violated the antitrust laws because its entry into the Philadelphia taxicab market was illegal, predatory, and led to a sharp drop in the value of taxicab medallions as well as a loss of profits. They contend that this is evidence that Uber's operation in Philadelphia was anticompetitive and caused them to suffer an antitrust injury. However, the conduct they allege falls short of the conduct that would constitute an attempted monopoly in contravention of the antitrust laws. Thus, we will affirm the District Court's dismissal of the SAC for failure to state a claim for attempted monopolization and failure to state an antitrust injury.

I. Background & Procedural History[1]

From March of 2005 to October of 2014, taxicabs operating in Philadelphia were required to have a medallion and a certificate of public convenience, issued by the Philadelphia Parking Authority ("PPA"). Medallions are property, and are often pledged as collateral to borrow funds to finance the purchase of the cab or to "upgrade and improve the operations of taxicabs." *53 Pa. C.S.A. § 5712(a)*. Once medallion-holders comply with the obligatory standards for taxicabs, they may obtain a certificate of public convenience. Those standards, **[**3]** which provide for safety and uniformity among taxicabs, require vehicles to be insured and in proper condition, and mandate that drivers are paid the prevailing minimum wage, are proficient in English, and have the appropriate drivers' licenses.

As alleged in the SAC, when the medallion system was mandated in Philadelphia in 2005, a medallion was worth only $65,000. In October of 2014, there were approximately 500 taxicab companies in Philadelphia. Together, 7,000 drivers held 1610 medallions, each valued at an average of $545,000.

Appellants are 80 of those 500 companies, which collectively hold 240 of the 1610 medallions, as well as PTA, which was incorporated to advance the legal interests of its members—the 80 individual medallion taxicab companies.

Uber began operating in Philadelphia in October of 2014 without securing medallions or certificates of public convenience for its vehicles. While a potential rider can avail himself of a medallion taxicab by calling a dispatcher or hailing an available cab, to use Uber, he can download the Uber application onto his mobile phone and request that the vehicle come to his location, wherever he is. Passengers enter **[*337]** payment information, which **[**4]** is retained by Uber and automatically processed at the end of each ride. Uber does not own or assume legal responsibility for the vehicles or their operation, nor does it hire the drivers as its employees.[2] Uber did not pay fines to the PPA or comply with its regulations when it first entered the Philadelphia taxi market, as is otherwise required

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[1] ***HN1***[] As this appeal arises from the grant of a motion to dismiss, the factual allegations set forth below are taken from the SAC and are accepted as true. *See Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 642 n.1, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*.

[2] We are aware that the issue of whether drivers can be classified as employees or independent contractors is the subject of ongoing litigation. *See, e.g., Razak v. Uber Techs., Inc., No. 16-cv-573, 2017 U.S. Dist. LEXIS 148087, 2017 WL 4052417 (E.D. Pa. Sept. 13, 2017)*.

for medallion taxicabs. Appellants maintain that this rendered Uber's operation illegal, and enabled the company to cut operating costs considerably.

In October of 2016, the Pennsylvania state legislature passed a law approving Uber's operation in Philadelphia, under the authority of the PPA. The law, which went into effect in November of 2016, allows the PPA to regulate both medallion taxicab companies and Transportation Network Companies ("TNCs")—a classification that includes Uber and other vehicle-for-hire companies that operate through digital apps—in Philadelphia. TNCs must now obtain licenses to operate and comply with certain requirements, including insurance obligations and safety standards for drivers and vehicles. The law also exempts TNCs from disclosing the number of drivers or vehicles operating **[**5]** in the city, and allows TNCs to set their own fares, unlike medallion taxicab companies, which comply with established rates, minimum wages, and have a limited number of vehicles and medallions operating at once in Philadelphia.

Before this law passed, in Uber's first two years in Philadelphia, nearly 1200 medallion taxicab drivers left their respective companies and began to drive for Uber. In those two years, there were 1700 Uber drivers and vehicles operating in Philadelphia, serving over 700,000 riders, for more than one million trips. Simultaneously, medallion taxi rides reduced by about 30 percent, and thus Appellants experienced a 30 percent decrease in earnings. The value of each medallion dropped significantly, to approximately $80,000 in November of 2016. Fifteen percent of medallions have been confiscated by the lenders due to default by drivers.

The PTA and 75 individual taxicab companies filed a Complaint, alleging three counts: attempted monopolization under *Section 2* of the Sherman Act, tortious interference with contract under Pennsylvania law, and unfair competition under Pennsylvania law. Uber moved to dismiss the Complaint.

Appellants, the PTA and now 80 individual taxicab companies, **[**6]** then filed an Amended Complaint, alleging the same three counts. Uber moved to dismiss the Amended Complaint. The District Court granted the dismissal, without prejudice. The District Court noted that Plaintiffs alleged merely harm to their business after Uber entered the Philadelphia taxicab market, and that Plaintiffs pointed to Uber's supposed illegal participation in the taxicab market as evidence of attempted monopolization. However, the District Court concluded that these harms are "not the type of injuries that antitrust laws were intended to prevent, and thus do not establish antitrust standing." *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 218 F. Supp. 3d 389, 392 (E.D. Pa. 2016)*. The Court also dismissed the state law claims, for failure to plead the proper elements of an unfair competition or a tortious interference claim.

Appellants then filed the SAC, alleging one count of attempted monopolization under **[*338]** *Section 2* of the Sherman Act and seeking treble damages under *Section 4* of the Clayton Act. Uber responded with a Motion to Dismiss, which the District Court granted, with prejudice. *Phila. Taxi Ass'n, Inc. v. Uber Techs., Inc., 2017 U.S. Dist. LEXIS 219688, 2017 WL 5515953 (E.D. Pa. Mar. 20, 2017)*. The District Court held that Appellants, in spite of multiple opportunities for amendment, had pled no antitrust injury sufficient for antitrust standing, and were unlikely to cure the lack **[**7]** of standing with any amendments to the SAC. The Court also held that the PTA could not satisfy the requirements for associational standing because the association's members lacked standing to sue on their own.

II. Standard of Review

The District Court had jurisdiction over the *Sherman Act* claim pursuant to *28 U.S.C. §§ 1331*, *1337(a)*, and *15 U.S.C. § 4*. We have jurisdiction under *28 U.S.C. § 1291*. ***HN2***[] We exercise plenary review of the District Court's dismissal of the SAC, *In re Lipitor Antitrust Litig., 868 F.3d 231, 249 (3d Cir. 2017)*, and may affirm the judgment below on any basis that is supported by the record. *Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011)*. We accept as true the factual allegations in the complaint, and draw all reasonable inferences in the plaintiff's favor. *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 91 (3d Cir. 2010)*.

III. Discussion

HN3[] Competition is at the heart of the antitrust laws; it is only anticompetitive conduct, or "a competition-*reducing* aspect or effect of the defendant's behavior," that antitrust laws seek to curtail. *Atl. Richfield Co. v. USA*

Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). "[I]t is inimical to the antitrust laws to award damages for losses stemming from continued competition." *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109-10, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)* (alternations and internal quotation marks omitted). This comports with the principle underlying antitrust laws: to protect *competition*, not *competitors. See* *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*.

If the challenged conduct has an effect on "prices, quantity or quality of goods or services," **[**8]** *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)*, we will find a violation of antitrust laws only when that effect harms the market, and thereby harms the consumer.

Anticompetitive conduct is the hallmark of an antitrust claim. An allegation of anticompetitive conduct is necessary both to: (1) state a claim for attempted monopolization; and (2) aver that a private plaintiff has suffered an antitrust injury. Appellants' SAC, however, is deficient in averring conduct that is, in fact, anticompetitive.

While our caselaw is unresolved regarding which to address first—an antitrust violation or an antitrust injury[3]—we need not resolve that here, because Appellants' claim fails on both counts. We begin by discussing how Appellants' allegations in the SAC fall short of demonstrating anticompetitive conduct, and thus fail to state **[*339]** a claim for attempted monopolization,[4] and then discuss how in the alternative, Appellants fail to allege antitrust injury to have antitrust standing. For both reasons, we affirm the judgment of the District Court dismissing the SAC with prejudice.

A. Attempted Monopolization

HN4[] To prevail on a claim under Sherman Act *Section 2* for attempted monopolization, a plaintiff must prove: "(1) that the defendant **[**9]** has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co., 838 F.3d 421, 433 (3d Cir. 2016)* (quoting *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 317 (3d Cir. 2007))*. Moreover, to survive a motion to dismiss under *Rule 12(b)(6)*, the claim must be "plausible on its face," allowing us to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Liability hinges on whether valid business reasons, as part of the ordinary competitive process, can explain the defendant's actions that resulted in a dangerous probability of achieving monopoly power. *See* *Avaya Inc., RP v. Telecom Labs, Inc., 838 F.3d 354, 393 (3d Cir. 2016)*.

In the SAC, Appellants allege that Uber: (1) flooded the market with non-medallion taxicabs, entered the market illegally without purchasing medallions, operated at a lower cost by failing to comply with statutory requirements and regulations, and lured away drivers from Individual Plaintiffs, which allegedly impaired the competitive market for medallion taxicabs; (2) knew of PPA's regulatory jurisdiction over vehicles for hire, purposefully ignored or avoided the regulations and rulings of the Court of Common Pleas, and thereby excluded rivals from competing in the taxicab market; and (3) is dangerously close **[**10]** to achieving monopoly power with its market share and by operating in an unfair playing field with the "financial ability" to be the only market player and to destroy competitors' business. SAC ¶ 83. Appellants also complain that the new legislation authorizing the TNCs' operation would facilitate the creation of an illegal monopoly.

We find that the SAC fails to plausibly allege any of the three elements of an attempted monopolization claim.

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[3] *Compare, e.g.,* *Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 639-41 (3d Cir. 1996)* (first holding that plaintiff had failed to state a claim for attempted monopolization, and then concluding that plaintiff had also failed to allege an antitrust injury), *with, e.g.,* *Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 274 (3d Cir. 1999)* (assuming the allegation of defendant's anticompetitive motive and then concluding that the plaintiff had adequately alleged an antitrust injury).

[4] Because the District Court found that Appellants had not alleged an antitrust injury to have standing, the Court did not reach the underlying attempted monopolization claim. Appellants nevertheless raised the issue on appeal, and because we may affirm the dismissal of the SAC on any basis that is supported by the record, *Murray, 650 F.3d at 247*, we will address this issue.

1. Anticompetitive Conduct

HN5[] Allegations of purportedly anticompetitive conduct are meritless if those acts would cause no deleterious effect on competition. This is where the SAC falters: Appellants set forth a litany of ways in which Uber's entry into the market has harmed Appellants' business and their investment in medallions; yet none of the allegations demonstrate a harmful effect on competition.

To determine whether conduct is anticompetitive, "courts must look to the monopolist's conduct taken as a whole rather than considering each aspect in isolation." *LePage's Inc. v. 3M, 324 F.3d 141, 162 (3d Cir. 2003)* (en banc).

[*340] Here, Appellants claim that Uber inundated the Philadelphia taxicab market illegally with their non-medallion vehicles. They contend that Uber's entry into the **[**11]** market was predatory because it failed to comply with statutory and regulatory requirements, failed to purchase medallions, failed to pay drivers a minimum wage, and failed to obtain the proper insurance, among other actions. All of these actions, Appellants assert, enabled Uber to operate at a significantly lower cost than the medallion companies, and thereby acquire a stronghold in the Philadelphia taxicab market.

Appellants also maintain that Uber "flooded" the Philadelphia taxicab market by improperly luring drivers away from medallion companies, including Individual Plaintiffs. Appellants cite Uber's practice of sending representatives to 30th Street Station and the Philadelphia International Airport, where medallion taxicab drivers often congregate, to disseminate information about its services and to recruit potential drivers. They argue that Uber promised new drivers financial inducements, such as reimbursements for the cost of gasoline, as an incentive to leave their medallion companies and instead drive for Uber.

Considering the averments regarding Uber's conduct in their totality, Uber's elimination of medallion taxicab competition did not constitute anticompetitive conduct **[**12]** violative of the antitrust laws.

First, inundating the Philadelphia taxicab market with Uber vehicles, even if it served to eliminate competitors, was not *anticompetitive*. Rather, this bolstered competition by offering customers lower prices, more available taxicabs, and a high-tech alternative to the customary method of hailing taxicabs and paying for rides. *HN6*[] It is well established that lower prices, as long as they are not predatory,[5] benefit consumers—"regardless of how those prices are set." *Atl. Richfield, 495 U.S. at 340*. "Cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 592, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Thus, lost business alone cannot be deemed a consequence of "anticompetitive" acts by the defendant. *See* *Atl. Richfield, 495 U.S. at 337*.

Second, Uber's ability to operate at a lower cost is not anticompetitive. *HN8*[] Running a business with greater economic efficiency is to be encouraged, because that often translates to enhanced competition among market players, better products, and lower prices for consumers. Even if Uber were able to cut costs by allegedly violating PPA regulations, Appellants cannot use the antitrust laws to hold Uber liable for these violations absent proof of anticompetitive conduct. Even unlawful conduct is "of no **[**13]** concern to the antitrust laws" unless it produces an anticompetitive effect. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Finally, hiring rivals may be anticompetitive, but only in certain cases. For example, if rival employees were hired in an attempt to exclude competitors from the market for some basis other than efficiency or merit, such as to acquire monopoly power or to merely deny the employees to the rival, this could violate the antitrust **[*341]** laws if injurious to the rival and to competition at large. *W. Penn, 627 F.3d at 109* (citing cases).

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[5] *HN7*[] To allege predatory pricing, a plaintiff must first demonstrate that prices are set below costs, and that the competitor had a dangerous probability of recouping those lost profits after it had driven other competitors out of the market. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. Appellants have not alleged predatory pricing in this case.

However, Appellants acknowledge that the nearly 1200 medallion taxicab drivers that Uber recruited did not remain idle, but rather they drove for Uber. In sum, what Appellants allege does not give rise to an inference of anticompetitive or exclusionary conduct and suggests, if anything, that Uber's ability to attract these drivers was due to its cost efficiency and competitive advantage.

Thus, the SAC is devoid of allegations of truly anticompetitive conduct.

2. Specific Intent to Monopolize

Appellants allege specific intent to monopolize from Uber's knowledge that the PPA maintained regulatory authority over vehicles-for-hire, and its choice to avoid regulation by being a TNC that neither owned vehicles nor employed **[**14]** drivers. They also point to Uber's alleged willful disregard of the rulings of the Court of Common Pleas. Appellants' claim, in essence, is that Uber's knowledge that their operation was illegal reveals a specific intent to monopolize.

HN9[] "[I]n a traditional *§ 2* claim, a plaintiff would have to point to specific, egregious conduct that evinced a predatory motivation and a specific intent to monopolize." *Avaya, 838 F.3d at 406* (citing *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*.

Some courts have inferred specific intent from anticompetitive or exclusionary conduct, *Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1199 (3d Cir. 1995)*, for instance, when business conduct is "not related to any apparent efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 n.39, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)* (quoting R. Bork, *The Antitrust Paradox* 157 (1978)) (alterations omitted); *see also* 4 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 805d, (4th ed. 2017) (discussing how some courts "would find for the plaintiff only if the defendant's acts were not motivated by 'reasonable' or 'legitimate' business purposes").

While Uber's alleged conduct might have formed the basis of a regulatory violation, its knowledge of existing regulations alone cannot reasonably be said to demonstrate specific intent to monopolize. Further, Uber's choice to distinguish itself from other vehicles-for-hire, eschewing medallions in **[**15]** favor of independent drivers who operate their own cars at will, can instead be reasonably viewed as "predominantly motivated by legitimate business aims." *Times Picayune Publ'g Co. v. United States, 345 U.S. 594, 627, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*. Appellants have not averred any other motive. The allegations suggest that these business choices allowed Uber to operate more efficiently, and to offer a service that consumers find attractive, thus enabling it to acquire a share of the Philadelphia taxicab market.

Thus, Uber's alleged competitive strategy of creating a vehicle-for-hire business model, presumably to acquire customers, does not reflect specific intent to monopolize. Accordingly, Appellants have failed to allege specific intent on Uber's part.

3. Dangerous Probability of Achieving Monopoly Power

HN10[] We held in *Broadcom Corp. v. Qualcomm Inc*. that because the dangerous probability standard is a complex and "fact-intensive" inquiry, courts "typically should not resolve this question at the pleading stage 'unless it is clear on the face of the complaint that the "dangerous probability" standard cannot be met as a **[*342]** matter of law.'" *501 F.3d at 318-19* (quoting *Brader v. Allegheny Gen. Hosp., 64 F.3d 869, 877 (3d Cir.1995))*.

We may consider factors such as "significant market share coupled with anticompetitive practices, barriers to entry, the strength of **[**16]** competition, the probable development of the industry, and the elasticity of consumer demand" to determine whether dangerous probability was alleged in the pleadings. *Id.* Entry barriers include "regulatory requirements, high capital costs, or technological obstacles[] that prevent new competition from entering a market." *Id. at 307* (citations omitted). "No single factor is dispositive." *Id. at 318*. Appellants argue that Uber has a dangerous probability of achieving monopoly power because it has pushed numerous competitors out of the market. As discussed, however, the SAC fails to allege anticompetitive practices by Uber. Nor does the SAC mention Uber's market share; it merely suggests that Uber and medallion taxicabs had similar numbers of vehicles operating in Philadelphia as of October 2016. This allegation falls short of indicating Uber's market share in the context of *all* the competitors in the Philadelphia taxicab market, such as other TNCs.

Similarly, the SAC makes no allegation of current barriers to entry or weak competition from other market participants. Appellants make the bold allegation that Uber holds the *power* to raise barriers to entry in the market, without any factual support. In fact, **[**17]** the SAC alleges that Uber was readily able to enter the Philadelphia market. "[E]asy entry—particularly historical evidence of entry—is even more significant in the attempt case than in monopolization cases generally." Areeda & Hovenkamp, ¶ 807a.[6] Surely other competitors, such as Lyft, are able to enter without difficulty, as well.

Nor does the SAC describe any potentially harmful industry developments. It only vaguely claims that Uber may be able to drive out competition and raise entry barriers. Appellants assert in the SAC that once Uber becomes the dominant competitor, it *would be able to* charge higher prices, and consumers who do not own smartphones would be deprived of the ability to hail taxis on the street. Absent any allegations of a dangerous probability of achieving monopoly power, this argument fails. And, as counsel for Uber stated at oral argument, if Uber raised its prices, this would encourage other rivals to enter the market and charge lower prices, battling Uber through price competition.

HN11[] Because the elements of attempted monopolization are often interdependent, proof of one element may provide "permissible inferences" of other elements. *Broadcom, 501 F.3d at 318* (quoting *Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 112 (3d Cir.1992))*. Even so, none **[**18]** of the other elements of attempted monopolization allow us to infer a dangerous probability that Uber will achieve monopoly power. Acknowledging *Broadcom*'s reticence to resolve the dangerous probability question at the pleadings stage, we nevertheless find that the SAC does not allege any of the relevant factors to prove that Uber had a dangerous probability of achieving monopoly power.

[*343] In sum, Appellants have failed to set forth a plausible claim of attempted monopolization under *Section 2* of the Sherman Act, as a matter of law.

III. Antitrust Standing

Alternatively, Appellants' antitrust claim fails for lack of ***HN12***[] antitrust standing, which is a threshold requirement in any antitrust case. Rooted in prudential principles, antitrust standing is distinct from Article III standing, which is rooted in the Constitution. *Ethypharm S.A. Fr. v. Abbott Labs., 707 F.3d 223, 232 (3d Cir. 2013)*.[7] While "[h]arm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact," courts must also consider "whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n.31, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*; *see also* Areeda & Hovenkamp, ¶ 335.

Of the requirements for antitrust standing,[8] antitrust injury is "a necessary but insufficient condition," and is the **[**19]** only requirement in dispute here. *Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997)*.

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[6] Areeda and Hovenkamp explain that in an attempt case, when "the defendant is not yet a monopolist," market prices are more competitive. ¶ 807g. On the other hand, "[i]n a monopolization case the defendant is already a dominant firm and the market already presumably exhibits monopoly prices that have not been effectively disciplined by new entry." *Id.* Thus, easy entry into the market is indicative that the market lacks barriers to entry that may otherwise protect a dominant firm's monopoly power. *Id.*

[7] Because antitrust standing is prudential, we are not bound to address it first, because it "does not affect the subject matter jurisdiction of the court, as Article III standing does." *Ethypharm, 707 F.3d at 232*.

[8] ***HN13***[] The test for antitrust standing is: "(1) the causal connection between the antitrust violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the antitrust laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence

HN14[] In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, the Supreme Court rejected the notion that antitrust injury could be alleged by a private plaintiff averring that it would have fared better without the defendant's alleged conduct. *429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701*. Rather, the plaintiff must prove the existence of an antitrust injury, which is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id. at 489*; *see also* *Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours and Co., 826 F.2d 1235, 1240 (3d Cir. 1987)* (explaining that to establish antitrust injury, "plaintiffs must prove more than harm causally linked to an illegal presence in the market"). The injury must "reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *W. Penn, 627 F.3d at 101* (quoting *Brunswick, 429 U.S. at 489*).

Compensating plaintiffs injured by the effects of truly anticompetitive conduct serves the purpose of antitrust laws, namely, to foster competition. Thus, the antitrust injury requirement ensures that damages are only awarded for losses that "correspond[] to the rationale for finding a violation of the antitrust laws in the first place." *Atl. Richfield, 495 U.S. at 342*; Areeda & Hovenkamp, ¶ 337a. That is, there must be a causal link between the alleged **[**20]** injury and an antitrust violation's anticompetitive effects.

Appellants decry Uber's entry into Philadelphia as a campaign to inflict **[*344]** economic harm and to cause Appellants to lose their market share. They argue that all vehicles-for-hire legally operating in Philadelphia, and the riding public, have been harmed by Uber's allegedly illegal presence in Philadelphia between October of 2014 and October of 2016, when TNCs were officially permitted to operate. Appellants allege that they experienced financial harm and a reduced market share through fewer drivers, medallion cabs sitting idle, a decline in ridership, and loss of medallion value. The effect of the decrease in earnings, Appellants argue, is that taxicab companies are nearing default on their medallions and are close to being driven out of business.

Appellants allege their own injury, namely, financial hardship. Tellingly, they fail to aver an antitrust injury, such as a negative impact on consumers or to competition in general, let alone any link between this impact and the harms Appellants have suffered.[9] Perhaps this is because Appellants cannot do so. According to Appellants' own pleadings, Uber's entry into the Philadelphia **[**21]** market, regardless of its legality, *increased* the number of vehicles-for-hire available to consumers and product differentiation in the market, thereby *increasing* competition.

The facts of *Brunswick* illustrate this point. There, a bowling equipment manufacturer acquired several failing bowling alleys that had defaulted on their equipment payments. *429 U.S. at 479-80*. Three active bowling alleys brought an antitrust claim against the manufacturer, arguing that if the alleys had been allowed to fail, former patrons would have frequented plaintiffs' alleys, increasing plaintiffs' profits and market share. *Id. at 481*.

HN15[] The Supreme Court held that even if the acquisition was unlawful because it provided the manufacturer with monopoly power, the plaintiffs failed to prove that there were anticompetitive effects of that acquisition in order to establish an antitrust injury. *Id. at 487-88*. Plaintiffs sought to recover lost profits from bolstered competition—the manufacturer's keeping the defaulting alleys in business. *Id.* The presence of *more* bowling alleys resulted in *more* competition, and thus the Supreme Court held that plaintiffs had not sustained an antitrust injury. *Id. at 489*.[10]

Similarly here, Appellants urge the **[**22]** application of antitrust laws for the express *opposite* purpose of antitrust laws: to compensate for their loss of profits due to increased competition from Uber. However, harm to Appellants'

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of more direct victims of the alleged antitrust violations; and (5) the potential for duplicative recovery or complex apportionment of damages." *Ethypharm, 707 F.3d at 232-33* (quoting *In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1165-66 (3d Cir. 1993))*.

[9] Appellants allege the potential detriment to consumers in the event that medallion taxicabs are driven out of the market, entirely. *See, e.g.*, SAC ¶ 62. Yet they fail to aver any facts suggesting that this is an imminent, realistic possibility.

[10] *See also* Areeda & Hovenkamp, ¶ 337 *HN16*[] ("At its most fundamental level, the antitrust injury requirement precludes any recovery for losses resulting from competition, even though [in *Brunswick*] such competition was actually caused by conduct violating the antitrust laws.").

business does not equal harm to competition. ***HN17***[] "Conduct that merely harms competitors, . . . while not harming the competitive process itself, is not anticompetitive." *Broadcom, 501 F.3d at 308*. Were we to award Appellants antitrust damages to compensate for their financial injuries, we would condemn vigorous competition, rather than encourage it. *See Travelers Ins. Co. v. Blue Cross of W. Pa., 481 F.2d 80, 84 (3d Cir. 1973)*.

Without demonstrating a harmful effect on price, such as predatory or monopoly pricing, Appellants instead argue that **[*345]** Uber's ability to operate at a lower cost caused Appellants economic harm and caused Appellants to lose their market share. But Appellants never argue that the lower cost—evidence of *increased* competition—failed to result in lower prices for consumers. ***HN18***[] "A plaintiff who wants . . . less competition or higher prices, that would injure consumers, does not suffer antitrust injury." *U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003)*.

Nor do Appellants aver a negative effect on the availability of taxicab services. Appellants themselves admit that Uber's 1700 vehicles took over 700,000 riders on more than one million **[**23]** trips in its first two years in Philadelphia, while the number of medallion cabs allegedly decreased by at least 15 percent, or roughly 240 vehicles, from its peak of 1610. Thus, the SAC alleges an increase in the availability of vehicles-for-hire for Philadelphia passengers.

Appellants also insist that Uber's alleged illegal presence in Philadelphia caused an antitrust violation.[11] They attempt to circumvent the antitrust injury requirement by focusing on how Uber's purportedly illegal operation enabled it to cut costs and increase its market share. But again, ***HN19***[] the Supreme Court has squarely rejected illegal conduct as a basis for antitrust injury. A competitor's illegal presence in a market is not a *per se* antitrust violation, and any resulting injury is alone insufficient for a private plaintiff to state an antitrust injury. *Atl. Richfield, 495 U.S. at 334* (quoting *Brunswick, 429 U.S. at 489*).

Finally, Appellants do not cite any case in support of the contention that Uber's violation of state regulations, even if that gave Uber a competitive advantage, renders its operation in violation of antitrust laws. Even if we were to find Uber's operation in Philadelphia unlawful in its first two years, we would do so under PPA regulations, and not **[**24]** under antitrust laws. Ultimately, Uber's presence in the market, as alleged, created *more* competition for medallion taxicabs, not *less*, and thus Uber's so-called "predation"—operating without medallions or certificates of public convenience—does not give rise to an antitrust injury.

In sum, we affirm the dismissal of the SAC for the additional reason that it fails to assert an antitrust injury.

IV. Associational Standing

HN20[] To have associational standing, the PTA must meet three requirements: "(1) the organization's members must have standing to sue on their own; (2) the interests the organization seeks to protect are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires individual participation by its members." *Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 279 (3d Cir. 2014)* (quoting *Pa. Prison Soc. v. Cortes, 508 F.3d 156, 163 n.10 (3d Cir. 2007))*.

The District Court concluded that the PTA failed the first requirement of associational standing that the Supreme Court articulated in *Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*, because the Individual Plaintiffs lack standing to sue on their own in light of their failure to aver an antitrust injury.

However, as we discussed in Section III, *supra*, ***HN21***[] Article III standing is a constitutional requirement, separate from antitrust standing, and Article III standing could be satisfied if a plaintiff **[**25]** presents a "case or controversy." *United Food & Commercial **[*346]** Workers Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 554-55, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996)*.

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[11] "The antitrust injury in this case is the anticompetitive effect made possible by the violation of the laws and regulations in place at the time." SAC ¶ 75.

Here, the Individual Plaintiffs do have Article III standing by virtue of their alleged competitive injury in the taxicab market, such that the PTA satisfies the first requirement, and could plausibly meet the other two requirements, for associational standing. However, even if the PTA has *associational* standing, they do not have *antitrust* standing in order to maintain an antitrust cause of action.

V. Conclusion

Appellants may have been better off, financially, if Uber had not entered the Philadelphia taxicab market. However, Appellants have no right to exclude competitors from the taxicab market, even if those new entrants failed to obtain medallions or certificates of public convenience. *See Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 597 (7th Cir. 2016) (Posner, J.), cert. denied sub nom. Ill. Transp. Trade Ass'n v. City of Chicago, Ill., 137 S. Ct. 1829, 197 L. Ed. 2d 761 (2017)*.

If medallion taxicabs could prevent TNCs from entering the Philadelphia market, and if incumbents could prevent new entrants or new technologies from competing because they fear loss of profits, then "economic progress might grind to a halt." *Id. at 596-97*. "Instead of taxis we might have horse and buggies; instead of the telephone, the telegraph; instead of computers, slide rules." *Id. at 597*.

Absent any allegations of anticompetitive conduct, Appellants **[**26]** fail to allege any of the elements for a claim for attempted monopolization under *Section 2* of the Sherman Act and fail to allege antitrust standing.

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

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Cargill, Inc. v. WDS, Inc.

United States District Court for the Western District of North Carolina, Charlotte Division

March 28, 2018, Decided; March 28, 2018, Filed

DOCKET NO. 3:16-cv-00848-FDW-DSC

Reporter
2018 U.S. Dist. LEXIS 51854 *; 2018 WL 1525352

CARGILL, INC., and CARGILL MEAT SOLUTIONS, CORP., Plaintiffs, vs. WDS, INC., JENNIFER MAIER, and BRIAN EWERT, Defendants.

Prior History: *Cargill, Inc. v. WDS, Inc., 2017 U.S. Dist. LEXIS 217033 (W.D.N.C., Oct. 2, 2017)*

Core Terms

Plaintiffs', costs, attorney's fees, purchase order, matter of law, unfair, Supplier, damages, new trial, margins, Defendants', misrepresentation, conversion, courts, jury instructions, deceptive trade practices, prejudgment interest, conspiracy, employees, products, parties, contracts, taxable costs, concealment, overcharges, invoices, subsequent contract, deceptive, ownership, proximate

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Judges: Frank D. Whitney, Chief United States District Judge.

Opinion by: Frank D. Whitney

Opinion

ORDER

THIS MATTER is before the Court upon the filing of several post-trial motions by Plaintiffs and Defendants and one pending pre-trial motion filed by Plaintiffs. Before trial, Plaintiffs sought default judgment against all Defendants as sanction for abusive litigation practices. (Doc. No. 187). After trial, Plaintiffs filed a Motion for Award of Prejudgment Interest (Doc. No. 320), a Motion for Award of Attorneys' Fees and Costs (Doc. No. 325), and a Memorandum of Law on the *Unfair and Deceptive Trade Practice Act* (Doc. No. 329).[1] Defendants WDS, Inc. ("WDS") and Brian Ewert ("Ewert") move under *Rule 50(b)* and *Rule 59 of the Federal Rules of Civil Procedure* for judgment as a matter of law in its favor or in the alternative a new trial. (Doc. No. 322). Defendant Jennifer Maier ("Maier") also filed a motion seeking judgment as a matter of law in her favor under *Rule 50(b)* or in the alternative, a new trial or amendment to the judgment under *Rule 59*. (Doc. No. 323). All motions and matters are now ripe for resolution. The Court addresses each motion but not necessarily in the order filed.

I. BACKGROUND

In the interests of judicial economy, the **[*3]** Court provides a general overview of the case here but summarizes the specific background relevant to the issues raised by the parties' motions in the analysis. Plaintiff Cargill, Inc. ("Cargill") and its wholly owned subsidiary, Cargill Meat Solutions, Corp. ("CMS"), had contractual relations with Defendant WDS. Under these contractual arrangements, Cargill, CMS, and other entities controlled by Cargill ("Cargill Affiliates") purchased products and related services from WDS, as a supplier that provides warehousing and distribution services. WDS was founded and managed by Defendant Maier, as majority owner (51%) and President, and Defendant Ewert, minority owner (49%) and at times, Vice President of Sales. As alleged, this litigation stems from WDS charging prices in the purchase orders generated throughout the course of the parties' relationship that exceeded the margins provided for in the Select Supplier Agreements ("SSAs") executed by Cargill and WDS in 2009, 2012, and 2015 and the actions taken by WDS, Ewert, and Maier to misrepresent and conceal the margins. After a seven day trial, the jury found all Defendants liable for conversion, fraud, and conspiracy to defraud Plaintiffs **[*4]** or engage in commercial bribery that damaged Plaintiffs. The jury found Defendant Ewert liable under the *Racketeer Influenced and Corrupt Organizations Act ("RICO") § 1962(a)* and *(c)* and both Defendants Ewert and Maier liable under *RICO § 1962(d)*. The jury found Defendant WDS liable for breach of contract. The jury also found all Defendants misrepresented to Plaintiffs the margins charged on the products WDS supplied to Plaintiffs; falsified business records, including invoices and alleged agreements, in order to further their misrepresentation to Plaintiffs; and engaged in commercial bribery. Defendant Ewert also was found by the jury to have engaged in other misrepresentations causing Plaintiffs to continue the business relationship with WDS. The jury concluded the conduct it found was in or affecting commerce and the proximate cause of Plaintiffs' injury as required by the Unfair and Deceptive Trade Practices Act. On each of the aforementioned claims, the jury concluded Plaintiffs were entitled to recover $35,177,269.

II. ANALYSIS

A. Defendants' Motions under *Rule 50(b)* and *Rule 59*

Defendants WDS and Ewert renew their motion under *Rule 50 of the Federal Rules of Civil Procedure* and move for judgment as a matter of law on several claims and in the alternative move for a **[*5]** new trial under *Rule 59(a)*. Defendant Maier also moves under *Rule 50* for judgment as a matter of law and alternatively moves for a new trial under *Rule 59*. Accordingly, the Court considers each of these matters under *Rule 50(b)* and *Rule 59(a)*, where applicable.

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[1] Defendant Jennifer Maier filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code, but the automatic stay has been terminated and modified to allow this case to "proceed in all respects to completion." (See Doc. No. 346-1). Therefore, the Court can proceed on all motions and matters against all Defendants. (See Doc. Nos. 346, 348).

1. Legal Standard

a. *Federal Rule of Civil Procedure 50(b)*

A motion under *Rule 50(b)* "assesses whether the claim should succeed or fail because the evidence developed at trial was insufficient as a matter of law to sustain the claim." *Belk, Inc. v. Meyer Corp., 679 F.3d 146, 155 (4th Cir. 2012)*. The moving party must have moved under *Rule 50(a)* for relief on similar grounds to move after trial under *Rule 50(b)*. See *Fed. R. Civ. P. 50*; *Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008)*. Failure to move under *Rule 50(a)* and appraise the court of the alleged insufficiency of the suit results in waiver of that unraised insufficiency. See *Varghese v. Honeywell Int'l, Inc., 424 F.3d 411, 423 (4th Cir. 2005)*; *Price v. City of Charlotte, N.C., 93 F.3d 1241, 1248-49 (4th Cir. 1996)*; *Bridgetree, Inc. v. Red F. Marketing LLC, No. 3:10-cv-00228-FDW-DSC, 2013 U.S. Dist. LEXIS 15372, 2013 WL 443698, at *17 (W.D.N.C. Feb. 5, 2013)*.

When considering a *Rule 50* motion, the court cannot reweigh the evidence or consider the credibility of the witness and must view "all the evidence in the light most favorable to the prevailing party and draw all reasonable inferences in [the prevailing party's] favor." *Konkel v. Bob Evans Farms, Inc., 165 F.3d 275, 279 (4th Cir. 1999)*. A jury's verdict will withstand a motion under *Rule 50* unless the court "determines that the only conclusion a reasonable trier of fact could draw from the evidence is in favor of the moving party." *Tools USA and Equip. Co. v. Champ Frame Straightening Equip., Inc., 87 F.3d 654, 656-57 (4th Cir. 1996)* (quoting *Winant v. Bostic, 5 F.3d 767, 774 (4th Cir. 1993)*); see also *Konkel, 165 F.3d at 279*. When **[*6]** ruling on a motion under *Rule 50(b)*, the court may allow judgment on the verdict, order a new trial, or direct entry of judgment as a matter of law. *Fed. R. Civ. P. 50(b)*.

b. *Federal Rule of Civil Procedure 59(a)*

"The grant or denial of a motion for new trial is entrusted to the sound discretion of the district court and will be reversed on appeal only upon a showing of abuse of discretion." *Cline v. Wal-Mart Stores, 144 F.3d 294, 305 (4th Cir. 1998)* (citing *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 435, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)*). A court may grant a new trial on some or all of the issues "for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]" *Fed. R. Civ. P. 59(a)(1)(A)*. Acceptable reasons include: "(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Cline, 144 F.3d at 301* (quoting *Atlas Food Sys. & Servs., Inc. v. Crain Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir. 1996)*). When making this determination, the court may weigh the evidence and consider the credibility of witnesses. *Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1433 (4th Cir. 1985)* (citing *Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891-92 (4th Cir. 1980)*).

2. Select Supplier Agreements

a. Enforceability

Defendants WDS and Ewert maintain that the SSAs are not enforceable contracts. (Doc. No. 322-1 at 8). They contend the SSAs are contracts for the sale of goods between merchants, and the SSAs do not contain a quantity term as required under **[*7]** the Uniform Commercial Code. (Doc. No. 322-1 at 8). Although the *Uniform Commercial Code section 2-201(1)*, as adopted by New York, provides that a writing for "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense" unless a quantity term is included, *N.Y. U.C.C. § 2-201(1)* (McKinney), the SSAs are not contracts for the sale of goods. Goods are "all things . . . which are movable at the time of identification to the contract for sale . . ." *N.Y. U.C.C. § 2-105(1)* (McKinney). Meanwhile, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price[.]" *N.Y. U.C.C. § 2-106(1)* (McKinney). In the SSAs, Cargill designates WDS as a "Select Supplier" and Cargill and WDS make mutual promises and covenants to govern their relationship. The SSAs contemplate a relationship between Cargill, Cargill Affiliates, and WDS involving the sale of goods to be facilitated by the issuance of purchase orders, but the SSAs contain no promise to pass title for anything. Accordingly, the Uniform Commercial Code does not govern the enforceability of the contract, and the lack of a quantity term does not render the SSAs unenforceable.

Citing the Alabama Supreme Court decision in *Mobil Oil Corp. v. Schlumberger, 598 So. 2d. 1341 (Ala. 1992)*, Defendants WDS and Ewert also argue that the **[*8]** SSAs standing alone are not enforceable. (Doc. No. 322-1 at 8). However, Mobil[2] does not hold that master agreements are never enforceable contracts. The Supreme Court of Alabama in Mobile stated:

> A master service agreement is not binding alone. A master service agreement provides the framework for subsequent contracts that result from oral or written work orders. . . . "Such a contract 'merely sets out the rules of the game in the event the parties decide to play ball.'"

Id. at 1345 (internal citations omitted). Thus, the Court in Mobil considers master agreements unenforceable until subsequent contracts are made. Although breaching a master agreement only providing the framework for subsequent contracts and the rules for those subsequent contracts may not be possible until a subsequent contract is entered, the Court need not consider that here, because it is undisputed that subsequent contracts were entered. See generally *Crown Battery Mfg. Co. v. Club Car, Inc., No. 3:12CV2158, 2014 U.S. Dist. LEXIS 18907, 2014 WL 587142, at *5 (N.D. Ohio Feb. 14, 2014)* (finding enforceable a master supply agreement that "establish[ed] the terms for future purchase orders of batteries"). As supported by the SSAs' and Purchase Orders' language and evidence of Plaintiffs and WDS's expectations **[*9]** and course of performance, the SSAs set forth the "framework for subsequent contracts" and the rules, through promises and covenants, which would govern those subsequent contracts. The Purchase Orders are the subsequent contracts for the actual sale of goods. Therefore, the Court cannot conclude that the SSAs are not enforceable contracts as a matter of law.

b. Superseding Contract

Defendants WDS, Ewert, and Maier submit that they are entitled to judgment as a matter of law on all claims by CMS because the Purchase Orders are unambiguous and supersede any pre-existing agreements, including the SSAs. (Doc. No. 322-1 at 4-6; Doc. No. 323-1 at 18-21). "[W]here the parties have clearly expressed or manifested their intention that a subsequent agreement supersede or substitute for an old agreement, the subsequent agreement extinguishes the old one and the remedy for any breach thereof is to sue on the superseding agreement." *Northville Indus. Corp. v. Fort Neck Oil Terminals Corp., 100 A.D.2d 865, 474 N.Y.S.2d 122, 125 (N.Y. App. Div. 1984)* (citations omitted). If intent "is determinable by [the] written agreements, the question is one of law[.]" *Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 298 N.E.2d 96, 100, 344 N.Y.S.2d 925 (N.Y. 1973)* (citations omitted). However, if the intent "must be determined by disputed evidence or inferences outside the written words of the instrument[,]" it is **[*10]** a "question of fact[.]" Id. (citations omitted). In this case, the Purchase Orders are not clear and unequivocal. There is no express statement that the Purchase Orders supersede the SSAs. Rather, the Purchase Orders contain language that its terms and conditions shall exclusively govern and any terms WDS includes in their standard sale acknowledgment or other form which alter or are inconsistent with CMS's terms and conditions are of no legal force or effect. The terms and conditions referenced then indicate that they supersede prior agreements between WDS and CMS with respect to the subject matter of the Order. From the contract language and the referenced terms and conditions, the Court cannot conclude as a matter of law that the parties expressed and intended the Purchase Orders to supersede the SSAs. As a result, the Court properly submitted the matter to the jury to determine the parties' intent based on the disputed evidence and to construe the ambiguous provisions. In addition to the language in the SSAs and the Purchase Orders, testimony

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[2] This case does not involve the application of Alabama law. Therefore, this Court is not bound by any holding in *Mobil.*

concerning the parties' dealings leading up the execution of the contracts, the purpose and object of the contracts and their provisions, **[*11]** and their course of performance during the parties' contractual relationship, including Ewert's direction to charge prices in accordance with the SSA after confrontation by Plaintiffs and Maier's falsification of the invoices to make the margins match the SSA, provided substantial evidence for the jury's conclusion that the Purchase Orders did not supersede the SSAs.[3]

c. Construction

i. Affiliate Participation

Defendants WDS, Ewert, and Maier claim that CMS's purchases are not governed by the SSAs because CMS did not opt into the SSAs. (Doc. No. 322-1 at 9; Doc. No. 323-1 at 13-15). In other words, Plaintiffs failed to put forth evidence that CMS met the condition precedents for affiliate participation in the SSAs. The SSAs provided that entities controlled by Cargill, Cargill Affiliates, who met WDS's customer credit requirements, could participate in and receive the benefits of the SSA by among other things issuing a purchase order in accordance with the SSA. The contract language does not provide how such terms are applied. Therefore, this ambiguity warranted resolution by the jury. As presented at trial, CMS issued Purchase Orders to WDS, and WDS accepted **[*12]** and fulfilled them. Evidence of the parties' purpose for entering the SSAs, including the notice to suppliers regarding select supplier agreements that accompanied the SSAs, and evidence of other acts, like representing that WDS was not charging more than ten percent and correcting margins in CMS purchases to conform to the SSAs' margins upon confrontation, also support the jury's finding in favor of CMS. Substantial evidence buttresses a conclusion that CMS was a party to the SSAs in accordance with the SSAs provisions.

ii. Referencing the SSAs

Defendant Maier asserts Plaintiffs are barred from recovery because Plaintiffs did not reference the SSAs in the Purchase Orders. (Doc. No. 323-1 at 18). However, this argument is waived; Maier did not move for judgment as a matter of law under *Rule 50(a)* on this or related grounds. It also plainly fails. The plain language cited by Maier does not create a duty, material or otherwise, requiring Plaintiffs to reference the SSAs in the Purchase Orders. (See Doc. No. 323-1 at 18). The clause following the language cited by Maier, which is omitted from her brief, expressly states that the SSAs will govern even if the SSAs are not referenced in the Purchase **[*13]** Orders. (See Doc. No. 347 at 13-14).

iii. Losses for Cargill's Negligent Act or Omission

Maier also construes the SSAs to bar recovery in this action because the losses arose out of Plaintiffs' negligence. (Doc. No. 347 at 21-22). In addition to being a waived argument, this interpretation ignores the plain language of the provision, the defined terms, and the context of the provision. Section 12 of the SSAs provide that except as limited in Section 13, WDS agrees to indemnify and hold harmless Cargill from all "Losses" as defined therein. Section 13 reflects that WDS will not be liable for Losses arising out of Cargill's negligent act or omission. From the language

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[3] See, e.g., *Cromwell Towers Redevelopment Co. v. City of Yonkers, 41 N.Y.2d 1, 359 N.E.2d 333, 337, 390 N.Y.S.2d 822 (N.Y. 1976)* ("In construing the contract . . ., due consideration must be given to the purpose of the parties in making the contract[.]"); *Roberts v. Consolidated Rail Corp., 893 F.2d 21, 24 (2d Cir. 1989)* ("[C]ourts look to the acts and circumstances surrounding execution of the ambiguous term to ascertain the parties' intent."); *Sea Lion Oil Trading & Transp., Inc. v. Statoil Mktg. & Trading (US) Inc., 728 F. Supp. 2d 531, 535 (S.D.N.Y. 2010)* ("[W]hen considering a sale of goods contract under the U.C.C., the determination of a contract's meaning is not made in a vacuum. Rather, it is done *in conjunction with* evidence about course of dealing, usage of trade, and the parties' course of performance so long as that extrinsic evidence does not contradict the contract's language.").

of these provisions and considering the contract as whole, the Court cannot conclude as a matter of law that the parties intended to contractually prohibit the liability of third parties, like Maier, for her torts against Plaintiffs. Even if unambiguously expressed, a contractual provision prohibiting liability for intentional torts, as advanced by Maier, would be unenforceable as contrary to public policy. *Kalisch-Jarcho, Inc. v. City of New York, 58 N.Y.2d 377, 448 N.E.2d 413, 416-17, 461 N.Y.S.2d 746 (N.Y. 1983)*.

iv. All Products

Defendant Maier also argues the SSAs do not cover the sale of all products by WDS. (Doc. No. 323-1 at 16-18). As Maier did not move under **[*14]** *Rule 50(a)* for judgment in her favor on these grounds, this contention is waived. Nevertheless, the language in the SSAs and the trial record support the jury's determination in favor of Plaintiffs. The SSAs, relevant to the claims, from 2012 and 2015 provide that the Supplier will apply a fixed margin to determine pricing on all products in accordance with a schedule that set margins for specific named suppliers, all other identified trilateral spend, and all other identified non-trilateral spend. As the language is ambiguous, the Court properly delegated to the jury the responsibility of construction. Plaintiffs put forth testimony and evidence from those involved in the negotiation and oversight over the SSAs, testimony and evidence of the purpose of the SSAs, and the parties' actions while operating under the contract supporting a construction in favor of Plaintiffs. Hence, from this evidence and the explicit contractual language of all products, a reasonable jury could find in favor of Plaintiffs.

d. Conclusion

For all the foregoing reasons, the Court concludes Defendants are not entitled to judgment as a matter of law in their favor and finds no grounds justifying a new trial.

3. Economic [*15] Loss Rule

Defendants WDS, Ewert, and Maier[4] aver the Court erred by submitting Plaintiffs' tort claims to the jury when all these claims are premised on WDS's alleged overcharging for products covered by the SSAs. (Doc. No. 322-1 at 10; Doc. No. 323-1 at 3-4). "Ordinarily, a breach of contract does not give rise to a tort action by the promisee against the promisor." *N.C. State Ports Authority v. Lloyd A. Fry Roofing, Co., 294 N.C. 73, 240 S.E.2d 345, 350 (N.C. 1978)* (citations omitted). However, there are situations when a promisor will be liable for a tort, such as when "[t]he injury so caused was a wilful injury to or a conversion of the property of the promisee, which was the subject of the contract, by the promisor." *Ports Authority, 240 S.E.2d at 350-51*; see also *Beaufort Builders, Inc. v. White Plains Church Ministries, Inc., 246 N.C. App. 27, 783 S.E.2d 35, 40 (N.C. Ct. App. 2016)*. Hence, North Carolina appellate courts have limited the application of this bar, commonly known as the economic loss rule, to the barring of negligence claims. *Bradley Woodcraft, Inc. v. Bodden, 795 S.E.2d 253, 258 (N.C. Ct. App. 2016)*. Appellate courts have held that claims of fraud are not barred by this rule. *Bradley Woodcraft, 795 S.E.2d at 259* (citing *Jones v. Harrelson & Smith Contr'rs, LLC, 194 N.C. App. 203, 670 S.E.2d 242, 250 (N.C. Ct. App. 2008))*. Thus, following the "the final authority on state law" for the tort claims brought in this diversity suit, *Fidelity Union Trust Co. v. Field, 311 U.S. 169, 177-78, 61 S. Ct. 176, 85 L. Ed. 109 (1940)*, the Court concludes and reaffirms its determination that Plaintiffs' tort claims are not barred by the economic loss rule. All of Plaintiffs' tort claims fall into the category recognized as actionable **[*16]** torts in Ports Authority despite a related existing contract. Plaintiffs presented circumstantial and direct evidence of Defendants' conduct, through testimony and exhibits, showing or tending to

[4] Defendant Maier for the first time argues that New York's economic loss doctrine applies. (Doc. No. 323-1 at 3). This argument has been waived by failing to preserve it in her *Fed. R. Civ. P. 50(a)* motion. Maier did not raise it in her *Rule 50(a)* motion or by joining in WDS and Ewert's *Rule 50(a)* motion. Liberally considering the record, the Court has assumed for purposes of this Order that Maier joined in WDS and Ewert's *Rule 50(a)* motion.

show intentional false representations and payments of goods and services to pivotal Cargill employees and others in exchange for favorable treatment, including concealment of fraud and breach. On this evidence and other evidence presented at trial, the Court did not err in submitting instructions to the jury on torts.[5]

4. Fraud

Defendants WDS and Ewert argue that there was insufficient evidence to support a fraud claim against them.[6] (Doc. No. 322-1 at 11). They appear to argue that Plaintiffs' knowledge of the margins provided for in the SSAs and the costs provided for in its contracts with trilateral product suppliers preclude reasonable reliance. (Doc. No. 322-1 at 11). Meanwhile, Defendant Maier[7] argues that the only evidence supporting her fraud claim is her admitted misrepresentation of invoices sent to Plaintiffs in March 2016, which she contends was not relied on by Plaintiffs. (Doc. No. 323-1 at 7).

Defendants' narrow view of a claim for fraud and the evidence presented supporting a claim **[*17]** for fraud is not supported by the law or by the evidence. "Fraud has no all-embracing definition . . . [b]ecause of the multifarious means by which human ingenuity is able to devise means to gain advantages by false suggestions and concealment of the truth[.]" *Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202, 205 (N.C. 1951)*. However, the elements of fraud are generally recognized as "(1) [f]alse representation or concealment of a [past or existing] material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Hardin v. KCS Int'l, Inc., 199 N.C. App. 687, 682 S.E.2d 726, 733 (N.C. Ct. App. 2009)* (citations omitted). Thus, "fraud may be based on an 'affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose.'" Id. (quoting *Harton v. Harton, 81 N.C. App. 295, 344 S.E.2d 117, 119 (N.C. Ct. App. 1986))*. A duty to disclose arises when "a party has taken affirmative steps to conceal material facts from the other[.]" Id. (quoting *Sidden v. Mailman, 137 N.C. App. 669, 529 S.E.2d 266, 270-71 (N.C. Ct. App. 2000))*.

Here, Plaintiffs presented evidence showing the origination of the price figures used in the purchase orders, including testimony that Ewert and Maier gave to Kerry Uptergrove, the product manager for WDS, the prices, which were then provided to employees of Plaintiffs. The resulting purchase **[*18]** orders charged margins on goods exceeding the margins set in the SSAs. Neither WDS, Ewert, nor Maier informed either Plaintiff of the actual margins charged to Plaintiffs and, at times, misrepresented the margin. Kevin Walker, Plaintiff's expert, testified that the sum of net overcharges during the terms of the 2012 and 2015 SSA equal $35,177,269. Ewert directed others to fabricate documents with false information that he or others then provided to employee of Plaintiffs as legitimate. Ewert instructed WDS employees to withhold or misrepresent information about pricing, capabilities of WDS's software, and WDS's relationship to other vendors. Neither WDS, Ewert, nor Maier disclosed their financial interests in other vendors that supplied goods to WDS that were then sold to CMS. Ewert decided to keep all savings from its

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[5] Defendants WDS and Ewert argue that the damages awarded by the jury were excessive because Plaintiffs were not required to prove, and did not produce evidence of, any damages other than the overcharges. (Doc. No. 322-1 at 14). However, as explained above, the economic loss rule does not bar Plaintiffs' tort claims, and Defendants have cited no case law to support their proposition.

[6] Defendants WDS and Ewert did not preserve this arguments, except to the extent they argue there was a lack of reasonable reliance. Therefore, WDS and Ewert's broad objection is waived.

[7] The jury found Plaintiffs' claims for fraud were not barred by the statute of limitation. (Doc. No. 314). Consistent with the North Carolina patterned instructions, the jury was asked "Did the Plaintiffs file this action within three years after discovery of the facts constituting the fraud?" and was instructed as to discovery and reasonable diligence to discover. (Doc. No. 314). Defendant Maier mistakenly overlooks that the cause of action accrues and the statute of limitations begins running upon discovery by Plaintiffs—not the occurrence of the facts constituting the fraud, *N.C. Gen. Stat. § 1-52(9)*; *Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202, 207 (N.C. 1951)*. (Doc. No. 351 at 4). Therefore, despite Defendant Maier's attempt, whether Maier committed a continuing wrong is moot. (Docs. No. 323-1 at 7; Doc. No. 347 at 9). The jury concluded Plaintiffs' claim of fraud resulting in damages of $35,177,269 was timely.

suppliers lowering prices instead of passing the savings on to CMS. Maier's responsibilities and role, as president of WDS, included overseeing day-to-day management of WDS and participating in the negotiations and executions of contracts. In this capacity and as majority shareholder, she executed the 2008 agreement, which allocated 70.6% of WDS profits to Ewert's wholly **[*19]** owned corporation, ODDS, LLC ("ODDS") for Ewert's cultivation of business relationships and marketing services. The supervisor of sales, head of human resources, purchasing manager, chief operations officer, and corporate accountant, which included Brian Ewert, all reported to Maier. In addition to the 2016 invoices that Maier admits she falsified, Maier misrepresented an agreement in 2011, rebates owed to SSA, other information provided to Plaintiffs employees that omit certain vendors, and Ewert's departure from WDS.

Further, evidence tending to show Ewert and Maier took affirmative steps to conceal material facts was put forth. WDS and ODDS, with the authorization of WDS's corporate accountants, paid for trips and gifts for members of Cargill's strategic sourcing division, who were responsible for executing and overseeing the SSAs with WDS, and for a procurement manager. These expenditures included yacht trips costing over $100,000. WDS, with the consent of Maier and Ewert, also paid for the health insurance under WDS's employee plan for the mother-in-law of Chuong Shawn Nguyen, a member of Cargill's strategic sourcing division. WDS, Maier, and Ewert arranged payment of these bribes **[*20]** through WDS's payment of commissions to ODDS under the 2008 agreement. Additionally, at Ewert's direction, WDS's corporate accountants transferred money from WDS to ODDs to Ewert's personal Money Market Account. Ewert, then, withdrew thousands of dollars of cash. Subsequently, Ewert mailed packages with the FedEx costs, at times invoiced to Maier's American Express, or Ewert traveled to the place of residence of the members of Cargill's strategic sourcing division. The emails and text messages between Ewert and members of Cargill's strategic sourcing division, the procurement manager, and other influential employees of Cargill's customers show a *quid pro quo* relationship. Further, the timing of the trips, gifts, or cash withdraws often coincide with the consideration of rebates or contracts, to which WDS, Ewert, and Maier had interests in seeing executed in their favor. WDS, Ewert, and Maier did not inform CMS or Cargill of these trips, gifts, or cash payments. The SSAs required WDS to adhere to a Supplier Code of Conduct, which included an obligation to compete fairly for Cargill's business, without any illegal or improper inducements or advantages. Additionally, Cargill had adopted **[*21]** an anti-bribery policy for its employees and employees of all subsidiaries and affiliates. Maier and Ewert also threatened its non-trilateral suppliers' employees like Brian Kincannon to honor their confidentiality obligations or face legal action in order to keep actual invoices out of the Plaintiffs' hands. Without the actual invoices, Plaintiffs could not determine the actual margins being charged in the purchase orders. Ewert also suppressed WDS's own employees like Kerry Uptergrove from raising any concerns by telling them to focus on their job.

Testimony and evidence on Plaintiffs' inability to reasonably discern the actual costs for products sold by WDS without their cooperation was also shown. Plaintiffs' agreements with suppliers within the trilateral category set pricing formulas, not discrete prices. These formulas resulted in daily price variation preventing Plaintiffs from reasonably knowing the costs charged to WDS and thus inhibiting Plaintiffs from calculating WDS's margins on those products. Plaintiffs were not privy to WDS's contracts with non-trilateral suppliers or their invoices. Defendants employed confidentiality requirements with its suppliers. Even after the **[*22]** initiating of the audit of WDS, Defendants tactically continued to make misrepresentations to stop, delay, and hinder the audit. After receiving Maier's fabricated invoices in 2016, Plaintiffs continued to purchase products from WDS.[8]

From such evidence, a reasonable jury could conclude that WDS, Ewert, and Maier[9] committed fraud through either or both a false representation or a concealment of a material fact that resulted in injury to Plaintiffs of $35,177,269. Therefore, Defendants are not entitled to judgment as a matter of law in their favor on the fraud claim.[10]

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[8] During trial, Plaintiffs' expert testified that the net overcharges occurring from February 1, 2012 through April 30, 2016 equaled $35,177,269. Plaintiffs sought this amount in damages for all claims.

[9] Defendant Maier, in a footnote, additionally moves for a reduction of damages from $35,177,259 to $191,076 under *Fed. R. Civ. P. 59(e)*, asserting again that the only conduct within the applicable statute of limitations that can form the basis of a claim against her occurred in 2016. (Doc. No. 323-1 at 24 n. 12). A *Rule 59(e)* motion seeking to "to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment" is not proper. *Exxon Shipping Co., 554 U.S. at 485 n.5*; see also *Pac. Ins. Co., 148 F.3d at 403*. A court may only grant a motion under *Rule 59(e)* to alter or amend

5. Conversion

Defendants WDS and Ewert contend Plaintiffs' did not present evidence that Plaintiffs retained ownership in the funds sent to WDS, entitling them to judgment on the conversion claim. (Doc. No. 322-1 at 15-16). "Conversion is 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.'" *Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559, 564 (N.C. 1966)* (citations omitted). "[T]he fact the parties had a contract does not prevent plaintiffs' claim for conversion." *Se. Shelter Corp. v. BTU, Inc., 154 N.C. App. 321, 572 S.E.2d 200, 207 (N.C. Ct. App. 2002)*. "A party who comes into possession of . . . converted funds [pursuant **[*23]** to a contract or otherwise] 'will not be permitted . . . to use [the] funds when he is fully aware of their nature, or there are circumstances to awaken suspicion and put him on inquiry.'" *Variety Wholesalers, Inc. v. Salem Logistics Traffic Services, LLC, 723 S.E.2d 744, 365 N.C. 520 (N.C. 2012)* (quoting *Lavecchia v. N.C. Joint Stock Land Bank of Durham, 215 N.C. 73, 1 S.E.2d 119, 120 (N.C. 1939))*. As addressed in Variety Wholesalers, whether the plaintiff retains ownership over funds, as required for a conversion claim, may require establishing ownership of the funds after the plaintiff voluntarily transferred the funds to another. *Id. at 747*. In that case, whether the plaintiff retained ownership turned on the construction of ambiguous contract language. Id. Here, as well, Plaintiffs' "ownership" and "retained ownership" turned on the jury's construction of the SSAs and the Purchase Orders. The evidence previously discussed supporting the interpretation of the SSAs and the Purchase Orders and the claim for fraud, along with evidence of Plaintiffs' payments through an automatic clearing house ("ACH") to WDS; Ewert and Maier's ownership of WDS; Ewert and Maier's admitted control and their admitted withdrawal from WDS's accounts, to which Plaintiffs made their payments; and subsequent distributions from WDS to Ewert and Maier provide substantial evidence supporting the jury's verdict for conversion **[*24]** against each Defendant: Plaintiffs "retained ownership" over the $35,177,269 assumed by Defendants in excess of the costs and margins established in the SSAs.

Relying on Variety Wholesalers, Defendant Maier advances that the conversion claim fails because Plaintiffs did not present evidence showing the specific source or specific destination of the converted funds. (Doc. No. 323-1 at 6 (citing *Variety Wholesalers, 723 S.E.2d at 751*)). As Maier declined to raise this issue in a *Rule 50(a)* motion, this argument is waived. Maier also did not propose instructions or object to the final jury instructions on these grounds. Further, on this record, it cannot prevail: substantial evidence, as summarized in the previous paragraph, supports Plaintiffs' conversion claim against each Defendant, including Maier.

Accordingly, the Court denies all Defendants request for judgment as a matter of law and finds no basis for a new trial.

6. Unfair and Deceptive Trade Practices

Defendants contend the Court erred by instructing the jury on North Carolina's Unfair and Deceptive Trade Practices Act, because North Carolina law cannot apply to Plaintiffs' claim. (Doc. No. 322-1 at 15; see Doc. No. 323-1 at 7 n.2). Federal courts must apply the conflict of law **[*25]** rules of the state in which they sit when sitting in diversity jurisdiction. *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (4th Cir. 1941)*. North Carolina courts follow the traditional conflict of laws rule for matters affecting substantial rights of

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a judgment if it finds "that there has been an intervening change of controlling law, that new evidence has become available, or that there is a need to correct a clear error or prevent manifest injustice." *Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 411 (4th Cir. 2010)*. Here, Defendant Maier is rearguing old matters and has not explained any reason justifying granting a *Rule 59(e)* motion. As found by the jury, the statute of limitations also does not limit Plaintiffs' damages against Maier. Maier's motion pursuant to *Rule 59(e)* is denied.

[10] Defendant Maier makes the same arguments for the claim of unfair and deceptive trade practices. (Doc. No. 323-1 at 7). She also argues there is no evidence she participated in a conspiracy. (Doc. No. 323-1 at 8). These arguments fail for the same reasons they fail for fraud.

the parties—lex loci, the law of the situs of the claim. *Boudreau v. Baughman, 322 N.C. 331, 368 S.E.2d 849, 853-54 (N.C. 1988)*. For actions sounding in tort, including unfair or deceptive trade practices claims, "the state where the injury occurred is considered the situs of the claim." *Boudreau, 368 S.E.2d at 854*; *United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90, 94 (N.C. Ct. App. 1986)*. North Carolina courts have rejected a bright line rule that the injured party, such as the Plaintiffs in this case, suffers its injury at its principal place of business. *Harco Nat'l Ins. Co. v. Grant Thornton, 206 N.C. App. 687, 698 S.E.2d 719, 725-26 (N.C. Ct. App. 2010)*. Instead, courts analyze and determine where an injured party in fact sustained its alleged injury to determine the applicable law. *Id. at 726*. Defendants WDS and Ewert argue that no evidence was presented that Plaintiffs suffered any harm in North Carolina. However, Plaintiffs presented evidence that payment through ACH of the Purchase Orders containing overcharges was paid to WDS at a North Carolina address.[11] The parties also stipulated and read into evidence that WDS is a corporation existing under the laws of the State of North Carolina. Therefore, the Court properly found that Plaintiffs' injury occurred when Plaintiffs **[*26]** paid WDS in North Carolina. As the last act giving rise to Plaintiffs' claim for unfair and deceptive trade practices occurred in North Carolina, the Court did not err by instructing the jury on North Carolina's Unfair and Deceptive Trade Practice Act.

7. Conspiracy

Defendant Maier for the first time argues that the conspiracy claim and the RICO conspiracy claim are barred by the intra-corporate conspiracy doctrine.[12] (Doc. No. 323-1 at 8). This argument has been waived by failing to preserve the argument, and Defendant Maier cites no authority that would allow her to make this argument for the first time at this stage in the proceedings. Further, as argued by Plaintiffs, Maier's argument is also moot. (Doc. No. 347 at 12). The doctrine, established in the field of ***antitrust law*** in *Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir.1952)*, held that "a corporation cannot conspire with its agents because the acts of the agents are acts of the corporation itself." *Bank Realty Inc. v. Practical Mgmt. Tech. Inc., No. 90-2128, 1991 U.S. App. LEXIS 11793, 1991 WL 97490, at *4 (4th Cir. June 11, 1991)* (unpublished table decision). Here, the jury found for Maier on all claims that named WDS as an enterprise. Also, the jury instructions required for conspiracy a finding that WDS, Maier, and Ewert agreed with each other and others known and known. Similarly, for a finding of *RICO 1962(d)* **[*27]** conspiracy, the jury instructions required a finding that two or more people agreed. Thus, even if the intra-corporate doctrine applies as claimed by Defendant Maier, it is moot.

8. Racketeer Influenced and Corrupt Organizations Act

Defendants WDS and Ewert maintain that the Court erred by allowing evidence and argument on Plaintiffs' RICO claims. (Doc. No. 322-1 at 12). Citing no binding precedent, Defendants WDS and Ewert contend this case "involves nothing more than two merchants disputing the pricing terms of their written agreements for the sale of goods[,]" rendering "Plaintiffs' RICO claim[s] . . . inappropriate and its inclusion . . . inconsistent with the statutory design of RICO." (Doc. No. 322-1 at 13). Defendants' contention, however, does not accurately reflect the trial record. Plaintiffs presented evidence of the overcharges in the Purchase Orders; allocation of a majority of WDS's

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[11] Defendants WDS and Ewert also admitted that certain payments of the Purchase Orders were made to a bank account located in North Carolina. (Doc. No. 182 at ¶ 238).

[12] Although the Fourth Circuit has recognized the applicability of the intra-corporate conspiracy doctrine in the antirust context, *Greenville Publishing Co., Inc. v. Daily Reflector, Inc., 496 F.2d 391, 399 (4th Cir.1974)*, and *section 1985* civil rights context, *Buschi v. Kirven, 775 F.2d 1240, 1252-53 (4th Cir.1985)*, these claims are not before the Court in this case. The one case cited by Maier that addresses and applies the intra-corporate conspiracy doctrine in the context of RICO is not binding on this Court, *Walters v. McMahen, 795 F. Supp. 2d 350, 358-59 (D. Md. 2011)*, and on appeal to the Fourth Circuit, the court expressly stated "[b]ecause we conclude that the plaintiffs have failed to plead adequately a cause of action under *18 U.S.C. § 1962(d)*, we need not address the separate issue whether the intracorporate immunity doctrine bars their cause of action[,]" *Walters v. McMahen, 684 F.3d 435, 445 n.11 (4th Cir. 2012)*. The Fourth Circuit case, *Detrick v. Panalpina, Inc., 108 F.3d 529, 544 (4th Cir. 1997)*, cited by Maier also involves counterclaims for conspiracy under Virginia law, not North Carolina law.

profits, resulting from the overcharges, to ODDS, Ewert, and Maier; withdraws of tens of thousands of dollars in cash from ODDS prior to Ewert travelling across state lines to interact with influential members of Cargill's strategic sourcing division or mailing a package across state lines; **[*28]** hundred-thousand dollar plus yacht trips and other trips for influential members of Cargill's strategic sourcing division, often in close proximity to the execution of contracts involving Defendants; other expensive entertainment and benefits for such individuals and others; extensive communication between Ewert and these individuals in other states to further profit from overcharges or conceal the overcharges; and fabrication of contracts and invoices sent across state lines. Courts in similar circumstances have recognized the availability of RICO claims under subsection *18 U.S.C. § 1962*. See, e.g., *Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 122-23 (2d Cir. 2013)*; *Cosmos Forms Ltd. v. Guardian Life Ins. Co. of Am., 113 F.3d 308, 309-10 (2d Cir. 1997)*. As Defendants WDS and Ewert's alleged error is without merit, the Court denies their request for judgment as a matter of law and a new trial.

Defendant Maier moves for judgment as a matter of law by asserting that the RICO conspiracy claim under *section 1962(d)* cannot stand alone. (Doc. No. 323-1 at 9-10). Once again, this argument has been waived by failing to preserve it on the record by moving under *Rule 50(a)*. Further, Plaintiffs' prevailed on RICO claims under *sections 1962(a)* and *1962(c)* against Ewert. Therefore, unlike the cases relied on by Maier,[13] Plaintiffs' RICO conspiracy claim under *section 1962(d)* against Defendant Maier does not stand alone. See **[*29]** *Beck v. Prupis, 529 U.S. 494, 506-07, 120 S. Ct. 1608, 146 L. Ed. 2d 561 (2000)*. ("Under our interpretation, a plaintiff could, through a *§ 1964(c)* suit for a violation of *§ 1962(d)*, sue co-conspirators who might not themselves have violated one of the substantive provisions of *§ 1962*.").

Defendant Maier also claims that the RICO predicate acts are not the but-for and proximate cause of Plaintiffs' damages of $35,177,269, as awarded by the jury. (Doc. No. 323-1 at 10-11). Although this argument has been waived by failing to preserve the issue, the Court disagrees with Defendant Maier's interpretation of the Walter's opinion and attempt to analogize those facts with the facts of this case. Unlike Walter, the Court is not considering the sufficiency of the complaint, and concerns about causation were not raised and are not present in this case. *Walters, 684 F.3d at 444* (citing *Holmes, 503 U.S. 258, 269-70, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992))*; see also *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 459-61, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)* (considering Holmes factors). Further, the jury, as instructed, found proximate cause for an award of $35,177,269. Based on the evidence previously discussed, the Court cannot conclude that no reasonable jury could conclude in Plaintiffs' favor on their claim for RICO conspiracy against Maier and that such violation proximately damaged Plaintiffs in the amount of $35,177,269.

9. Cargill Meat Solutions

Maier asserts claims by CMS **[*30]** for conversion and fraud against Maier fail for insufficient evidence of payment by CMS or misrepresentation to CMS or any of its employees. (Doc. No. 323-1 at 6, 11; Doc. No. 351 at 7-8). However, this argument has been waived. Maier did not move for judgment as a matter of law against CMS for lack of evidence as to the elements of a claim for conversion or fraud. Further, for the reasons previously stated, the Court finds sufficient evidence to support Cargill and CMS's claim for conversion and fraud.

10. Maier's Counterclaims

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[13] *Walters, 684 F.3d at 440* (holding failure to plead plausible violation of either predicate act fatal to *section 1962(c)* claim, which rendered plaintiffs' claims under *section 1962(d)* for conspiracy to violate *section 1962(c)* insufficient); *Tal v. Hogan, 453 F.3d 1244, 1249-50, 1252, 1270 (10th Cir. 2006)* ("Because Appellants have failed to allege a sufficient claim under *subsections (b)* or *(c)*, their *subsection (d)* conspiracy claim fails as a matter of law."); *Lightning Lube v. Witco Corp., 4 F.3d 1153, 1191 (3d Cir. 1983)* (same).

Maier contends she is entitled to judgment as a matter of law on all her counterclaims, which seek declaratory judgments, for the reasons she is entitled to judgment as a matter of law on Plaintiffs' claims. (Doc. No. 181; Doc. No. 323-1 at 23). For the reasons stated in this Order denying Maier's motion as to Plaintiff's claims and allowing judgment on the verdict, the Court declines to declare the rights of the litigants as sought by Maier. *28 U.S.C. § 2201(a)*; *Wilton v. Seven Falls Co., 515 U.S. 277, 286-88, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995)*.

11. Jury Instructions

Defendants WDS, Ewert, and Maier[14] submit that the instructions to the jury and verdict form that reference Cargill and CMS collectively as Plaintiffs prejudiced Defendants, entitling Defendants to **[*31]** a new trial. (Doc. No. 322-1 at 3; Doc. No. 323-1 at 23). Defendants argue the instructions impermissibly treated Cargill and CMS as one entity. (Doc. No. 322-1 at 3).

"District courts are necessarily vested with a great deal of discretion in constructing the specific form and content of jury instructions." *Hardin v. Ski Venture, Inc., 50 F.3d 1291, 1293 (4th Cir. 1995)* (citing *Price v. Glosson Motor Lines, Inc., 509 F.2d 1033, 1036 (4th Cir. 1975))*. Specific jury instructions "may not be judged in artificial isolation, but must be viewed in the context of the overall charge[,]" *Noel v. Artson, 641 F.3d 580, 586 (4th Cir. 2011)* (quoting *Henderson v. Kibbe, 431 U.S. 145, 153 n. 10, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977))*, for "the charge in its totality was what the jury heard[,]" *id. at 586*. "Instructions will be considered adequate if construed as a whole, and in light of the whole record, they adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the [objecting] party." *Gentry v. E. W. Partners Club Mgmt. Co. Inc., 816 F.3d 228, 233 (4th Cir. 2016)* (quoting *Bunn v. Oldendorff Carriers GmbH & Co. KG, 723 F.3d 454, 468 (4th Cir. 2013))*.

Here, the jury instructions, as read to the jury, set out early in the trial that Plaintiffs were two separate entities, Cargill and CMS. Form thence forth, the jury instructions referenced them collectively as Plaintiffs and the verdict form, consistent with the jury instructions, referenced them collectively as Plaintiffs. The jury was then instructed on all six claims of Plaintiffs' burden to prove each **[*32]** elements as to Plaintiffs. As argued by Plaintiffs, the reference to Plaintiffs collectively was appropriate on the trial record because Plaintiffs' claims arose from the same set of facts and Plaintiffs' expert testified that Plaintiffs' collectively sustained damages from contractual overcharges of $35,177,629. On this trial record,[15] collective references to Plaintiffs was appropriate and necessary to avoid jury confusion and to avoid the possibility of an excessive or duplicative award of damages. See generally *Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc., 975 F. Supp. 681, 691 (D.N.J. 1997)*, aff'd & remanded, *181 F.3d 446 (3d Cir. 1999)* (rejecting defendants' post-trial argument of error for the verdict's failure to separate damages for

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[14] Defendant Maier also alleges that asking the jury "Do you find any of the following Defendants liable to Plaintiffs under the Unfair or Deceptive Trade Practices Act?" was an error because the jury does not determine whether the act was unfair or deceptive. (Doc. No. 323-1 at 24). As reflected in the record, the jury instructions did not ask the jury whether the acts were unfair or deceptive. These terms were not defined. Rather, the jury was asked to address the factual questions of in or affecting commerce and causation, which are necessary elements for an Unfair and Deceptive Trade Practices Act claim, and answer in the affirmative to the question if they so found. Further, Maier never objected to the phrasing of the question. In fact, Defendants agreed in the proposed instructions submitted to the Court to the listing of Plaintiffs' first claim or count as a violation of the Unfair and Deceptive Trade Practices Act and proposed verdict questions that used the terminology "unfair or deceptive act."

[15] Cargill moved to amend its complaint to add CMS after Defendants Ewert and WDS sought to amend their answer to allege that Cargill was not the real party in interest and did not have standing to sue for any transactions involving Cargill Meat Solutions. (See Doc. No. 37-1; 39-1; 49). Cargill argued joinder proper under *Fed. R. Civ. P. 20*, which permits the joinder of a party if "they assert any right to relief jointly, severally, . . . and any question of law or fact common to all plaintiffs will arise in the action." The Court agreed and granted the motion to amend and join CMS. (Doc. No. 55). As Plaintiffs seek relief jointly and severally, as permitted under *Rule 20*, the Court did not err as to the instructions and verdict form. See generally, *Fenton v. Freedman, 748 F.2d 1358, 1359-1361 (9th Cir. 1984)* (affirming judgment in favor of co-plaintiffs Shaindy Fenton and Shaindy Fenton, Inc. where acts of co-plaintiffs were "so intertwined . . . that the claims could have been filed jointly" and the court joined Shaindy Fenton, Inc. after defendants sought to dismiss the case because "Shaindy Fenton was not the real party in interest since the evidence showed all transactions sued upon were entered into between Shaindy Fenton, Inc. and [defendants]").

each wholly owned, vertically aligned subsidiary plaintiff). The jury instructions provided a correct statement of the law applicable to the claims and "left the attorneys ample room to argue their case." *Noel, 641 F.3d at 587*. The Court does "not bear the burden of highlighting helpful arguments nor of marginalizing harmful ones." Id. The jury instructions properly let counsel argue factually whether Plaintiffs had or had not met their burden and proven the elements required for an answer in their favor on the verdict form. See id. Therefore, the Court concludes it did not **[*33]** err and denies Defendants' request for a new trial.

12. Excessive Damages

Defendants WDS and Ewert argue they are entitled to a new trial because the jury's award of damages was excessive. (Doc. No. 322-1 at 13). See *Cline, 144 F.3d at 305*; *N.C. R. Civ. P. 59(a)(6)*. Defendants WDS and Ewert argue the damages are excessive for reasons previously raised and overruled by the Court, including the collective reference to Plaintiffs, the allowance of tort claims, the lack of reliance by Plaintiffs on misrepresentations by Defendants, and the lack of reasonable reliance on misrepresentations as to trilateral products. (Doc. No. 322-1 at 14-15). The Court incorporates its previous analysis and rulings on these matters, and accordingly, denies Defendants WDS and Ewert's request for a new trial on the grounds of excessive damages for the North Carolina or federal claims.

13. Evidentiary Rulings

Errors in admitting or excluding evidence are not grounds for a new trial "[u]nless justice requires[.]" *Fed. R. Civ. P. 61*. "A party may claim error in a ruling to admit . . . only if the error affects a substantial right of the party and . . . [the] party, on the record: timely objects or moves to strike; and states the specific **[*34]** grounds, unless it was apparent from the context." *Fed. R. Evid. 103(a)(1)*. An error is harmless and does not require a new trial if the court can "say 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the errors.'" *Taylor v. Va. Union Univ., 193 F.3d 219, 235 (4th Cir. 1999)* (citations omitted). By focusing on "whether the error itself had substantial influence[,]" this analysis allows the court to distinguish between harmless errors and those impacting a substantial right. Id.

a. Parol Evidence

Defendants WDS and Ewert argue parol evidence was inadmissible as to the terms of the Purchase Orders because the Purchase Orders were clear and unambiguous. (Doc. No. 322-1 at 6). As previously addressed by the Court in subsection I.A.2.b., the Court properly concluded that the contract terms at issue in this case, including those in the Purchase Orders, were ambiguous. The Terms and Conditions language in the Purchase Orders did not have "a definite and precise meaning." *Riverside S. Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 920 N.E.2d 359, 363, 892 N.Y.S.2d 303 (N.Y. 2009)* (citation omitted) (defining the lack of ambiguity). Therefore, the admission of parol or extrinsic evidence was not an error. *Innophos, Inc. v. Rhodia, S.A., 882 N.E.2d 389, 392, 852 N.Y.S.2d 820, 10 N.Y.3d 25 (N.Y. 2008)*.

b. Depositions of Charles Milacki and Chuong Shawn Nguyen

Defendants **[*35]** WDS and Ewert contend the admission of deposition testimony of Chuong Shawn Nguyen ("Nguyen") and Charlie Milacki ("Milacki") asserting the *Fifth Amendment* against self-incrimination improper pursuant to *Federal Rules of Evidence 401*, *402*, and *403*. (Doc. No. 322-1 at 16).[16] First, Defendants reason the

[16] Maier also stated, without elaboration or citation, that "the admission of certain testimony as to Maier was also improper and prejudicial, such as the non-parties that invoked the *Fifth Amendment* . . . ." (Doc. No. 323-1 at 24). From this mere listing of this

admission and allowance of a negative inference against Nguyen and Milacki[17] an error given their status as non-parties. However, Defendants cite no binding authority for this proposition. See generally Fed. R. Evid. 402. The Fifth Amendment of the Constitution states "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. This prohibition allows a person to assert his or her Fifth Amendment privilege and refuse to answer "official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings[,]" Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973), but it does not preclude in a civil case the admissibility of the assertion of the Fifth Amendment privilege or an adverse inference, see Baxter v. Palmigiano, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976). The Supreme Court and the Fourth Circuit have not expressly addressed the matter as to non-parties, but other circuits have found admission of testimony and the allowance of negative inferences against non-parties proper in civil actions, see, e.g., LiButti v. United States, 107 F.3d 110, 124 (2d Cir. 1997); FDIC v. Fidelity & Deposit Co. of Md., 45 F.3d 969, 977 (5th Cir. 1995) (finding **[*36]** "no constitutional bar to the admission of [a nonparty's invocation of the Fifth Amendment privilege]").

Second, Defendants argue the testimony is not relevant because they do not testify to any fact and the negative inference is against them, not Defendants. To the contrary, "silence in the face of accusation is a relevant fact[.]" Baxter, 425 U.S. at 319. Invoking the Fifth Amendment privilege when questioned about accepting bribes from Defendants and their actions in furtherance of Defendants' overcharging of Plaintiffs is relevant: "it has [a] tendency to make a fact [of consequence] more or less probable than it would be without the evidence[.]" Fed. R. Evid. 401. Further, other testimony and evidence reflecting Nguyen's and Milacki's relationship and dealings with Defendants was presented, so the "jury could determine that a witness who colluded with [Defendants] took the Fifth Amendment to avoid disclosing that collusion." See FDIC, 45 F.3d at 977.

Third, Defendants represent that the danger of unfair prejudice was great, and the Court erred in its application of the fourth factor in Libutti. The Court disagrees. When considering a non-party's invocation of the Fifth Amendment privilege under Fed. R. Evid. 403, many federal courts have adopted and applied the analysis of the Second Circuit in Libutti. See, e.g. **[*37]**, Coquina Invs. v. TD Bank, NA, 760 F.3d 1300, 1310-11 (11th Cir. 2014). Libutti recognizes that the "overarching concern is . . . whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth[,]" 107 F.3d at 124, and identifies the following factors for consideration: (1) the nature of the relevant relationships, (2) the degree of control of the party over the non-party, (3) the compatibility of the interests of the party and the non-party in the outcome of the litigation, and (4) the role of the nonparty in the litigation, id. at 123-24. In this case, consideration of the factors do not raise concerns about the trustworthiness of the assertion of the Fifth Amendment privilege. Nguyen and Milacki maintained close business and social relationship with Defendants, as evidenced by their personal and business communication and their receipt of items of economic value from Defendants. Although not employees of Defendants, evidence supports that they acted for the interests of Defendants instead of their employers and came to expect remuneration for their services. Thus, Nguyen, Milacki, and Defendants interests are aligned in this litigation. Nguyen, Milacki, and Defendants benefit from Nguyen and Milacki asserting the Fifth Amendment privilege as it prevents **[*38]** the uncovering of additional facts and evidence in this case and any criminal proceeding. Nguyen and Milacki were also key figures in perpetrating and concealing the fraudulent overcharges, which are the basis for and cause of damages for all claims in this case. They held positions of great responsibility and authority that could be and, as suggested by the evidence, were misused to further the conspiracy. Therefore, the circumstances before the Court do not show unfair prejudice. Allowing admission and an instruction on an inference will advance the search for the truth, and the relevance of the assertion of the Fifth Amendment privilege in these circumstances is undeniable and exceeds any unfair prejudice.

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alleged error, Maier has not shown an acceptable reason for the grant of a new trial. Cline, 144 F.3d at 301. Further, the Court concludes herein the errors alleged by Defendant WDS and Ewert are not errors. Therefore, the Court denies Maier's request for a new trial.

[17] As pointed out by Plaintiffs, the instruction allowing a negative inference was limited to the witnesses themselves, Nguyen and Milacki. (Doc. No. 340 at 24).

c. Deposition of Mike Dyer

Defendants WDS, Ewert, and Maier argue the admission of testimony from Mike Dyer "regarding his opinions on certain communications recovered by Plaintiffs during their investigation" was improperly admitted under *Federal Rule of Evidence 701*. (Doc. No. 322-1 at 19; see also Doc. No. 323-1 at 24). Upon consideration of the testimony, the Court finds regardless of the grounds for admissibility at trial, Dyer's testimony was not in the form of an opinion and was admissible under *Rule 602*, as argued by Plaintiffs **[*39]** (Doc. No. 340 at 25-26). See *Fed. R. Evid. 701*. *Rule 602 of the Federal Rules of Evidence* permits testimony by a lay witness on "a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

> *Rule 602* . . . does not require that the witness' knowledge be positive or rise to the level of absolute certainty. Evidence is inadmissible under this rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testifies to.

Myrtle Beach Air Force Base Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 681 F.2d 930, 932 (4th Cir. 1982). Here, testimony and evidence established Dyer's personal knowledge of the existence and timing of communications and documentary evidence obtained and reviewed during the course of the investigation he led on behalf of Plaintiffs. As he personally observed these documents and observed the sequence or timing of the time stamped documentary evidence and communications between Defendants and Plaintiffs' employees, Dyer could testify under *Rule 602* as to the timing and sequence of the time stamped documentary evidence and communications. His observation of the close proximity of such evidence and communication and the repeated close proximity of such evidence and communication is therefore admissible. **[*40]** Although the terminology and framing of the questions by counsel could have been refined, Dyer's testimony did not go beyond the observations permissible under *Rule 602*.

d. Exhibit 444

Maier's complaint that the admission of Exhibit 444 was improper because it "was not complete, contained unexplained symbols, and could not be authenticated" is unavailing. (Doc. No. 323-1 at 24). Exhibit 444 was part of an email string between Maier and Ewert. Maier's statements in the email, including her reference to going to jail, suggest her complicity in wrongdoing, including the fabrication and falsification of a contract. Although other emails in the string were produced, this email was not produced by any Defendant but was recovered forensically from Ewert's devices by Plaintiffs. As explained by Plaintiffs' counsel, the exhibit contained symbols where corruption in the data prevented recovery in the first two lines of email. At trial, Maier did not object to the authenticity of the document but argued that the document was incomplete and therefore any probative value outweighed the prejudicial effect under *Rule 403*. See *Fed. R. Evid. 103(a)* (requiring timely objection); see, e.g., *Bituminous Constr., Inc. v. Rucker Enter., Inc., 816 F.2d 965, 969 (4th Cir. 1987)* (denying review of objection not made upon introduction **[*41]** of evidence at trial). The Court concludes it was not an error under *Rule 403* to admit Exhibit 444. Maier suffered no undue prejudice as she was the drafter of the email, she did not produce the email herself, and the omissions do not hinder comprehension. Further, the email is undeniably probative to this case.

e. Testimony of Kevin Walker

Maier also objects to the testimony of Plaintiff's expert, Kevin Walker, on matters outside the scope of his qualified expertise and his personal knowledge. (Doc. No. 323-1 at 24). To the extent there was such testimony, it was in response to Defendants' questioning about matters beyond his qualifications and personal knowledge. See, e.g., *United States v. Armedo-Sarmiento, 545 F.2d 785, 795 (2d Cir. 1976)* ("When a defendant has been made fully aware of the response which a question is bound to elicit, he should object when the question is asked, rather than delay with the hope of inviting error and laying the foundation for a mistrial."). Further, Maier did not timely object to Walker's testimony but moved to strike part of the record after Walker left the witness stand. See *Fed. R. Evid.*

103(a); United States v. Vogt, 910 F.2d 1184, 1192 (4th Cir. 1990) (denying review where counsel for defendant failed to object to admission but codefendant timely objected); United States v. Martinez, 962 F.2d 1161, 1164-1166 (5th Cir. 1992) (finding failure to make timely objection **[*42]** precluded any appellate challenge when motion to strike was not contemporaneous with admission of testimony). Therefore, the Court stands by its ruling on the record.

f. Conclusion

As addressed in the previous paragraphs, the Court concludes that no error occurred. Nevertheless, even if the testimony and evidence discussed herein was inadmissible, any error was harmless. On the trial record before the Court, "the judgment was not substantially swayed by the errors.'" Id. Accordingly, the Court denies Defendants' request for a new trial.

B. Unfair or Deceptive Act or Practice[18]

Plaintiffs seek a determination that the acts found by the jury constituted an unfair or deceptive trade practice as a matter of law. (Doc. No. 329).[19] An unfair and deceptive trade practice claim under N.C. Gen. Stat. § 75-1.1(a) ("UDTPA") has three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) proximately causing actual injury to plaintiff. Furr v. Fonville Morisey Realty, Inc., 130 N.C. App. 541, 503 S.E.2d 401, 408 (N.C. Ct. App. 1998). The second and third elements and whether the alleged conduct occurred are fact questions for the jury. See, e.g., Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 529 S.E.2d 676, 681 (N.C. 2000); Kewaunee Sci. Corp. v. Pegram, 130 N.C. App. 576, 503 S.E.2d 417, 420 (N.C. Ct. App. 1998); Belk, Inc. v. Meyer Corp., 679 F.3d 146, 164 (4th Cir. 2012). Based on the jury's findings, the court then determines whether an act or practice is unfair or deceptive in the conduct of trade or commerce. **[*43]** See, e.g., Dalton v. Camp, 353 N.C. 647, 548 S.E.2d 704, 711 (N.C. 2001).

A practice is deceptive if it has "the tendency or capacity to mislead" and unfair "when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397, 403 (N.C. 1981) (citations omitted); see also Dalton, 548 S.E.2d at 711. The determination that a trade practice is unfair or deceptive "depends upon the facts of [the]

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[18] In Defendant Maier's response to Plaintiffs' request for prejudgment interest, request for attorneys' fees and memorandum of law on the UDTPA, Maier contends all of these requests should be denied for the reasons stated by Defendants Ewert and WDS and because: "(1) the requests are not governed by North Carolina law; (2) Maier did not make an unwarranted refusal to settle; (3) Maier was the prevailing party on the three of the four RICO claims asserted against her; (4) all of the attorneys' fees incurred by Plaintiffs were not in connection with claims against Maier; (5) 'Losses' as defined by the WDS-Cargill Agreements, including attorneys' fees, are not recoverable; and (6) any recovery by Plaintiffs would be less than what is sought because an award of damages against Maier, if any, must be reduced." (Doc. No. 354 at 1-2). Arguments one, five, and six have already been rejected by the Court in this Order and in its previous oral rulings. Therefore, the Court only addresses arguments two, three, and four.

[19] Defendants WDS and Ewert object to the "[t]rebling of the jury's award of $35,177,269.00 under N.C. Gen. Stat. § 75-16" because "(1) North Carolina's Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 et seq. ('UDPTA') does not apply because neither Plaintiff presented evidence that it suffered any harm in North Carolina; (2) the UDPTA claim is barred by the economic loss doctrine and Plaintiffs only sought contract-based damages; (3) neither Plaintiff presented sufficient evidence to support the fraud-based claims; (4) the jury should not have been permitted to consider the RICO claim; (5) the damages assessed by the jury are erroneous, against the weight of the evidence, and a product of jury confusion; (6) the commercial bribery finding does not support the jury's award; and (7) the finding of falsification of records does not support the jury's award." (Doc. No. 342). Arguments one through five were raised by Defendants WDS and Ewert in their Fed. R. Civ. P. 50(b) and 59 motion, which have previously been addressed and rejected in this Order. Defendants' sixth and seventh argument do not address the matter before the Court, whether the conduct found by the jury is unfair or deceptive. Defendants have not preserved this argument. Therefore, it is denied.

case and the impact the practice has in the marketplace." Marshall, 276 S.E.2d at 403. As a result, the intent of the actor is not relevant, and the "unfairness and deception are gauged by consider[ing] . . . the effect of the practice on the marketplace" and the "consuming public." Id.

Therefore, the Court, considering the facts and the impact on the marketplace, must determine whether the jury's findings are unfair or deceptive under the UDTPA. As the jury found all Defendants liable for fraud and separately found misrepresentations of margins charged, falsified business records to further misrepresentations, and commercial bribery, in addition to other findings, the jury's findings clearly establish an unfair and deceptive trade practice. Under North Carolina Supreme Court precedent, the finding of liability for fraud alone is **[*44]** sufficient for the Court's finding. Sara Lee Corp. v. Carter, 351 N.C. 27, 519 S.E.2d 308, 311 (N.C. 1999); Bhatti v. Buckland, 328 N.C. 240, 400 S.E.2d 440, 442 (N.C. 1991); Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342, 346 (N.C. 1975); see also Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch, 80 F.3d 895, 903 (4th Cir. 1996). The "acts of commercial bribery[,]" as found by the North Carolina Court of Appeals, are also sufficient alone for the Court's finding. Kewaunee Sci. Corp., 503 S.E.2d at 420.[20] The jury's additional findings of conduct and of liability provide further support for the Court's determination in favor of Plaintiffs. The conduct of misrepresentation and falsification of business records to further their misrepresentations is unethical and unscrupulous and demonstrates that Defendants' conduct, as implicitly found by the jury's finding of liability for fraud, had a "the tendency or capacity to mislead[.]" Marshall, 276 S.E.2d at 403 (citation omitted). Therefore, in this case, the Court finds the practice to both unfair and deceptive.

Not only do Plaintiffs, as direct consumers of Defendants' services and goods, suffer the consequences of this conduct but indirectly the consuming public, who buy products from Plaintiffs, may also be impacted. Section 75-1.1 was enacted for this purpose: to protect consumers, including businesses, by allowing a cause of action to deter conduct that may ultimately harm consumers. See Dalton, 548 S.E.2d at 710 (citations omitted); Marshall, 276 S.E.2d at 400. Additionally, conduct resulting in injury of this **[*45]** magnitude—over $35 million—may detrimentally alter the behavior of contracting parties that reasonably rely on the representations of other contracting parties if not checked by private actions brought under N.C. Gen. Stat. § 75-1.1. See Johnson v. Owens, 263 N.C. 754, 140 S.E.2d 311, 314 (N.C. 1965) ("[T]here must be a reliance on the integrity of man or else trade and commerce could not prosper." (citations omitted)). As stated by the North Carolina Court of Appeals, "[t]he purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State[,] and [it] applies to dealings between buyers and sellers at all levels of commerce." United Va. Bank, 339 S.E.2d at 93 (citations omitted). Thus, the Court allows the judgment on the verdict finding Defendants liable to Plaintiffs under the UDTPA. The Court has found as a matter of law from the findings of the jury that Defendants committed an unfair and deceptive trade practice, and the jury answered in the affirmative that Defendants' conduct was in or affecting commerce[21] and was a proximate cause of Plaintiffs' injury.

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[20] Defendants WDS and Ewert appear to argue that Plaintiffs' failure "to present evidence of the value of the alleged commercial bribes" and "represent[ation] that they would not seek such damages" distinguishes this case from Kewaunee. However, in reaching their conclusion, the court in Kewaunee relied on "[t]he jury f[inding] that the defendant paid Pegram in exchange for Pegram's cooperation or assistance in arranging sales and for refusing to entertain quotes or bids from other potential corrugated cardboard suppliers." 503 S.E.2d at 420. Given this finding, the court noted that commercial bribery is a crime under N.C. Gen. Stat. § 14-353. Id. The court then held "a violation of G.S. 14-353 should also be considered a violation of G.S. 75-1.1 as an unfair and deceptive trade practice." Id. Section 14-353 does not require a showing of damage or injury nor allows such a recovery. Instead, section 14-353 requires a showing consistent with the jury's finding in Kewaunee and the instructions given to the jury in this case. Thus, the Court finds no merit in Defendants WDS and Ewert's argument. The jury's finding of commercial bribery "satisf[ies] the first element" for a claim of unfair and deceptive trade practices. Kewaunee, 503 S.E.2d at 420.

[21] Some case law suggests this determination is a question for the Court. Compare Sara Lee Corp., 519 S.E.2d at 311 (deciding whether acts were "in or affecting commerce"), with United Lab., Inc. v. Kuykendall, 437 S.E.2d 374, 376 (N.C. 1993) (jury determined whether conduct was in or affecting commerce), and Kewaunee Sci. Corp., 503 S.E.2d at 420 (jury determined whether conduct was in or affecting commerce). Therefore, to the extent necessary, the Court clarifies that the conduct found by the jury was in or affecting commerce as defined under N.C. Gen. Stat. § 75-1.1. "'Commerce' includes all business activities, however denominated," N.C. Gen. Stat. § 75-1.1(b), which has been recognized by the North Carolina Supreme Court to apply

As a result, Plaintiffs are entitled to a "judgment . . . in favor of plaintiff[s] and against defendant[s] for treble the amount fixed by **[*46]** the verdict." *N.C. Gen. Stat. § 75-16*; see *Marshall, 276 S.E.2d at 402* (holding that trebling is automatic); *Atl. Purchasers, Inc. v. Aircraft Sales, Inc., 705 F.2d 712, 715 (4th Cir. 1983)* (same). Accordingly, Plaintiffs are entitled to treble the jury verdict of $35,177,269 under *N.C. Gen. Stat. § 75-16*.

C. Plaintiffs' Motion for Prejudgment Interest

Plaintiffs seek prejudgment interest on the principal amount from the date of the filing of this action, December 16, 2016, to the date of entry of judgment, January 23, 2018, in accordance with *section 24-1 of the North Carolina General Statutes*. (Doc. Nos. 320, 321). As North Carolina's legal rate of interest is eight percent, *N.C. Gen. Stat. § 24-1*, Plaintiffs seek an amendment to the judgment to provide for prejudgment interest of $3,107,164.80. (Doc. Nos. 320, 321). Defendants do not appear to dispute that Plaintiffs are entitled to prejudgment interest under North Carolina law.

The Fourth Circuit has recognized that other circuits have held that courts must apply the law of the forum to questions involving prejudgment interest in diversity cases. *United States v. Dollar Rent A Car Sys., Inc., 712 F.2d 938, 940 (4th Cir. 1983)* (citing *Klaxon, 313 U.S. at 497*; *Clissold v. St. Louis-San Francisco Ry., 600 F.2d 35, 38-39 (6th Cir. 1979)*; *Am. Ins. Co. v. First Nat'l Bank in St. Louis, 409 F.2d 1387, 1392 (8th Cir. 1969))*. Accordingly, this Court has concluded that it is bound to follow the law of the forum as it pertains to prejudgment interest in diversity cases. See *Legacy Data Access, LLC v. MediQuant, Inc., No. 3:15-cv-00584-FDW-DSC, 2017 U.S. Dist. LEXIS 198817, 2017 WL 6001637, at *19 (W.D.N.C. Dec. 4, 2017)*. The North Carolina legislature has enacted a statute **[*47]** governing prejudgment interest that provides "[i]n an action other than contract, any portion of a money judgment designated by the fact finder as compensatory damages bears interest from the date the action is commenced until the judgment is satisfied." *N.C. Gen. Stat. § 24-5(b)*. The statute creates no exceptions or conditions and has been held "to be mandatory and not discretionary on the part of the trial court." *Hamby v. Williams, 196 N.C. App. 733, 676 S.E.2d 478, 481 (N.C. Ct. App. 2009)*; see also *Castles Auto & Truck Serv., Inc. v. Exxon Corp., 16 F. App'x 163, 168 (4th Cir. 2001)* (construing *N.C. Gen. Stat. § 24-5(b)* as a mandatory provision). Therefore, the Court concludes that it is bound to award prejudgment interest on Plaintiffs' compensatory damages for its non-contract North Carolina claims for the period from December 16, 2016 to January 23, 2018, at the state of North Carolina's legal interest rate of 8%, *N.C. Gen. Stat. § 24-1*. The Court awards $3,107,164.80 of prejudgment interest for these claims.

D. Plaintiffs' Motion for Attorneys' Fees and Cost

Plaintiffs seek an award of attorneys' fees and costs under (i) the indemnity provisions of the SSAs; (ii) RICO, *18 U.S.C. § 1964(c)*; and (ii) UDTPA, *N.C. Gen. Stat. § 66-154(d)*. (Doc. Nos. 325, 325-1, 338). The Court address each herein.

1. Select Supplier Agreements

"Under New York law, a contract that provides for an award of reasonable attorneys' fees to the prevailing party in an action to enforce **[*48]** the contract is enforceable if the contractual language is sufficiently clear." *NetJets Aviation, Inc. v. LHC Commc'ns, LLC, 537 F.3d 168, 175 (2d Cir. 2008)* (citations omitted). As argued by Defendants WDS and Ewert, the contract language relied on by Plaintiffs is not sufficiently clear for an award of attorneys' fees under New York law. (Doc. No. 341 at 1-3). The provision in the SSAs provides:

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to buyers and sellers in a commercial context. See *Bhatti, 400 S.E.2d at 444* (citation omitted); see also *Sara Lee Corp., 519 S.E.2d at 311-12*. The findings by the jury, which the Court has concluded constitute an unfair and deceptive practice, all occurred in the context of the selling by Defendants to Plaintiffs in a commercial context. Accordingly, the Court affirms the jury's finding.

> . . . Supplier agrees to *indemnify and hold harmless* Cargill from any and all liabilities, losses, damages, fines, penalties, cost and expenses (including reasonable attorney fees) . . . to the extent arising from . . . any breach by Supplier (and/or Supplier Affiliate) of any of its obligations under this agreement. . . [or] any negligent act or omission, or willful misconduct of Supplier . . . .

(Doc. No. 325-1 at 3-4) (emphasis added). An agreement to indemnify "permits a party held legally liable to shift the entire loss to another" and "usually arises from an express agreement by which one party agrees to hold the other harmless for claims brought against it by a third party." *Gen. Conference of Seventh-Day Adventists (Risk Mgmt. Servs.) v. AON Reinsurance Agency, Inc., 860 F. Supp. 983, 986 (S.D.N.Y. July 25, 1994)*, amended by, *860 F. Supp. 983 (S.D.N.Y. Sept. 30, 1994)* (citations omitted); see also *Atl. Richfield Co. v. Interstate Oil Transp. Co., 784 F.2d 106, 115 (2d Cir. 1986)* ("[I]ndemnity agreements are generally designed only to protect against liability for damage to third parties."). This clause, with its language **[*49]** "to indemnify and hold harmless," addresses claims brought against Cargill by a third party. However, the contract language is not sufficiently clear for an award of attorneys' fees in this action by Cargill against the Supplier for breach of contract and other torts. *Autocrafting Fleet Sols. v. Alliance Fleet Co., 148 A.D.3d 1564, 1565-66, 51 N.Y.S.3d 285 (N.Y. App. Div. 2017)* (affirming that language in indemnity provision did not contemplate intraparty claim for breach of contract). Therefore, the Court denies Plaintiffs' request for an award of costs and attorneys' fees against WDS pursuant to the SSAs.

2. Unfair and Deceptive Trade Practices Act

"[T]o encourage individuals to bring valid actions to enforce the [UDTPA] by making such actions economically feasible[,]" *United Lab., Inc. v. Kuykendall, 403 S.E.2d 104, 111 (N.C. Ct. App. 1991)* (citations omitted), aff'd, *335 N.C. 183, 437 S.E.2d 374 (N.C. 1993)*, the UDTPA provides that courts may award reasonable attorneys' fees to the prevailing party if the court finds that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." *N.C. Gen. Stat. § 75-16.1(1)*. "An act is 'willful' within the meaning of *N.C. Gen. Stat. § 75-16.1(1)* if it is 'done voluntarily and intentionally with the view to doing injury to another.'" *Faucette v. 6303 Carmel Road, LLC, 242 N.C. App. 267, 775 S.E.2d 316, 326 (N.C. App. Ct. 2015)* (quoting *Standing v. Midgett, 850 F. Supp. 396, 404 (E.D.N.C. 1993))*. "The award or denial of attorney's **[*50]** fees under *section 75-16.1* is within the [sound] discretion of the trial judge." *Barbee v. Atl. Marine Sales & Serv., Inc., 115 N.C. App. 641, 446 S.E.2d 117, 121-22 (N.C. App. Ct. 1994)* (citing *Borders v. Newton, 68 N.C. App. 768, 315 S.E.2d 731, 732 (N.C. App. Ct. 1984))*.

Plaintiffs, as the prevailing parties receiving damages on their UDTPA claim, argue Defendants' acts were willful, as the jury found intentional acts and found Defendants liable for fraud, which requires a showing of intent to deceive. (Doc. No. 325-1 at 5). Plaintiffs argue Defendants conduct during the course of this litigation through continued concealment and misrepresentation demonstrate Defendants unwarranted refusal to resolve the matter. (Doc. No. 325-1 at 5). Defendants do not dispute that Plaintiffs are the prevailing party or that the acts found were willful, but they do argue that Defendants' refusal to resolve the matter was not unwarranted.[22] Defendants WDS and Ewert argue that they did not have the resources to meet the settlement demanded by Plaintiffs. (Doc. No. 341 at 3-4). Maier similarly argues she offered what she was able to pay. (Doc. No. 354 at 4). Defendants also argue they sought early mediation. (Doc. No. 341 at 3; Doc. No. 354 at 3-4). Plaintiffs in response argue that, as evidenced by the declaration of counsel Edward F. Hennessey, Defendants never made any realistic attempts to settle **[*51]** or fully resolve this matter. (Doc. No. 360 at 1; see also Doc. No. 345 at 3). Hennessey's declaration provides that at the mediation held on December 29, 2017, Defendants Ewert and WDS made no offer to settle, and Defendant Maier offered to settle for a total of $950,000 to be paid over ten years with a confession of judgment as security. (Doc. No. 327-5, ¶ 16). No subsequent offers were known by Hennessey. (Doc. No. 327-5, ¶ 16). Defendants have not filed affidavits to contradict Plaintiffs' declarations.

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[22] Defendants reassert their argument that Chapter 75 does not apply because Plaintiffs did not present evidence that it suffered harm in North Carolina. The Court has already rejected this argument.

Here, the jury's findings of misrepresentation, falsification, commercial bribery, and of liability for fraud evidences willfulness. These acts, which the Court has found to be an unfair and deceptive practice as a matter of law, were voluntarily committed knowing it would injure Plaintiffs. Therefore, based on the jury's findings and the trial record, the Court finds Defendants' violation of the UDTPA resulted from a willful act or practice. Based on the Court's review of the record, the Court also concludes that there was "an unwarranted refusal by [Defendants] to fully resolve the matter which constitutes the basis of [the] suit." *N.C. Gen. Stat. § 75-16.1(1)*. The Court finds WDS and Ewert's conduct in this **[*52]** litigation has been objectively deficient and dilatory for no justified reason. (See, e.g., Doc. Nos. 106, 123). As recited by Plaintiffs and supported by the record and trial record, Maier's discovery conduct is equally blemished. (Doc. No. 360 at 5-7). Maier did not timely produce many relevant documents and never produced several relevant documents, subsequently recovered by Plaintiffs at great expense. (See Doc. No. 360 at 6-7). She also represented the authenticity of fabricated documents. (See Doc. No. 360 at 6). Further, evidence presented at trial involving all parties suggested intentional depletion of WDS's assets. The Court therefore finds WDS and Ewert did not make any offer to resolve this matter, and Maier's offer of settlement was unreasonable, especially in light of the jury's verdict of over $35 million and evidence of her receipt of $4 million in distributions from WDS in excess of her salary. The Court cannot find that in the circumstances of this case, the willingness to mediate and the inability to pay excuse Defendants from attempting to "resolve the matter which constitutes the basis of [this] suit" in whatever manner reasonably within their means, whether monetary **[*53]** or not, and justify Defendants' conduct impeding resolution of this matter. *United Lab., Inc., 403 S.E.2d at 111* (finding that in light of the jury's award, defendant's offer of $20,000 to settle the matter was an unwarranted refusal to settle); *Barbee, 446 S.E.2d at 122* (affirming award of attorneys' fees where "record [was] rife with evidence of defendant's intractability"); see generally *Edwards v. West, 128 N.C. App. 570, 495 S.E.2d 920, 925 (N.C. Ct. App. 1998)* (affirming award of attorneys' fees). Upon these findings of a willful practice and an unwarranted refusal to resolve the matter, the Court awards reasonable attorneys' fees under *N.C. Gen. Stat. § 75-16.1* against WDS, Ewert, and Maier.

3. Racketeer Influenced and Corrupt Organizations Act

Section 1964(c) of Title 18 provides that "[a]ny person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." Congress, by using the language "shall," clearly established that an award of costs, including a reasonable attorneys' fee, is mandatory. Defendant Ewert does not contest. Yet, without citing any law or precedent, Defendant Maier argues an award under *section 1964(c)* is improper because she prevailed on **[*54]** three of the four RICO claims asserted against her. (Doc. No. 354 at 5). However, the plain language of *section 1964(c)* does not support her argument. The only requirement for this mandatory award is injury by the defendant by reason of a violation of *section 1962*. Here, the jury found Maier liable for injury to Plaintiffs under *section 1962(d)*. Thus, Plaintiffs "shall recover . . . the costs of suits, including a reasonable attorney's fee" against Ewert and Maier.

4. Reasonable Attorneys' Fees

Guided by the twelve "Johnson" factors set forth in *Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 n. 28 (4th Cir. 1978)*, courts determine what constitutes a reasonable number of hours and reasonable rate for attorneys' fees. *Brodziak v. Runyon, 145 F.3d 194, 196 (4th Cir. 1998)* (citations omitted); see also *United Lab., Inc., 403 S.E.3d at 111* (making findings "as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney" (citation omitted)). Here, Plaintiffs seek attorneys' fees totaling $2,712,266.35. (Doc. No. 325-1 at 2). Defendants only object to the attorneys' fees to the extent they seek paralegal and support staff time. (Doc. No. 341 at 5; Doc. No. 354 at 2).

After review of the declarations of attorneys Jacob D. Bylund and Edward F. Hennessey and the accompanying billing records, the Court makes the following **[*55]** findings and awards Plaintiffs their requested attorneys' fees after deducting fees for paralegals and support staff. This case was a complex case, raising unique legal questions and requiring extensive filings sometimes on short deadlines. As a result, this case required attorneys of skill and experience to expend a significant amount of time to pursue the claims. Skills commensurate with the skills of Plaintiffs' counsel were necessary. Counsel's fee rates were agreed to, billed, and paid by Cargill and CMS. Fee rates for out-of-state counsel were the ordinary and customary rate charged to their longstanding client. The hourly fees charged were within the range typically charged for complex business litigation in North Carolina. *Legacy Data Access, 2017 U.S. Dist. LEXIS 198817, 2017 WL 6001637, at *20* (citing *In re Newbridge Bancorp S'holder Litig., No. 15 CVS 9251, 2016 NCBC LEXIS 91, 2016 WL 6885882, at *14 (N.C. Super. Ct. Nov. 22, 2016))*; (see also Doc. No. 327-5, ¶¶ 7, 14). The claims in this case against all Defendants arise from the same nucleus of operative facts and are inextricably interwoven with each other.[23] *Whiteside Estates, Inc. v. Highlands Cove, LLC, 553 S.E.2d 431, 467, 146 N.C. App. 449, 467 (N.C. Ct. App. 2001)*. The amount in controversy and results obtained through the jury award and this order further support the requested attorneys' fees.

However, the Court cannot conclude on the record that the paralegals and support staff provided professional legal services that required **[*56]** a legal training or background or that the fees for the services are commensurate with fees charged for such services in North Carolina. See *Irwin Indus. Tool Co. v. Worthington Cylinders Wis., LLC, 747 F.Supp.2d 568, 591, 592-93 (W.D.N.C. 2010)* (declining to award fees for project assistant and only awarding paralegal fees at an hourly rate of $75); see also *United States Trouser, S.A. de C.V. v. Int'l Legwear Group, Inc., No. 1:11-cv-00244-MR-DLH, 2013 U.S. Dist. LEXIS 53822, at *2 (W.D.N.C. April 16, 2013)* ("Hours claimed by a legal secretary or legal assistant are considered overhead for the firm and are therefore not recoverable." (citations omitted)); *Rainbow Sch., Inc. v. Rainbow Early Educ. Holding LLC, No. 5:14-CV-482-BO, 2016 U.S. Dist. LEXIS 172519, at *11-12 (E.D.N.C. Dec. 12, 2016)* (awarding fees for paralegals at rate of $100). This burden is on Plaintiffs. See *Robinson v. Equifax Info. Svcs., LLC, 560 F.3d 235, 244 (4th Cir. 2009)*. Therefore, on this record, the Court only awards attorneys' fees totaling $2,493,796.48.

5. Costs

Plaintiffs also seek $698,878.30 of other costs and $40,723.23 in taxable costs under *18 U.S.C. § 1964(c)*. (Doc. No. 338 at 2). Defendants argue Plaintiffs' costs should be limited to taxable costs under *28 U.S.C. §§ 1920*, *1821* and, as a result, exclude charges for Westlaw research, meals, e-discovery costs, and expert witness fees. (Doc. No. 341 at 4-6; Doc. No. 354 at 2). Defendants do not dispute the amount of taxable costs, which are provided for under *28 U.S.C. §§ 1920*, *1821*, and *Local Rule 54.1*. (See Doc. No. 338-1) Although **[*57]** some courts have limited costs to taxable costs, other circuits and district courts have held that non-statutory costs are allowed under RICO, which provides recovery of "the cost of the suit[.]" *18 U.S.C. § 1964(c)*; see, e.g., *Uniroyal Goodrich Tire Co. v. Mutual Trading Corp., 63 F.3d 516, 526-27 (7th Cir. 1995)* (affirming award of costs and attorneys' fees that included costs of legal research, copying documents, and expert witnesses cost); Fed. Proc., Lawyers Ed., 5B Fed. Proc. § 10:283 ("A prevailing civil RICO plaintiff may recover costs beyond the statutory costs provided for by *Fed. R. Civ. P. 54(d)* and *28 U.S.C.A. § 1920*, since the costs available to a prevailing party under *18 U.S.C.A. § 1964(c)* are equivalent to those allowable in a civil rights case."). Thus, in the absence of binding precedent, the Court reads the plain language of *18 U.S.C. § 1964(c)* to require the award of costs to a prevailing party under RICO beyond taxable costs, provided the costs are necessary costs of the suit. See generally *Cherry v. Champion Int'l Corp., 186 F.3d 442, 449 (4th Cir. 1999)* (finding that the concept of necessity requires something more than convenience and disallowing duplicative costs). The Court finds the other costs requested were reasonable and necessary expenses that have been or will be billed to the clients. Therefore, the Court hereby awards Plaintiffs' taxable costs of $40,723.23 and other costs of $698,878.30.

E. Plaintiffs' [*58] Motion for Terminating Sanctions

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[23] Defendant Maier's objection to the attorneys' fees and request for apportionment is overruled. (See Doc. No. 354). The record and jury's findings reflect the inextricably intertwined nature of all the claims among all Defendants, whom the jury found to be co-conspirators. (See Doc. No. 360 at 3-5).

On December 18, 2017, Plaintiffs moved for terminating sanctions against all Defendants and an award of damages pursuant to *Rules 26* and *37 of the Federal Rules of Civil Procedure* and the Court's inherent powers (the "Second Motion for Sanctions"). (Doc. No. 187).[24] Since then, this case has proceeded to trial, and the jury rendered a verdict on January 22, 2018. (Doc. No. 314). Judgment was entered on January 23, 2018. (Doc. No. 315, 316). As this matter is now before the Court after the jury's award of all compensatory damages sought by Plaintiffs and the Court's allowance of judgment on the jury verdict in this Order, the Court denies the Second Motion for Sanctions as moot.[25]

F. Correction of Judgment to Preclude Double Recovery

The Court must *sua sponte* correct the judgment to reflect that Plaintiffs are only entitled to one recovery for the injury underlying all their claims[26] pursuant to *Rule 60(a) of the Federal Rules of Civil Procedure*. See *Gordon v. Pete's Auto Serv. of Denbigh, 637 F.3d 454, 460 (4th Cir. 2011)*; *Smith v. Gulf Oil Corp., 239 N.C. 360, 79 S.E.2d 880, 885 (N.C. 1954)*. Here, the jury awarded the same amount for each claim. See generally *Vanwyk Textile Sys., B.V. v. Zimmer Mach. Am., Inc., 994 F. Supp. 350, 358-59 (W.D.N.C. 1997)* (reducing judgment to highest amount awarded by jury in verdict). The Court also has determined that Plaintiffs are entitled to treble damages, pre-judgment interest, attorneys' fees, taxable costs, and other costs where afforded by specific **[*59]** claims. Therefore, the Court amends the judgment to clarify that Plaintiffs are only entitled to recover once the highest amount of trebled damages, pre-judgment interest, attorneys' fees, taxable costs, and other costs.

III. CONCLUSION

IT IS THEREFORE ORDERED that for the reasons explained above:

1. Defendants WDS and Ewert's "Renewed Motion for Judgment as a Matter of Law and Alternative Motion for New Trial" (Doc. No. 322) is DENIED.

2. Defendant Maier's "Motion for Judgment as a Matter of Law or Alternatively for New Trial or to Alter or Amend Judgment" (Doc. No. 323) is DENIED.

3. As to Plaintiffs' "Memorandum of Law on UDTPA" (Doc. No. 329), the Court concludes that the practices found by the jury were unfair and deceptive as a matter of law. The Court allows judgment on the jury's verdict on the claim for Unfair and Deceptive Trade Practices of $35,177,269 and trebles the damages awarded by the jury pursuant to *N.C. Gen. Stat. § 75-16*.

4. Plaintiffs' "Motion for Award of Prejudgment Interest" (Doc. No. 320) is GRANTED. The Court awards prejudgment interest of $3,107,164.80 for each of Plaintiffs' claims of violation of the UDTPA, conversion, fraud, and civil conspiracy to defraud or engage in commercial **[*60]** bribery.

5. Plaintiffs' "Motion for Award of Attorneys' Fees and Costs" (Doc. No. 325) is GRANTED IN PART and DENIED IN PART. The Court awards Plaintiffs' attorneys' fees of $2,493,796.48, taxable costs of $40,723.23, and other costs of $698,878.30 pursuant to *18 U.S.C. § 1964(c)*. The Court awards Plaintiffs' attorneys fees under *N.C. Gen. Stat. § 75-16.1(1)* of $2,493,796.48 and costs pursuant to Rule 54.1 of the Federal Rules of Civil Procedure of $40,723.23.

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[24] Plaintiffs sought in the alternative an order to show cause why sanction should not be imposed on Defendants. However, Plaintiffs, and all Defendants, agreed after trial that a hearing on this pending motion was not necessary. Further, as the relief requested is moot, the request for a show cause hearing addressing the requested relief is also moot.

[25] If their request for relief is no longer moot, Plaintiffs may re-new their motion for relief.

[26] As agreed by all the parties, the Court informed the jury that the Court will use the jury's verdict to determine the judgment and will not allow a double recovery.

6. Plaintiffs' "Motion for Terminating Sanctions, or in the Alternative, for an Order to Show Cause" (Doc. No. 187) is DENIED as MOOT.

7. In accordance with the foregoing order, the Court AMENDS the judgment as follows to reflect Plaintiffs' one recovery of the following:

a. Plaintiffs are entitled to recover $105,531,807.00 in trebled/threefold damages from WDS, Ewert, and Maier joint and several.

b. Plaintiffs are entitled to recover $3,107,164.80 in pre-judgment interest from WDS, Ewert, and Maier joint and several.

c. Plaintiffs are entitled to recover $2,493,796.48 in attorneys' fees from WDS, Ewert, and Maier joint and several.

d. Plaintiffs are entitled to recover $40,723.23 in taxable costs from WDS, Ewert, and Maier joint and several.

e. Plaintiffs are entitled to recover $698,878.30 in other costs from Ewert and Maier **[*61]** joint and several.

8. This results in a total judgment against WDS, Ewert, and Maier of $111,173,491.51 with an additional judgment against Ewert and Maier for other costs of $698,878.30.

IT IS SO ORDERED.

Signed: March 28, 2018

/s/ Frank D. Whitney

Frank D. Whitney

Chief United States District Judge

In re Mylan N.V. Sec. Litig.

United States District Court for the Southern District of New York

March 28, 2018, Decided; March 28, 2018, Filed

16-CV-7926 (JPO)

Reporter
2018 U.S. Dist. LEXIS 52084 *; Fed. Sec. L. Rep. (CCH) P100,066

IN RE MYLAN N.V. SECURITIES LITIGATION

Subsequent History: Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *In re Mylan N.V. Sec. Litig., 379 F. Supp. 3d 198, 2019 U.S. Dist. LEXIS 54122, 2019 WL 1427430 (S.D.N.Y., Mar. 29, 2019)*

Related proceeding at *MYL Litig. Recovery I LLC v. Mylan N.V., 2020 U.S. Dist. LEXIS 55501, 2020 WL 1503673 (S.D.N.Y., Mar. 30, 2020)*

Dismissed by, in part, Motion denied by, in part, Class certification granted by *In re Mylan N.V. Sec. Litig., 2020 U.S. Dist. LEXIS 60563, 2020 WL 1673811 (S.D.N.Y., Apr. 6, 2020)*

Summary judgment granted by, Partial summary judgment denied by, Motion denied by *In re Mylan N.V. Sec. Litig., 2023 U.S. Dist. LEXIS 55739 (S.D.N.Y., Mar. 30, 2023)*

Prior History: *In re EpiPen Mktg., 268 F. Supp. 3d 1356, 2017 U.S. Dist. LEXIS 121974, 2017 WL 3297989 (J.P.M.L., Aug. 3, 2017)*

Core Terms

rebate, alleges, misleading, drugs, generic, anticompetitive, investor, scienter, markets, misclassified, prices, misclassification, fail to disclose, products, disclosure, classification, calculations, Rates, pharmaceutical, antitrust, Annual, competitors, inflated, disclose, stock, securities law, generic drug, manufacturers, price-fixing, decisions

Counsel: **[*1]** For Stef Van Duppen, Individually, Stef Van Duppen, On behalf of others similarly situated, Plaintiffs: Phillip C. Kim, The Rosen Law Firm P.A., New York, NY.

For Landon W. Perdue, Individually and on behalf of all others similarly situated, Consolidated Plaintiff: Jeremy Alan Lieberman, LEAD ATTORNEY, Joseph Alexander Hood, II, Pomerantz LLP, New York, NY.

For Dan Kleinerman, Co-Lead Plaintiff's, Movant: Daniel Stephen Sommers, LEAD ATTORNEY, Steven Jeffrey Toll, Times Wang, Cohen Milstein Sellers & Toll PLLC (DC), Washington, DC; Jeremy Alan Lieberman, Pomerantz LLP, New York, NY.

For Vladimir Tchentsov, Movant: Joseph R. Seidman, LEAD ATTORNEY, Bernstein Liebhard, LLP, New York, NY.

For Menorah Mivtachim Insurance Ltd., Menorah Mivtachim Pensions and Gemel Ltd., Phoenix Insurance Company Ltd., Meitav DS Provident Funds and Pension Ltd., Movants: Jeremy Alan Lieberman, LEAD ATTORNEY, Joseph Alexander Hood, II, Pomerantz LLP, New York, NY; Austin Patrick Van, Pomerantz LLP (NYC), New York, NY.

For John D. Sheehan, Defendant: Sandra C Goldstein, LEAD ATTORNEY, Cravath, Swaine & Moore LLP, New York, NY; Stefan H. Atkinson, Cravath, Swaine & Moore LLP, New York, NY.

For Mylan N.V., Mylan, Inc., **[*2]** Heather Bresch, Robert J. Coury, Paul B. Campbell, Kenneth S. Parks, John D. Sheehan, Consolidated Defendants: Sandra C Goldstein, LEAD ATTORNEY, Kevin J. Orsini, Stefan H. Atkinson, Cravath, Swaine & Moore LLP, New York, NY.

Judges: J. PAUL OETKEN, United States District Judge.

Opinion by: J. PAUL OETKEN

Opinion

OPINION AND ORDER

J. PAUL OETKEN, District Judge:

This case is a securities class action against the drug manufacturer Mylan N.V. and several of its officers. The Complaint alleges that Mylan knowingly misclassified the EpiPen for purposes of Medicaid rebates; that Mylan entered into anticompetitive agreements to inflate drug prices; and that after committing these illegal acts, Mylan made materially misleading statements about its conduct to investors, in violation of U.S. and Israeli securities laws.

Mylan now moves to dismiss the complaint. For the reasons that follow, the motion is granted in part and denied in part.

I. Background

The following facts are taken from the Amended Class Action Complaint (the "Complaint") and are assumed true for purposes of this motion. (*See* Dkt. No. 39 ("Compl.").)

Mylan develops, licenses, manufactures, markets, and distributes brand-name and generic pharmaceuticals worldwide. **[*3]** (Compl. ¶ 2.) This action arises out of Mylan's conduct regarding a few drugs in particular: the branded drug EpiPen Auto-Injector ("EpiPen") and the generic drugs albuterol sulfate, benazepril, clomipramine, divalproex, doxycycline hyclate delayed release ("Doxy DR"), and propranolol. (*Id.*)

Mylan is a public company, trading on both the NASDAQ Global Select Market ("NASDAQ") and the Tel Aviv Stock Exchange ("TASE"). (Compl. ¶ 25.) Lead Plaintiffs Menorah Mivtachim Insurance Ltd., Menorah Mivtachim Pensions and Gemel Ltd., Phoenix Insurance Company Ltd., Meitav DS Provident Funds and Pension Ltd., and Dan Kleinerman ("Plaintiffs") bring this action on behalf of themselves and a class of individuals who purchased the common stock of Mylan N.V. or Mylan, Inc. between February 21, 2012, and January 29, 2017, on the NASDAQ or the TASE. (Compl. ¶ 1.) Plaintiffs bring suit against Mylan N.V. and Mylan, Inc. (Mylan N.V.'s predecessor and now its subsidiary), and Mylan executives Heather Bresch, Mylan's Chief Executive Officer ("CEO") since January 2012; Paul B. Campbell, Mylan's Chief Accounting Officer since May 2015; Robert J. Coury, Mylan's CEO from September 2002 through January 2012; **[*4]** Kenneth S. Parks, Mylan's Chief Financial Officer ("CFO") since June 2016; and John D. Sheehan, Mylan's CFO from April 2010 until April 2016 (collectively, "Mylan"). (Compl. ¶¶ 26-32.)

A. Mylan's Allegedly Unlawful Conduct

The conduct giving rise to this action falls into two categories of alleged wrongdoing: (1) Medicaid misclassification and (2) antitrust violations.

First, the Complaint alleges that Mylan unlawfully misclassified the EpiPen as a generic drug for purposes of the Medicaid Drug Rebate Program ("MDRP"). (Compl. ¶ 5.) The MDRP requires pharmaceutical companies to give the Centers for Medicare & Medicaid Services ("CMS"), the agency that administers Medicaid, a rebate on their drugs. (*See* Compl. ¶ 41.) Rebate rates are set by law, and they vary based on whether the drug in question is a single source drug ("S drug"), an innovator multiple source drug ("I drug"), or a noninnovator multiple source drug ("N drug"). (Compl. ¶ 44.) Guidance from CMS indicates that "[i]n general, those products that are approved under a New Drug Application (NDA) need to be reported to CMS as either single source (S) or innovator multiple source (I) and those products approved under an Abbreviated **[*5]** New Drug Application (ANDA) need to be reported to CMS as non-innovator multiple source (N)."[1] (Compl. ¶ 48.) The rebates for S and I drugs are higher than the rebates for N drugs, so Mylan's decision to classify the EpiPen as an N drug allegedly saved the company over $700 million. (Compl. ¶ 53.)

The Complaint alleges that CMS expressly informed Mylan that it had misclassified the EpiPen as an N drug. On March 16, 2009, the Department of Health and Human Services Inspector General ("HHS IG") provided CMS with a list of eight misclassified drugs, including the EpiPen. (Compl. ¶ 65.) Sometime after this disclosure, and on "multiple occasions," CMS informed Mylan that the EpiPen was incorrectly classified. (*Id.*) The Complaint further alleges that Mylan received a subpoena from the Department of Justice ("DOJ") in November 2014 regarding an investigation into whether the EpiPen was properly classified. (Compl. ¶ 72.) On October 7, 2016, Mylan announced that it had agreed to a $465 million settlement with the DOJ and other government agencies (Compl. ¶ 85) in which Mylan agreed to reclassify the EpiPen but did not admit to any wrongdoing (Dkt. No. 54-1).[2]

Second, the Complaint alleges that **[*6]** Mylan entered into a number of anticompetitive agreements to inflate the prices of various drugs. Plaintiffs allege two violations specific to the EpiPen: (1) that Mylan's settlement of a patent infringement suit against Teva Pharmaceuticals ("Teva") included an unlawful "pay for delay" clause that obligated Teva to delay introduction of a generic EpiPen competitor (Compl. ¶¶ 93-100), and (2) that Mylan entered into exclusive dealing agreements with schools that prevented the schools from purchasing EpiPen competitor-products (Compl. ¶¶ 101-02). Plaintiffs further allege that in the generic drug market, Mylan entered into agreements with its competitors (1) to allocate the market for Doxy DR (Compl. ¶¶ 112-26), and (2) to fix the prices of albuterol sulfate, benazepril, clomipramine, divalproex, and propranolol (Compl. ¶¶ 127-60).

The Complaint cites a number of DOJ, congressional, and state investigations into potential anticompetitive conduct by pharmaceutical companies, including Mylan, in the generic drug market. (Compl. ¶¶ 188-200.)[3] However, throughout the class period, Mylan was never—and, as of today, never has been—found liable for the misconduct alleged by Plaintiffs. (Dkt. **[*7]** No. 12-13.)

B. Mylan's Statements to Investors

While intentional misclassification and anticompetitive conduct are both unlawful in their own right, illegal conduct does not in of itself constitute a securities-law violation. Instead, Plaintiffs allege that Mylan misled investors about its misclassification of the EpiPen and its anticompetitive agreements. (Compl. ¶¶ 76, 92, 185-86.) Plaintiffs have

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[1] NDAs cover "new drug[s]" and ANDAs cover "generic drug product[s]." FDA, "Types of Applications," https://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/default.htm. The parties dispute whether the EpiPen was misclassified.

[2] On consent of both parties, the Court takes judicial notice of Mylan's August 31, 2017, press release finalizing the terms of the settlement. (*See* Dkt. Nos. 53-55.)

[3] Additionally, on consent of the parties, the Court takes judicial notice of (1) the fact that a press release was issued by the Attorney General of Connecticut, on behalf of 46 state attorneys general, announcing their intention to file an amended complaint against Mylan and other drug companies in an antitrust suit, and (2) the fact that the proposed amended complaint in that suit was filed. (Dkt. Nos. 61-1 & 61-2; *see also* Dkt. Nos. 61 & 63.)

identified a long list of allegedly misleading statements spanning the five-year class period. (*See* Compl. ¶¶ 201-297.) These statements can be divided into the following categories.[4]

1. Statements of Income. Mylan stated its financial and operating results in Annual Reports on Form 10-K, in Quarterly Reports on Form 10-Q, and in Current Reports on Form 8-K.

2. Statements Explaining Income. Mylan's Current Reports (Form 8-K) and a quarterly earnings call described the causes and sources of Mylan's financial performance.

3. Statements Explaining the Market. Mylan's Annual Reports (Form 10-K) contained descriptions of the U.S. pharmaceutical market—for example, characterizing the market as "very competitive" and "highly sensitive to price." (Compl. ¶¶ 225, 244, 262, 283.)

4. Statements of **[*8]** Rebate Rates. Mylan's Annual Reports (Form 10-K) also stated the Medicaid rebate rates for "products marketed under ANDAs" and "Medicaid-reimbursed non-innovator products." (*E.g.*, Compl. ¶¶ 203, 260.) None of the Annual Reports stated Mylan's classification of the EpiPen or the rebate rate that Mylan had paid to CMS.

5. Statements of Rebate Complexity and Regulatory Risk. Mylan included statements in both its Annual Reports (Form 10-K) and Quarterly Reports (Form 10-Q) characterizing the Medicaid rebate program as "complex" and warning that its rebate calculations were "subject to . . . review and challenge by the applicable governmental agencies" and that "a governmental authority may take a position contrary to a positon we have taken." (Compl. ¶¶ 205, 210, 215, 227, 246, 264, 269, 287.)

6. Code of Conduct and Business Ethics. Throughout the class period, Mylan's Code of Conduct and Business Ethics stated that "Mylan is committed to complying with applicable antitrust and fair competition laws." (Compl. ¶ 296.)

C. Procedural History

Plaintiffs are all purchasers of Mylan's common stock. Plaintiff Stef Van Duppen filed an action against Mylan N.V., Mylan Inc., Heather Bresch, and John **[*9]** Sheehan on October 11, 2016. (Dkt. No. 1.) Separately, Plaintiff Landon W. Perdue filed an action against Mylan N.V., Mylan Inc., Heather Bresch, Paul B. Campbell, Robert J. Coury, Kenneth S. Parks, and John D. Sheehan on October 13, 2016. *See Perdue v. Mylan N.V.*, No. 16 Civ. 8000, Dkt. No. 1. By Order dated January 9, 2017, the Court consolidated the two cases for pre-trial purposes, appointed Lead Plaintiffs, and approved Lead Counsel. (Dkt. No. 26.)

Lead Plaintiffs subsequently filed the Amended Class Action Complaint (Dkt. No. 39) asserting claims under: (1) *Section 10(b)* of the *Securities Exchange Act of 1934 ("Exchange Act")*, *15 U.S.C. § 78j(b)*, and *Rule 10b-5*, *17 C.F.R. § 240.10b-5*, against all Defendants; (2) *Section 20(a)* of the Exchange Act, *15 U.S.C. § 78t(a)*, against the individual Defendants; and (3) Section 1 of the Israeli Securities Law of 1968, against all Defendants.

Defendants have jointly moved to dismiss all claims for failure to state a claim upon which relief can be granted and to dismiss claims under the Israeli Securities Law for lack of subject matter jurisdiction, for lack of personal jurisdiction, and on *forum non conveniens* grounds. (Dkt. No. 45.)

II. U.S. Securities Law Claims

A. Legal Standard

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[4] For a complete list of each allegedly misleading statement, see Appendix A to this Opinion and Order.

Plaintiffs' primary cause of action asserts a securities fraud **[*10]** claim under *Rule 10b-5(b)* for "mak[ing] any untrue statement of a material fact or . . . omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . in connection with the purchase or sale of any security." *17 C.F.R. § 240.10b-5*. "To state a claim under these provisions, a plaintiff must show '(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.'" *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC, 164 F. Supp. 3d 568, 576 (S.D.N.Y. 2016)* (quoting *Stoneridge Inv. Partners, LLC v. Scientific—Atlanta, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008))*.

Claims for securities fraud are subject to the heightened pleading standards of *Federal Rule of Civil Procedure 9(b)* and the Private Securities Litigation Reform Act ("PSLRA"). *See Fed. R. Civ. P. 9(b)*; *15 U.S.C. § 78u-4*. A claim for securities fraud must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *15 U.S.C. § 78u-4(b)(1)*; *see also Fed. R. Civ. P. 9(b)* ("In alleging fraud **[*11]** or mistake, a party must state with particularity the circumstances constituting fraud or mistake."); *Rombach v. Chang, 355 F.3d 164, 170 (2d Cir. 2004)*. The PSLRA further requires that "the complaint shall, with respect to each act or omission alleged to violate [the Exchange Act], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *15 U.S.C. § 78u-4(b)(2)*.

Plaintiffs' second claim arises under *§ 20(a)* of the Exchange Act. *Section 20(a)* imposes liability on "every person who, directly or indirectly, controls any person liable" for securities fraud. *15 U.S.C. § 78t(a)*. "As a general rule, there can be no control person liability without a 'primary violation' of the Exchange Act." *Menaldi, 164 F. Supp. 3d at 576* (quoting *Wilson v. Merrill Lynch & Co., 671 F.3d 120, 139 (2d Cir. 2011))*. The parties agree that Plaintiff's *§ 10(b)* and *§ 20(a)* claims rise and fall together.

To survive a motion to dismiss for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wilson v. Merrill Lynch & Co., 671 F.3d 120, 128 (2d Cir. 2011)* (quoting *Iqbal, 556 U.S. at 678*) (internal quotation marks omitted). When considering a motion **[*12]** to dismiss, courts "must accept as true all of the factual allegations contained in the complaint," *Twombly, 550 U.S. at 572* (quoting *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 n.1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002))*, and must draw "all inferences in the light most favorable to the non-moving party[]," *In re NYSE Specialists Sec. Litig., 503 F.3d 89, 95 (2d Cir. 2007)* (Sotomayor, J.).

On a 12(b)(6) motion, a court may "look[] only to the complaint; documents that are attached as exhibits to, incorporated by reference, or integral to the complaint; and matters of which judicial notice may be taken." *Rhee-Karn v. Burnett, No. 13 Civ. 6132, 2014 U.S. Dist. LEXIS 128199, 2014 WL 4494126, at *3 (S.D.N.Y. Sept. 12, 2014)* (citing *Samuels v. Air Transp. Local 504, 992 F.2d 12, 15 (2d Cir. 1993))*.

B. Material Misrepresentations

The failure to disclose a material fact does not necessarily make its omission untrue or misleading. "*[Section] 10(b)* and *Rule 10b-5(b)* do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 44, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011)*. Instead, "omissions are actionable under *§ 10(b)* only when a corporation has a duty to disclose." *Menaldi, 164 F. Supp. 3d at 579*.

A company has a duty to disclose material information "when (1) a statute or regulation requires disclosure or (2) disclosure is necessary to avoid rendering existing statements misleading by failing to disclose material facts." *Id.* In most circumstances, a company does not have to speak. But "'once a company speaks on an issue or topic, there is a duty to tell the whole truth,' '[e]ven when there is no existing independent duty to disclose **[*13]** information' on the issue or topic." *In re Vivendi, S.A. Sec. Litig., 838 F.3d 223, 258 (2d Cir. 2016)* (alteration in original) (quoting *Meyer v. Jinkosolar Holdings Co., Ltd., 761 F.3d 245, 250 (2d Cir. 2014))*. "[E]ven an entirely truthful statement may provide a basis for liability if material omissions related to the content of the statement make it—or other statements made—materially misleading." *In re Bristol Myers Squibb Co. Sec. Litig., 586 F. Supp. 2d 148, 160 (S.D.N.Y. 2008)*. This is, in short, a rule against telling "half-truths." *In re Vivendi, 838 F.3d at 240*.

One expression of this principle is the rule that corporations are under no general duty "to disclose corporate mismanagement or uncharged criminal conduct." *In re Sanofi Sec. Litig., 155 F. Supp. 3d 386, 403 (S.D.N.Y. 2016)*. "[T]he federal securities laws do not require a company to accuse itself of wrongdoing." *In re Citigroup, Inc. Sec. Litig., 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004)*, *aff'd sub nom. Albert Fadem Tr. v. Citigroup, Inc., 165 F. App'x 928 (2d Cir. 2006)*. Consequently, to impose securities law liability on a corporation for failure to disclose underlying unlawful conduct, a plaintiff must plead with particularity the affirmative statements that were made misleading by the defendant's failure to disclose the alleged wrongdoing. *See Menaldi, 164 F. Supp. 3d at 578-80*. Additionally—and perhaps obviously—such statements cannot be misleading if the misconduct did not happen; consequently, a plaintiff must adequately plead that the misconduct did, in fact, occur.[5] *Id.*

The Complaint identifies a long list of statements that were allegedly made materially misleading by Mylan's failure to disclose **[*14]** its underlying wrongdoing. These statements fall into six categories: statements of Mylan's income ("Statements of Income"); statements explaining the sources of Mylan's income ("Statements Explaining Income"); statements describing the market in which Mylan sold its products ("Statement Explaining the Market"); statements of the Medicaid rebate rates ("Statements of Rebate Rates"); statements indicating the complexity and regulatory risk associated with calculating Medicaid rebate rates ("Statements of Rebate Complexity and Regulatory Risk"); and Mylan's Code of Conduct and Business Ethics. The Complaint alleges that each category of statement is a half-truth that, once made, gave rise to a duty to make additional disclosures about Mylan's EpiPen classification and anticompetitive agreements.

1. Statements of Income and Statements Explaining Income

In its various periodic financial disclosures, Mylan made (a) statements of income on its Forms 10-K and 10-Q and (b) statements explaining income on its Forms 8-K.[6] The Complaint alleges that these statements

> were misleading because they failed to disclose: (1) that Mylan's net income and revenue were inflated because Mylan knowingly had misclassified **[*15]** the EpiPen for the purposes of the MDRP, and accordingly overcharged Medicaid for its EpiPen purchases; and (2) that this knowing misclassification created an acute risk that the Company would be required to pay steep regulatory fines as a penalty for its illegal conduct, which would ultimately be deducted as a charge against the firm's reported net income.

(*E.g.*, Compl. ¶ 202.) For statements beginning with Mylan's August 1, 2013 Form 8-K, the Complaint additionally alleges that the statements "were misleading because they failed to disclose . . . (3) [that] Mylan's income and revenue were inflated as a result of Mylan's anticompetitive activity, including allocation of the market for, and price fixing of, generic drugs." (*E.g.*, Compl. ¶ 234.)

The quantitative statements of earnings contained in Mylan's Forms 10-K and 10-Q are not actionable. Plaintiffs do not allege that Mylan's annual and quarterly earnings reports were themselves false, and "[a]ccurate statements

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[5] Because the question of underlying illegality overlaps with—and in many ways is overtaken by—the separate requirement of scienter, the Court considers these questions together.

[6] Mylan also offered an explanation of income in its August 2015 quarterly earnings call. (Compl. ¶ 274.)

about past performance are self evidently not actionable under the securities laws." *Nadoff v. Duane Reade, Inc., 107 F. App'x 250, 252 (2d Cir. 2004)*. Instead, Plaintiffs argue that providing income and revenue information, without a disclosure that those figures were inflated due to **[*16]** illegal conduct, was misleading. But the mere statement of historical financial information does not give rise to a duty to disclose illegal conduct that may have contributed to that performance. *See* *In re Marsh & Mclennan Companies, Inc. Sec. Litig., 501 F. Supp. 2d 452, 470 (S.D.N.Y. 2006)* ("[T]he isolated statement of actual revenues allegedly generated by improper activities does not create *Section 10(b)* liability.").

Mylan's Forms 8-K, however, go one step further. These Current Reports explained the sources and causes of Mylan's financial success. For example, Mylan's August 2013 Form 8-K stated, "The most significant contributor to Specialty segment revenues continues to be the EPIPEN® Auto-Injector, sales of which increased as a result of favorable pricing and volume." (Compl. ¶ 232.) In the next paragraph, Mylan went on to state that "[a]djusted gross margins were positively impacted in the current quarter as a result of the increase in sales of the EPIPEN® Auto-Injector and margins on new products, which was offset [by] the impact of unfavorable pricing on existing products in all regions within our Generics segment." (*Id.*)

Unlike Mylan's statements *of* income on Forms 10-K and 10-Q, Mylan's statements *explaining* income "put the sources of [Mylan's] revenue at issue." **[*17]** *In re Van der Moolen Holding N.V. Sec. Litig., 405 F. Supp. 2d 388, 401 (S.D.N.Y. 2005)*. "[W]here a company puts at issue the cause of its financial success, it may mislead investors if the company fails to disclose that a material source of its success is the use of improper or illegal business practices." *In re FBR Inc. Sec. Litig., 544 F. Supp. 2d 346, 357 (S.D.N.Y. 2008)*.

Mylan's Forms 8-K squarely put its sources of income at issue. For example, attributing EpiPen's strength to "favorable pricing and volume" (Compl. ¶ 232) may have been misleading in the absence of an additional statement disclosing that the EpiPen's strength was *also* due to anticompetitive agreements and knowingly miscalculated Medicaid rebates. Similarly, stating that the generics segment faced "unfavorable pricing" (*id.*) may have been misleading in the absence of a disclosure that low prices were mitigated by price-fixing agreements. Mylan's repeated use of causal language such as "as a result of," "primarily the result of," "driven by," and "due to" exacerbates this problem. (*E.g.*, Compl. ¶¶ 207, 251.)

However, Mylan's statements explaining income created no duty to disclose that its "knowing misclassification created an acute risk that [Mylan] would be required to pay steep regulatory fines as a penalty." (*E.g.*, Compl. ¶ 202.) Mylan's statements disclosing **[*18]** some sources of past income created a duty to tell the whole truth about past sources of income. But Mylan's statements explaining past income do not obligate Mylan to disclose *future risk*. Mylan must tell the whole truth about only the topics it raises.

In sum, the Court concludes that Mylan's statements explaining income were misleading because Mylan failed to disclose that "Mylan's net income and revenue were inflated because Mylan knowingly had misclassified the EpiPen" (*e.g.*, Compl ¶ 201) and that "Mylan's income and revenue were inflated as a result of Mylan's anticompetitive activity" (*e.g.*, Compl. ¶ 232). Mylan is not, however, liable for statements of income made in its Forms 10-K and 10-Q; nor is it liable for failing to disclose an "acute risk" of fines in its Forms 8-K.

2. Statements Explaining the Market

In four of Mylan's five Annual Reports issued during the class period, the company described the market in which it sold the EpiPen and generic drugs. These descriptions emphasized the competitive nature of the U.S. pharmaceutical market and the means by which Mylan competed with other drug companies. In each of these Form 10-Ks, Mylan stated (with a few minor variations **[*19]** irrelevant to the instant motion):

> Our ***primary competitors*** include other generic companies (both major multinational generic drug companies and various local generic drug companies) and branded drug companies that continue to sell or license branded pharmaceutical products after patent expirations and other statutory expirations. In the branded

> space, ***key competitors*** are generally other branded products that ***compete based on their clinical characteristics and benefits***.
>
> ***Competitive factors*** in the major markets in which we participate can be summarized as follows:
>
> United States. ***The U.S. pharmaceutical industry is very competitive***. Our competitors vary depending upon therapeutic areas and product categories. ***Primary competitors include the major manufacturers of brand name and generic pharmaceuticals***.
>
> ***The primary means of competition are innovation and development, timely FDA approval, manufacturing capabilities, product quality, marketing, portfolio offering size, customer service, reputation and price***. The environment of the U.S. pharmaceutical marketplace is ***highly sensitive to price. To compete effectively, we rely on cost-effective manufacturing processes to meet the rapidly changing* [*20] *needs of our customers around a reliable, high quality supply of generic pharmaceutical products***. With regard to our Specialty Segment business, ***significant sales and marketing effort is required*** to be directed to each targeted customer segment in order ***to compete effectively***.
>
> ***Our competitors include other generic manufacturers, as well as brand companies that license their products*** to generic manufacturers prior to patent expiration or as relevant patents expire. . . .

(Compl. ¶¶ 225 (emphasis added); *see also* 244, 262, 283.) The Complaint alleges that these statements

> were misleading because they failed to disclose: (1) that among the primary means by which Mylan competed was through use of anticompetitive agreements [regarding the EpiPen] . . . ; (2) that Mylan had engaged in collusive anticompetitive activity with other drug companies, including (a) allocating the markets for certain generic drugs . . . and (b) colluding with other drug companies to fix the prices of certain generic drugs; (3) that as a result of this anticompetitive activity, the markets for certain generic drugs sold by Mylan were not competitive; and (4) that while absent anti-competitive conduct, "the U.S. pharmaceutical **[*21]** marketplace [was] highly sensitive to price," the price-fixing cartel of which Mylan was a participant controlled the prices of certain generic drugs for which demand was relatively inelastic, allowing the price-fixing cartel to increase prices for those drugs exponentially without generating a proportionate drop in demand.

(Compl. ¶¶ 226, 245, 263, 284.)

Plaintiffs are correct. "[E]ven though no duty to make a statement on a particular matter has arisen, once corporate officers undertake to make statements, they are obligated to speak truthfully and to make such additional disclosures as are necessary to avoid rendering the statements made misleading." *In re Par Pharm., Inc. Sec. Litig., 733 F. Supp. 668, 675 (S.D.N.Y. 1990)*.

Mylan's Annual Reports are replete with statements that characterize the markets for Mylan's EpiPen and generic drugs as "very competitive" and "highly sensitive to price." These statements detail the "primary means of competition" that Mylan employs to survive in those markets and identifies Mylan's "primary competitors" as both brand-name and generic drug manufacturers. If, as Plaintiffs allege, Mylan was engaged in a variety of anticompetitive practices—often in collusion with Mylan's competitors—then these statements are misleading **[*22]** in the absence of a disclosure of that anticompetitive conduct. *See In re Sotheby's Holdings, Inc., No. 00 Civ. 1041, 2000 U.S. Dist. LEXIS 12504, 2000 WL 1234601, at *4 (S.D.N.Y. Aug. 31, 2000)* (holding that statements that identified "'intense' competition" with a "primary . . . competitor" and described the importance of price to consumers were misleading because a "price-fixing agreement between [the company and its competitor] had eliminated price competition"); *see also Menkes v. Stolt-Nielsen S.A., No. 03 Civ. 409, 2005 U.S. Dist. LEXIS 28208, 2005 WL 3050970, at *7 (D. Conn. Nov. 10, 2005)*.

3. Statements of Rebate Rates

In each of Mylan's Annual Reports during the class period, it described the rebate rates that pharmaceutical companies are required to remit to Medicaid. In Mylan's 2012, 2013, and 2014 Form 10-Ks, it stated that "[t]he required rebate is currently 13% . . . for sales of Medicaid-reimbursed products marketed under ANDAs" and that "[s]ales of Medicaid-reimbursed products marketed under NDAs require manufacturers to rebate . . . 23%." (Compl. ¶¶ 203, 223, 242.) In its 2015 and 2016 Form 10-Ks, Mylan substituted the phrase "Medicaid-reimbursed non-innovator products" for "products marketed under ANDAs" and "Medicaid-reimbursed innovator or single-source products" for "products marketed under NDAs." (Compl. ¶¶ 260, 285.) The Complaint alleges that these statements "were misleading because they failed to disclose **[*23]** that Mylan marketed EpiPen under an NDA but rebated Medicaid only 13% of the average manufacturer's price for sales of Medicaid-reimbursed products." (Compl. ¶¶ 204, 224, 243, 261, 286.)

In its first three Annual Reports, Mylan stated a simple rule: *If ANDA, then 13%*. This statement is true, but was made misleading by Mylan's failure to disclose that this formula was untrue in the case of the EpiPen, which was marketed under an NDA but rebated at 13%. Mylan's last two Annual Reports are less blatantly misleading, stating instead: *If N drug, then 13%*. Mylan did, in fact, classify EpiPen as an N drug and rebate at 13%. However, read in the context of Mylan's previous three Annual Reports, a reasonable investor would likely infer that if ANDA-marketed drugs are rebated at 13%, and N drugs are marketed at 13%, then N drugs are those drugs that are marketed under ANDAs. In other words: If ANDA equals 13%, and N drug equals 13%, then ANDA-marketed drugs and N drugs are equivalents. That was not true in the case of the EpiPen, which was marketed under an NDA but rebated at the N drug rate. Consequently, each of Mylan's Form 10-K Annual Reports contained statements that, absent a clear statement **[*24]** of the EpiPen rebate rate, could have misled a reasonable investor as to the rate at which Mylan was rebating the EpiPen.

4. Statements of Rebate Complexity and Regulatory Risk

In eight different Annual and Quarterly Reports on Forms 10-K and 10-Q, Mylan made statements describing the complexity of calculating Medicaid rebate rates and the risk that Mylan's calculations could be incorrect. The following statement from Mylan's February 2012 10-K is representative:

> OUR REPORTING AND PAYMENT OBLIGATIONS UNDER THE MEDICARE AND/OR MEDICAID REBATE PROGRAM AND OTHER GOVERNMENTAL PURCHASING AND REBATE PROGRAMS ***ARE COMPLEX AND MAY INVOLVE SUBJECTIVE DECISIONS THAT COULD CHANGE*** AS A RESULT OF NEW BUSINESS CIRCUMSTANCES, NEW REGULATORY GUIDANCE, OR ADVICE OF LEGAL COUNSEL. ***ANY DETERMINATION OF FAILURE TO COMPLY WITH THOSE OBLIGATIONS COULD SUBJECT US TO PENALTIES AND SANCTIONS*** WHICH COULD HAVE A MATERIAL ADVERSE EFFECT ON OUR BUSINESS, FINANCIAL POSITION AND RESULTS OF OPERATIONS, AND THE MARKET VALUE OF OUR COMMON STOCK COULD DECLINE.
> . . .
>
> The regulations regarding reporting and payment obligations with respect to Medicare and/or Medicaid reimbursement and rebates and other governmental programs **[*25]** are complex. Because our processes for these calculations and the judgments involved in making these calculations involve, and will continue to involve, subjective decisions and complex methodologies, ***these calculations are subject to the risk of errors***. In addition, ***they are subject to review and challenge by the applicable governmental agencies*** . . . .
>
> Should there be ambiguity with regard to how to properly calculate and report payments — and even in the absence of any such ambiguity — ***a governmental authority may take a position contrary to a position we have taken*** . . . .

(Compl. ¶ 205 (emphasis added and brackets omitted); *see also* Compl. ¶¶ 210, 215, 227, 246, 264, 269, 287.) Beginning with its February 2014 Form 10-K, Mylan added that "ANY FAILURE TO COMPLY WITH THOSE

OBLIGATIONS COULD SUBJECT US TO ***INVESTIGATION***, PENALTIES, AND SANCTIONS." (Compl. ¶¶ 246, 264, 269, 287 (emphasis added).)

The Complaint alleges that these statements were misleading because (1) "the classification of the EpiPen was not complex and did not involve subjective decisions" and "Mylan's classification of the EpiPen was not subject to 'differing interpretations,'" (2) a government authority, namely the **[*26]** HHS IG and CMS, had already taken a position contrary to Mylan's and, starting with Mylan's March 2015 Form 10-K, the DOJ had already subjected Mylan to an investigation, and (3) "Mylan had in fact already failed to comply" with its obligations under the rebate program and that the disclosed "'risk of error already had materialized." (Compl. ¶¶ 206, 211, 216, 228, 247, 265, 270, 288.)

Plaintiffs' first set of allegations fail. Mylan's statements about the complexity, ambiguity, and subjectivity of the rebate calculation are statements of opinion. "A plaintiff who asserts that a statement of opinion or belief . . . is an '*untrue statement* of a material fact' . . . must do more than allege that the underlying fact is false . . . . Rather, such a plaintiff must plead facts that, if true, would be sufficient to show that the speaker did not 'actually hold[] the stated belief' . . . ." *In re Lehman Bros. Sec. & ERISA Litig., 131 F. Supp. 3d 241, 252 (S.D.N.Y. 2015)* (brackets in original) (quoting *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1326, 191 L. Ed. 2d 253 (2015))*. While Plaintiffs allege that Mylan knowingly misclassified the EpiPen, they do not adequately and separately allege that Mylan knowingly misclassified the EpiPen *and believed the classification scheme to be simple, unambiguous, or objective*.[7]

As to Plaintiffs' second set **[*27]** of allegations, there is some disagreement among courts in this circuit over whether cautionary statements can give rise to liability when they disclose the future risk of a present fact. *See In re FBR Inc. Sec. Litig., 544 F. Supp. 2d 346, 360-63 (S.D.N.Y. 2008)* (describing the disagreement). Mylan argues that the "risk disclosures about dangers of regulatory noncompliance [are] not actionable" (Dkt. No. 46 at 8 n.7), while Plaintiffs respond that "statements that a company faces risk of a contingency that in fact has already occurred are misleading" (Dkt. No. 49 at 7 n.4.)

"In all cases, however, the court must keep in mind" that the test is whether a "reasonable investor could have been misled about the nature of the risk when he invested." *Halperin v. eBanker USA.com, Inc., 295 F.3d 352, 359 (2d Cir. 2002)* (emphasis omitted). The question, therefore, is not whether a statement of risk is *per se* actionable, but rather whether Mylan's statement of risk could have misled a reasonable investor. *See Menaldi, 164 F. Supp. 3d at 581* ("[A] duty to disclose can arise when a defendant states an opinion that, absent disclosure, misleads investors about material facts underlying that belief.") In many cases, general or boilerplate disclosures of future regulatory risk would not cause a reasonable investor to believe that the company faced **[*28]** no current regulatory risks. *See In re FBR, 544 F. Supp. 2d at 362*. However, the more specific the caution, the more likely it is to mislead a reasonable investor. For example, a caution that "input prices may rise next quarter" would not cause a reasonable investor to conclude that the prices of all inputs had remained flat or declined in the previous quarter. *See In re Noah Educ. Holdings, Ltd. Sec. Litig., No. 08 Civ. 9203, 2010 U.S. Dist. LEXIS 34459, 2010 WL 1372709, at *7 (S.D.N.Y. Mar. 31, 2010)*. But a caution that "the price of our primary input may rise above $5 next quarter" could certainly cause a reasonable investor to conclude that the price was, at present, $4.99 or less.

The Court concludes that Mylan's statements regarding the risk that "a governmental authority may take a . . . contrary" position and the risk that it "could [be] subject[ed] . . . to investigation" both fall on the potentially misleading side of the line. A reasonable investor could have concluded from Mylan's statement that although the government "may" disagree with Mylan, and "could" open an investigation, such unfavorable events had not yet occurred. In this context, "to warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit." **[*29]** *In re Van der Moolen Holding N.V. Sec. Litig., 405 F. Supp. 2d 388, 400 (S.D.N.Y. 2005)* (quoting *Voit v. Wonderware Corp., 977 F. Supp. 363, 371 (E.D. Pa. 1997))*; *cf. Rombach v. Chang, 355 F.3d 164, 173 (2d Cir. 2004)*

[7] Indeed, Plaintiffs appear to abandon this claim in their opposition brief. (*See* Dkt. No. 49 at 7 (listing four categories of misleading statements relating to EpiPen, none of which included statements regarding complexity).)

("Cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired.").

Regarding Plaintiffs' third set of allegations, an investor could not reasonably interpret Mylan's caution that rebate calculations are "subjective," "complex," and "subject to the risk of errors" as a statement that its current calculations were—as an objective matter—correct and compliant. Unlike Mylan's warning about the risk of specific adverse regulatory actions, its general caution about the chance of rebate inaccuracy *specifically disclaimed* the interpretation that such inaccuracy was not yet existing.

Instead, the only reasonable inference an investor could have drawn is much narrower: That, at the time of the disclosure, Mylan did not *affirmatively know* that the EpiPen was misclassified. While warning that the rebate calculation *could be wrong* does not imply that the rebate calculation is correct, such a warning does imply that the rebate calculation *could also be correct*. If Mylan knew for certain that the EpiPen was misclassified, then warning about the "risk of errors" could have mislead a reasonable investor as to Mylan's then-existing **[*30]** knowledge. Thus, Plaintiffs' third set of allegations survive only to the extent that Mylan misrepresented its knowledge about the EpiPen's misclassification.

5. Code of Conduct and Business Ethics

Finally, the Complaint alleges that Mylan's Code of Conduct and Business Ethics, which stated that "Mylan is committed to complying with applicable antitrust and fair competition laws," was materially misleading for failure to disclose Mylan's anticompetitive activities. (Compl. ¶¶ 296-97.)

This claim fails. "It is well-established that general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery,' meaning that they are 'too general to cause a reasonable investor to rely upon them.'" *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG, 752 F.3d 173, 183 (2d Cir. 2014)* (quoting *ECA, Local 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009))*; *see also* *Singh v. Cigna Corp., 277 F. Supp. 3d 291, 2017 WL 4318057, at *11 (D. Conn., 2017)* ("Although the Code of Ethics was made publicly available on the website and therefore was open for an investor to peruse, there is no reasonable investor who would rely on such 'puffery' . . . .").

C. Scienter and Underlying Misconduct

For each misleading statement, Plaintiffs must allege that Defendants acted with the necessary scienter. "The requisite state of mind in a *Rule 10b-5* action is 'an intent to deceive, manipulate or defraud.'" *Ganino v. Citizens Utilities Co., 228 F.3d 154, 168 (2d Cir. 2000)* (quoting **[*31]** *Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976))*. "In addition to intent, recklessness is a sufficiently culpable mental state for securities fraud in this circuit. Recklessness is defined as 'at the least, . . . an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" *ECA, 553 F.3d at 198* (internal citation omitted) (quoting *Novak v. Kasaks, 216 F.3d 300, 308 (2d Cir. 2000))*.

The requisite scienter "can be established 'either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.'" *Ganino, 228 F.3d at 168-69* (internal citation omitted) (quoting *Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994))*.

To establish scienter under the motive prong, the Complaint must allege that the officers in question "benefitted in some concrete and personal way from the purported fraud." *Novak, 216 F.3d at 307-08*. "Motives that are common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive' for purposes of this inquiry. Rather, the 'motive' showing is generally met when corporate insiders allegedly make **[*32]** a misrepresentation in order to sell their own shares at a profit." *ECA, 553 F.3d at 198* (internal citations omitted). Plaintiffs do not make any allegations of motive with respect to any individual Defendant.

Alternatively, Plaintiffs can plead scienter under the circumstantial evidence prong, although "[w]here motive is not apparent . . . the strength of the circumstantial allegations must be correspondingly greater." *Kalnit v. Eichler, 264 F.3d 131, 142 (2d Cir. 2001)* (quoting *Beck v. Mfrs. Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987))* (internal quotation marks omitted). "At least four circumstances may give rise to a strong inference of the requisite scienter: where the complaint sufficiently alleges that the defendants (1) 'benefitted in a concrete and personal way from the purported fraud'; (2) 'engaged in deliberately illegal behavior'; (3) 'knew facts or had access to information suggesting that their public statements were not accurate'; or (4) 'failed to check information they had a duty to monitor.'" *ECA, 553 F.3d at 199* (quoting *Novak, 216 F.3d at 311*).

To adequately plead scienter, the Complaint must "state with particularity facts giving rise to a strong inference that the defendant[s] acted with the required state of mind." *15 U.S.C. § 78u-4(b)(2)*. "To qualify as 'strong' . . . an inference of scienter must be more than merely plausible or reasonable—it must be **[*33]** cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007)*. "[T]he court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically." *Id. at 326*.

Plaintiffs have identified four categories of actionable statements which could have misled the reasonable investor about: (1) the rate at which Mylan rebated the EpiPen, (2) whether a government agency had expressed disagreement with or opened an investigation into Mylan's rebate calculation, (3) whether Mylan had knowingly misclassified the EpiPen, and (4) whether Mylan had entered into anticompetitive agreements with respect to the EpiPen and generic drugs. *See supra* Part II.B. For ease of reference, the Court will call these categories of statements Rebate Statements, Regulatory Risk Statements, Misclassification Statements, EpiPen Antitrust Statements, and Generic Drugs Antitrust Statements.

For some of these categories, whether Mylan acted with the requisite state of mind in making misleading statements hinges, at least in part, on whether underlying unlawful conduct occurred. Thus, where appropriate, the Court conducts its analysis of illegality and scienter together.

1. Rebate [*34] Statements and Regulatory Risk Statements

Mylan's Rebate Statements and Regulatory Risk Statements are potentially material even in the absence of illegal conduct. Mylan's statements in these two categories were misleading because they gave the investor the false impression that (1) the EpiPen was being rebated at 23% and (2) Mylan's rebate calculation had not yet been contradicted by CMS and was not yet subject to a DOJ investigation. Even if Mylan's rebate rate was legally correct, Mylan nevertheless faced a risk of liability. A reasonable investor certainly could have found information about that liability "important in deciding how to act," *ECA, 553 F.3d at 197* (brackets omitted), and disclosure of the EpiPen's real rebate rate and the existence of significant governmental scrutiny could have "significantly altered the 'total mix' of information made available" to a reasonable investor, *Basic Inc. v. Levinson, 485 U.S. 224, 232, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988)* (quoting *TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976))* (internal quotation marks omitted). Thus, Mylan's Rebate Statements and Regulatory Risk Statements need not be illegal to be materially misleading.

Construing all inferences in Plaintiffs' favor, the Court has no trouble concluding that Plaintiffs have adequately pleaded scienter with respect to Mylan's Rebate **[*35]** Statements and Regulatory Risk Statements. It requires no stretch of the imagination to infer that, due to their positions at the company and the importance of EpiPen to Mylan's operations, Defendants "knew facts or had access to information suggesting that their public statements" about the EpiPen rebate rate and the existence of adverse regulatory activity "were not accurate." *Novak, 216 F.3d at 311*. With respect to the rebate rate, the individual Defendants almost certainly had access to the information that Mylan was rebating EpiPen at 13%. (Compl. ¶ 330.) Similarly, with respect to regulatory scrutiny, the Complaint alleges that "CMS repeatedly informed Mylan that Mylan was misclassifying the EpiPen" and that Defendants were notified of the DOJ investigation by a subpoena in November 2014. (Compl. ¶ 331.)

Consequently, Plaintiffs have plausibly alleged with particularity that Defendants were at least reckless with respect to their Rebate Statements and Regulatory Risk Statements because "the danger was either known to the defendant[s] or so obvious that the defendant[s] must have been aware of it." *Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 47 (2d Cir. 1978)*, *amended sub nom.* *Rolf v. Blyth Eastman Dillon & Co., 570 F.2d 38, 1978 WL 4098 (2d Cir., 1978)* (quoting *Sanders v. John Nuveen & Co., 554 F.2d 790, 793 (7th Cir. 1977))*.

2. Misclassification Statements

Mylan's Misclassification Statements are materially misleading **[*36]** only if the EpiPen was, in fact, misclassified—and knowingly done so. Plaintiffs allege that Mylan's Misclassification Statements were misleading because the company failed to disclose that "Mylan knowingly had misclassified the EpiPen." (*E.g.*, Compl. ¶ 202.) Mylan never affirmatively represented that the EpiPen was classified correctly; indeed, it warned investors that the EpiPen rebate rate was subject to error. Because Mylan warned investors that its rebate rate could be incorrect, Mylan's statements could mislead a reasonable investor only as to Mylan's *knowledge about* EpiPen's alleged misclassification—not the fact of misclassification alone.

Consequently, to state a claim for violation of the securities laws for Mylan's Misclassification Statements, Plaintiffs must adequately plead that (1) the EpiPen was, in fact, misclassified, (2) that Mylan knew EpiPen was misclassified, and (3) that Mylan acted with the requisite scienter in misleading investors about Mylan's knowledge of the misclassification. These three requirements are all the harder to demonstrate because Plaintiffs must plead not only Mylan's knowledge of the *fact* of Mylan's classification as an N drug, but also—more **[*37]** significantly—knowledge of the *legal conclusion* that such a classification was incorrect.

At this stage of the litigation, Plaintiffs have succeeded in clearing these high hurdles. Plaintiffs offer the following pieces of circumstantial evidence to create "a strong inference" of scienter: (1) the individual Defendants' high-level positions at Mylan, (2) the importance of the EpiPen to Mylan's business, (3) the individual Defendants' signed certifications ("SOX certifications") of Mylan's Forms 10-K and 10-Q, (4) notification by CMS that the EpiPen was misclassified, and (5) receipt of the DOJ subpoena. (Compl. ¶¶ 325-31.)

The most important of these pieces of evidence is the allegation that CMS "repeatedly informed Mylan that Mylan was misclassifying the EpiPen for purposes of the MDRP." (Compl. ¶ 331.) The Complaint alleges that the HHS IG identified the EpiPen as a misclassified drug in March 2009, and that sometime thereafter, CMS "on multiple occasions, provided guidance to . . . Mylan on the proper classification of drugs and . . . expressly told Mylan that [the EpiPen] is incorrectly classified." (Comp. ¶ 65 (alterations in original) (quoting Letter from Andrew Slavitt, CMS Acting **[*38]** Administrator, to Ron Wyden, U.S. Senator (Oct. 5, 2016)).) Unlike other government *investigations*, which generally do not demonstrate scienter, the CMS communication reflected a final determination that Mylan had incorrectly classified EpiPen. *Cf.* *Lipow v. Net1 UEPS Techs., Inc., 131 F. Supp. 3d 144, 167 (S.D.N.Y. 2015)* ("[T]he government investigations cannot bolster allegations of scienter that do not exist, and, as currently plead[ed], the government investigations are just that, investigations.").

Plaintiffs' other pieces of circumstantial evidence bolster the inference of scienter. The individual Defendants' position at the company, the importance of EpiPen to Mylan's bottom line, and Defendants' SOX certifications all give rise to the strong inference that the individual Defendants knew that EpiPen's was classified as an N drug, knew that it was being rebated at 13%, and knew that Mylan had been informed by CMS that the EpiPen's classification was incorrect. *Cf.* *Plumbers & Steamfitters Local 773 Pension Fund v. Canadian Imperial Bank of Commerce, 694 F. Supp. 2d 287, 300 (S.D.N.Y. 2010)* (declining to infer scienter from Defendants' management roles when "Plaintiff [had] not 'specifically identified any reports or statements' or any dates or time frame in which Defendants were put on notice of contradictory information" (quoting *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 196 (2d Cir. 2008)))*. Furthermore, although "the **[*39]** existence of an investigation alone is not sufficient to give rise to a requisite cogent and compelling inference of scienter," Mylan's receipt of a DOJ subpoena in 2014 "may be considered by the Court as part of its analysis." *In re Gentiva Secs. Litig., 932 F. Supp. 2d 352, 380 (E.D.N.Y. 2013)*.

Mylan argues that the EpiPen could not have been knowingly misclassified both because the classification rules are complex and because Mylan relied on "longstanding advice from CMS" indicating that the EpiPen was classified correctly. (Dkt. No. 46 at 6-8.) Mylan may yet be proven correct. But at this stage of the litigation, Plaintiffs have plausibly pleaded that underlying misconduct occurred and that "the inference of scienter is as compelling as the opposing inference of the non-fraudulent intent of the Individual Defendants." *Patel v. L-3 Commc'ns Holdings Inc., 2016 U.S. Dist. LEXIS 42978, 2016 WL 1629325, at *12 (S.D.N.Y. Apr. 21, 2016)*. Whether the EpiPen was misclassified, and whether the individual Defendants had knowledge of such misclassification, is appropriately the subject of discovery.

3. EpiPen Antitrust Statements

The Complaint alleges that Mylan entered into two anticompetitive agreements with respect to the EpiPen. But Plaintiffs have failed to plausibly allege that either kind of agreement violated the antitrust laws.

First, Plaintiffs allege that a 2012 **[*40]** settlement agreement with the generic drug manufacturer Teva likely contained a "pay-for-delay" provision "that required Mylan to give Teva a monetary payment in consideration for Teva's agreement to delay introducing its generic epinephrine autoinjector." (Compl. ¶ 97.)

However, these types of "reverse payment" settlement agreements are not presumptively unlawful, but are instead subject to the fact-intensive rule-of-reason antitrust analysis. *See* *F.T.C. v. Actavis, Inc., 570 U.S. 136, 159, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*. To determine whether a reverse payment violates the antitrust laws, a court must consider "its size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification." *Id.* The Complaint makes no allegations of these sorts. Instead, it offers only the conclusory allegations that (1) a "'pay-for-delay' agreement . . . violates antitrust laws where, as here, the monetary payment is offered as consideration primarily to achieve the anticompetitive effect of delaying the entry of a competitive drug into the market" and (2) that Mylan was "able to increase the price of the EpiPen by more than 400% between 2009 **[*41]** and 2016." (Compl. ¶¶ 97, 100.) Even drawing all inferences in favor of Plaintiffs, the Court cannot construe these bare statements as plausibly alleging that the alleged pay-for-delay scheme[8] is unlawfully anticompetitive under the multifactor *Actavis* test.

Second, Plaintiffs allege that Mylan "thwarted competition against the EpiPen by requiring schools . . . to sign exclusive dealing agreements with Mylan" that prevented the schools from purchasing products that competed with EpiPen within the next year. (Compl. ¶ 101.) Plaintiffs allege that these arrangements violated *Section 2* of the *Sherman Act*.[9]

Section 2 of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. To allege a violation of *Section 2*, a plaintiff "must show harm to competition in the relevant market." *Solent Freight Servs., Ltd. Inc. v. Alberty, 914 F. Supp. 2d 312, 323 (E.D.N.Y. 2012)*; *see also* *E & L Consulting,*

[8] Because the terms of the settlement agreement are confidential, the Complaint alleges that it "likely contained" a pay-for-delay provision. (Compl. ¶ 97.)

[9] The Complaint also alleges that the exclusive dealing arrangements violate *Section 3* of the *Clayton Act*, but Plaintiffs have waived this claim by failing to respond to Defendants' contrary arguments in their motion-to-dismiss briefing. (*See* Dkt. No. 46 at 9; Dkt. No. 49 at 10 n.8.) Regardless, the Court concludes that the Complaint does not adequately allege a violation of *Section 3* because it fails to allege that "the competition foreclosed by the contract[s] . . . constitute[s] a substantial share of the relevant market." *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*.

Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 31 (2d Cir. 2006) ("A viable claim under Section 2 . . . must . . . show a harm to competition."). "[I]t usually does not further harm competition for a monopolist in one market to leverage its advantage into a monopoly in a downstream market," and exclusive-dealing agreements "may . . . have pro-competitive **[*42]** purposes and effects, such as assuring steady supply, affording protection against price fluctuations, reducing selling expenses, and promoting stable, long-term business relationships." Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 508 & n.4 (2d Cir. 2004). Therefore, as a general rule, exclusive-dealing agreements are "presumptively legal." Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240, 245 (2d Cir. 1997).

Plaintiffs have failed to allege that Mylan's exclusive-dealing agreements had "an actual adverse effect on competition as a whole in the relevant market," George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 139 (2d Cir. 1998), or that the arrangements' "anticompetitive effects outweigh [their] procompetitive effects," E & L Consulting, Ltd., 472 F.3d at 29 (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)). The Complaint's allegation that Mylan's school contracts "foreclosed a substantial portion of the market for school purchases of epinephrine autoinjectors" (Compl. ¶ 102) is conclusory and fails to support a plausible inference of illegality.

Alternatively, Plaintiffs argue that Mylan's failure to disclose the pay-for-delay and exclusive-dealing agreements is misleading, even if those agreements are entirely legal, because "Mylan's failure to list [such] agreements as among the means by which it competed misled investors into believing that Mylan did not employ such agreements, when in fact it did." (Dkt. No. 49 at 9.)

Plaintiffs' argument goes too far. The **[*43]** Complaint alleges that Mylan's Statements Explaining Income were misleading because "Mylan's income and revenue were *inflated* as a result of Mylan's anticompetitive activity" (*e.g.*, Compl. ¶ 234 (emphasis added)), and that Mylan's Statements Explaining the Market were misleading because they failed to disclose "that among the primary means by which Mylan competed was through use of *anticompetitive agreements*" and "that Mylan had engaged in *collusive anticompetitive activity* with other drug companies" in the generics market (*e.g.*, Compl. ¶ 226 (emphasis added)). In short, the Complaint alleges that Mylan's statements were misleading because they failed to disclose that *illegal means* had inflated Mylan's margins and altered the market. Nothing in the Complaint explains why Mylan's statements would be materially misleading if the agreements were, as a legal matter, not unlawfully anticompetitive.[10] Plaintiff's newfound theory of liability, raised for the first time in their opposition to Defendants' motion to dismiss, comes too late.

Finally, even if the Complaint adequately pleaded underlying unlawful conduct, it has not alleged with particularity that Defendants acted with the requisite **[*44]** scienter. Plaintiffs' sparse allegations of illegality cannot give rise to a strong inference that Mylan was reckless in its failure to disclose the existence of either the pay-for-delay or exclusive-dealing agreements. *See* Novak, 216 F.3d at 308 (defining recklessness as "an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it" (alteration in original) (quoting Rolf v. Blyth, Eastman Dillon & Co., Inc., 570 F.2d 38, 47 (2d Cir. 1978))).

4. Generic Drugs Antitrust Statements

a. Underlying Misconduct

The Complaint alleges that Mylan engaged in two different kinds of anticompetitive activities in the market for generic drugs. Plaintiffs plausibly allege that both types of unlawful conduct occurred.[11]

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[10] Even if such allegations could be teased out of the Complaint, the Court is constrained from doing so because a claim for securities fraud must allege with particularity "the reason or reasons why [each] statement is misleading." 15 U.S.C. § 78u-4(b)(1).

First, Plaintiffs allege that Mylan executives entered into an unlawful agreement with executives at Heritage Pharmaceuticals, Inc. to allocate the market for Doxy DR. (Compl. ¶¶ 112-26.) Relying on information contained in a joint complaint filed by the attorneys general many different states (Compl. ¶ 113), Plaintiffs allege that Jason Malek, Vice President of Commercial Operations at Heritage, and Jeffrey Glazer, Heritage's President and CEO, initiated discussions **[*45]** with Mylan about a market allocation scheme in May 2013 (Compl. ¶¶ 115-16). Communicating via LinkedIn and telephone, "Heritage and Mylan executives agreed to allocate the market for Doxy DR," which included a commitment by Mylan "to 'walk away' from at least one large national wholesaler and one large pharmacy chain to allow Heritage to obtain the business." (Compl. ¶ 115-18.) When a dispute over the arrangement arose in November 2013, Heritage executives "contacted Mylan directly to address the situation." (Compl. ¶ 119.) The Complaint cites two internal Heritage communications and one email to Mylan which confirm Mylan's participation in Heritage's market allocation scheme. (Compl. ¶¶ 119, 122, 126.)

These allegations are sufficient to plausibly plead the existence of a market allocation arrangement between Mylan and Heritage. The Complaint alleges how the agreement was made, when the agreement was made, and the rough contours of the agreement—certainly "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly, 550 U.S. at 556*. To be sure, Plaintiffs' allegations leave the reader wanting to know more. But "[a]sking for plausible grounds to infer an agreement does not impose **[*46]** a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* The Complaint exceeds this standard.

Second, Plaintiffs allege that Mylan agreed with other drug companies to fix the prices of five generic drugs: albuterol sulfate, benazepril, clomipramine, divalproex, and propranolol. (Compl. ¶¶ 127-60.) The Complaint offers no direct evidence of conspiracy. Instead, it identifies parallel price movements for each of the drugs, all characterized by a sharp spike over the course of several months (*see* Compl. ¶¶ 131, 137, 143, 149, 155), and additional factors that tend to indicate conscious agreement to raise prices (*see* Compl. ¶¶ 161-84).

"[C]onscious parallelism . . . is not in itself unlawful." *Twombly, 550 U.S. at 553-54* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))* (internal quotation marks omitted). "Accordingly, to prove an antitrust conspiracy, 'a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.'" *United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)* (quoting *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987))*. "Circumstances that may raise an inference of conspiracy **[*47]** include 'a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications.'" *Id.* (quoting *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013))*. Plaintiffs must allege "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly, 550 U.S. at 556 n.4* (quoting 6 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶ 1425, at 167-185 (2d ed. 2003)).

Viewed in the light most favorable to Plaintiffs, the facts alleged in the Complaint meet this burden. The Complaint alleges specific features of the generic drug market that gave Mylan a motive to conspire to fix prices, including:

> (1) a high degree of industry concentration; (2) high barriers to entry; (3) demand inelasticity; (4) the lack of available substitutes; (5) a high degree of interchangeability between the goods of cartel participants; (6) ease of, and opportunities for intercompetitor contacts and communication; (7) sufficient numbers to drive competition; (8) absence of departures from the market; (9) absence of non-conspiring competitors; **[*48]** (10) size of price increases; and (11) reimbursement of generic drugs.

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[11] The parties dispute whether, in securities fraud actions premised on a failure to disclose underlying criminal conduct, the underlying conduct is subject to heightened pleading standards or plausibility pleading analysis. The Court need not decide this issue because it concludes that Plaintiffs have satisfied either standard.

(Compl. ¶ 162.) *See also* *In re Propranolol Antitrust Litig., 249 F. Supp. 3d 712, 719 (S.D.N.Y. 2017)* ("Defendants are correct that the bare allegation that defendants operate in an oligopolistic market is insufficient to establish a common motive to conspire. Instead, a plaintiff must allege facts, specific to the market at issue, suggesting that the defendants had an incentive to manipulate prices." (internal citation omitted)). Furthermore, the Complaint alleges that because generic drugs are easily substitutable, they compete primarily on price. (Comp. ¶ 161.) Consequently, "[i]n a market free of collusion, if one generic drug marketer raises its prices significantly above those of its competitors, that marketer will lose market share." (*Id.*) The importance of price in the generics market, coupled with the lack of an external triggering event (e.g., a supply shortage or spike in demand), supports the inference that Mylan's sudden price increases "would have been against its self-interest in the absence of price collusion." (*Id.*)

b. Scienter

With respect to Mylan's Generic Drugs Antitrust Statements, the crux of Plaintiffs' scienter allegations rely on the allegations of a "confidential **[*49]** witness" ("CW"). (Compl. ¶¶ 110-11; 332-33.) CW worked at Mylan from 2010 until October 2015 as Director of Costing and later as Director of Production Planning. (Compl. ¶ 110.) At times, CW worked directly with Defendant Sheehan and attended company-wide meetings involving Mylan's CEO and CFO. (Compl. ¶¶ 110-11.) CW allegedly reports that "pricing decisions at Mylan occurred frequently and involved all of Mylan's top executives" and that "the CEO and CFO . . . reviewed any price adjustments and had the last word on pricing decisions for Mylan's drugs." (Compl. ¶ 111.) When it came to price, "[e]verything went up through the top." (*Id.*)

With respect to price-fixing, these allegations are sufficient to support a "strong inference" that the individual Defendants either consciously participated in price-fixing, or were at least reckless in ignoring information indicating that price-fixing was occurring. Based on CW's personal observations at meetings with Mylan's CEO and CFO, he alleges that individuals serving in those positions certainly had access to, and actively participated in, pricing decisions. Although CW does not directly allege that the individual Defendants agreed to fix prices, **[*50]** the Complaint persuasively alleges that in the absence of a collusive agreement, Mylan's dramatic price increases would have been against corporate self-interest. (Comp. ¶ 161.) Consequently, the inference that Defendants knew about such price-fixing agreements is "at least as compelling as any opposing inference" that they approved economically irrational price hikes. *Tellabs, Inc., 551 U.S. at 314*.

With respect to Mylan's Doxy DR market-allocation agreement, however, Plaintiffs do not adequately plead scienter. CW alleges only that the individual Defendants participated in pricing decisions. CW does not allege that the individual Defendants participated in decisions about which markets or customers to target for the sale of *any* generic drug, much less Doxy DR in particular. And the Complaint's allegations about the underlying market-allocation agreement identify only amorphous Mylan "employees" and "executives."[12] Finally, although the Complaint notes subsequent government investigations into Mylan's conduct in the generics market, "government investigations cannot bolster allegations of scienter that do not exist." *Lipow, 131 F. Supp. 3d at 167*.

D. Loss Causation

"Loss causation . . . is the causal link between the alleged misconduct **[*51]** and the economic harm ultimately suffered by the plaintiff." *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc., 343 F.3d 189, 197 (2d Cir. 2003)*. "[T]o establish loss causation, 'a plaintiff must allege . . . that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered,' *i.e.*, that the misstatement or omission concealed something

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[12] For the same reasons, the Complaint also fails to sufficiently plead corporate scienter. *See* *Wyche v. Advanced Drainage Sys., Inc., No. 15 Civ. 5955, 2017 U.S. Dist. LEXIS 34656, 2017 WL 971805, at *15 n.9 (S.D.N.Y. Mar. 10, 2017)*, *aff'd*, *710 Fed. Appx. 471, 2017 WL 4570663 (2d Cir., 2017)* (concluding that allegations of the actions of "unnamed employees" did not give rise to corporate scienter because, "though there is no specific seniority formula for scienter, these employees are clearly not identified with the requisite particularity that would permit the Court to infer that their seniority is sufficient").

from the market that, when disclosed, negatively affected the value of the security." *Lentell v. Merrill Lynch & Co., 396 F.3d 161, 173 (2d Cir. 2005)* (second alteration in original) (internal citations omitted) (quoting *Suez Equity Investors, L.P. v. Toronto—Dominion Bank, 250 F.3d 87, 95 (2d Cir. 2001))*. At the motion to dismiss stage, the Court must determine whether the complaint has sufficiently pleaded that "that the loss [was] foreseeable *and* that the loss [was] caused by the materialization of the concealed risk." *Id.*

Plaintiffs plausibly allege that Mylan's misstatements about rebate rates, regulatory risk, misclassification, and generic drug price-fixing all "concealed the circumstances that bear upon the loss suffered such that plaintiffs would have been spared all or an ascertainable portion of that loss absent the fraud." *Lentell, 396 F.3d at 175*. Plaintiffs allege, for example, that disclosures of EpiPen's rebate rate and CMS's adverse regulatory determination caused Mylan's share price to fall 4.65% in September 2016 **[*52]** and another 3.13% in October 2016. (Compl. ¶¶ 308-10.) Similarly, disclosure of the suspected price-fixing scheme caused Mylan's stock to drop 6.9% and then another 1.64% in November 2016. (Compl. ¶¶ 315-18.)

These allegations are sufficient, at this stage, "to provide [the] defendant[s] with some indication of the loss and the causal connection that the plaintiff has in mind." *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 404 (2d Cir. 2015)*. Having concluded that Plaintiffs have sufficiently pleaded loss causation, the Court defers questions about the robustness of Plaintiffs' selection of corrective disclosures to a later stage of litigation, after the aid of discovery.

III. Israeli Securities Law Claim

In addition to U.S. securities-law claims brought on behalf of individuals who purchased Mylan stock on the NASDAQ, Plaintiffs also assert a third cause of action under Israeli securities laws on behalf of individuals who purchased Mylan stock on the Tel Aviv Stock Exchange. The Court declines to exercise supplemental jurisdiction over this Israeli law claim.

For claims not falling within a court's original jurisdiction,[13] the federal supplemental jurisdiction statute provides that "the district courts shall have supplemental jurisdiction over all other **[*53]** claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." *28 U.S.C. § 1367(a)*. *Section 1367(c)*, however, gives district courts discretion to refuse to exercise supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367; *see also* *Kolari v. New York-Presbyterian Hosp., 455 F.3d 118, 122 (2d Cir. 2006)* ("*Subsection (c)* of *§ 1367* confirms the discretionary nature of supplemental jurisdiction . . . ." (quoting *City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 173, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997))* (internal quotation marks omitted)).

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[13] The Court notes that it is possible that Plaintiffs' Israeli law claim could fall within the Court's original diversity jurisdiction. It appears that at least one defendant, Mylan Inc., is a citizen of New York because its principal place of business is located in this state. (Compl. ¶ 27.) But because the Complaint does not allege the citizenship of the plaintiffs or the individual Defendants, the Court cannot determine whether complete or minimal diversity exists. *See* *28 U.S.C. § 1332(a)*, *(d)*. Because "jurisdiction must be shown affirmatively, and that showing is not made by drawing from the pleadings inferences favorable to the party asserting it," *Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998)*, the Court presumes that the only possible basis for jurisdiction over the Israeli claim is supplemental jurisdiction, as alleged in the Complaint. (*See* Compl. ¶ 22.) Furthermore, the Court notes that although it does not reach Defendants' motion to dismiss under the doctrine of *forum non conveniens*, several of the factors compelling the Court to decline supplemental jurisdiction would also weigh in favor of a dismissal on those alternative grounds.

Both the first and fourth factors compel the Court to decline to exercise supplemental jurisdiction. First, Plaintiffs' Israeli law claim raises a complex issue of foreign law.[14] Specifically, Plaintiffs' claim calls on this Court to decide whether Israeli courts would apply U.S. securities law or Israeli securities law to a "dual listed" company such as Mylan. Plaintiffs cite three district-level decisions by Israeli courts applying **[*54]** U.S. law, but these decisions are not precedential. *See* CC (TA) 28811/16 *Damati v. Mankind Corp.* ¶ 80 (2016) (Isr.) (Dkt. No. 60-2) ("According to the Israeli legal system, decisions of a district court do not constitute accepted legal theory and do not obligate other instances that rule on the same issue . . . ."). And the Israeli Supreme Court has recently and explicitly stated that this choice-of-law issue is an open question:

> The question of what the applicable law is in a claim such . . . which relates to a "dual" company that is listed on both the stock exchange in Israel and on a stock exchange in the United States, is indeed a question that has not yet been finally answered in the settled law in Israel. It is not a simple question, and the discussion of it must take into account a variety of considerations.

CA 28811/16 *Damti v. MannKind Corp.* ¶ 45 (2016) (Isr.) (Dkt. No. 57-1). The Court agrees with the *Damati* district court, which candidly opined that "it is not possible to determine, solely on the basis of the language of the law, what law applies to the question of liability for the reporting of dual-listed companies" because "the language of the law can bear" opposing interpretations. **[*55]** CC (TA) 28811/16 *Damati v. Mankind Corp.* ¶ 28 (2016) (Isr.). Consequently, the Court believes it better to decline to exercise supplemental jurisdiction, and to leave this novel question of Israeli law to the Israeli Supreme Court to answer in the first instance.

Furthermore, the Court concludes that this case presents the kind of "exceptional circumstances" offering "compelling reasons for declining jurisdiction" under *§ 1367(c)(4)*. Two separate class actions are currently pending in Israeli courts, both brought by purchasers of Mylan's stock on the TASE and both raising claims similar to those in Plaintiffs' Complaint.[15] (*See* Dkt. No. 52, at 1-3.) Israeli courts are better equipped than this Court to offer Israeli plaintiffs an appropriate forum to litigate their claims under Israeli law. As the Supreme Court has observed:

> Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions **[*56]** may be joined in a single suit, what attorney's fees are recoverable, and many other matters.

Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 269, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). (*See also* Dkt. No 52, at 6 (describing Israel's streamlined system for distributing damage awards to shareholders).) In the interests of international comity, this Court hesitates to impinge on Israeli courts' ability to adjudicate the claims of their own citizens under their own securities laws—even if Israel has chosen, as a matter of *Israeli law*, to apply U.S. securities law. "[R]espect for foreign law would be completely subverted if foreign claims were allowed to be piggybacked into virtually every American securities fraud case, imposing American procedures, requirements, and interpretations . . . ." *In re Toyota Motor Corp. Secs. Litig., No. 10 Civ. 922, 2011 U.S. Dist. LEXIS 75732, 2011 WL 2675395, at *7 (C.D. Cal. July 7, 2011)*.

On the other side of the ledger, the United States has only a minimal interest, if any, in providing a forum to litigate the claims of foreign stockholders under foreign securities laws. *See* *Dar El-Bina Eng'g & Contracting Co. v. Republic of Iraq, 79 F. Supp. 2d 374, 388 (S.D.N.Y. 2000)*; *see also* *Morrison, 561 U.S. at 270* ("While there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign

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[14] "While many of the cases refer to supplemental jurisdiction over 'state claims,' *Section 1367* applies to 'all other claims' and therefore the same analysis would also apply to foreign law claims." *Roman y Gordillo, S.C. v. The Bank of New York Mellon Corp., No. 12 Civ. 212, 2015 U.S. Dist. LEXIS 135664, 2015 WL 5786460, at *21 n.29 (S.D.N.Y. Sept. 29, 2015)*.

[15] By letter dated March 18, 2018, Plaintiffs' counsel in the Israeli class actions represented to the Court that they "intend to stay" those actions. (Dkt. No. 68 at 2.) However, even if the Israeli courts grant such a stay, the remaining *§ 1367(c)* considerations still counsel in favor of declining to exercise supplemental jurisdiction over Plaintiffs' Israeli law claims.

securities markets, some fear that it has become the Shangri—La of class-action litigation for lawyers representing those allegedly cheated in foreign securities **[*57]** markets."). And, finally, declining jurisdiction over the Israeli Plaintiffs avoids the risk of exposing Defendants to inconsistent or double liability.

To be sure, "declining jurisdiction outside the ambit of *1367(c)(1)-(3)* appears as the exception rather than the rule." *Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 448 (2d Cir. 1998)*. But in this instance, "to further the 'values of economy, convenience, fairness, and comity,'" the Court concludes that "any exercise of supplemental jurisdiction should be declined." *Roman Y Gordillo, S.C., 2014 U.S. Dist. LEXIS 96789, 2014 WL 3507300, at *12* (quoting *Itar-Tass Russian News Agency, 140 F.3d at 448*).

Accordingly, Count Three of the Complaint is dismissed.

IV. Conclusion

For the foregoing reasons, Defendants' motion to dismiss the Amended Class Action Complaint is GRANTED in part and DENIED in part. Defendants shall file an answer to the surviving claims by two weeks from the date of this order.

The Clerk of Court is directed to close the motion at Docket Number 45.

SO ORDERED.

Dated: March 28, 2018

New York, New York

/s/ J. Paul Oetken

J. PAUL OETKEN

United States District Judge

Appendix A: Allegedly Misleading Statements

Statement	**Complaint Paragraph**	**Type of Statement**
Feb. 21, 2012 Form 10-K	201	Statement of Income
Apr. 26, 2012 Form 8-K	207	Statement Explaining Income
Apr. 27, 2012 Form 10-Q	208	Statement of Income
July 26, 2012 Form **[*58]** 8-K	212	Statement Explaining Income
July 26, 2012 Form 10-Q	213	Statement of Income
Oct. 25, 2012 Form 8-K	217	Statement Explaining Income
Oct. 25, 2012 Form 10-Q	218	Statement of Income
Feb. 27, 2013 Form 8-K	220	Statement Explaining Income

Statement	Complaint Paragraph	Type of Statement
Feb. 28, 2013 Form 10-K	221	Statement of Income
May 2, 2013 Form 8-K	229	Statement Explaining Income
May 2, 2013 Form 10-Q	230	Statement of Income
Aug. 1, 2013 Form 8-K	232	Statement Explaining Income
Aug. 1, 2013 Form 10-Q	233	Statement of Income
Oct. 31, 2013 Form 8-K	235	Statement Explaining Income
Oct. 31, 2013 Form 10-Q	236	Statement of Income
Feb. 27, 2014 Form 8-K	238-39	Statement Explaining Income
Feb. 27, 2014 Form 10-K	240	Statement of Income
May 1, 2014 Form 8-K	248	Statement Explaining Income
May 1, 2014 Form 10-Q	249	Statement of Income
Aug. 7, 2014 Form 8-K	251	Statement Explaining Income
Aug. 7, 2014 Form 10-Q	252	Statement of Income
Oct. 30, 2014 Form 8-K	254	Statement Explaining Income
Nov. 5, 2014 Form 10-Q	255	Statement of Income
Mar. 2, 2015 Form 8-K	257	Statement Explaining Income
Mar. 2, 2015 Form 10-K	258	Statement of Income
May 5, 2015 Form 8-K	266	Statement Explaining Income
May 8, 2015 Form 10-Q	267	Statement of Income
Aug. 6, 2015 Form 8-K	271	Statement Explaining Income
Aug. 6, 2015 Form 10-Q	272	Statement of Income
Oct. 30, 2015 Form 8-K	276	Statement Explaining **[*59]** Income
Oct. 30, 2015	277	Statement of

Statement	Complaint Paragraph	Type of Statement
Form 10-Q		Income
Feb. 10, 2016 Form 8-K	279-80	Statement Explaining Income
Feb. 10, 2016 Form 10-K	281	Statement of Income
May 3, 2016 Form 8-K	289	Statement Explaining Income
May 3, 2016 Form 10-Q	290	Statement of Income
Aug. 9, 2016 Form 8-K	292-93	Statement Explaining Income
Aug. 9, 2016 Form 10-Q	294	Statement of Income
Aug. 6, 2015 Q2 Earnings Call	274	Statement Explaining Income
Feb. 21, 2012 Form 10-K	203	Statement of Rebate Rates
Feb. 28, 2013 Form 10-K	223	Statement of Rebate Rates
Feb. 27, 2014 Form 10-K	242	Statement of Rebate Rates
Mar. 2, 2015 Form 10-K	260	Statement of Rebate Rates
Feb. 16, 2016 Form 10-K	285	Statement of Rebate Rates
Feb. 21, 2012 Form 10-K	205	Statement of Rebate Complexity and Regulatory Risk
Apr. 27, 2012 Form 10-Q	210	Statement of Rebate Complexity and Regulatory Risk
July 26, 2012 Form 10-Q	215	Statement of Rebate Complexity and Regulatory Risk
Feb. 28, 2013 Form 10-K	227	Statement of Rebate Complexity and Regulatory Risk
Feb. 27, 2014 Form 10-K	246	Statement of Rebate Complexity

Statement	Complaint Paragraph	Type of Statement
		and Regulatory Risk
Mar. 2, 2015 Form 10-K	264	Statement of Rebate Complexity and Regulatory Risk
May 8, 2015 Form 10-Q	269	Statement of Rebate Complexity and Regulatory Risk
Feb. 16, 2016 Form 10-K	287	Statement of Rebate Complexity and Regulatory Risk **[*60]**
Feb. 28, 2013 Form 10-K	225	Statement Explaining the Market
Feb. 27, 2014 Form 10-K	244	Statement Explaining the Market
Mar. 2, 2015 Form 10-K	262	Statement Explaining the Market
Feb. 16, 2016 Form 10-K	283	Statement Explaining the Market
Code of Conduct and Business Ethics	296	Code of Conduct and Business Ethics

Statement	Plaintiffs' Reason(s) Why the Statement Is Misleading
Feb. 21, 2012 Form 10-K Apr. 26, 2012 Form 8-K Apr. 27, 2012	Failed to disclose that: (1) Net income and revenue were inflated due to EpiPen misclassification (2) Misclassification created an acute risk of future fines

Statement	**Plaintiffs' Reason(s) Why the Statement Is Misleading**
Form 10-Q	
July 26, 2012	
Form 8-K	
July 26, 2012	
Form 10-Q	
Oct. 25, 2012	
Form 8-K	
Oct. 25, 2012	
Form 10-Q	
Feb. 27, 2013	
Form 8-K	
Feb. 28, 2013	
Form 10-K	
May 2, 2013	
Form 8-K	
May 2, 2013	
Form 10-Q	
Aug. 1, 2013 Form 8-K Aug. 1, 2013 Form 10-Q Oct. 31, 2013 Form 8-K Oct. 31, 2013 Form 10-Q	Failed to disclose that: (1) Net income and revenue were inflated due to EpiPen misclassification (2) Misclassification created an acute risk of future fines (3) Income and revenue were inflated as a result of anticompetitive conduct
Feb. 27, 2014	
Form 8-K	
Feb. 27, 2014	
Form 10-K	
May 1, 2014	
Form 8-K	
May 1, 2014	
Form 10-Q	
Aug. 7, 2014	
Form 8-K	
Aug. 7, 2014	
Form 10-Q	
Oct. 30, 2014	
Form 8-K	
Nov. 5, 2014	
Form **[*61]** 10-Q	
Mar. 2, 2015	
Form 8-K	

Statement	Plaintiffs' Reason(s) Why the Statement Is Misleading
Mar. 2, 2015 Form 10-K	
May 5, 2015 Form 8-K	
May 8, 2015 Form 10-Q	
Aug. 6, 2015 Form 8-K	
Aug. 6, 2015 Form 10-Q	
Oct. 30, 2015 Form 8-K	
Oct. 30, 2015 Form 10-Q	
Feb. 10, 2016 Form 8-K	
Feb. 10, 2016 Form 10-K	
May 3, 2016 Form 8-K	
May 3, 2016 Form 10-Q	
Aug. 9, 2016 Form 8-K	
Aug. 9, 2016 Form 10-Q	
Aug. 6, 2015 Q2 Earnings Call	(4) Failed to disclose that Mylan's margins were inflated as a result of anticompetitive activity
Feb. 21, 2012 Form 10-K	(5) Failed to disclose that Mylan rebated EpiPen at 13%
Feb. 28, 2013 Form 10-K	
Feb. 27, 2014 Form 10-K	
Mar. 2, 2015 Form 10-K	
Feb. 16, 2016 Form 10-K	
Feb. 21, 2012 Form 10-K	Failed to disclose that: (6) Mylan had already failed to comply (7) Classification was neither complex nor

Statement	Plaintiffs' Reason(s) Why the Statement Is Misleading
	subjective
Apr. 27, 2012 Form 10-Q	(8) Classification was not subject to a "risk" of error because it had already occurred (9) Classification was not subject to different interpretations
July 26, 2012 Form 10-Q	(10) Government authority had already taken a contrary position (HHS IG and CMS)
Feb. 28, 2013 Form 10-K	
Feb. 27, 2014 Form 10-K	
Mar. 2, 2015 Form 10-K	Failed to disclose that: (6) Mylan had already failed to comply (7) Classification was neither complex nor subjective
May 8, 2015 Form 10-Q	(8) Classification was not **[*62]** subject to a "risk" of error because it had already heard (9) Classification was not subject to different interpretations
Feb. 16, 2016 Form 10-K	(10) Government authority had already taken a contrary position (HHS IG and CMS) (11) Mylan was already under investigation by the DOJ
Feb. 28, 2013 Form 10-K	Failed to disclose that: (12) Among the primary means by which Mylan competed was through the use of anticompetitive
Feb. 27, 2014 Form 10-K	agreements with respect to EpiPen (13) Mylan had engaged in collusive anticompetitive activity with respect to generic
Mar. 2, 2015 Form 10-K	drugs, including (a) market allocation, and (b) price fixing (14) As a result of Mylan's anticompetitive
Feb. 16, 2016 Form 10-K	activity, markets for certain generic drugs were not competitive (15) As a result of Mylan's price-fixing, markets for certain generic drugs were not "highly sensitive to price"
Code of Conduct and	Failed to disclose that: (16) Mylan was violating antitrust laws

Statement	Plaintiffs' Reason(s) Why the Statement Is Misleading
Business Ethics	(12) Mylan competed through the use of anticompetitive agreements with respect to EpiPen
	(13) Mylan had engaged in collusive anticompetitive activity with respect to generic drugs, including (a) market allocation, and (b) price fixing

In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.

United States District Court for the Northern District of California

March 28, 2018, Decided; March 28, 2018, Filed

Case Nos. 14-md-02541-CW; 14-cv-02758-CW

Reporter

2018 U.S. Dist. LEXIS 52230 *; 2018-1 Trade Cas. (CCH) P80,326; 2018 WL 1524005

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION; THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: *Jenkins v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 311 F.R.D. 532, 2015 U.S. Dist. LEXIS 163878 (N.D. Cal., Dec. 4, 2015)*

Core Terms

student-athletes, athletic, procompetitive, restrictive alternative, Plaintiffs', benefits, effects, schools, summary judgment, attendance, basketball, football, amateurism, conferences, res judicata, expenses, relevant market, incidental, moving party, anticompetitive, purposes, consolidated, grant-in-aid, injunction, non-moving, educational expenses, collateral estoppel, tethered, summary judgment motion, financial aid

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For Dalenta Jameral "D.J." Stephens, Plaintiff (4:14-md-02541-CW): Lawrence Timothy Fisher, LEAD ATTORNEY, Bursor & Fisher, P.A., Walnut Creek, CA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Craig Ripley Spiegel, Hagens Berman Sobol **[*10]** Shapiro LLP, Seattle, WA; David G. Feher, David L. Greenspan, Jeffrey L. Kessler, Jennifer Stewart, Winston and Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Sean D. Meenan, Winston and Strawn, San Francisco, CA; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Joseph A. Litman, Winston and Strawn, New York, NY; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For Justine Hartman, Plaintiff (4:14-md-02541-CW): Elizabeth Cheryl Pritzker, LEAD ATTORNEY, Bethany Caracuzzo, Jonathan Krasne Levine, Pritzker Levine, LLP, Oakland, CA; David G. Feher, David L. Greenspan, Jeffrey L. Kessler, Jennifer Stewart, Winston and Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Sean D. Meenan, Winston and Strawn, San Francisco, CA; Joseph A. Litman, Winston and Strawn, New York, NY.

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For Pacific 12 Conference, Defendant (4:14-md-02541-CW): Bart Harper Williams, Proskauer Rose, Los Angeles, CA; Jacquelyn Nicole Crawley, Jennifer L. Jones, Kyle Alexander Casazza, Manuel Francisco Cachan, Scott P. Cooper, Shawn Scott Ledingham, Jr., Proskauer Rose LLP, Los Angeles, CA; Joseph C. O'Keefe, Wanda L. Ellert, Proskauer Rose LLP, Newark, NJ; Lawrence R. Sandak, Proskauer & Rose LLP, Newark, NJ; William L. Greene, Minneapolis, MN.

For The Big Ten Conference, Inc., Defendant (4:14-md-02541-CW): Christopher John Kelly, LEAD ATTORNEY, Mayer Brown LLP, Palo Alto, CA; Andrew S. Rosenman, Britt Marie Miller, Mayer Brown LLP, Chicago, IL; Michael Martinez, Mayer Brown LLP, New York, NY; Richard J. Favretto, Mayer Brown **[*12]** LLP, Washington, DC.

For Southeastern Conference, Defendant (4:14-md-02541-CW): Nathan Clifton Chase, Jr., LEAD ATTORNEY, Robinson Bradshaw & Hinson, Charlotte, NC; Amanda Rae Pickens, PRO HAC VICE, Robinson Bradshaw Hinson, Charlotte, NC; John A. Boyle, Kevin Harry Marino, Marino Tortorella & Boyle PC, Chatham, NJ; Lawrence C Moore, III, PRO HAC VICE, Robinson, Bradshaw and Hinson, P.A., Charlotte, NC; Mark J. Seifert, Seifert Law Firm, San Francisco, CA; Pearlynn G. Houck, Robinson Bradshaw Hinson, Charlotte, NC; Robert Walker Fuller, III, Robert Evans Harrington, Robinson Bradshaw Hinson, P.A., Charlotte, NC.

For Atlantic Coast Conference, Defendant (4:14-md-02541-CW): Charles Lagrange Coleman, III, LEAD ATTORNEY, Holland & Knight LLP, San Francisco, CA; Adanna M Love, San Francisco, CA; Charles Bailey King, Jr., Jonathan P Heyl, Smith Moore Leatherwood LLP, Charlotte, NC; David Erik Albright, Smith Moore Leatherwood LLP, Greensboro, NC; Duvol Thompson, Holland and Knight LLP, New York, NY; James Donald Smeallie, Holland and Knight LLP, Boston, MA; Sean C. Sheely, Holland & Knight LLP, New York, NY.

For The Big Twelve Conference, Inc., Defendant (4:14-md-02541-CW): Wesley Douglas Hurst, **[*13]** LEAD ATTORNEY, Polsinelli LLP, Los Angeles, CA; Amy Dawn Fitts, Kansas City, MO; Caitlin Jemilha Morgan, Leane K Capps, Polsinelli, PC, Dallas, TX; Matthew P. O'Malley, Tompkins McGuire Wachenfeld & Barry LLP, Newark, NJ; Milton Winter, Polsinelli PC, Kansas City, MO.

For National Collegiate Athletic Association, Defendant (4:14-md-02541-CW): Beth Wilkinson, LEAD ATTORNEY, Alexandra M Walsh, Brian L Stekloff, Rakesh Kilaru, WILKINSON WALSH + ESKOVITZ LLP, Washington, DC; Anthony J Dreyer, Jeffrey A. Mishkin, Karen Hoffman Lent, PRO HAC VICE, Skadden Arps Slate Meagher Flom LLP, New York, NY; Gregory L. Curtner, Riley Safer Holmes & Cancila LLP, Ann Arbor, MI; Jacob Klein Danziger, Robert James Wierenga, PRO HAC VICE, Schiff Hardin LLP, Ann Arbor, MI; Patrick Maben Hammon, Skadden Arps Slate Meagher Flom, Palo Alto, CA; Sean Eskovitz, Wilkinson Walsh Eskovitz LLP, Los Angeles, CA.

For Conference USA, Defendant (4:14-md-02541-CW): Leane K Capps, LEAD ATTORNEY, Caitlin Jemilha Morgan, Polsinelli PC, Dallas, TX; Amy Dawn Fitts, Kansas City, MO; Milton Winter, Polsinelli PC, Kansas City, MO.

For American Athletic Conference, Defendant (4:14-md-02541-CW): Benjamin C. Block, LEAD ATTORNEY, Covington **[*14]** and Burling LLP, Washington, DC; Lindsey Catherine Barnhart, Covington Burling LLP, San Francisco, CA; Rebecca Ariel Jacobs, Covington and Burling LLP, San Francisco, CA.

For Mid-American Conference, Defendant (4:14-md-02541-CW): Andrew B. Downs, LEAD ATTORNEY, Bullivant Houser Bailey PC, San Francisco, CA; Robert Todd Hunt, LEAD ATTORNEY, Benjamin G. Chojnacki, Walter Haverfield LLP, Cleveland, OH.

For Mountain West Conference, Defendant (4:14-md-02541-CW): Meryl Macklin, LEAD ATTORNEY, Bryan Cave LLP, San Francisco, CA; Richard Young, LEAD ATTORNEY, Brent Rychener, Bryan Cave LLP, Colorado Springs, CO.

For Sun Belt Conference, Defendant (4:14-md-02541-CW): Mark Aaron Cunningham, LEAD ATTORNEY, Jones Walker LLP, New Orleans, LA.

For Western Athletic Conference, Defendant (4:14-md-02541-CW): Karen Hoffman Lent, LEAD ATTORNEY, Jeffrey A. Mishkin, Skadden Arps Slate Meagher Flom LLP, New York, NY; Patrick Maben Hammon, Skadden Arps Slate Meagher Flom, Palo Alto, CA.

For Lamar Dawson, Movant (4:14-md-02541-CW): Betsy Carol Manifold, Wolf Haldenstein Adler Freeman & Herz, Symphony Towers, San Diego, CA; Mark Carl Rifkin, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY.

For Turner Broadcasting **[*15]** System, Inc., Interested Party (4:14-md-02541-CW, 4:14-cv-02758-CW): Dean Allen Morehous, Jr., LEAD ATTORNEY, Troutman Sanders LLP, San Francisco, CA.

For NBCUniversal Media, LLC, Interested Party (4:14-md-02541-CW): Kelli L. Sager, LEAD ATTORNEY, Davis Wright Tremaine LLP, Los Angeles, CA.

For Darrin Duncan, Objector (4:14-md-02541-CW): Caroline Victoria Tucker, TUCKER POLLARD, Irvine, CA.

For Iowa State University, University of Iowa, University of Northern Iowa, Miscellaneous (4:14-md-02541-CW): William Robert Pearson, Iowa Department of Justice, Des Moines, Io.

For ESPN, Inc., ESPN Enterprises, Inc., American Broadcasting Companies, Inc., Intervenors (4:14-md-02541-CW): Evan R. Chesler, LEAD ATTORNEY, David Kumagai, Joe Wesley Earnhardt, Cravath, Swaine and Moore LLP, New York, NY; Joseph Richard Wetzel, King & Spalding, San Francisco, CA.

For Fox Broadcasting Company, Fox Cable Networks, Inc., Fox International Channels (US), Inc., Intervenors (4:14-md-02541-CW, 4:14-cv-02758-CW): David R. Singer, Richard Lee Stone, LEAD ATTORNEYS, Anthony Basich, Jenner & Block, Los Angeles, CA; Jeffrey Aaron Atteberry, Jenner and Block LLP, Los Angeles, CA.

For CBS Broadcasting Inc., Intervenor (4:14-md-02541-CW, **[*16]** 4:14-cv-02758-CW): Christopher J. Cox, LEAD ATTORNEY, Weil Gotshal & Manges, Redwood Shores, CA; David Ramraj Singh, LEAD ATTORNEY, Weil, Gotshal and Manges LLP, Redwood Shores, CA; Yehudah L Buchweitz, LEAD ATTORNEY, New York, NY.

For Johnathan Moore, Kevin Perry, William Tyndall, individually and on behalf of all others similarly situated, Plaintiffs (4:14-cv-02758-CW): James S. Richter, LEAD ATTORNEY, Winston & Strawn LLP, Newark, NJ; Jeffrey L. Kessler, LEAD ATTORNEY, David G. Feher, David L. Greenspan, Winston & Strawn LLP, New York, NY; Derek J Sarafa, PRO HAC VICE, Winston and Strawn LLP, Chicago, IL; Ian L Papendick, Winston & Strawn LLP, San Francisco, CA; Jeanifer Ellen Parsigian, Sean D. Meenan, Winston and Strawn, San Francisco, CA; Joseph A. Litman, Winston and Strawn, New York, NY; Melissa Steedle Bogad, Winston & Strawn LLP, Newak, NJ; Sean Gerald Wieber, Winston and Strawn, Chicago, IL.

For Shawne Alston, Plaintiff (4:14-cv-02758-CW): Steve W. Berman, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jon T. King, Law Offices of Jon T. King, Concord, CA.

For Nicholas Kindler, Plaintiff **[*17]** (4:14-cv-02758-CW): Steve W. Berman, LEAD ATTORNEY, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA.

For National Collegiate Athletic Association, Defendant (4:14-cv-02758-CW): ANTHONY JOSEPH DREYER, LEAD ATTORNEY, SKADDEN ARPS, NEW YORK, NY; Jeffrey A. Mishkin, LEAD ATTORNEY, Karen Hoffman Lent, Skadden Arps Slate Meagher Flom LLP, New York, NY.

For Atlantic Coast Conference, Defendant (4:14-cv-02758-CW): David Erik Albright, LEAD ATTORNEY, Smith Moore Leatherwood LLP, Greensboro, NC; Duvol Thompson, LEAD ATTORNEY, Holland and Knight LLP, New York, NY; Jonathan P Heyl, LEAD ATTORNEY, Charles Bailey King, Jr., Smith Moore Leatherwood LLP, Charlotte, NC; Robert Neil Marcus, LEAD ATTORNEY, Attorney at Law, Los Angeles, CA; Sean C. Sheely, LEAD ATTORNEY, Holland & Knight LLP, New York, NY.

For Big 12 Conference, Defendant (4:14-cv-02758-CW): Leane K Capps, LEAD ATTORNEY, Polsinelli PC, Dallas, Tx; Matthew P. O'Malley, LEAD ATTORNEY, Tompkins McGuire Wachenfeld & Barry LLP, Newark, NJ; Milton Winter, LEAD ATTORNEY, Polsinelli PC, Kansas City, MO; Amy Dawn Fitts, Kansas City, MO.

For BIG TEN CONFERENCE, Defendant (4:14-cv-02758-CW): **[*18]** Michael Martinez, LEAD ATTORNEY, Mayer Brown LLP, New York, NY; Andrew S. Rosenman, Britt Marie Miller, PRO HAC VICE, Mayer Brown LLP, Chicago, IL; Richard J. Favretto, PRO HAC VICE, Mayer Brown LLP, Washington, DC.

For Pac-12 Conference, Defendant (4:14-cv-02758-CW): Jennifer L. Jones, Scott P. Cooper, LEAD ATTORNEYS, Proskauer Rose LLP, Los Angeles, CA; Joseph C. O'Keefe, Wanda L. Ellert, LEAD ATTORNEYS, Proskauer Rose LLP, Newark, NJ; Lawrence R. Sandak, LEAD ATTORNEY, Proskauer & Rose LLP, Newark, NJ.

For Southeastern Conference, Defendant (4:14-cv-02758-CW): John A. Boyle, LEAD ATTORNEY, Marino Tortorella & Boyle PC, Chatham, NJ; KEVIN HARRY MARINO, LEAD ATTORNEY, MARINO TORTORELLA & BOYLE, PC, CHATHAM, NJ; Robert Walker Fuller, III, LEAD ATTORNEY, Robinson Bradshaw Hinson, P.A., Charlotte, NC; Mark J. Seifert, Seifert Law Firm, San Francisco, CA.

For Conference USA, Miscellaneous (4:14-cv-02758-CW): Leane K Capps, Polsinelli, PC, Dallas, TX; Amy Dawn Fitts, Kansas City, MO.

For ESPN, Inc., ESPN Enterprises, Inc., American Broadcasting Companies, Inc., Intervenors (4:14-cv-02758-CW): Evan R. Chesler, LEAD ATTORNEY, Joe Wesley Earnhardt, Cravath, Swaine and Moore LLP, New York, NY; **[*19]** David Kumagai, PRO HAC VICE, Cravath, Swaine and Moore LLP, New York, NY; Joseph Richard Wetzel, King & Spalding, San Francisco, CA.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

(Dkt. Nos. 657, 704, 797, 800)

In this multidistrict litigation, student-athlete Plaintiffs allege that Defendants National Collegiate Athletic Association (NCAA) and eleven of its member conferences fixed prices for the payments and benefits that the students may receive in return for their elite athletic services. Now pending are cross-motions for summary judgment.[1] For the reasons set forth below, the cross-motions for summary judgment are granted in part and denied in part.[2]

BACKGROUND

Plaintiffs are current and former student-athletes in the sports of men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball. Defendants are the NCAA and eleven conferences that participated, during the relevant period, in FBS football and in men's and women's Division I basketball. Plaintiffs allege that Defendants violated federal ***antitrust law*** by conspiring to impose an artificial ceiling on the scholarships **[*20]** and benefits that student-athletes may receive as payment for their athletic services.

I. O'Bannon v. NCAA

In 2009, a group of college Division I student-athletes brought an antitrust class action against the NCAA to challenge the association's rules preventing men's football and basketball players from being paid, either by their school or by any outside source, for the sale of licenses to use the student-athletes' names, images, and/or likenesses (NIL) in videogames, live game telecasts, and other footage. *O'Bannon v. NCAA, 7 F. Supp. 3d 955,*

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[1] The Court will rule by separate order on the pending motions to seal and to exclude proposed expert testimony.

[2] In the exercise of discretion, the Court denies Defendants' Motion for Supplemental Briefing and Plaintiffs' Motion to File Supplemental Evidence for the Summary Judgment Record. See *Civil Local Rule 7-3(d)*. The Court does not, at this time, rule on whether Plaintiffs' proposed supplemental evidence will be admissible at trial.

962-63 (N.D. Cal. 2014). The rules challenged by the O'Bannon plaintiffs, which furthered the agreement of the NCAA and its members to fix the value of student-athletes' NIL at zero, included the then-applicable maximum limit on financial aid. Under that limit, student-athletes were prohibited from receiving "financial aid based on athletics ability" that exceeded the value of a full grant-in-aid. O'Bannon, 7 F. Supp. 3d at 971. The rules defined "grant-in-aid" as "financial aid that consists of tuition and fees, room and board, and required course-related books." Id. Other expenses related to school attendance, such as supplies and transportation, were not included in the grant-in-aid limit, although they were calculated in a school-specific **[*21]** figure called "cost of attendance." Id.

The Court held a bench trial and ruled that the challenged NCAA rules violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Id. at 963. The Court found that the evidence presented at trial established that FBS football and Division I men's basketball schools compete to recruit the best high school football and men's basketball players in a relevant market for a college education combined with athletics. 7 F. Supp. 3d at 965-68, 986-88. In exchange for educational and athletic opportunities, the FBS and Division I schools compete "to sell unique bundles of goods and services to elite football and basketball recruits." Id. at 965, 986. The Court found that this market, alternatively, could be understood as a monopsony, in which the NCAA member schools, acting collectively, are the only buyers of the athletic services and NIL licensing rights of elite student-athletes. Id. at 973, 993.

The Court found that the plaintiffs met their burden to show that the NCAA had fixed the price of the student-athletes' NIL rights, which had significant anticompetitive effects in the relevant market. Id. at 971-73, 988-93. On the question of procompetitive justifications of the restraints, the Court found that the NCAA's challenged restrictions on student-athlete compensation **[*22]** played "a limited role in driving consumer demand for FBS football and Division I basketball-related products." Id. at 1001. The Court also found that the challenged rules "might facilitate the integration of academics and athletics . . . by preventing student-athletes from being cut off from the broader campus community." Id. at 1003.

The O'Bannon plaintiffs proposed three alternatives that they asserted were less restrictive than the NCAA rules that they challenged: (1) raising the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes; (2) allowing schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; and (3) permitting student-athletes to receive limited compensation for third-party endorsements approved by their schools. 7 F. Supp. 3d at 982. Each of these proposed less restrictive alternatives related specifically to the use of revenue derived from NIL licensing and endorsements.

This Court found that the first two of these proposed alternatives "would limit the anticompetitive effects of the NCAA's current restraint without **[*23]** impeding the NCAA's efforts to achieve its stated purposes." Id.; see also id. at 983-84. The Court rejected the plaintiffs' third proposed alternative. Id. at 984. Accordingly, this Court enjoined the NCAA from enforcing any rules that would prohibit its member schools and conferences from offering their FBS football and men's Division I basketball recruits a limited share of the revenues generated from the use of their NIL in addition to a full grant-in-aid, but permitted the NCAA to implement rules capping the amount of compensation that could be paid to student-athletes while they are enrolled in school at the cost of attendance. Id. at 1007-08. The Court also prohibited the NCAA from enforcing rules to prevent member schools and conferences from offering to deposit a limited share of NIL licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires. Id. at 1008.

The Ninth Circuit largely affirmed this Court's decision, including the finding that allowing NCAA member schools to award grants-in-aid up to the student-athletes' full cost of attendance would be a substantially less restrictive alternative to the existing compensation rules. O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015). It held **[*24]** that "the grant-in-aid cap has no relation whatsoever to the procompetitive purposes of the NCAA: by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses." Id. at 1075. However, it vacated the judgment and injunction insofar as they required the NCAA to allow its member schools to pay student-athletes limited deferred compensation in a trust account. Id. at 1079. The circuit court found that allowing "students to receive NIL cash payments untethered to their education expenses" would not promote the NCAA's procompetitive purposes as effectively as a rule forbidding cash compensation, even if the payment was limited and took the form of a trust fund. Id. at 1076.

II. This Litigation

Plaintiffs initiated these actions in 2014 and 2015, attacking the NCAA's cap on their grant-in-aid itself, rather than merely the association's restrictions on sharing NIL revenue. The United States Judicial Panel on Multidistrict Litigation transferred actions filed in other districts to this Court pursuant to 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings. All but one of the actions were consolidated. The operative pleading in the consolidated **[*25]** action is Plaintiffs' consolidated amended complaint, filed July 11, 2014. The consolidated amended complaint has been amended by orders incorporating additional allegations about named Plaintiffs in subsequently-filed cases (Docket Nos. 86, 184, 197). One case, Jenkins v. NCAA, No. 14-cv-02758, has not been consolidated, but all pending motions were briefed together in the consolidated action and in Jenkins.[3]

On December 4, 2015, the Court certified three injunctive relief classes in the consolidated action, under Federal Rule of Civil Procedure 23(b)(2): a Division I FBS Men's Football Class, a Division I Men's Basketball Class, and a Division I Women's Basketball Class, each consisting of student-athletes who received or will receive a written offer for a full grant-in-aid as defined by NCAA Bylaw 15.02.5 during the pendency of this action. In the Jenkins action, the Court certified the men's football and basketball classes; the women's basketball class was not sought in that case. As part of the class certification proceedings, all Plaintiffs committed to seek to stay either the consolidated case or the Jenkins case prior to trial of the other in order to avoid duplicative trials **[*26]** on behalf of identical classes and a race to determine which judgment would be binding under principles of res judicata.

Defendants and the consolidated Plaintiffs reached a settlement of all claims for damages, and the Court granted final approval of that settlement and entered a partial judgment under Federal Rule of Civil Procedure 54(b) on December 6, 2017. The Jenkins Plaintiffs have not sought damages. Therefore, only claims for injunctive relief remain pending.

LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Material facts which would preclude entry of summary judgment are those which, under applicable substantive law, may affect the outcome of the case. The substantive law will identify **[*27]** which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

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[3] The Jenkins Plaintiffs raise one separate issue in a footnote to Plaintiffs' opposition to Defendants' cross-motion for summary judgment. They request that if the Court grants Defendants' summary judgment motion in the consolidated action, the Court not apply the ruling to the Jenkins action, but instead remand it back to the District of New Jersey, where the decisions of the Ninth Circuit and this Court in O'Bannon would not control under the doctrine of stare decisis. At the hearing on the motion, the Jenkins Plaintiffs clarified that they do not seek remand if the Court grants summary judgment only in part. See Jan. 16, 2018 Tr. at 50. Because the Court grants summary judgment in part and denies it in part, the Jenkins Plaintiffs' request for remand prior to summary judgment is moot.

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of production by either of two methods:

> The moving party may produce evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000).

If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim or defense, it is not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evidence negating the non-moving party's claim. Id.; see also *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*; *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991)*. If the moving party shows an absence of evidence to support the non-moving party's case, the burden then shifts to the non-moving party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan, 929 F.2d at 1409*.

If the moving party discharges its burden by negating an essential element of the non-moving party's claim or defense, it must **[*28]** produce affirmative evidence of such negation. *Nissan, 210 F.3d at 1105*. If the moving party produces such evidence, the burden then shifts to the non-moving party to produce specific evidence to show that a dispute of material fact exists. Id.

If the moving party does not meet its initial burden of production by either method, the non-moving party is under no obligation to offer any evidence in support of its opposition. Id. This is true even though the non-moving party bears the ultimate burden of persuasion at trial. *Id. at 1107*.

DISCUSSION

I. Res Judicata and Collateral Estoppel

Defendants argue that all of Plaintiffs' claims are foreclosed under the doctrines of res judicata, or claim preclusion, and collateral estoppel, or issue preclusion, by the decisions of the Ninth Circuit and this Court in *O'Bannon. 802 F.3d 1049*; *7 F. Supp. 3d 955*. The purpose of these doctrines is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)*. The burden of proving the elements of either res judicata or collateral estoppel is on the party asserting it. *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1050-51 (9th Cir. 2008)* (collateral estoppel); *Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 627 n.4 (9th Cir. 1988)* (res judicata).

Res judicata prohibits the re-litigation of any claims that **[*29]** were raised or could have been raised in a prior action. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077-78 (9th Cir. 2003)*. Three elements must be present in order for res judicata to apply: (1) an identity of claims; (2) a final judgment on the merits; and (3) the same parties or their privies. *Id. at 1077*.

Collateral estoppel "prevents a party from relitigating an issue decided in a previous action if four requirements are met: '(1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated in that action; (3) the issue was lost as a result of a final judgment in that action; and (4) the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action.'" *Kendall, 518 F.3d at 1050* (quoting *United States Internal Revenue Serv. v. Palmer, 207 F.3d 566, 568 (9th Cir. 2000))*.

The application of either res judicata or collateral estoppel here would require that any Plaintiff not present in O'Bannon have been in privity with the parties in that case. Two primary categories of Plaintiffs here were not part of the O'Bannon class: male student-athletes who were recruited after O'Bannon and female student-athletes.[4]

Defendants contend that privity nonetheless exists here because, in O'Bannon, the interests of nonparty student-athletes **[*30]** were represented adequately by the plaintiffs there with the same interests and the Court took special care to protect the interests of future student-athletes. In "certain limited circumstances, a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions." *Taylor v. Sturgell, 553 U.S. 880, 894, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)* (internal alteration, citation and quotation marks omitted). The Supreme Courtheld,

> A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented.

Taylor, 553 U.S. at 900 (citations omitted). The Supreme Court further explained that, in the federal class action context, the limitations on nonparty representation "are implemented by the procedural safeguards contained in *Federal Rule of Civil Procedure 23*." *Id. at 900-01*. In other **[*31]** words, the definition of the O'Bannon class under *Rule 23* limits the persons who are subject to the preclusive effect of the judgment. Under Taylor, then,the effect of res judicata does not extend to individuals who were not part of the O'Bannon class. Furthermore, Defendants cannot satisfy the Taylor factors for individuals who were not classmembers in that case. The Court and the parties in O'Bannon focused their analysis on the claims of class members, the named plaintiffs represented only class members, and only classmembers were on notice that they were represented.

None of the current Plaintiffs' claims are precluded for an additional reason, regardless of whether those Plaintiffs were O'Bannon class members. The general rule is that "'the continuation of conduct under attack in a prior antitrust suit'" gives rise to a new action. *Harkins Amusement Enters., Inc. v. HarryNace Co., 890 F.2d 181, 183 (9th Cir. 1989)* (quoting 2 P. Areeda & D. Turner, Antitrust Laws § 323c (1978)) ("Failure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time."); see also *Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000)* ("A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for **[*32]** the earlier claim."). Only where no distinct conduct is alleged can res judicata be applied to bar claims arising from a different time period. See *In re Dual-Deck Video Cassette Recorder Antitrust Litig., 11 F.3d 1460, 1464 (9th Cir. 1993)* (applying res judicata where nothing new was "alleged--no new conspiracy, no new kinds of monopolization, no new acts").

The Court must consider the "conduct of parties since the first judgment" and other factual matters in the new cause of action. *Harkins, 890 F.2d at 183* (quoting *California v. Chevron Corp., 872 F.2d 1410, 1415 (9th Cir. 1989))*. It is not enough that "both suits involved essentially the same course of wrongful conduct" or that injunctive relief was sought in the first action, especially "in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action." *Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 327, 329, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)* (internal quotation marks omitted).

The NCAA Bylaws were changed after, and in part because of, O'Bannon, and now permit student-athletes to receive financial aid, based on athletics ability, up to their cost of attendance, or more than that in the case of a Pell grant. See Pls. Ex. 15 at 182 (Bylaws 15.1, 15.1.1). In this case, Plaintiffs do not challenge the bar on distributing NIL licensing revenue to student-athletes or the former grant-in-aid limitation. Rather, the challenged **[*33]**

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[4] The parties have not briefed whether there are any class members in this case who were not class members in O'Bannon because their NIL have not been, and will not be, included in game footage or in videogames after the conclusion of the athlete's participation in intercollegiate athletics. See *O'Bannon, 7 F. Supp. 3d at 965* (quoting class definition).

restraints are the current, interconnected set of NCAA rules that generally limit financial aid to the cost of attendance yet also fix the prices of numerous and varied exceptions--additional benefits that have a financial value above the cost of attendance. See Pls. Opp. to Defs. MSJ, App'x A (Challenged Rules and Operative Language).

Some of these rules regulate payment for additional benefits that do appear to be tethered to education, such as the rule limiting the availability of academic tutoring. See Defs. Ex. 1 at 102 (Bylaw 13.2.1.1(k), prohibiting tutoring to assist in initial eligibility, transfer eligibility, or waiver requests). The rules also restrict schools' ability to reimburse student-athletes for computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies. See NCAA (Kevin C. Lennon) Depo. at 212:11-19. Plaintiffs also challenge various additional restrictions on benefits related to educational expenses, such as providing guaranteed post-eligibility scholarships. Id. at 195:5-199:17. Currently, schools may provide guaranteed post-eligibility **[*34]** scholarships for undergraduate or graduate study and tutoring costs only at their own institution, but not at other institutions. Id.

Defendants also allow, but fix the amount of, benefits that a school may provide that are incidental to athletic participation, such as travel expenses and prizes. See id. at 58:20-59:16 ("There are items that schools can provide outside of educational expenses, which, again, are tethered to cost of attendance, that I would kind of capture as incidental to participation."). Some of the additional benefits limited by the rules at issue in this case were provided to student-athletes at the time of the O'Bannon trial, but neither this Court nor the Court of Appeals addressed them in that case and their scope has expanded since that time. For example, student-athletes could previously receive meals incidental to participation in athletics, see O'Bannon Ex. 2340-233 (then-applicable Bylaws), but may now receive unlimited meals and snacks, see Pls. Ex. 15 at 183 (Bylaw 15.2.2.1.6 regarding meals incidental to participation); Mishkin Reply Decl. Ex. 1 at 207 (Bylaw 16.5.2(d), (e) regarding meals and snacks). Witnesses in O'Bannon testified that the Student Assistance **[*35]** Fund (SAF)[5] could then be used to purchase a "special insurance policy" or "catastrophic injury insurance," O'Bannon Tr. 2147:14-23, 2152:7-17, but student-athletes now may borrow against future earnings to purchase loss-of-value insurance, Pls. Ex. 15 at 58 (Bylaw 12.1.2.4.4). Student-athletes now may receive athletic performance bonuses from international organizations related to Olympic participation. See Pls. Ex. 15 at 57 (Bylaw 12.1.2.1.5.2, adopted January 17, 2015 and effective August 1, 2015). There has been an increase in permissible reimbursement for family travel expenses, which permits schools to pay limited expenses of a student-athlete's spouse and children to attend games, although still not those of parents or siblings. Eugene DuBuis Smith Depo. at 51:24-57:18; see also NCAA (Lennon) Depo. at 71:7-73:2, 186:1-16 (discussing Bylaw 16.6.1.1); Mishkin Reply Decl. Ex. 1 at 303 (Bylaw 18.7.5).

Because Plaintiffs raise new antitrust challenges to conduct, in a different time period, relating to rules that are not the same as those challenged in O'Bannon, res judicata and collateral estoppel do not preclude the claims even of those Plaintiffs who were O'Bannon class members. **[*36]**

II. *Section 1* of the Sherman Act

The Court next turns to the remaining issues in the parties' cross-motions. Plaintiffs move for summary judgment of their claims under *Section 1* of the Sherman Act. *15 U.S.C. § 1*. In order to establish a *Section 1* claim, Plaintiffs must demonstrate: "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *Tanaka v. Univ. of S. California, 252 F.3d 1059, 1062 (9th Cir. 2001)* (internal quotation marks omitted). The existence of a contract, combination or conspiracy that affects interstate commerce is undisputed in this case. NCAA regulations are subject to antitrust scrutiny under the Sherman Act and must be tested using a rule-of-reason analysis. *O'Bannon, 802 F.3d at 1079*. Under that analysis, Plaintiffs bear the initial burden of showing that the challenged restraints produce significant anticompetitive effects within a relevant market. If Plaintiffs meet this burden, Defendants must come forward with evidence of the restraints' procompetitive effects.

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[5] The SAF is a fund that the NCAA provides to member schools to distribute to student-athletes for a variety of uses, some of which are in addition to full cost-of-attendance financial aid. See NCAA (Lennon) Depo. at 152:19-153:19; Pls. Ex. 24 at NCAAGIA03316052 (reporting on SAF uses).

Plaintiffs must then show that any legitimate objectives can be achieved in a substantially less restrictive manner. *Tanaka, 252 F.3d at 1063*.

Plaintiffs contend that the undisputed **[*37]** evidence supports their claim that the challenged restraints cause anticompetitive effects in the relevant market, and that Defendants cannot meet their burden to prove that the restraints have procompetitive benefits. They request that the Court grant summary judgment on this basis, obviating the need to reach the question of whether there are any less restrictive alternatives to any legitimate objectives. Plaintiffs do not seek summary judgment on the existence of less restrictive alternatives.

Defendants cross-move for summary judgment on the basis that the decisions of this Court and the Ninth Circuit in O'Bannon bar all of Plaintiffs' claims, under the doctrine of stare decisis. "If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect. Binding authority must be followed unless and until overruled by a body competent to do so." *Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001)*. Stare decisis applies when "there are neither new factual circumstances nor a new legal landscape." *Ore. Natural Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 786 (9th Cir. 2008)*. A court is required to reach the same legal consequence from the same "detailed set of facts." *In re Osborne, 76 F.3d 306, 309 (9th Cir. 1996)*. "Insofar as there **[*38]** may be factual differences between the current case and the earlier one, the court must determine whether those differences are material to the application of the rule or allow the precedent to be distinguished on a principled basis." *Hart, 266 F.3d at 1172*; see also *Miranda v. Selig, 860 F.3d 1237, 1242 (9th Cir. 2017)* (stare decisis required where circumstances of new case are not "separate and distinct in a meaningful way for the purposes of the Sherman Act"). The doctrine encompasses issues actually decided in a prior case even if those issues were not, in a technical sense, necessary, but only if they were germane to the eventual resolution of the case and expressly resolved after reasoned consideration. *Alcoa, Inc. v. Bonneville Power Admin., 698 F.3d 774, 804 n.4 (9th Cir. 2012)*; *Barapind v. Enomoto, 400 F.3d 744, 751 (9th Cir. 2005)* (en banc).

In the area of ***antitrust law***, however, another interest competes with the doctrine of stare decisis. That is an interest "in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Rule-of-reason analysis "evolves with new circumstances and new wisdom." *Id. at 21* (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731-32, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988))*. "The rule of reason requires an evaluation of each challenged restraint in light of the special circumstances involved. That the analysis will differ from case to case is the essence of the rule." *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1449 (9th Cir. 1988)* (citation omitted).

A. Anticompetitive Effects **[*39]** in the Relevant Market

1. Market Definition

In a rule-of-reason analysis, the Court must first define the relevant market within which the challenged restraint may produce significant anticompetitive effects. Both sides here request that the Court adopt the market definition applied in O'Bannon, which was not challenged in the appeal of that case. *802 F.3d at 1070*. Plaintiffs argue that the evidence supports the same education or labor market for student-athletes in FBS football and Division I basketball. Defendants contend that stare decisis controls the outcome of this case, including the market definition.[6] Defendants also agreed at the January 21, 2018 hearing that the market definition, as well as other rulings in O'Bannon, would apply equally to the women's basketball Plaintiffs in this action. Tr. at 7-8.

In the absence of any material factual dispute, the Court will grant both parties' summary judgment motions on the issue of market definition and adopt the market definition from *O'Bannon*, the market for a college education combined with athletics or alternatively the market for the student-athletes' athletic services.

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[6] Defendants' expert Dr. Kenneth G. Elzinga posits that the market should be viewed more broadly as a multi-sided one for the educational services of colleges and universities, but Defendants, having taken the position that O'Bannon is controlling, do not rely on this theory.

2. The Challenged Restraints and Significant Anticompetitive Effects **[*40]**

The next element of the rule-of-reason analysis is whether the challenged restraints produce significant anticompetitive effects within the relevant market. Plaintiffs have produced undisputed evidence that greater compensation and benefits would be offered in the recruitment of student-athletes absent the challenged rules, meeting their burden for summary adjudication on this question. Defendants' position is that O'Bannon is binding on this point under the doctrine of stare decisis. See *802 F.3d at 1070-72*; *7 F. Supp. 3d at 971-73, 988-93*. They have not meaningfully disputed Plaintiffs' showing that the challenged restraints produce significant anticompetitive effects within the relevant market. Because Plaintiffs have met their burden and Defendants have not created a factual dispute, the Court will grant the parties' cross-motions for summary adjudication of this element and find that the challenged restraints produce significant anticompetitive effects in the relevant market.

B. Procompetitive Benefits of the Restraints

The next factor is whether Defendants have come forward with evidence of procompetitive effects of the challenged restraints. Defendants claim that O'Bannon established as a matter of law that the NCAA's rules serve **[*41]** the procompetitive purposes of "integrating academics with athletics, and 'preserving the popularity of the NCAA's product by promoting its current understanding of amateurism.'" *802 F.3d at 1073* (quoting *7 F. Supp. 3d at 1005*). They further argue that the record in this case contains ample evidence of these procompetitive justifications as well as of other possible procompetitive justifications not found in O'Bannon. Plaintiffs respond that O'Bannon does not require the Court to uphold Defendants' procompetitive justifications in this case because Plaintiffs have developed a record of factual circumstances that have changed after the close of the record in O'Bannon.

Plaintiffs first point to the change caused by O'Bannon: student-athletes now may receive scholarships above the former grant-in-aid limit, up to the cost of attendance. This change, however, does not distinguish the present case from O'Bannon because it was the very issue adjudicated in that case. The change that was made was required and approved by the Court. *802 F.3d at 1075-76*.

Next, Plaintiffs identify the NCAA rule changes discussed above, which have generally increased but continue to fix various benefits related to athletic participation that a member school may provide for **[*42]** its student-athletes or permit them to receive from outside sources. See Section I above. They also identify new concessions by Defendants that benefits and gifts that are related to athletic participation but are above the cost of attendance are connected neither to education nor to their understanding of amateurism. See, e.g., Big 12 (Robert A. Bowlsby, II) Depo. at 162:10-14 (not sure how valuable gifts could be tethered to education); Michael Slive Depo. at 218:4-10 (gift card "not really" connected to educational experience); NCAA (Lennon) Depo. at 119:20-122:22, 287:6-19 (gifts not related to amateurism). Plaintiffs contend that because Defendants permit student-athletes to be paid money that does not go "to cover legitimate educational expenses," they are not amateurs. *O'Bannon, 802 F.3d at 1075*. Plaintiffs also identify a number of expenses that they contend are tethered to education but are still disallowed. See Pls. MSJ, App'x B (citing NCAA (Lennon) Depo. at 195:5-215:14); see also Section I above.

While the restraints challenged in this case overlap with those in O'Bannon, the specific rules at issue are not the same. Challenges to the NCAA's rules must be assessed on a case-by-case basis under the **[*43]** rule of reason, and O'Bannon's holding that there were procompetitive justifications for the rules challenged in that case would not necessarily require the Court to find that different rules, challenged in this case, also have the same procompetitive effects. *802 F.3d at 1063* (citing *NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))* ("we are not bound by Board of Regents to conclude that every NCAA rule that somehow relates to amateurism is automatically valid"). The Court rejects Defendants' contention that merely because all of the then-existing NCAA Bylaws were part of the record in O'Bannon, the Court necessarily adjudicated in Defendants' favor all possible challenges to any of those rules. The reasoning of O'Bannon will be very relevant in assessing whether the rules in this case have procompetitive effects. However, like the NIL rules in O'Bannon, the validity of the specific rules challenged in this case "must be proved, not presumed." *Id. at 1064*.

Plaintiffs further contend that Defendants have failed to provide material evidence that their current rules create procompetitive effects. Therefore, Plaintiffs argue, the Court should enter summary judgment against Defendants without balancing the competitive effects of the restraints or reaching the question **[*44]** of less restrictive alternatives. However, Defendants have presented sufficient evidence in support of the two procompetitive effects found in O'Bannon to create a factual issue for trial. This includes a survey of consumer preferences, which led Defendants' expert Dr. Bruce Isaacson to conclude that fans are drawn to college football and basketball in part due to their perception of amateurism. See Isaacson Depo. at 48:4-17; Isaacson Rep. ¶¶ 151 & Table 7, 155. Plaintiffs identify various defects in Defendants' survey evidence, including the fact that it reflects consumers' stated preferences rather than how consumers would actually behave if the NCAA's restrictions on student-athlete compensation were modified or lifted. However, the weight of Dr. Isaacson's testimony is a question for trial rather than summary judgment.

Defendants also present evidence that paying student-athletes would detract from the integration of academics and athletics in the campus community. For example, Professor James T. Heckman testified that paying student-athletes would likely lead them to dedicate even more effort and possibly more time to their sports, potentially diverting them "away from actually **[*45]** being students and towards just being athletes." Heckman Depo. at 315:5-316:18.

Accordingly, the Court will deny the parties' cross-motions for summary adjudication of the question of whether the challenged NCAA rules serve Defendants' asserted procompetitive purposes of integrating academics with athletics and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism. See *802 F.3d at 1073* (quoting *7 F. Supp. 3d at 1005*).

Plaintiffs also move for summary judgment that Defendants have abandoned seven additional procompetitive justifications that they identified in response to an interrogatory. See Defs. Ex. 8 (NCAA Amended Responses to Pls. Second Set of Interrogatories) at 9-14. Plaintiffs contend that Defendants developed no record to support any of them.

Defendants first respond to this argument by contending that Plaintiffs' summary judgment motion inadequately demonstrates an absence of evidence on these procompetitive justifications, and should be denied due to Plaintiffs' failure to meet their burden as the moving party. However, "the Celotex 'showing' can be made by 'pointing out through argument'" the "'absence of evidence to support plaintiff's claim.'" *Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001)* (quoting *Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th Cir. 2000))*. Although **[*46]** not lengthy, Plaintiffs' argument that Defendants have not developed evidence to support additional procompetitive justifications, identified in their interrogatory responses, is sufficient to shift the burden to Defendants to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan, 929 F.2d at 1409*. For six of their asserted procompetitive justifications, Defendants have not attempted to meet this burden at all, only quoting their interrogatory response identifying those justifications in a footnote but producing no evidence to support them.[7] See Defs. Opp. to Pls. MSJ at 50 n.27. Accordingly, the Court will grant summary judgment on these six procompetitive justifications.

Defendants do attempt to meet their burden on one procompetitive justification, specifically, their contention that:

> The challenged rules serve the procompetitive goals of expanding output in the college education market and improving the quality of the collegiate experience for student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundational principle, thereby **[*47]** distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic rivalry and as an essential component of a comprehensive college education.

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[7] Except to the extent that they are included in the interrogatory response, Defendants do not request that the Court reconsider the procompetitive justifications of increased output and competitive balance rejected in O'Bannon. See *7 F. Supp. 3d at 978-79, 981-82*. The O'Bannon defendants did not substantively defend the rejected procompetitive justifications on appeal, *802 F.3d at 1072*, and Defendants here do not proffer any evidence to support them.

Defs.Ex. 8 (NCAA Amended Responses to Pls. Second Set of Interrogatories) at 11. This proffered justification does not coincide with the justification relating to expanding output that the Court rejected in O'Bannon. In that case, the defendants argued that the NCAA's rules enable it to increase the number of opportunities available for participation in FBS football and Division I basketball, increasing the number of games that can be played. *7 F. Supp. 3d at 981*. Rather, this purportedly new justification seems largely to overlap with Defendants' two remaining O'Bannon justifications of integrating academics with athletics ("improving the quality of the collegiate experience for student-athletes") and preserving the popularity of college sports ("distinguishing amateur college athletics from professional sports"). Defs. Ex. 8 (NCAA Amended Responses to Pls. Second Set of Interrogatories) at 11.

In advancing this purportedly new and separate procompetitive justification, Defendants rely solely on the testimony **[*48]** of two expert witnesses, their expert Dr. Elzinga and Plaintiffs' expert Dr. Edward P. Lazear. Dr. Elzinga's report focuses on issues relating to the relevant market. Elzinga Rep. at 4-10. In that context, he explains his theory that, because the relevant market is properly viewed as a multi-sided market for higher education, colleges must price participation in activities, including athletics, to provide an "optimal balance" for different constituents. Id. at 35; see also id. at 9, 27-29, 32-33. Defendants contend that this view is supported by Dr. Lazear's testimony that the demand in the relevant college education market is derived from "some higher-level market, which might include alums, it might include viewers, it might include other students," who are direct participants in the market. Lazear Depo. at 217:19-218:24. Assuming the admissibility of these experts' testimony, taking it as true and drawing all reasonable inferences in favor of Defendants, however, it does not constitute evidence of a new or different procompetitive justification. Dr. Elzinga did not purport to opine on the impact of the challenged restraints on output or examine data that might support any such opinion. Elzinga Depo. at 29:14-30:18. Defendants' attempt **[*49]** to characterize Dr. Elzinga's opinions as supporting a procompetitive justification he did not directly consider is insufficient to raise a genuine issue of material fact, and the Court will grant summary judgment on this proposed procompetitive justification as well.

C. Less Restrictive Alternatives

The final step in the rule-of-reason analysis is whether Plaintiffs can "make a strong evidentiary showing" that any legitimate objectives can be achieved in a substantially less restrictive manner. *O'Bannon, 802 F.3d at 1074*. Plaintiffs do not move for summary judgment on this issue, but seek to prove at trial their contention that the NCAA's rules are "patently and inexplicably stricter than is necessary to accomplish" the NCAA's procompetitive objectives. *O'Bannon, 802 F.3d at 1075*. Defendants, on the other hand, move for summary judgment that all less restrictive alternatives proposed in this case are foreclosed by O'Bannon. The Court finds that because Plaintiffs challenge different rules and propose different alternatives from those considered in O'Bannon, the Court is not precluded from considering this factor.

To be viable, an alternative "must be 'virtually as effective' in serving the procompetitive purposes of the NCAA's current **[*50]** rules, and 'without significantly increased cost.'" *Id. at 1074* (quoting *Cnty. Of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001))*. In addition, any less restrictive alternatives "should either be based on actual experience in analogous situations elsewhere or else be fairly obvious." Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1913b (3d ed. 2006). In considering Plaintiffs' showing, the Court will afford the NCAA "ample latitude" to superintend college athletics. *O'Bannon, 802 F.3d at 1074* (quoting *Bd. of Regents, 468 U.S. at 120*). The Court will not "use ***antitrust law*** to make marginal adjustments to broadly reasonable market restraints." *Id. at 1075*.

As discussed, Plaintiffs in this case do not challenge restrictions on distribution of licensing revenue derived from NILs, as was the case in O'Bannon. Rather, they challenge NCAA rules relating to the benefits that schools may offer student-athletes to compete for their recruitment. The less restrictive alternatives that they propose in this case are different from those reviewed in O'Bannon. As the Ninth Circuit explained, to "say that the NCAA's amateurism rules are procompetitive, as Board of Regents did, is not to say that they are automatically lawful; a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a **[*51]** substantially less restrictive rule would further the same objectives equally well." *O'Bannon, 802 F.3d at 1063-64* (citing *Bd. of Regents, 468 U.S. at 101 n.23*); see also *id. at 1063* ("we are not bound by Board of Regents to conclude that every NCAA rule that somehow relates to amateurism is automatically valid").

The first less restrictive alternative that Plaintiffs propose is allowing the Division I conferences, rather than the NCAA, to set the rules regulating education and athletic participation expenses that the member institutions may provide. Plaintiffs argue that this alternative would be substantially less restrictive because it would allow conferences to compete to implement rules that attract student-athletes while still maintaining the popularity of college sports and balancing the integration of academics and athletics. They contend that none of the conferences has market power and, thus, their rule-making would not be subject to an antitrust challenge.[8]

Plaintiffs contend that their proposed conference-autonomy system is based on actual experience in a closely analogous context. It could "operate like the college athletic system during the first half of the 20th Century, when each conference had its own compensation rules." Roger Noll Rep. at 30. To support their **[*52]** argument that such autonomy is viable as a less restrictive alternative to NCAA regulations, Plaintiffs have identified new NCAA Bylaws, adopted on August 7, 2014 (after the O'Bannon trial), that grant the Power Five Conferences autonomy to adopt or amend rules on a variety of topics. See Defs. Ex. 1 at 27-28 (Bylaw 5.3.2.1). The Bylaws now grant autonomy to the Power Five Conferences to legislate, for example, regarding "a student-athlete's individual limit on athletically related financial aid, terms and conditions of awarding institutional financial aid, and the eligibility of former student-athletes to receive undergraduate financial aid"; pre-enrollment expenses and support; student-athletes securing loans to purchase loss-of-value and disability insurance; and awards, benefits and expenses for student-athletes and their family and friends. Id.; see also Daniel A. Rascher Rep. at 12-13 & n.21, 172-182 (discussing proposed less restrictive alternatives). The existence of these exceptions for the Power Five Conferences constitutes evidence sufficient to raise a factual question that allowing relevant areas of autonomy for all Division I conferences would be a less restrictive alternative to current NCAA rules. **[*53]**

Defendants argue that this proposal was considered and rejected in O'Bannon. The record in O'Bannon, however, does not support their contention. One of the plaintiffs' expert witnesses, Dr. Noll, testified briefly in O'Bannon about the alternative of allowing the individual conferences to set the rules. O'Bannon Tr. at 445:11-451:5. In closing argument, there was discussion of whether an injunction should allow conference-level decision-making on the topics of the challenged NCAA restraints. Id. at 3382:19-3383:2. Ultimately, however, the plaintiffs proposed to the Court only the three less restrictive alternatives, listed above, that were addressed in the Court's August 8, 2014 Findings of Fact and Conclusions of Law. See O'Bannon Plaintiffs' Opening Post-Trial Brief at 25 (No. 09-cv-03329-CW, Dkt. No. 275); O'Bannon Plaintiffs' Post-Trial Reply Brief at 14-15 (No. 09-cv-03329-CW, Dkt. No. 281). The O'Bannon plaintiffs proposed language for an injunction, asking the Court to enjoin the member institutions and conferences along with the NCAA. O'Bannon Plaintiffs' Proposed Order Granting Injunctive Relief (No. 09-cv-03329-CW, Dkt. No. 193-1); O'Bannon Plaintiffs' Alternative Proposed **[*54]** Form of Injunction (No. 09-cv-03329-CW, Dkt. No. 252). The permanent injunction entered by the Court enjoined the NCAA's member schools and conferences as well as the NCAA itself. O'Bannon Permanent Injunction (No. 09-cv-03329-CW, Dkt. No. 292). In O'Bannon, this Court did not rule on the less restrictive alternative of conference autonomy. No rule of law established in that case, or any other, precludes the Court from considering conference autonomy as a less restrictive alternative in this case. "A hypothetical that is unnecessary in any sense to the resolution of the case, and is determined only tentatively . . . does not make precedential law." *Alcoa, 698 F.3d at 804 n.4*; see also *Osborne, 76 F.3d at 309* ("the doctrine of stare decisis concerns the holdings of previous cases, not the rationales"). A hypothetical that is not determined at all, such as the question of conference autonomy in O'Bannon, is not binding under the doctrine of stare decisis.

Plaintiffs propose a second less restrictive alternative, requesting that the Court enjoin all national rules that prohibit or limit any payments or non-cash benefits that are tethered to educational expenses, or any payments or benefits that are incidental to athletic participation. **[*55]** See Rascher Rep. at 173-177. Their position is that because Defendants already permit some payments and benefits in these two categories above the cost of attendance, it would be virtually as effective in serving the NCAA's procompetitive purposes to require the NCAA to allow all

[8] Defendants argue that Plaintiffs' proposed less restrictive alternative of conference autonomy is inconsistent with Plaintiffs' challenge to conference-specific rules. See Pls. MSJ, App'x A (listing challenged rules). However, Plaintiffs challenge only the portions of the conference rules that require compliance with challenged NCAA rules. See Pls. Reply, App'x A (listing challenged language of each rule).

benefits in either category. Plaintiffs contend that this alternative could be applied with or without conference autonomy because abolishing the NCAA restraints would be a less restrictive alternative to the current system regardless of whether conference rules were permitted as a replacement.

In support of this contention, Plaintiffs first identify evidence that Defendants already allow schools to offer some benefits above the cost of attendance that are related to athletic participation but not tethered to education. See, e.g., Noll Rep. at 17-18 (discussing categories of benefits); NCAA (Lennon) Depo. at 58:20-59:16 (same). For example, schools can pay the expenses for an athlete's spouse and children to attend a playoff game, because such expenses are incidental to athletic participation, but not the expenses of parents, grandparents, or siblings. NCAA (Lennon) Depo. at 186:1-16; see also id. at 86:17-87:13 (schools may reimburse students' national **[*56]** championship, Olympic trials and national team tryout costs).

Plaintiffs contend that Defendants have conceded that the payment of currently-allowed benefits above the cost of attendance but tethered to education or incidental to athletic participation does not undermine their procompetitive purposes. The NCAA's *Rule 30(b)(6)* witness Kevin C. Lennon testified extensively on this topic. Id. at 63:21-64:1 (expenses incidental to athletic participation can be paid for athletes without offending collegiate model); 71:23-73:2 (NCAA membership's decision to pay expenses incidental to athletic participation does not violate principle of amateurism); 85:5-23 (per diem during trips does not violate principle of amateurism); 93:4-10 ("If the--the benefit provided is permitted within the legislation as either related to educational expenses or--or incidental to participation, then it would be not considered pay, and it would be permitted to be received."); 186:1-16 (schools' payment of costs for athlete's spouse and children to attend playoff game does not implicate principle of amateurism); 287:6-19 (NCAA membership is comfortable with "two buckets" of expenses, those tethered to education and those incidental **[*57]** to athletics participation). Plaintiffs also cite the conclusion of their survey expert Hal Poret that there would be no negative impact on consumer demand for college football and basketball if various forms of additional benefits were provided to student-athletes. Poret Rep. at 19-21.

Defendants respond that Plaintiffs' suggestion cannot be squared with O'Bannon's holding that limiting payments to Plaintiffs' legitimate costs to attend school is consistent with ***antitrust law***. See *802 F.3d at 1075* ("student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses."). In O'Bannon, the Ninth Circuit concluded, "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student-athletes. It does not require more." *802 F.3d at 1079*. Defendants' position is that this means that stare decisis limits the less restrictive alternatives that the Court may consider in this case to the relief that was provided in O'Bannon. They argue that Plaintiffs' proposed less restrictive alternatives are no more than new arguments in support of the same challenge already adjudicated in O'Bannon. Relying on a district court case, they argue that stare decisis **[*58]** "would be largely meaningless if a lower court could change an appellate court's interpretation of the law based only on a new argument." *Rambus Inc. v. Hynix Semiconductor Inc., 569 F. Supp. 2d 946, 972 (N.D. Cal. 2008)*.

In Rambus, however, the district court held that the doctrine of stare decisis bound it to follow the Federal Circuit's previous construction of the same term at issue, "integrated circuit device." *Id. at 963, 972* (citing *Rambus Inc. v. Infineon Techs. AG, 318 F.3d 1081, 1089-95 (Fed. Cir. 2003)*. The question for the court to decide was the same; only the arguments in support of the issue had changed. Here, in contrast, the Court is presented with the new and unresolved issue of whether Plaintiffs have identified different less restrictive alternatives to all of the NCAA's rules that prohibit schools from competing to recruit student-athletes with offers of cash or various benefits tethered to educational expenses or incidental to athletic participation, including rules that have changed after O'Bannon.

As the Ninth Circuit explained in O'Bannon, "NCAA regulations are subject to antitrust scrutiny and must be tested in the crucible of the Rule of Reason." *Id. at 1079*. A ruling on less restrictive alternatives to certain NCAA rules in one case does not bar consideration of different less restrictive alternatives to a different, if overlapping, set **[*59]** of rules challenged in a different case. The Supreme Court suggested in Board of Regents that the NCAA's purpose of marketing "a particular band of football--college football" could be a procompetitive justification for rules designed to preserve the "character and quality" of this product, including compensation limitations. *468 U.S. at 101-02*. This did not mean, however, that the rules challenged in O'Bannon were exempt from antitrust scrutiny, because "a restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well." *O'Bannon, 802 F.3d at 1063-64*; see also *Nat'l Basketball Ass'n v. SDC Basketball Club, Inc., 815 F.2d 562, 564, 567-68 (9th Cir. 1987)* (prior decisions on similar franchise relocation rule in football context did not bar fact-specific rule-of-reason analysis in subsequent challenge in basketball context). Likewise, here, the NCAA's revised rules and Plaintiffs' proposed less restrictive alternatives to those rules are "separate and distinct in a meaningful way for the purposes of the Sherman Act" from those presented in O'Bannon. *Miranda, 860 F.3d at 1242*.

To be clear, if Defendants prevail in demonstrating the same procompetitive justifications that the Court found in O'Bannon, the NCAA will still be able to prohibit its **[*60]** member schools from paying their student-athletes cash sums unrelated to educational expenses or athletic participation. *O'Bannon, 802 F.3d at 1078-79*. Under such circumstances, the Court will not consider any proposed less restrictive alternative by which Plaintiffs seek payment untethered to one of these two categories.

Plaintiffs have proffered evidence supporting two possible less restrictive alternatives not previously presented for decision or ruled upon, raising a genuine issue of material fact as to whether they can meet their evidentiary burden to show that such alternatives would be virtually as effective as the challenged restraints in advancing Defendants' procompetitive objectives. They do not seek summary judgment in their favor on this factor. Defendants have failed to show that these proposed less restrictive alternatives are foreclosed by O'Bannon. Accordingly, the Court will deny summary judgment on the question of less restrictive alternatives.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment (Docket No. 657 in Case No. 14-md-02541 and Docket No. 301 in Case No. 14-cv-02758) is GRANTED IN PART AND DENIED IN PART. Defendants' cross-motion for summary judgment (Docket No. 704 in Case No. 14-md-02541 and **[*61]** Docket No. 327 in Case No. 14-cv-02758) is GRANTED IN PART AND DENIED IN PART.

1. The Court holds that neither res judicata nor collateral estoppel bars Plaintiffs' claims, and denies Defendants' summary judgment motion on this point.

2. The Court grants both parties' summary judgment motions to find that Plaintiffs have met their initial burden of showing that Defendants' challenged restraints are agreements that produce significant anticompetitive effects, affecting interstate commerce, within the same relevant market as that in O'Bannon.

3. The Court denies Defendants' summary judgment motion, under the doctrine of stare decisis, to hold that the same two procompetitive benefits of Defendants' restraints found in O'Bannon apply in this case as a matter of law. The Court denies Plaintiffs' motion for summary adjudication that the procompetitive justifications found in O'Bannon do not apply, but grants Plaintiffs' motion for summary judgment regarding Defendants' other proffered procompetitive justifications.

4. The Court denies Defendants' motion for summary judgment that O'Bannon precludes consideration of the two less restrictive alternatives that Plaintiffs propose in this case.

The **[*62]** Court DENIES Defendants' Motion for Supplemental Briefing (Docket No. 797) and Plaintiffs' Motion to File Supplemental Evidence for the Summary Judgment Record (Docket No. 800). The Court does not rule on whether Plaintiffs' proposed supplemental evidence will be admissible at trial.

A final pretrial conference will be held at 2:30 p.m. on Tuesday, November 13, 2018 and a bench trial of no longer than ten days will commence at 8:30 a.m. on Monday, December 3, 2018. The parties shall comply with the Court's standing order for pretrial preparation. Direct expert testimony shall be presented in writing, with cross-examination and re-direct to take place in Court. The parties shall limit percipient witness testimony to that which is essential, attempt to reach stipulations regarding potentially cumulative evidence and focus their cases only on the issues remaining for trial.

IT IS SO ORDERED.

Dated: March 28, 2018

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

Dvorak v. St. Clair Cty.

United States District Court for the Southern District of Illinois

March 29, 2018, Decided; March 29, 2018, Filed

Case No. 14-CV-1119-SMY-RJD

Reporter

2018 U.S. Dist. LEXIS 53286 *; 2018-1 Trade Cas. (CCH) P80,325; 2018 WL 1532793

KEVIN DVORAK, et al., Plaintiffs, vs. ST. CLAIR COUNTY, ILLINOIS, et al., Defendants.

Prior History: Bloyer v. St. Clair Cnty., 2016 U.S. Dist. LEXIS 10801 (S.D. Ill., Jan. 28, 2016)

Core Terms

purchaser, bids, auctions, conspiracy, Properties, redeemed, antitrust, rates, summary judgment, redemption, antitrust claim, indirect, bidder, civil conspiracy, tax year, anticompetitive, exemption, damages, monopoly power, tax sale, certificates, breach of fiduciary duty, money had and received, statute of limitations, redeem property, property owner, deposition, real estate tax, anti trust law, genuine

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For Scott McLean, Land of Lincoln Securities, LLC, White Oak Securities, LLC, Algonquin Securities, LLC, Defendants: Brian E. McGovern, McCarthy, Leonard et al., Town & Country, MO; Mark G. McLean, McCarthy, Leonard & Kaemmerer, LC, Town and Country, MO.

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For Kurt Prenzler, Movant: Stephen J. Maassen, LEAD ATTORNEY, Rynearson, Suess et al, Edwardsville, IL.

Judges: STACI M. YANDLE, United States District Judge.

Opinion by: STACI M. YANDLE

Opinion

MEMORANDUM AND ORDER

YANDLE, District Judge:

Plaintiffs Kevin Dvorak and Kathleen **[*3]** Dvorak[1] are proceeding on an eight Count Complaint asserting an alleged conspiracy to fix St. Clair County, Illinois real estate tax sales so that property owners were required to pay artificially high interest penalties to redeem their properties. The defendants include St. Clair County, St. Clair County Treasurer Charles Suarez, and a number of individual and associated business purchasers who are alleged to have participated in the conspiracy (collectively, "Purchaser Defendants").

Before the Court are Defendants' Motions for Summary Judgment (Docs. 265, 266, 267, 268, 269, 270 and 272). Plaintiffs have filed responses to most, though not all, of these motions (Docs. 278, 279, 280, 281, 282, 283).[2] For the following reasons, Defendants' motions (Docs. 265, 266, 267, 268, 269, 270 and 272) are **GRANTED**.

BACKGROUND

This case arises from certain St. Clair County real estate tax sales of properties for which the prior year's property taxes are delinquent. The general structure and requirements for the tax sales are set forth in *Article 21 of the Illinois Property Tax Code (35 ILCS 200/21 et seq.*). Under the statute, the County Collector (an *ex officio* role of the County Treasurer) conducts the sales. Purchasers **[*4]** do not receive clear title to the property at issue, but rather a Certificate of Purchase and the right to collect the amount of unpaid taxes from the owner plus a "penalty" ranging from 0 to 18% interest. The winning bidder for a given property is the one who is willing to accept the lowest penalty rate if the owner exercises their right of redemption. Each successful bidder pays the County the amount of the delinquency. The maximum penalty percentage that may be bid is 18%. If no bids are received on a given property, it reverts to the County at the maximum penalty rate.

For example, a property with a $2000 overall delinquency is offered at the tax sale. One bidder offers 18% — meaning that he will pay $2000 to the County and charge the property owner an additional 18%, if they want to redeem the property. Another bidder offers 13%. If this is the winning bid, the property owner would pay less to redeem the property. If no lower bids are received, the second bidder receives the Certificate of Purchase.

If a property owner fails to redeem a property within the statutory redemption period, the successful bidder may file a petition for a tax deed. Once a tax deed is issued, it conveys **[*5]** merchantable title, free and clear from most previous interests in the property.

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[1] The named plaintiffs originally included John R. Bloyer, Jr. and Adrianne L. Bloyer. They have voluntarily dismissed their individual claims. (Doc. 120).

[2] Many of the motions refer to and purport to join each other. For purposes of simplicity and clarity, the Court will address the generally-applicable grounds for summary judgment as a group, as well as those well-pled grounds which pertain to specific defendants and Counts.

If the property is redeemed, the purchaser of the tax lien receives the certificate amount (what it paid to the County) plus the penalty percentage. The penalty rate increases every six months by the amount of the penalty rate that was originally bid. Using the above example, the property owner would owe the winning bidder $2,260 if redeemed within six months, $2,520 if redeemed between six months and a year, $2,780 if redeemed between a year and 18 months, etc. The holder of a tax lien may also pay subsequent unpaid real estate taxes on a property and claim an automatic 12% penalty on the subsequent taxes. An owner or other eligible party wishing to redeem the property pays the total amount owed to the County, which in turn sends that amount to the tax purchaser.

Because the cost of redemption is usually significantly less than the market value of the property, there is a strong incentive for anyone holding a sizeable ownership or security interest in the property to redeem it following a tax sale. For that reason, if a property owner is unable to pay the cost of redemption, it is common for a mortgage **[*6]** holder or other lienholder to redeem on behalf of the property owner in order to preserve their interest. The amount paid on the owner's behalf is then added to the owner's outstanding obligation.

Plaintiffs claim that the St. Clair County tax sale process was tainted in 2007 and 2008. Specifically, they allege that Defendant Suarez, in exchange for political contributions for himself and the St. Clair County Democrat Party, arranged for the auctioneer to recognize the Purchaser Defendants as winning bidders (presumably in cases of identical bids) and to distribute the winning bids between the Purchaser Defendants. (Doc. 2 at ¶¶74, 79). They also allege that Suarez arranged for representatives tied to Purchaser Defendants to have advantageous seating positions and caused the auctioneer to ignore subsequent (or "trailing") lower bids, thereby artificially inflating the penalty rates. Finally, Plaintiff's allege that the Purchaser Defendants agreed amongst themselves to keep their bids at or near the 18% statutory maximum penalty rate. (*Id.* at ¶74).

Plaintiffs owned two properties that were sold at the 2007 St. Clair County real estate tax sale conducted in November 2008. (*Id.* at ¶¶6-11). **[*7]** The first property is located at 518 E. Washington St., O'Fallon, Illinois ("Washington Property"); the second property is located at 619 W. Schuetz St., Lebanon, Illinois ("Schuetz Property"). Both properties were purchased by Defendant White Oak Securities at 18% penalty rates and were subsequently redeemed on November 8, 2011 by mortgage holder First Federal Savings Bank (Docs. 268-4 and 268-5). Because the redemption took place nearly three years after the sale, $1,725.03 in penalty interest was assessed on a $1,597.25 tax bill for the Washington Property. (Doc. 268-4). Redemption of the Schuetz Property cost $2,018.22 in penalty interest on a $1,868.72 2007 tax bill. (Doc. 268-5). Both properties were sold at tax sales several years before and several years after the 2007 tax year sales at lower penalty rates. (Docs. 278-2 and 278-3).

Plaintiffs assert eight causes of actions, including claims against all defendants for Civil Conspiracy (Count I), violations of the *Sherman Anti-Trust Act, 15 U.S.C. §§ 1* and *2* (Counts III and IV) and violations of the *Illinois Antitrust Act, 740 ILCS 10/1, et seq.* (Counts V-VII). They also assert claims for money had and received against all defendants except Suarez (Count II) and **[*8]** breach of fiduciary duty against Suarez alone (Count VIII). In each Count, Plaintiffs allege damages "based on the difference [between] the amount redeemed and the amount that would have been needed to redeem the property at a reasonable and appropriate penalty rate[,]" plus attorneys' fees, expenses and trebling of damages where allowed by statute. (Doc. 2).

LEGAL STANDARD

Summary judgment is appropriate only if the moving party can demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265(1986)*; *see also* *Ruffin-Thompkins v. Experian Information Solutions, Inc., 422 F.3d 603, 607 (7th Cir. 2005)*. The moving party bears the initial burden of demonstrating the lack of any genuine issue of material fact. *Celotex, 477 U.S. at 323*. Once a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*.

A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Estate of Simpson v. Gorbett, 863 F.3d 740, 745 (7th Cir. 2017)* (quoting *Anderson, 477 U.S. at 248*). When deciding a summary judgment motion, the Court views the facts in the light most favorable to, and draws all reasonable inferences in favor of, the nonmoving party. *Apex Digital, Inc. v. Sears, Roebuck & Co., 735 F.3d 962, 965 (7th Cir. 2013)* (citation omitted).

DISCUSSION

[*9] Defendant Kenneth Rochman

As an initial matter, Defendant Kenneth Rochman filed for summary judgment of the claim asserted against him individually. (Doc. 267). He maintains that he is entitled to judgment as a matter of law because there are no allegations or evidence connecting him to the alleged scheme.

Plaintiffs did not respond to Rochman's motion. Under this Court's local rules, "[f]ailure to timely file a response to a motion may, in the Court's discretion, be considered an admission of the merits of the motion." *SDIL-LR 7.1(c)*. The Court finds it appropriate to invoke *Rule 7.1(c)* in this situation. Accordingly, Defendant Kenneth Rochman's Motion for Summary Judgment is granted.

Statute of Limitations

Defendants argue that the applicable statutes of limitations bar Plaintiffs' claims. (Doc. 271 at 12-16). The statutes of limitations for claims grounded in state law are governed by the law of that state. *Indep. Tr. Corp. v. Stewart Info. Servs. Corp., 665 F.3d 930, 935 (7th Cir. 2012)*. Like the statute of limitations itself, state rules that are an "integral part of the statute of limitations" such as tolling and equitable estoppel, are also applied by federal courts to state law claims. *Hollander v. Brown, 457 F.3d 688, 694 (7th Cir. 2006)* (citing *Walker v. Armco Steel Corp., 446 U.S. 740, 751-53, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980))*.

Civil conspiracy (Count I) is not a separate and distinct tort in Illinois. *See* *Weber v. Cueto, 253 Ill. App. 3d 509, 624 N.E.2d 442, 449, 191 Ill. Dec. 593 (1993)*. Rather, **[*10]** "[a] cause of action for civil conspiracy exists only if one of the parties to the agreement commits some act in furtherance of the agreement, which is itself a tort." *Adcock v. Brakegate, Ltd., 164 Ill. 2d 54, 645 N.E.2d 888, 894, 206 Ill. Dec. 636 (1994)*. *See also* *Borsellino v. Goldman Sachs Grp., Inc., 477 F.3d 502, 509 (7th Cir. 2007)* (a claim for civil conspiracy requires "at least one tortious act by one of the co-conspirators in furtherance of the agreement."). As a result, a civil conspiracy claim is subject to the same statute of limitations as the underlying tort on which the claim is based. *Mauvais-Jarvis v. Wong, 987 N.E.2d 864, 894, 987 N.E.2d 864, 370 Ill. Dec. 98 (2013)*.

Claims for money had and received (Count II) and breach of fiduciary duty (Count VIII) must be commenced within 5 years after the cause of action accrued. *735 ILCS 5/13-205*.

A 4 year statute of limitations applies to violations of the Sherman Act (as enforced by private parties under the Clayton Act) (Counts III and IV). *15 U.S.C. § 15b*. Relatedly, a federal antitrust cause of action "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *In re Copper Antitrust Litig., 436 F.3d 782, 789 (7th Cir. 2006)* (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* (*Zenith II*).

A private action for violation of the Illinois Antitrust Act (Counts V-VII) must be commenced within 4 years after the cause of action accrued. *740 ILCS 10/7(2)*. In the context of an antitrust conspiracy, accrual is generally triggered by the last overt act in furtherance **[*11]** of the alleged conspiracy. *People ex rel. Hartigan v. Moore, 143 Ill. App. 3d 410, 493 N.E.2d 85, 86, 97 Ill. Dec. 603 (1986)*.

Here, the tax sale in question took place on November 10, 2008. (Doc. 230-4 at 78). Plaintiffs have not alleged any overt acts in furtherance of the alleged conspiracy after the sale. Nor do Plaintiffs claim that their injury arose from any act committed after November 10, 2008. Plaintiffs filed this lawsuit on October 17, 2014 — five years and eleven months later. (Doc. 2). Facially, Plaintiffs' claims in Counts I and III-VIII appear to have been filed out of time. The only claim that is not barred on its face is Count II for money had and received, because penalty was not paid until November 8, 2011.

Plaintiffs contend that their claims are timely by application of the "discovery rule." Under the discovery rule, the statute of limitations' accrual date "is not determined when the injury occurs but when it is discovered or should have been discovered." *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004)*. When the discovery rule applies, a statute of limitation begins to run "once a plaintiff has knowledge which would lead a reasonable person to investigate the possibility that her legal rights had been infringed." *CSC Holdings, Inc. v. Redisi, 309 F.3d 988, 992-93 (7th Cir. 2002)*; citing *LaSalle v. Medco Research, Inc., 54 F.3d 443, 446 (7th Cir. 1995)*. *See also* *Khan v. Deutsche Bank AG, 2012 IL 112219, 978 N.E.2d 1020, 1029, 365 Ill. Dec. 517 (2012)* ("When a party knows or reasonably should know both that an injury has **[*12]** occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed"). The discovery rule has been applied to antitrust claims, as well as breach of fiduciary duty claims. *See* *In re Copper Antitrust Litig., 436 F.3d at 789 (7th Cir. 2006)*, and *Fuller Family Holdings, LLC v. N. Tr. Co., 371 Ill. App. 3d 605, 863 N.E.2d 743, 756, 309 Ill. Dec. 111 (2007)*.

The relevant question then is when Plaintiffs knew or should have known that they had sustained an alleged wrongfully-caused injury.[3] At one point during her deposition, Kathleen Dvorak testified that "[t]he high interest rate" led her to believe that the sales were illegally conducted or rigged, and the 18 percent rate "on its face struck [her] as being wrong based on [her] prior experience of redeeming at a much lower interest rate[.]" (Doc. 272-1 at 41:19-42:21, 43:2-44:7, 76:10-13). She also testified that she knew the properties had been sold at the 18% rate for the 2007 tax year shortly after the tax sale had occurred. (*Id.* at 90:14-91:1). However, she testified elsewhere that she did not recall seeing the 18% penalty rates until she received "take-notice" letters issued in June 2011, although she admitted knowing that they send out notices shortly after the auctions. (*Id.* at 69:20-70:12, **[*13]** 88:1-23). She also testified that it was the interest rate on the redemption certificates (issued upon redemption in 2011) that caused her to believe the auctions may have been rigged. (*Id.* at 75:12-24). At another point, she claimed that she did not remember the rates the Properties had fetched at previous auctions when she saw the 18% rates, and that she looked those up sometime later and was "shocked" at that point. (*Id.* at 124:13-125:4). Finally, she testified that she did not actually appreciate that she might have been wrongly injured until October 2014, when a letter from Ken Brosh was left at the Washington Property. (*Id.* at 48:1-22).

A plaintiff may defeat summary judgment with her own deposition testimony where there is a genuine issue of fact as to plaintiff's subjective experience. *Xodus v. The Wackenhut Corp., 626 F. Supp. 2d 861, 863 (N.D. Ill. 2009)* (citing *Paz v. Wauconda Healthcare & Rehabilitation Centre, LLC, 464 F.3d 659, 664-65 (7th Cir. 2006))*. But if "sham" contradictions are created to defeat summary judgment, the Court may disregard the contradictory testimony; for instance, when a party submits either an errata sheet changing the substance of their testimony or submits an affidavit on summary judgment that contradicts their prior testimony or sworn statements. See *Bank of Illinois v. Allied Signal Safety Restraint Systems, 75 F.3d 1162 (7th Cir. 1996)*.

Here, Dvorak's deposition testimony regarding when she **[*14]** had information sufficient to put her on notice of wrongful injury is obviously contradictory. That said, there is no indication that the contradictions are a "sham" — manufactured for the purpose of creating an issue of fact where none would otherwise exist.

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[3] Kevin Dvorak testified in his deposition that his wife handles the financial matters in the household, that he was not significantly involved with the current matter and had no personal knowledge of any of the allegations in the Complaint other than the fact that he owned the properties, and that they were sold for delinquent taxes and eventually redeemed. (Docs. 271-5 at 3 and 278-6 at 4-5). As such, it is Kathleen Dvorak's testimony that is pertinent to the statute of limitations issue.

The Court cannot decide the credibility of testimony or weigh the evidence in making findings as a matter of law. Thus, when Plaintiffs knew or should have known that they allegedly had been victimized by the 2007 auction is a material issue of fact for the jury's determination. Summary judgment on statutes of limitations grounds is therefore inappropriate.

Federal Antitrust Claims

Relying on the Supreme Court's Decision in *Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, Defendants first argue that Plaintiffs' antitrust claims fail as a matter of law because Plaintiffs were "indirect purchasers" instead of "direct purchasers" with regard to the redemption of the Washington and Schuetz Properties. (Doc. 268 at 5). In *Illinois Brick*, the Court held that treble-damage antitrust claims were not available for those who were not paying the allegedly inflated price directly to the wrongdoer. Citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*, the Court expressed its "unwillingness to complicate treble-damages actions with attempts **[*15]** to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge[.]" *431 U.S. at 725-26* (internal quotations omitted).

Here, Defendants' argument fails as to the federal antitrust claims because Plaintiffs are not indirect purchasers with regard to the redemption of the Washington and Schuetz Properties. The tax sale statute specifically provides that "[a]ny redemption shall be presumed to have been made by or on behalf of the owners and persons interested in the property and shall inure to the benefit of the persons having the legal or equitable title to the property redeemed, subject to the right of the person making the redemption to be reimbursed by the persons benefited." *35 ILCS 200/21-345(a)*. While the payments to redeem the Washington and Schuetz Properties were made by First Federal Savings Bank, Defendants have advanced no argument to rebut this presumption.

Even if Plaintiffs were deemed indirect purchasers, the rationale behind an exception to the indirect purchaser doctrine applies under the facts in this case. In *Illinois Brick*, the Supreme Court left open potential exceptions to the indirect **[*16]** purchaser bar; one of which is triggered if the indirect purchaser received the goods from the direct purchaser pursuant to a pre-existing cost-plus contract. *In re Bulk Petroleum Corp., 796 F.3d 667, 677 (7th Cir. 2015)*. In that situation, the complexity and confusion associated with tracing the knock-on effects of the inflated price don't exist. Rather, "[t]he effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case." *Illinois Brick, 431 U.S. at 736*.

The amount that First Federal Savings Bank passed along to the Dvoraks was limited to the amount it paid to redeem the properties. This is equivalent to the exceptional situation described in *Illinois Brick*. The effect of the overcharge is determined in advance and there is no elasticity in the process. There are no or other factors that could have affected the amount First Federal Savings Bank assessed Plaintiffs. The alleged overcharge was transmitted directly to the Dvoraks, thereby eliminating any distinction between a direct or indirect purchaser. Therefore, summary judgment is not warranted on these grounds.

Defendants also challenge the sufficiency of evidence of an antitrust conspiracy as required under **[*17]** *Section 1* of the Sherman Act. "To prevail under *§ 1* under any theory, plaintiffs generally must prove three things: (1) that defendants had a contract, combination, or conspiracy ("an agreement"); (2) that as a result, trade in the relevant market was unreasonably restrained; and (3) that they were injured." *Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 705 (7th Cir. 2011)* (citing *Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*.

A plaintiff relying on circumstantial evidence of conspiracy "must show that the inference of conspiracy is reasonable in light of the competing inference[] of independent action." *Serfecz v. Jewel Food Stores, 67 F.3d 591, 599 (7th Cir. 1995)* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. The Seventh Circuit has distilled this determination into a 3-step analysis:

> 1) review the evidence of conspiracy submitted by the plaintiff; 2) examine whether the defendants have offered evidence that tends to show that the conduct which forms the basis of the plaintiff's complaint is as compatible with the legitimate business activities of the defendant as it is with illegal conspiracy; and
> 3) if the evidence of conspiracy is ambiguous, determine whether the plaintiff can point to any evidence that tends to exclude the possibility that the defendants were pursuing their legitimate independent interests.

Id. (citing *Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167 at 1171-72, (7th Cir. 1990))*.

Plaintiffs point to the higher overall weighted average bidding in St. Clair **[*18]** County for the 2006 and 2007 tax year auctions compared with other years and other counties as evidence of the alleged conspiracy. They also cite the testimony of competing tax buyer Ken Brosh, that representatives associated with Purchaser Defendants were given advantageous seating positions, that otherwise "tied" bids would be awarded to Purchaser Defendants, and that lower bids by non-Purchaser Defendants would not be accepted. (Deposition of Ken Brosh, Doc. 278-8 at 19:4-20:23; 35:1-4; 66:16-19; 108:18-21 and 172:3-17).

To rebut Plaintiffs' reliance on circumstantial evidence of conspiracy, Defendants quite effectively offer alternate explanations for the higher weighted average bidding, including higher supply due to the early stages of the 2008 financial crisis and lower bidder turnout due to more competing tax auctions taking place the same week than in other years. However, their challenges to Brosh's testimony — that he admitted he was also attempting to get the highest penalty rates he could, that the alleged favoritism also occurred in years other than the auctions at issue, and that the alleged refusal of the auctioneer to recognize lower trailing bids for those not seated **[*19]** in the front row — relate to the question of credibility. (Doc. 270 at 6, 15 n. 3). The credibility of this evidence isn't the issue at this point; the issue is the existence of facts which, if believed by the trier of fact, could show collusive conduct.

If believed, Brosh's testimony tends to exclude the possibility that the alleged wrongful anticompetitive effect on the market as a whole was the result of independent action. As such, sufficient circumstantial evidence of a conspiracy exists to survive summary judgment on that point.

Next, Defendants argue that Plaintiffs cannot succeed on their antitrust monopoly claims (Count IV and VII) because they have not presented any evidence of monopoly power or exclusionary conduct. (Doc. 268 at 8). *Section 2* of the Sherman Act, *15 U.S.C. § 2*, makes it unlawful for a person or company to monopolize and exclude competition. To prove monopolization, a plaintiff must show: "(1) the possession of monopoly power in the relevant market and (2) the willful...maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. The Supreme Court has defined monopoly power as "the power **[*20]** to control prices or exclude competition." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*. Possessing monopoly power does not by itself constitute impermissible monopolization. *Grinnell, 384 U.S. at 570-71*. Rather, *§ 2* of the Sherman Act makes it unlawful to maintain monopoly power through exclusionary conduct. *Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

Monopoly power may be shown either "through direct evidence of anticompetitive effects," or "by proving relevant product and geographic markets and by showing that the defendant's share exceeds whatever threshold is important for the practice in that case." *Toys 'R Us, Inc. v. F.T.C., 221 F.3d 928, 937 (7th Cir. 2000)*. With respect to the latter method of proof, "[t]he existence of such power ordinarily may be inferred from the predominant share of the market." *Grinnell, 384 U.S. at 571*. There is no bright-line test for what level of market share equates to sufficient market power to constitute a monopoly. *Id. at 571* (87% of the market is a monopoly); *American Tobacco Co. v. United States, 328 U.S. 781, 797, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* (over two-thirds of the overall market is a monopoly).

The record in this case raises a genuine issue of material fact as to market share and monopoly power. As this Court has previously noted, the relevant market is real estate tax liens in St. Clair County. *Bloyer v. St. Clair Cty. Illinois, 179 F. Supp. 3d 843, 849 (S.D. Ill. 2016)*. Plaintiffs offer evidence showing that Defendants won 87.81% of the tax auction bids for the tax years allegedly influenced by the anticompetitive **[*21]** actions. (Doc. 279 at 5, citing

Doc. 268-2 at 2). This percentage is within the range of what courts have found sufficient market share to constitute monopolistic market power.[4]

Additionally, Ken Brosh's previously discussed testimony creates a triable issue of fact as to whether there was exclusionary conduct because it could reasonably support a finding of an attempt to exclude outside bidders. Therefore, Defendants are not entitled to summary judgment on the issue of monopoly power.

Defendants St. Clair County and Suarez assert that they are exempt from liability for Plaintiff's federal antitrust claims under the state action doctrine and the *Illinois Local Government Antitrust Act* ("LGGA"). The state action doctrine exempts actions taken by states through their legislatures from federal ***antitrust law*** on principles of federalism and state sovereignty. *City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 370, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, (citing *Parker v. Brown, 317 U.S. 341, 350-51, 63 S. Ct. 307, 87 L. Ed. 315 (1943))*. On the other hand, municipalities and other political subdivisions are not *per se* exempt because they are not themselves sovereign entities to which those principles apply. In order for the exemption to apply to these entities, the anticompetitive activities in question must be authorized by the state "pursuant to state policy **[*22]** to displace competition with regulation or monopoly public service" and a party claiming exemption must demonstrate "clear articulation of a state policy to authorize anticompetitive conduct[.]" *Town of Hallie v. Eau Claire, 471 U.S. 34, 38-40, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (citations omitted). This "clear articulation" need not be absolutely explicit, as long as suppression of competition is the "foreseeable result" of what the statute authorizes. *Id. at 42*.

Here, Suarez and St. Clair County fail to articulate how suppression of competition is a foreseeable result of the Illinois statutory scheme for auctioning of unpaid real estate tax certificates. As such, they have not demonstrated that the state action doctrine applies.

Under the LGAA, "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under *section 4*, *4A*, or *4C* of the Clayton Act (*15 U.S.C. §§ 15*, *15a*, or *15c*) from any local government, or official or employee thereof acting in an official capacity." *15 U.S.C. § 35*. "Local Government" is defined to include counties. *15 U.S.C. § 34(A)*. Plaintiffs do not address St Clair County's claimed exemption under the LGAA. They argue only that Suarez is not entitled to the exemption because his alleged actions in connection with anticompetitive activities were not undertaken in his official capacity.

Plaintiffs **[*23]** have not identified any evidence that Suarez was involved in the alleged bid rigging. In fact, they offer no evidence regarding any actions undertaken by Suarez himself. They merely cite Defendant John Vassen's deposition testimony that he had known Suarez for 35 years, considered them "friends," and that his relationship with Suarez was "the same as his relationship to the convicted Madison County Treasurer, Fred Bathon." (Doc. 283 at 8, citing Doc. 278-10 at 46-47, 60, 63). However, Vassen also clarified that by "relationship," he meant the general association between County Treasurer and buyer of tax liens. (Doc. 278-10 at 46). Although Vassen also testified that he made campaign contributions to county treasurers, including Suarez (*Id.* at 46-47), the inferences Plaintiffs would have this Court draw from this testimony are far from reasonable.

Plaintiffs also refer to Stipulations made by Defendants Barrett Rochman, Scott McLean and John Vassen in an unrelated criminal case regarding tax lien auctions in neighboring Madison County as support for their claims against Suarez. While the Stipulations detail the same or similar conduct alleged in this case, they are wholly irrelevant to Plaintiffs' **[*24]** claims against Suarez. Without evidence of some conduct other than the acceptance of campaign contributions, there is no indication that Suarez was acting outside the scope of his official duties. For these reasons, the LGAA's damage exemption applies to the federal antitrust claims asserted against St. Clair County and Suarez. With regard to the remaining Defendants, Plaintiffs must clear another hurdle.

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[4] Defendants point to the fact that other buyers did win tax certificates at the 2007 and 2008 tax year auctions, including 50 that Brosh won in the 2007 tax year auction, and assert that "if the named Defendants had monopoly power, this could not and would not have occurred." (Doc. 268 at 9). However, the exclusion need not be total in order to qualify as improper monopolistic conduct—courts routinely entertain monopoly claims where the market share is less than 100 percent, as discussed above.

Antitrust claims require that the plaintiff prove the defendant violated ***antitrust law*** and that the violation caused them some injury. *Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 818 (7th Cir. 2012)* (citations omitted). "To establish an antitrust injury, a plaintiff must show not only that the injury is of the type intended to be protected by the antitrust laws, but that the violation was 'the cause-in-fact of the injury: that but for the violation, the injury would not have occurred.'" *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 573 (7th Cir. 1994)* (citing *Greater Rockford Energy & Technology, 998 F.2d at 394-96*). Evidence of overall market harm is not sufficient to establish antitrust injury; "individual injury (also known as antitrust impact) is an element of the cause of action[.]" *Reed v. Advocate Health Care, 268 F.R.D. 573, 581 (N.D. Ill. 2009)* (quoting *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008)*, as amended (Jan. 16, 2009)).

Plaintiffs request as damages "the difference of the amount redeemed and the amount that would have been needed to redeem the property at **[*25]** a reasonable and appropriate penalty rate." (Doc. 2). Thus, they must produce competent evidence that the 18% penalty rate they paid on the Washington and Schuetz poperties was more than the "reasonable and appropriate penalty rate" for those properties in the 2007 tax year, and by how much. Plaintiffs have disclosed two expert witnesses in this case, but neither has offers an opinion as to what the reasonable penalty rates should have been for the Washington and Schuetz Properties for the 2007 tax year sale absent the alleged bid rigging scheme.

Victoria Harper, former Fulton County, Illinois Treasurer, analyzed overall bidding in historical tax sale data and opined that there were "unusually high interest rates" overall in the 2006 and 2007 St. Clair tax auctions. (Harper Expert Report, Doc. 218-1 at 1). She offered no opinion, however, as to whether the penalty rates paid on the Washington and Schuetz Properties for the 2007 tax year were higher than they might be otherwise. In fact, Plaintiffs confirm that Ms. Harper is not "offering opinions as to complex macro-economic issues or as to Plaintiff's damages[.]" (Doc. 234).

Plaintiffs also disclosed Dr. Carl Peters as an expert. Dr. **[*26]** Peters conducted statistical analyses (including calculating weighted average bidding) regarding the overall results of the 2006 and 2007 tax year auctions and how they compare with other years and other counties. (Peters Expert Report, Doc. 255-1). However, during his deposition, he conceded that his methodology does not provide a basis to determine what rate would have applied to any particular property owner's delinquent taxes absent the alleged wrongful acts. (Deposition of Carl Peters, Doc. 255-2 at 117:8-118:1).

Plaintiffs point only to the overall weighted average bids for the St. Clair County market in 2006 and 2007 compared with other years and other counties as evidence that the alleged anticompetitive conduct had an antitrust impact. But this information is not probative of whether Plaintiffs themselves paid more than they would have if the auctions were not allegedly manipulated. In the absence of even a scintilla of evidence regarding what the penalty rates on the Washington and Schuetz Properties should have been in 2007, Plaintiffs cannot prove antitrust injury or make a submissible case on damages. The jury would improperly be left to rely on mere speculation and guesswork. **[*27]**

Illinois Antitrust Act Claims

Defendants challenge Plaintiffs' state antitrust claims as well. Under Illinois law, federal courts' interpretation of federal ***antitrust law*** guides state courts' construction of substantially similar Illinois ***antitrust law***. *State of Ill., ex rel. Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1480 (7th Cir.1991)*. As such, the Court's above analysis of the federal statutes and case law applies to the equivalent state law claims.

Defendants also seek to invoke the indirect purchaser doctrine on the state antitrust claims. But the state law antitrust claims are not affected by whether Plaintiffs are deemed direct or indirect purchasers. The Supreme Court has specifically held that *Illinois Brick* does not preempt state law with regard to indirect purchasers; that is, it does not prevent indirect purchasers from recovering damages under state antitrust laws where the state laws otherwise allow it. *See, California v. ARC Am. Corp., 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*.

The applicable Illinois statute provides that "[n]o provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages." *740 ILCS 10/7(2)*. Defendants correctly point out that the statute prohibits indirect purchasers from maintaining a class action for antitrust violations. But because class certification has been denied in this **[*28]** case, that provision is no barrier to the Dvoraks maintaining their own claims. Summary judgment is not proper on these grounds.

As was the case with respect to the federal antitrust claims, Defendants Suarez and St. Clair County argue that the provisions of the Illinois Antitrust Act do not apply to them, and therefore, the state law antitrust claims should be dismissed. (Doc. 272 at 5-6). They refer to *Section 5* of the statute, which provides, "the activities of a unit of local government or school district and the activities of the employees, agents and officers of a unit of local government or school district" are not subject to the statute. *740 ILCS 10/5(15)*. The Illinois Constitution's definition of "units of local government" includes counties. *Ill. Const. 1970, art. VII, § 1*.

Plaintiffs do not challenge St. Clair County's assertion that it escapes state antitrust liability under *Section 5(15)*, but once again, they contend Suarez does not qualify because his alleged conduct in participating in anticompetitive activities were outside the scope of his official authority. *Lathrop v. Juneau & Assocs., Inc. P.C., 220 F.R.D. 330, 338 (S.D. Ill. 2004)*. As previously noted, Plaintiffs have produced no actual evidence indicating that Suarez engaged in any anticompetitive or collusive activities. Therefore, **[*29]** the *Section 5(15)* exemption applies.

State Common Law Claims

Breach of Fiduciary Duty

Suarez, the only defendant against whom the breach of fiduciary duty claim is asserted, argues that he is entitled to public official immunity. Under that doctrine, "a public officer is immune from individual liability for the performance of discretionary duties in good faith." *Kinzer on Behalf of City of Chicago v. City of Chicago, 128 Ill. 2d 437, 539 N.E.2d 1216, 1220, 132 Ill. Dec. 410 (1989)*. While an official performing discretionary duties is entitled to immunity, one performing ministerial duties is not. The distinction between discretionary and ministerial acts is murky at the best, and must be made on a case-by-case basis. However, Illinois law generally...

> ...deems discretionary acts as those that are unique to a particular public office, and involve the making of a decision about whether or how to perform a particular act following the exercise of personal deliberation and judgment. In contrast, ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act. That is, ministerial acts are those acts that are absolute, certain and imperative, involving merely **[*30]** the execution of a set task so that nothing remains for judgment or discretion.

Wrobel v. City of Chicago, 318 Ill. App. 3d 390, 742 N.E.2d 401, 406-07, 252 Ill. Dec. 151 (2000).

Here, Suarez's conduct as developed in the record is discretionary in nature. The broad requirements for conducting tax auction sales are spelled out in the Illinois Property Tax Code and implicate arguably ministerial acts. That said, significant aspects of how the auctions are to be conducted are left to the judgment of the organizing official and his or her office. Therefore, Suarez is entitle to public official immunity on Plaintiffs' breach of fiduciary duty claim.

Civil Conspiracy

Civil conspiracy claims require proof of a combination of two or more persons for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means. *Adcock, 645 N.E.2d at*

894. Conspiracy claims operate to extend liability beyond the active wrongdoer to those who have planned, assisted or encouraged the wrongdoer's acts. *Id.* To prove civil conspiracy, Plaintiffs must prove not only that a defendant committed an overt act in furtherance of the conspiracy, but also that the act was tortious or unlawful. *Id.* In other words, there "must be an independent cause of action underlying a plaintiff's conspiracy **[*31]** claim." *Siegel v. Shell Oil Co., 656 F. Supp. 2d 825, 836 (N.D. Ill. 2009)*, aff'd, *612 F.3d 932 (7th Cir. 2010)* (citing *Thomas and Indeck N. Am. Power Fund, L.P. v. Norweb PLC, 316 Ill. App. 3d 416, 735 N.E.2d 649, 249 Ill. Dec. 45 (2000))*.[5]

Here, Plaintiffs' civil conspiracy claim must rest on their state antitrust and/or breach of fiduciary duty claims. Because those claims are subject to summary dismissal, the conspiracy claim fails as well.

Money Had and Received

Money had and received is a state law claim arising in equity. In order to prove such a claim under Illinois law, a plaintiff must establish that (1) he was compelled to pay money to the defendant, (2) the defendant had no legal right to demand the money, and (3) payment was necessary in order to avoid an injury to his business, person or property. *Butitta v. First Mortg. Corp., 218 Ill. App. 3d 12, 578 N.E.2d 116, 118-19, 160 Ill. Dec. 937 (1991)*.

The basis of Plaintiffs' claim is the money they paid to redeem the Washington and Schuetz Properties over and above what they allege they should have paid. Defendant White Oak Securities won the tax certificates for the properties at the 2007 tax year auction. (Doc. 2 at ¶¶7, 10). First Federal Savings Bank paid the redemption amounts to St. Clair County. As Plaintiffs acknowledge, the certificate amount and the additional penalty paid by a redeeming party "is in turn paid by the County to the tax purchaser, and the property is released back to its redeeming owner." (Doc. **[*32]** 2 at ¶62). That being the case, St. Clair County did not retain any of the penalty at issue or realize any benefit from it. It played no role with respect to the penalty payments except as an intermediary before disbursing the money to White Oak Securities.

This specific scenario was addressed by the Fifth District Illinois Appellate Court in *Bueker v. Madison Cty., 2016 IL App (5th) 150282, 406 Ill. Dec. 633, 61 N.E.3d 237, 256 (2016)*, in which that court held that a state law claim for money had and received based on allegedly rigged property tax penalty rate auction would not lie against the county to which the redemption payment was tendered, as the county passes the payment along to the bidder and does not retain any benefit from the alleged wrongful charge. Plaintiffs acknowledge *Bueker*, but urge this Court to disregard it in favor of *Drury v. McLean Cty., 89 Ill. 2d 417, 433 N.E.2d 666, 60 Ill. Dec. 624 (1982)*.

In *Drury*, individuals who had been convicted and paid fines to the circuit clerk under a statute later found unconstitutional sought to recover the fines and costs from McLean County under the money had and received theory. Plaintiffs mischaracterize the holding in *Drury* as "allowing plaintiffs...to recover for money had and received against funds actually received by the county." (Doc. 283 at 11). That is incorrect. The Illinois Supreme **[*33]** Court actually found that the action would not lie against the County, because 1) the circuit clerk was not a county official and 2) the money had never been received by the county, but was instead distributed by circuit clerk to the town of Normal and the State of Illinois. *Drury at 670*. Here, St. Clair County's position is analogous to that of the circuit clerk in *Drury*, having taken in the money and then disbursed it to another entity. Plaintiffs' reliance on *Drury* is therefore misplaced.

There is no evidence that any of the defendants besides White Oak Securities received and retained the allegedly inflated penalty payments from the Washington and Schuetz Properties or any benefit from such payments. Thus, Plaintiffs' claim for money had and received fails on liability as to Defendants other than White Oak. But that doesn't end the analysis.

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[5] Plaintiff cites to an Illinois Court of Appeals case, *Vance v. Chandler, 231 Ill. App. 3d 747, 597 N.E.2d 233, 236, 173 Ill. Dec. 525 (1992)*, holding that "independent, actionable tortious conduct is not needed" to support a civil conspiracy claim. (Doc. 283 at 11). *Vance*, however, was decided before *Adcock* and the subsequent appellate cases interpreting it.

Plaintiffs' inability to show that their penalty rates were higher than what they reasonably should have been is fatal to their money had and received claim against White Oak Securities as well. One of the elements of the claim is a showing that the defendant had no legal right to demand the money. Had White Oak won the bidding on Plaintiffs' properties **[*34]** at "reasonable and appropriate rates," there would be no question that it would have had the legal right to demand payment under the statutory scheme. In the absence of any evidence that the actual rates were higher than the reasonable and appropriate rates, however, a jury would have no basis on which to conclude that White Oak was not legally entitled to collect the full amount it received.

CONCLUSION

For the foregoing reasons, Defendants' motions for summary judgment (Docs. 265, 266, 267, 268, 269, 270 and 272) are **GRANTED** and the case is **DISMISSED with prejudice**. All other pending motions are **DENIED as MOOT**. The Clerk of Court is **DIRECTED** to enter judgment in favor of Defendants and against Plaintiffs and to close the case

IT IS SO ORDERED.

DATED: March 29, 2018

/s/ Staci M. Yandle

STACI M. YANDLE

United States District Judge

JUDGMENT IN A CIVIL ACTION

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to the Stipulations of Dismissal dated May 12, 2016 (Doc. 202) and June 1, 2016 (Doc. 205), Plaintiffs' claims against Defendants Edward Beasley and John W. Scott have been **DISMISSED without prejudice**.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to the Order entered on March 29, 2018 (Doc. **[*35]** 297), Plaintiffs' claims against all other Defendants are **DISMISSED with prejudice**. Accordingly, the Clerk of Court is **DIRECTED** to close this case.

DATED: March 29, 2018

Approved: /s/ Staci M. Yandle

STACI M. YANDLE

DISTRICT JUDGE

San Miguel v. HP Inc.

United States District Court for the Northern District of California, San Jose Division

March 29, 2018, Decided; March 29, 2018, Filed

Case No. 5:16-cv-05820-EJD

Reporter
317 F. Supp. 3d 1075 *; 2018 U.S. Dist. LEXIS 54227 **; 2018 WL 1536766

RICHARD SAN MIGUEL, et al., Plaintiffs, v. HP INC., Defendant.

Subsequent History: Costs and fees proceeding at, Motion granted by, in part, Motion denied by, in part, Motion granted by *In re HP Printer Firmware Update Litig., 2019 U.S. Dist. LEXIS 108959 (N.D. Cal., June 28, 2019)*

Core Terms

printer, cartridges, ink, update, firmware, allegations, third-party, authorization, consumer, disabling, unfair, accesses, messages, non-HP, permission, omission, Knowingly, contends, box, replace, computer system, intentionally, compatible, violations, trespass, fraudulent, installed, warranty, damaged, business practice

Counsel: **[**1]** For Richard San Miguel, individually and on behalf of all others similarly situated, DeLores Lawty, individually and on behalf of all others similarly situated, Plaintiffs: Elizabeth Antonia Kramer, Jordan S Elias, Daniel C. Girard, Girard Gibbs LLP, San Francisco, CA.

For Christopher Ware, Plaintiff: Elizabeth Antonia Kramer, Jordan S Elias, Girard Gibbs LLP, San Francisco, CA; Joseph R. Saveri, Joseph Saveri Law Firm, Inc., San Francisco, CA.

For Robert Doty, Plaintiff: Adrian R. Bacon, Todd Michael Friedman, LEAD ATTORNEYS, Law Offices of Todd M. Friedman, P.C., Woodland Hills, CA; Adrian Bacon, Law Offices of Todd M. Friedman, P.C., Beverly Hills, CA; Elizabeth Antonia Kramer, Jordan S Elias, Girard Gibbs LLP, San Francisco, CA.

For Richard Faust, Plaintiff: Elizabeth Antonia Kramer, Jordan S Elias, Girard Gibbs LLP, San Francisco, CA.

For James Andrews, Plaintiff: Adrian Bacon, Law Offices of Todd M. Friedman, P.C., Beverly Hills, CA; Elizabeth Antonia Kramer, Jordan S Elias, Girard Gibbs LLP, San Francisco, CA; Todd Michael Friedman, Law Offices of Todd M. Friedman, P.C., Woodland Hills, CA.

For HP Inc., Delaware corporation, Defendant: Samuel G. Liversidge, LEAD ATTORNEY, Jared Michael **[**2]** Strumwasser, Joseph C. Hansen, Gibson Dunn & Crutcher LLP, Los Angeles, CA.

Judges: EDWARD J. DAVILA, United States District Judge.

Opinion by: EDWARD J. DAVILA

Opinion

[*1080] ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS CONSOLIDATED AMENDED COMPLAINT

I. INTRODUCTION

This putative nation-wide class action suit arises out of Defendant HP Inc.'s ("HP") allegedly unlawful implementation of a firmware update that incapacitated thousands of HP printers and all-in-one devices (collectively "HP printers") and prevented the use of certain third-party ink cartridges in those printers. Plaintiffs Richard San Miguel, DeLores Lawty, Richard Faust, Christopher Ware and James Andrew ("Plaintiffs")[1] allege that HP used the firmware in an attempt to gain an advantage over its competitors and to extract higher profits from the ink cartridge aftermarket.

HP moves to dismiss the Consolidated Amended Complaint ("Complaint")[2] pursuant to *Federal Rules of Civil Procedure 9(b)* and *12(b)(6)*, asserting, among other things, that HP has no legal obligation to make its printers compatible with any and all third-party ink cartridges. Based upon all pleadings filed to date and the comments of counsel at the hearing, HP's motion to dismiss is granted in part and denied **[**3]** in part.

II. BACKGROUND[3]

Plaintiffs each purchased an HP printer and bought third-party ink cartridges when the original HP ink cartridges that came with their printers ran out of ink. Plaintiff Richard San Miguel ("Miguel") purchased an HP printer in December 2015. Miguel refilled his printer with ink cartridges manufactured by an HP competitor. These ink cartridges functioned up until September 12, 2016. On September 13, 2016, Miguel's HP printer unexpectedly failed and the screen displayed a message directing him to remove "damaged" ink cartridges and replace them with new cartridges. **[*1081]** Miguel alleges that HP caused this failure by disabling his printer. Miguel clicked on the link that was displayed on his screen, which led him to an HP website selling HP ink cartridges. The screen on his printer also indicated that his replacement color ink cartridges were empty, but they weren't. Miguel alleges that "[h]is printer's inoperability caused him to expend time and money." Complaint at ¶17. He further alleges that when he bought his HP printer, he relied on the ability to use third-party ink cartridges. If he had known that HP would prevent him from using third-party ink cartridges, he would **[**4]** not have bought an HP printer or he would have paid significantly less for it.

Plaintiff DeLores Lawty ("Lawty") purchased an HP printer in February 2015 and used the HP ink cartridges that came with the printer until approximately June 2016. Lawty replaced them with non-HP ink cartridges purchased online and printed documents using those cartridges. On September 15, 2016, Lawty's printer wouldn't work and the screen on her printer said there was an error with her ink cartridges. Lawty checked her cartridges and they were still full of ink. Lawty replaced the non-HP cartridges with a new set of non-HP cartridges, but the printer still would not work. Lawty tried to troubleshoot the problem with HP, but she was unable to get her printer to work. Lawty alleges that HP caused her printer to fail by disabling it. She ultimately bought a replacement printer from HP. Lawty never allowed HP to push through its firmware update. If Lawty had known that HP could or would disable her printer remotely, she would not have bought an HP printer or she would have paid significantly less for it.

Plaintiff Richard Faust ("Faust") purchased an HP printer in 2014. When the ink cartridges that came with **[**5]** the printer ran out of ink, he purchased and installed ink cartridges made by an HP competitor. He used the non-HP cartridges to print hundreds of pages of documents. On or about September 16, 2016, Faust's printer wouldn't work. The error message on the printer screen said that the ink cartridges were missing or damaged. Faust alleges that HP caused his printer to fail by disabling it. When investigating his printer problem, Faust learned of an optional

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[1] The parties have stipulated to dismiss the claims of Plaintiff Robert Doty. See Dkt. 89.

[2] After the briefing on the motion to dismiss was completed, the parties stipulated to the filing of the Consolidated Amended Complaint and agreed that HP's motion to dismiss would apply to the Consolidated Amended Complaint without the need for further response or briefing.

[3] The Background is a summary of the allegations in the Complaint.

firmware update that HP had released to fix the problem. Faust downloaded the update, but still couldn't print documents. Faust contacted HP's technical support, but the problem was not resolved. Faust purchased a Canon printer to replace his HP printer. If Faust had known HP would disable his printer if he installed non-HP ink cartridges, he would not have bought an HP printer or would have paid significantly less for it.

Christopher Ware ("Ware") experienced similar problems with his HP printer. The error message on Ware's HP printer screen said: "There is a problem with the printer or ink system. Turn printer off, then on. If problem persists, contact HP." Complaint at ¶39. Ware tried twice to download the "patch" offered by HP to **[**6]** regain operability with certain non-HP printer cartridges, but was unable to do so. Id. at ¶41. Ware installed HP printer cartridges and was again able to use his HP printer.

When James Andrews ("Andrews") was shopping for a printer, he "learned that the HP Officejet 4500 printer used 901 and 61 ink cartridges; HP represented on the product box that the printer used these models." Id. at ¶44. Andrew alleges that "[t]he 901 and 61 labels are generic part numbers for cartridges that are compatible, because of their size and functionality, with his printer." Id. Andrew alleges that HP never disclosed to **[*1082]** him that he would not be able to print documents using third-party ink cartridges. Id. Andrews planned to use third-party ink cartridges because he knew that HP ink cartridges were much more expensive. Andrews purchased and used "901 and 61 ink cartridges from third-party sellers." Id. at ¶47. However, in November 2016 his printer began rejecting the third-party ink cartridges and refills. When Andrews inserted a new third-party ink cartridge, the printer showed an error code and would not print. Andrews "later learned that HP, th[r]ough his computer, had forced a firmware modification **[**7]** that [] froze his printer and prevented him from using third-party ink cartridges." Id. at ¶49. Andrews never permitted HP to modify his printer's firmware. Andrews "had to buy new HP-branded ink cartridges at a considerably higher price than he paid for the non-HP cartridges" to get his printer to work again. Id. at ¶51. Andrews alleges that he relied to his detriment on "HP's material representations and omissions that he would be able to buy third-party ink cartridges and use them in his printer." Id. at ¶52. Andrews would not have bought the HP printer if he had known that "HP's representations were false or that HP would forcibly control and modify his printer." Id. at ¶53.

Plaintiffs collectively allege that HP's firmware update changed the communication protocol between HP printers and microchips located in both HP-branded ink cartridges and third-party cartridges so that certain varieties of third-party inkjet cartridge microchips, including those manufactured and distributed by Apex Microelectronics and Static Control Components, could no longer communicate with the HP printer. Id. at ¶¶80-82. The firmware blocked ink cartridges containing these chips from functioning in an **[**8]** HP printer. Id. Plaintiffs allege that this type of conduct, which HP refers to as "dynamic security," "has disrupted the marketplace in the inkjet cartridge and refill market, by systematically disabling technology lawfully reengineered by third-party makers who sell their products in the same market as HP." Id. at ¶¶82-83. Plaintiffs allege that the firmware updates have rendered third-party products obsolete with the click of a button, harmed competition, and caused consumers to pay more for HP products. Id. at ¶83.

Plaintiffs allege that HP's conduct in disabling printers prompted a flurry of complaints and criticisms from consumers, advocacy groups, and others. Id. at ¶88. In response, on September 28, 2016, Jon Flaxman, the Chief Operating Officer of HP, issued a public statement, which said: "We should have done a better job of communicating about the authentication procedure to customers, and we apologize. . . . Again, to our loyal customers who were affected, we apologize." Id. at ¶89. On October 12, 2016, HP notified customers "regarding an optional firmware update that customers could download." Id. at ¶91. Plaintiffs allege, however, that HP's notice of this remedial update **[**9]** did not fully and clearly disclose which printers and ink cartridges its firmware update impaired. Id. at ¶92. Plaintiffs also allege that HP has failed to adequately make Plaintiffs and class members aware that an update purporting to reverse the printer disablement is available. Id. at ¶93. "Unlike the printer-disabling firmware update that HP installed remotely, its remedial update is not automatic. It is available only as an optional download." Id. at ¶94. Plaintiffs allege that ordinary consumers "had no way of learning about HP's remedial update because HP buried its notice of this update on its website, with very limited notice to consumers." Id. at ¶97. Moreover, Plaintiffs allege that the remedial **[*1083]** update is inadequate to restore printer functionality. Id. at ¶99.

HP's warranty for the printers identified in the complaint ("Class Printers")[4] provides: "The use of a non-HP or refilled cartridge does not affect either the HP Limited Warranty to the end-user customer or any HP support contract with the end-user customer for the printer." Id. at ¶102. Plaintiffs allege that this language "reinforced consumers' ordinary custom, expectation and practice of printing documents with Class **[**10]** Printers using compatible non-HP ink cartridges." Id.

Based upon the foregoing allegations, Plaintiffs seek to represent the following Class and Subclasses (unless otherwise specified, the "Class"): all persons in California who own a Class Printer (the "Injunctive Relief Class"); all persons in the United States who purchased a Class Printer and experienced a print failure while using a non-HP aftermarket cartridge during the period between March 1, 2015 and December 31, 2017 (the "Disablement Class"); all persons in Texas who purchased or owned one or more Class Printers (the "Texas Subclass"); all persons in Washington who purchased or owned one or more Class Printers (the "Washington Subclass"); and all persons in New Jersey who purchased or owned one or more Class Printers (the "New Jersey Subclass"). Id. at ¶105. Plaintiffs assert claims for (1) unfair and unlawful business practices in violation of the *Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §17200, et seq.*, on behalf of the Injunctive Relief Class; (2) fraudulent business practices in violation of the UCL on behalf of the Class; (3) violation of the *False Advertising Law ("FAL"), Cal. Bus. & Prof. Code §17500, et seq.*, on behalf of the Class; (4) violation of the **[**11]** *Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §1750, et seq.*, on behalf of the Class; (5) violations of the *Texas Deceptive Trade Practices — Consumer Protection Act, Tex. Bus. & Com. Code Ann. §17.01, et seq.*, on behalf of the Texas Subclass; (6) violations of the *Washington Consumer Protection Act, Wash. Rev. Code Ann. §19.86.010 et seq.*, on behalf of the Washington Subclass; (7) violations of the *New Jersey Consumer Fraud Act, New Jersey Statutes Ann. 56:8-1, et seq.*, on behalf of the New Jersey Subclass; (8) violation of the *Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. §1030, et seq.*, on behalf of the Disablement Class; (9) violation of the *California Computer Crime Law, Cal. Penal Code §502*, on behalf of the California Subclass; (10) trespass to chattels; and (11) tortious interference with contractual relations and/or prospective economic advantage on behalf of the Class.

III. STANDARDS

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of claims alleged in the complaint. *Fed.R.Civ.P. 12(b)(6)*; *Parks School of Business, Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995)*. The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. When deciding whether to grant a motion to dismiss, the court must construe the alleged facts in the light most favorable to the plaintiff. See *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 945 (9th Cir. 2014)* (providing the court must "draw all reasonable inferences in favor of the nonmoving **[*1084]** party" for a *Rule 12(b)(6)* motion). However, "courts **[**12]** are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal, 556 U.S. at 678*. Dismissal "is proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*.

Consumer-protection claims that sound in fraud are subject to the heightened pleading requirements of *Fed.R.Civ.P. 9(b)*. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1102 (9th Cir. 2003)*; see also *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*; In re Apple and AT&T iPad Unlimited Data Plan Litigation, *802 F.Supp.2d, 1070, 1075 (N.D. Cal. 2011)* (*Rule 9(b)* applies to claims under the UCL and FAL). *Rule 9(b)* requires that "a party must state with particularity the circumstances constituting fraud. . . ." *Fed.R.Civ.P. 9(b)*. The circumstances constituting the fraud must be "specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985)*. Therefore, a

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[4] See Complaint at ¶63 for complete list of Class Printers.

party alleging fraud must set forth "the who, what, when, where, and how" of the misconduct. *Vess, 317 F.3d at 1106* (quoting *Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997))*.

IV. DISCUSSION

HP moves to dismiss all of Plaintiffs' claims, asserting that HP is not under any legal duty to make its printers compatible with third-party ink cartridges. HP reasons that all of Plaintiffs' claims start from the underlying and deficient premise that HP had some duty to **[**13]** make its printers compatible with third-party ink cartridges, even those using cloned and infringing security chips affected by the authentication procedure in HP's firmware. HP asserts that it was under no such legal obligation, did not make any such representations and did nothing unlawful.

A. Computer Intrusion Claims

HP contends that all claims premised on computer intrusion should be dismissed with prejudice because Plaintiffs do not allege and cannot allege that HP accessed any computer without authorization. In response, Plaintiffs contend that "[t]o the extent HP had any authorized access to Plaintiffs' printers, HP exceeded that access . . . when it froze them." Plaintiffs' Opposition at 21:22-24.

1. Violation of the CFAA (Claim 8)

The CFAA is a federal criminal statute that also authorizes civil actions for any person who suffers damage or loss by reason of a violation of the statute. *18 U.S.C. §1030(g)*. "The CFAA prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then taking specified forbidden actions, ranging from obtaining information to damaging a computer or computer data." *LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1135 (9th Cir. 2009)* **[**14]** (citing *18 U.S.C. 1030(a)(1)-(7) (2004)*).

Plaintiffs allege that HP violated *§1030(a)(5)(A) through (C)*, which create liability for whoever:

> (5)(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
>
> (B) intentionally accesses a protected computer without authorization, and as a **[*1085]** result of such conduct, recklessly causes damage; or
>
> (C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

18 U.S.C. §1030(a)(5)(A)-(C). The term "without authorization" has been interpreted to mean "when the person has not received permission to use the computer for any purpose (such as when a hacker accesses someone's computer without any permission)" or when the [computer owner] has rescinded permission to access the computer and the defendant uses the computer anyway." *Brekka, 581 F.3d at 1135*; see *Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1066 (9th Cir. 2016)* (same).

Subsections (B) and *(C)* are inapplicable in light of Plaintiffs' admission in the Complaint that HP had "authorized access" to Plaintiffs' printers. See Complaint at ¶¶208 (HP "exceeded its authorized access"); see also id. at ¶62 (HP can communicate with HP printers after it sells them by updating their firmware), and 82-83 (describing **[**15]** HP firmware updates). Nevertheless, Plaintiffs contend that they may proceed with their claim based upon allegations that HP "exceeded" its authorized access. Plaintiffs' Opposition at 21:22-25. Plaintiffs allege that HP neither sought nor obtained Plaintiffs' consent to access their printers to install the firmware update; HP did not notify Plaintiffs that it planned to "push" this update; Plaintiffs reasonably expected that HP was not entitled to disable their working printers; HP purposely concealed that it had accessed the printers to install disabling firmware; HP displayed false error messages; the firmware update was executed not for cyber-security reasons, but to suppress competition and limit consumer choice in the aftermarket for ink; and the firmware update intercepted and altered the communication protocol between the printers and their ink cartridges to cause these products to fail. Id. at 21:10 20.

Subsections (B) and *(C)* cannot reasonably be expanded in the manner proposed by Plaintiffs to encompass HP's alleged conduct that "exceeded authorized access." Plaintiffs' proposed expansion would be not only contrary to the plain language of *subsections (B)* and *(C)*, but also inconsistent with other provisions **[**16]** of the CFAA that expressly provide for liability when a defendant "accesses a computer without authorization *or* exceeds authorized access." *18 U.S.C. §1030(a)(2)*; see also *(a)(1)*, *(4)*, *7(B)*.[5] Furthermore, Plaintiffs' proposed expansion is inconsistent with the Congressional intent behind the CFAA. "Congress enacted the CFAA in 1984 primarily to address the growing problem of computer hacking, recognizing that '[i]n intentionally trespassing into someone else's computer files, the offender obtains at the very least information as to how to break into that computer system.'" *U.S. v. Nosal, 676 F.3d 854, 858 (9th Cir. 2012)* (en banc). The CFAA should be interpreted in a manner that "maintains the CFAA's focus on hacking rather than turning it into a sweeping Internet-policing mandate." Id. Because Plaintiffs have not alleged facts to show HP accessed their printer "without authorization," the CFAA claim is dismissed to the extent it is based on *subsections (B)* and *(C)*.

To the extent Plaintiffs' CFAA claim is based upon *subsection (A)*, the claim is cognizable because *subsection (A)* **[*1086]** does not require accessing a computer "without authorization." Instead, *subsection (A)* provides liability for "knowingly caus[ing] the transmission of a program, information, code or command, and as a result of such conduct, intentionally **[**17]** caus[ing] damage without authorization, to a protected computer." *18 U.S.C. §1030(a)(5)(A)*. Plaintiffs allege that HP knowingly transmitted the firmware update and intentionally caused damage. Plaintiffs further allege that they did not consent to installation of disabling firmware. At the pleading stage, these allegations are sufficient. See *In re Apple & AT & TM Antitrust Litigation, 596 F.Supp.2d 1288 (N.D. Cal. 2008)* (plaintiffs alleged they authorized software update, not that they authorized damages to their iPhones).

2. *California Penal Code §502* (Claim 9)

The *California Penal Code §502* imposes liability on a person who commits certain "acts" that constitute a public offense. *Penal Code §502(c)*. Plaintiffs allege that HP violated *§502(c)(1) through (c)(5)*, *(c)(7)* and *(c)(8)*, which impose liability on any person who:

> (1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any data, computer, computer system, or computer network in order to either (A) devise or execute any scheme or artifice to defraud, deceive, or extort, or (B) wrongfully control or obtain money, property, or data.
>
> (2) Knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, **[**18]** computer system, or computer network.
> (3) Knowingly and without permission uses or causes to be used computer services.
> (4) Knowingly accesses and without permission adds, alters, damages, deletes, or destroys any data, computer software, or computer programs which reside or exist internal or external to a computer, computer system, or computer network.
> (5) Knowingly and without permission disrupts or causes the disruption of computer services or denies or causes the denial of computer services to an authorized user of a computer, computer system, or computer network.
> * * *

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[5] The phrase "exceeds authorized access" is statutorily defined to mean "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." *18 U.S.C. §1030(e)(6)*.

> (7) Knowingly and without permission accesses or causes to be accessed any computer, computer system, or computer network.
>
> (8) Knowingly introduces any computer contaminant into any computer, computer system, or computer network.

Cal. Penal Code 502(c)(1)-(5), *(7)-(8)*.

HP contends that the *§502* claim must be dismissed in its entirety because HP had authorized access to Plaintiffs' printers and because Plaintiffs plead only threadbare legal conclusions unsupported by facts. Plaintiffs counter that *§502* does not require unauthorized access, only knowing access.

The Ninth Circuit has held that *§502* is "different" from the CFAA. *United States v. Christensen, 801 F.3d 970, 994 (2015)* (emphasis in original). "In contrast to the **[**19]** CFAA, the California statute does not require *unauthorized* access. It merely requires *knowing* access." Id. Despite this seemingly clear holding, HP relies upon language in the Ninth Circuit's Facebook decision, supra, that appears to create a contradiction: "because [defendant] had implied authorization to access Facebook's **[*1087]** computers, it did not . . . violate the statute." Seizing upon this statement, HP argues that it had authorization to access Plaintiffs' computers and therefore Plaintiffs' *Section 502* claim is similarly not cognizable, without consideration of the specific offenses that HP allegedly committed. A review of the underlying facts in Facebook is required to provide context for the Ninth Circuit's statement.

In Facebook, the defendant Power Ventures ("Power") caused a message to be transmitted to its user's friends within the Facebook system. In analyzing the CFAA claim predicated on *§1030(a)(2)(C)*[6] the Ninth Circuit determined that Power's users arguably gave Power permission to use Facebook's computers to disseminate messages, and that Power reasonably could have thought that consent from Facebook users was permission for Power to access Facebook's computers. The Ninth Circuit held in pertinent **[**20]** part that "[b]ecause Power had at least arguable permission to access Facebook's computers, [Power] did not initially access Facebook's computers 'without authorization' within the meaning of the CFAA." *Facebook, 844 F.3d at 1067*. After Power's initial access to Facebook's computers, Facebook issued a written cease and desist letter to Power. The Ninth Circuit held that after receiving the case and desist letter, Power's access of Facebook's computers was "without authorization" in violation of the CFAA. Turning to the *§502(c)(2)* claim, the Ninth Circuit acknowledged that *§502* was different from the CFAA insofar as *§502* did not require unauthorized access. *Facebook, 844 F.3d at 1069* (quoting *Christensen, supra*). The Ninth Circuit held that Power did not violate *§502* when it initially accessed Facebook's computers, reasoning as follows:

> But despite the differences in wording, the analysis of both statutes is similar in the present case. Because Power had implied authorization to access Facebook's computers, it did not, at first, violate the statute. But when Facebook sent the cease and desist letter, Power, as it conceded, knew that it no longer had permission to access Facebook's computers at all. Power, therefore, knowingly accessed and without permission took, copied, and made use of Facebook's **[**21]** data. Accordingly, we affirm in part the district court's holding that Power violated *section 502*.

Id. Placed in context, it is implicit in the Ninth Circuit's determination above that Power's "implied authorization" meant Power had "permission" to take, copy and make use of Facebook's data, and that therefore, Power "did not, at first, violate the statute." Id. The Ninth Circuit's determination cannot reasonably be construed, as HP suggests, to preclude any and all liability under *§502* whenever there is authorization to access. This is so because the Ninth Circuit clearly stated that *§502* "does not require *unauthorized* access. It merely requires *knowing* access." Id. (emphasis in original). Rather, whether there is liability under *§502* requires an analysis of the specific "acts" that are alleged to constitute an offense and whether there was "permission" to engage in those acts.

As for the substance of the various alleged *§502* violations, Plaintiffs' allegations are sufficient to state a plausible claim for violation of *subsection (c)(1)* based, at a minimum, upon the allegedly false error message stating that

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[6] This subsection creates liability for whoever "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." *18 U.S.C. §1030(a)(2)(C)*.

existing ink cartridges in the printers were "damaged **[*1088]** or missing" and should be replaced. Plaintiffs also state a viable **[**22]** claim for violations of *subsections (c)(4)* and *(c)(5)* based upon the alleged alteration and disruption caused by the firmware update to a "computer network," which is statutorily defined to include, among other things, "printers connected by telecommunication facilities." Penal Code *§502(b)(2)*. HP contends that *§502* is meant to impose liability for hacking, not firmware, and urges the Court to interpret the statute narrowly. See *Leocal v. Ashcroft, 543 U.S. 1, 11 n.8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)* (discussing rule of lenity to resolve ambiguity in criminal statute in petitioner's favor); see also *People v. Davis, 29 Cal.3d 814, 828, 176 Cal. Rptr. 521, 633 P.2d 186 (1981)* (setting forth principles of statutory interpretation). Although HP's contention has considerable merit, the language of *subsections (c)(1)*, *(c)(4)* and *(c)(5)* does not necessarily foreclose Plaintiffs' theories of liability, at least at the pleading stage.

Plaintiffs do not allege sufficient facts to state a claim for violations of *subsections (c)(2)-(3)* and *(8)*. The alleged violation of *subsection (c)(7)* also fails because Plaintiffs acknowledge that HP had permission to access their printers. The *§502* claim is accordingly dismissed to the extent it is based upon *subsections (c)(2)*, *(c)(3)*, *(c)(7)* and *(c)(8)*.

3. Trespass to Chattels (Claim 10)

"The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another." *Miller v. Nat'l Broad. Co., 187 Cal.App.3d 1463, 1480, 232 Cal. Rptr. 668 (1986)* (citations omitted). The California Supreme Court has held that **[**23]** the principles underlying the tort apply to allegations of digital trespass. *Intel Corp. v. Hamidi, 30 Cal.4th 1342, 1 Cal. Rptr. 3d 32, 71 P.3d 296 (2003)*. "[T]o prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff." eBay, *Inc. v. Bidder's Edge, Inc., 100 F.Supp.2d 1058, 1069-70 (N.D. Cal. 2000)*.

Plaintiffs' trespass allegations mirror those relating to its CFAA claim. Plaintiffs allege that HP exceeded its authorized access to Plaintiffs' printers when it activated a firmware update that disabled their printers. Complaint at ¶208. The firmware allegedly disabled Plaintiffs' printers and rendered their non-HP ink cartridges unusable. Id. at ¶226. Plaintiffs further allege that HP's conduct caused damage by preventing the class printers from operating, impairing the condition of the printers, reducing the value of the printers, and depriving Plaintiffs of the use of the printers and of their non-HP ink cartridges for a substantial period of time. Id. at ¶227. These allegations are sufficient to state a claim for digital trespass incident to a software download. See *In re Apple & AT & MT Antitrust Litigation, 596 F.Supp.2d at 1307* (consent limited **[**24]** to installation of software update did not foreclose trespass claim); see also eBay, *100 F.Supp.2d at 1070* (trespass claim cognizable because even if defendant's web crawlers were authorized to use eBay's system, the web crawlers exceeded the scope of any such consent when they began acting like robots by making repeated queries).

B. California Consumer Protection Claims

HP contends that each of Plaintiffs' California consumer protection claims fails to state a plausible claim and should be dismissed.

[*1089] 1. Claims 1-4: FAL, CLRA and UCL "fraudulent" prong Claims

Plaintiffs allege that HP made misrepresentations and omissions about the compatibility of third-party ink cartridges with their printers in violation of the FAL, the CLRA, and the "fraudulent" prong of the UCL. HP contends the claims should be dismissed as to San Miguel, Lawty, Faust and Ware because they do not allege that they were affirmatively misled. HP also contends that the claims should be dismissed as to Andrews for failure to plead fraud with particularity.

a. Allegedly Fraudulent Misrepresentations On Printer Box

Plaintiffs San Miguel, Lawty, Faust and Ware do not identify any HP representation that they saw or relied upon when purchasing their **[**25]** printers. Their Claims 1 through 4 are accordingly dismissed to the extent they are predicated upon alleged misrepresentations on HP's printer box.

Plaintiff Andrews alleges that "HP represented on the product box that the printer used [901 and 61 ink cartridges]" and that the "901 and 61 labels are generic part numbers for cartridges that are compatible . . . with his printer." Complaint at ¶44. Andrews' allegations are insufficient to comply with *Rule 9(b), Fed.R.Civ.P.* Andrews does not identify any statement on the box that would lead a reasonable consumer to believe the numbers on the product box are generic part numbers. Moreover, Andrews acknowledges that the printer box states "HP Original Ink." Plaintiffs' Opposition at 19:16-20. Andrews nevertheless contends that a reasonable consumer would be misled because "HP Original Ink" appears in much smaller type than the model numbers and a reasonable consumer would interpret "HP Original Ink" as promoting HP ink over generic ink. Id. at 19:17-20. It defies common sense to claim that the statement "HP Original Ink" misrepresents compatibility with non-HP ink simply because the statement appears in smaller type. Although it is theoretically possible that **[**26]** a consumer might construe the statement as Andrews contends, "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1162 (9th Cir. 2012)* (quoting *Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 129 Cal.Rptr.2d 486, 494 (2003)*; *Werbel ex rel. v. Pepsico, Inc., No. 09-4456 SBA, 2010 U.S. Dist. LEXIS 76289, 2010 WL 2673860, at *3 (N.D. Cal. July 2, 2010)*. Andrews' Claims 1through 4 are dismissed to the extent they are predicated upon alleged misrepresentations on the printer box.

b. Allegedly Fraudulent Misrepresentations inside HP Printer Box

Plaintiffs next contend that "HP's deception continued with statements inside the box. The printer card urged people to 'Say it best with HP ink.' [citation omitted] and the warranty booklet provided that a printer would remain under warranty even if fitted with 'a non-HP or refilled cartridge.'" Plaintiffs' Opposition at 19:20-23. Plaintiffs contend that "it defies logic that HP would make these statements and advertise its own ink, unless the consumer was free to use competing ink." Id. at 19:23-24. Plaintiffs acknowledge, however, that they were not "exposed" to the card and warranty until after they bought **[**27]** their printers. They do not allege that they read or relied upon these statements when making either their printer purchases or ink cartridge purchases. Therefore the statements inside HP's printer box do not provide **[*1090]** a basis for Plaintiffs' fraudulent misrepresentation claims.

c. Allegedly Fraudulent Misrepresentations in "Error Messages"

Plaintiffs also allege (in their UCL claim) that the "error messages" displayed on their printers were false and misleading. Specifically, Plaintiffs allege that the "error messages" misrepresented that the printer failure resulted from missing or damaged ink or from an undefined printer problem. HP contends the "error messages" cannot support a UCL fraud claim because they did not cause an independent economic injury. Plaintiffs' Complaint, however, includes allegations that they were induced to spend money on new replacement cartridges or a new printer. See Complaint at ¶¶21, 42, 51. At the pleading stage, Plaintiffs' allegations of economic injury are sufficient.

d. Allegedly Fraudulent Omissions

Plaintiffs assert violations of the UCL, FAL and CLRA based upon an alleged failure to disclose theory. Plaintiffs allege that HP concealed its intent to **[**28]** preclude the use of compatible third-party ink cartridges and to disable Class Printers containing them. HP contends that the failure to disclose theory is not legally viable because in the absence of an affirmative misrepresentation, only omissions regarding a physical injury or safety concerns are actionable. Plaintiffs argue that HP's position is based on a misreading of California law. Plaintiffs' Opposition at 17:8. Relying on *Rutledge v. Hewlett-Packard Co., 238 Cal.App.4th 1164, 190 Cal. Rptr. 3d 411 (2015)*, Plaintiffs contend that they are not required to allege that HP's concealment related to product safety for it to be material and actionable under California law. Plaintiffs' Opposition at 18:3-4.

A plaintiff may base a UCL claim on an alleged omission, "[but] to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact that the defendant was obliged to disclose." *Sud v. Costco Wholesale Corp., 229 F.Supp.3d 1075, 1085 (N.D. Cal. 2017)* (quoting *Daugherty v. Am. Honda Motor Co., 144 Cal.App.4th 824, 835, 51 Cal. Rptr. 3d 118 (2006))*; see also *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1141 (9th Cir. 2012)* (fraudulent omission concerning latent defect not actionable unless the omission is contrary to a representation actually made or an omission of fact the defendant was obliged to disclose); *McCoy v. Nestle USA, Inc., 173 F.Supp.3d 954, 965 (N.D. Cal. 2016)* ("[T]o be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of **[**29]** a fact the defendant was obliged to disclose.")

As stated previously, Plaintiffs allege that the "error messages" misrepresented that the printer failure resulted from missing or damaged ink or from an undefined printer problem. The alleged omission, that HP intentionally used a firmware update to disable printers that were using non-HP ink cartridges, is arguably contrary to the explanations for the printer failure stated in the "error messages." At the pleadings stage, Plaintiffs' allegations are sufficient to state fraud by omission under the FAL, CLRA and the UCL.

2. "Unfair" Business Practices Under the UCL (Claim 1)

The UCL does not define the term "unfair" and the California Supreme Court has not established a definitive test to determine whether a business practice is unfair in the context of consumer cases such as this one. *Wahl v. Yahoo! Inc., No. 17-2745 BLF, 2017 U.S. Dist. LEXIS 150403, 2017 WL 4098884, at *2 (N.D. Cal. Sept. 15, 2017)*. Nevertheless, **[*1091]** three separate tests have emerged from the California Courts of Appeal that provide guidance on the issue. The first test requires that the public policy underlying the claim "must be tethered to specific constitutional, statutory or regulatory provisions." **[**30]** *Drum v. San Fernando Valley Bar Assn., 182 Cal. App. 4th 247, 257, 106 Cal. Rptr. 3d 46 (2010)*. Under the second test, referred to as the "balancing test," courts analyze whether the alleged business practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" and "weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim." *Wahl supra, 2017 U.S. Dist. LEXIS 150403, [WL] at *2* (quoting *Drum, supra, at 257*); see also *South Bay Chevrolet v. Gen. Motors Acceptance Corp., 85 Cal. Rptr. 2d 301, 72 Cal.App.4th 861 (1999)*. The third test, which draws on the definition of "unfair" in *section 5* of the *Federal Trade Commission Act* (*15 U.S.C. §45, subd. (n)*), requires that "(1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided" ("*section 5* test"). *Drum, supra, at 257*. The Ninth Circuit, however, has expressly rejected the *section 5* test for consumer actions in the absence of a clear holding from the California Supreme Court. *Lozano v. AT&T Wireless Servs., Inc., 504 F.3d 718, 736 (9th Cir. 2007)*.

a. Tethering Test

HP contends that the UCL claim for "unfair" business practices does not satisfy the "tethering test" set forth in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. In Cel-Tech, the California Supreme Court held that in actions by a competitor alleging anticompetitive practices the word "unfair" means "conduct **[**31]** that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id. at 187* & n.12.

Plaintiffs allege that HP engaged in unfair methods of competition and unfair trade practices that violate the UCL in at least the following respects:

(a) With the intent and effect of stifling open and vigorous competition in the market for printer cartridges, HP devised and executed a material change to printers it had sold.

(b) HP intentionally caused HP printers to stop functioning upon detection of cartridges manufactured by HP's competitors.

(c) HP conditioned the operations of HP printers on their owners' purchases of HP products in another product market.

(d) HP tied HP printers' functionality to their owners' purchases of HP cartridges even though HP's Warranty expressly contemplates that printer owners may, will, and do replace depleted printer cartridges with cartridges not made or sold by HP.

(e) HP rendered printers it had sold inoperable without prior notice to their owners.

(f) HP printers remain inoperable as a result **[**32]** of HP's conduct unless their owners purchase and install cartridges made and sold by HP.

(g) By forcing Plaintiffs and Class members to purchase HP-branded ink cartridges to regain a working printer, **[*1092]** HP has obtained an unfair advantage in the marketplace and hindered competition for third-party ink cartridges.

(h) By rendering the use of third-party ink cartridges in Class Printers obsolete, HP, through its firmware update, has unfairly usurped the business of third-party ink sellers and required Plaintiff and Class members to pay around three to six times more for replacement ink cartridges than they otherwise would have paid.

(i) To induce purchases of HP cartridges, HP provided misleading written messages on the screens of all of the failed Class Printers directing their owners to replace non-HP cartridges that, in fact, still contained ink and, but for HP's conduct would function in an ordinary manner.

(j) HP's conduct was designed to increase and maintain its share of the printer cartridge market due to conditions separate from competitive factors like pricing and quality of goods.

Complaint at ¶118.

The laundry list of alleged misconduct is insufficient to satisfy the *Cel-Tech* test. **[**33]** Plaintiffs do not identify which constitutional, regulatory or statutory provision to which the allegations are tethered. Instead, Plaintiffs allege generally that HP's "unfair methods of competition and unfair acts and practices are contrary to California law and policy" and that HP's conduct "contravenes the legislatively declared policy against unfair methods of business competition." Complaint at ¶117. These allegations are too vague. See also *Palmer v. Apple Inc., No. 15-5808 RMW, 2016 U.S. Dist. LEXIS 51823, 2016 WL 1535087, at *7 (N.D. Cal. Apr. 15, 2016)* (allegation that defendant offended the "public policy in support of truth in advertising" insufficient to support UCL claim); *Campos v. Bank of Am., Inc., No. 11-431 SBA, 2012 U.S. Dist. LEXIS 96258, 2012 WL 2862603, at *9 (N.D. Cal. July 11, 2012)* (public policy in favor of home ownership insufficient to support UCL claim).

Plaintiffs argue that they have stated a UCL claim under the "unfair" prong because they have adequately pled "the central facts that characterize BP's anticompetitive behavior." Plaintiffs' Opposition at 11:9-10. Plaintiffs' position is not supported by any legal authority and inconsistent with the well-established *Cel-Tech* requirement to tether UCL claims under **[**34]** the "unfair" prong to specific constitutional, statutory or regulatory provisions. Plaintiffs next contend that they need not allege that BP's conduct violates the Cartwright Act. Although there is some merit to Plaintiffs' argument[7] Plaintiffs' allegations are nevertheless insufficient because they largely consist of legal

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[7] See e.g. *Creative Mobile Technologies, LLC v. Flywheel Software, Inc., No. 16-2560 SI, 2016 U.S. Dist. LEXIS 138549, 2016 WL 5815311, at *5 (N.D. Cal. Oct. 5, 2016)* (UCL claim not barred just because it does not currently meet the standards for a claim under the *Cartwright Act*); *Imperial Irrigation District v. California Independent System Operator Corp., No. 15-1576 AJB, 2016 U.S. Dist. LEXIS 101258, 2016 WL 4087302, at *12 (S. D. Cal. Aug. 1, 2016)* (allegations of monopolistic conduct that

conclusions. See *Eclectic Props. East, LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)* (allegations that are no more than legal conclusions are not entitled to an assumption of truth). For example, Plaintiffs allege a "market for printer cartridges," without alleging any facts regarding this market. Plaintiffs also do not allege facts to show how HP caused anticompetitive impact on that **[*1093]** market. Generalized allegations of harm do not satisfy Cel-Tech's requirement that the effect of a defendant's conduct amounts to a violation of antitrust laws "or otherwise significantly threatens or harms competition." See *Levitt v. Yelp! Inc., 765 F.3d 1123, 1136-7 (9th Cir. 2014)*.

The cases relied upon by Plaintiffs are distinguishable. Plaintiffs cite to *Atlantic Refining Co. v. F.T.C., 381 U.S. 357, 85 S. Ct. 1498, 14 L. Ed. 2d 443 (1965)* and *F.T.C. v. Texaco, Inc., 393 U.S. 223, 89 S. Ct. 429, 21 L. Ed. 2d 394 (1968)*, but these are FTC cases, not UCL cases. **[**35]** Plaintiffs also cite to *State Farm Mut. Auto. Ins. Co. v. Dempster, 174 Cal.App.2d 418, 344 P.2d 821 (Ct. App. 1959)*, which is a contract and trade secrets case, not a UCL case. Plaintiffs' last citation is to *Northwest Power Prod., Inc. v. Omark Indus., Inc., 576 F.2d 83, 88 (5th Cir. 1978)*, a *Sherman Act* case, and is also not on point. In sum, Plaintiffs' allegations are insufficient to satisfy the "tethering" test.

b. "Balancing" Test

HP contends that Plaintiffs' Complaint fails to state facts explaining how and why the "balancing test" is satisfied. In response, Plaintiffs contend that HP's firmware update was unscrupulous and harmful for the same reasons the firmware update was allegedly unfair. Among other things, Plaintiffs allege that HP, without notice to Plaintiffs, rendered their printers inoperable by executing a remote firmware update and displayed messages on printer screens stating: "There is a problem with the printer or ink system. Turn printer off, then on. If problem persists, contact HP."

When construed in a light most favorable to Plaintiffs, these allegations raise a reasonable inference that HP knowingly and purposefully rendered the printers inoperable and sent error messages that intentionally misled Plaintiffs into believing their printers or ink systems were malfunctioning for reasons unknown to HP, when HP knew and intended for **[**36]** its firmware update to render their printers inoperable. Plaintiffs allege that there were reasonably available alternatives to HP's allegedly unfair conduct and provide examples of alternatives in their Opposition brief: instead of disabling printers, HP could have created incentives for customers to use HP cartridges, disclosed any risks from using competing cartridges, or demanded that any manufacturers of counterfeit ink cartridges stop selling such products. Plaintiffs' Opposition at 7:8-12. These alternatives, however, are not set forth in the Complaint and will not be considered. See *Broam v. Bogan, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003)*. In the absence of factual allegations regarding HP's alternatives, Plaintiffs' UCL claim does not satisfy the "balancing" test.

3. "Unlawful" Business Practices Under the UCL

For purposes of the UCL, "unlawful" practices are those forbidden by law. *Saunders v. Super. Ct., 27 Cal.App.4th 832, 838, 33 Cal. Rptr. 2d 438 (1994)*. Plaintiffs allege that BP's conduct violates the FAL, the CLRA, the CFAA and the California Computer Crime Law. Plaintiffs' UCL unlawful claim is viable because the complaint states at least one theory of liability under each of these statutes.

C. Plaintiff San Miguel's Texas Consumer Protection Claim (Claim 5)

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threatens competition sufficient to state unfair UCL claim, even though plaintiff failed to allege antitrust violation). But see *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC, No. 11-9514 PSG, 2013 U.S. Dist. LEXIS 201816, 2013 WL 12123772, at *8 (C.D. Cal. Feb. 26, 2013)* ("Where a party's UCL allegations [under the 'unfair' prong] are based [solely] on alleged antitrust violations, the failure to allege an antitrust violation results in the failure to allege unfair competition.").

Plaintiff San Miguel alleges that HP violated **[**37]** the *Texas Deceptive Trade Practices-Consumer Protection Act (Tex. Bus. & Com. Code Ann. §17.01, et seq.)*. The Court's analysis of the California state law claims applies equally to the Texas consumer protection claim and will not be **[*1094]** restated herein. Moreover, San Miguel has failed to give HP notice of this claim prior to filing suit as required by *§17.505(a)*. Accordingly, Claim 5 is dismissed with leave to amend.

D. Plaintiff Lawty's Washington Consumer Protection Act Claim (Claim 6)

Plaintiff Lawty asserts a claim under the *Washington Consumer Protection Act (Wash. Rev. Code Ann. §19.86.010, et seq.)*. The Court's analysis of the UCL claim applies to Lawty's Washington consumer protection claim. Claim 6 is dismissed with leave to amend.

E. Plaintiff Ware's New Jersey Consumer Fraud Act Claim (Claim 7)

Plaintiff Ware asserts a claim under the *New Jersey Consumer Fraud Act (N.J. Stat. Ann. §56:8-1, et seq.)*. The Court's analysis of the UCL, FAL and CLRA claims applies to Ware's New Jersey consumer fraud claim. Claim 7 is dismissed with leave to amend.

F. Tortious Interference (Claim 11)

Plaintiffs' last claim is entitled "Tortious Interference with Contractual Relations and/or Prospective Economic Advantage." Complaint at p. 33. HP seeks dismissal of both torts without leave to amend for several reasons, including **[**38]** because neither tort applies to the consumer transaction context.

To state a tortious interference with contract claim, a plaintiff must show: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional acts designed to induce breach or disruption of the contract; (4) actual breach or disruption; and (5) resulting damage." *Name.Space, Inc. v. Internet Corp. for Assigned Names and Numbers, 795 F.3d 1124, 1133 (9th Cir. 2015)* (quoting *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 825 (9th Cir.2008))*.

Here, Plaintiffs allege that their "sales transactions with third-party suppliers of compatible printer ink cartridges" involved various contractual conditions of sale, such as express and implied warranties, and included an implied warranty that the third-party cartridges Plaintiffs purchased were merchantable and fit for their ordinary use of printing documents. Complaint at ¶230. This generalized allegation is insufficient to allege a valid contract between plaintiff and a third party. *R. Power Biofuels, LLC v. Chemex LLC, No. 16-716 LHK, 2016 U.S. Dist. LEXIS 156727, 2016 WL 6663002, at *16 (N.D. Cal. Nov. 11, 2016)* (allegation that plaintiff "was involved in business and economic relationships with major consumers of biodiesel" insufficient). Although the actual name of the party with whom a plaintiff has a contractual **[**39]** relationship need not be pled, "the plaintiff must allege a relationship with 'a specific, albeit unnamed' third party." Id. (citing *Ramona Manor Convalescent Hosp. v. Care Enterps., 177 Cal.App.3d 1120, 225 Cal. Rptr. 120 (1986))*; c.f. *Moore v. Apple, Inc., 73 F.Supp.3d 1191, 1202 (N.D. Cal. 2014)* (plaintiff identified a valid existing contract with Verizon Wireless and the contractual duty to enable sending and receiving text messages). Nor have Plaintiffs alleged facts to establish the remaining elements of a claim for tortious interference with contractual relations.

Plaintiffs also fail to state a claim for intentional interference with prospective economic advantage. "A tortious interference with prospective economic advantage claim has the same elements (focusing instead on the existence and knowledge of a prospective economic relationship), but **[*1095]** also requires that the defendant's conduct be 'wrongful by some legal measure other than the fact of interference itself.'" *Name.Space, 795 F.3d at 1133* (quoting *Kor. Supply Co. v. Lockheed Martin Corp., 29 Cal.4th 1134, 131 Cal.Rptr.2d 29, 63 P.3d 937, 950 (2003)* (internal quotation marks omitted)). Plaintiffs have not sufficiently alleged the existence and HP's knowledge of any actual prospective business relationship and accordingly, the claim is subject to dismissal.

V. CONCLUSION

For the reasons set forth above, Defendant HP's motion to dismiss is GRANTED IN PART. The following claims are DISMISSED WITH LEAVE TO AMEND: **[**40]** Claim 1 to the extent it is based upon "unfair" business practices; Claims 2 through 4 to the extent the claims are based upon allegedly false or misleading statements on HP's printer box, printer card and warranty booklet; Claims 5 through 7; Claim 8 for violation of the CFAA under *subsections (B)* and *(C)*[8]; Claim 9 to the extent it is based upon *§502 (c)(2)-(3)*; and Claim 11. Claim 9 is DISMISSED WITH PREJUDICE to the extent it is based upon *§502(c)(7)* and *(8)*. HP's motion to dismiss is DENIED in all other respects. Plaintiffs may file and serve an amended complaint consistent with this Order no later than April 13, 2018.

Given the passage of time and the anticipated filing of a second amended complaint, the Court invites the parties to stipulate to an extension of the deadlines set forth in the Case Management Order (Dkt. 79) and the briefing schedule and hearing date for Plaintiffs' motion or class certification, if needed.

IT IS SO ORDERED.

Dated: March 29, 2018

/s/ Edward J. Davila

EDWARD J. DAVILA

United States District Judge

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[8] Although it is questionable whether Plaintiffs can credibly and within the confines of *Rule 11, Fed.R.Civ.P.*, allege that HP acted "without authorization," Plaintiffs' request for leave to amend is granted.

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Lenhoff Enters. v. United Talent Agency, Inc.

United States Court of Appeals for the Ninth Circuit

February 16, 2018, Argued and Submitted, Pasadena, California; March 30, 2018, Filed

No. 16-55739

Reporter

729 Fed. Appx. 528 *; 2018 U.S. App. LEXIS 8124 **; 2018-1 Trade Cas. (CCH) P80,333; 2018 WL 1548221

LENHOFF ENTERPRISES, INC., DBA Lenhoff and Lenhoff, a California corporation, Plaintiff-Appellant, v. UNITED TALENT AGENCY, INC., a California corporation; INTERNATIONAL CREATIVE MANAGEMENT PARTNERS, LLC, a Delaware limited liability company, Defendants-Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[**1]** Appeal from the United States District Court for the Central District of California. D.C. No. 2:15-cv-01086-BRO-FFM. Beverly Reid O'Connell, District Judge, Presiding.

Lenhoff Enters. v. United Talent Agency, Inc., 2016 U.S. Dist. LEXIS 77958 (C.D. Cal., Apr. 20, 2016)

Disposition: AFFIRMED.

Core Terms

Agencies, intentional interference, third amended complaint, district court, allegations, talent, amend

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN1[] **Standards of Review, De Novo Review**

The court of appeals reviews de novo the district court's dismissal of a complaint for failure to state a claim. In conducting this review, it accepts the factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] Per Se Rule & Rule of Reason, Per Se Violations

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C.S. § 1. Section 1 outlaws only unreasonable restraints. Certain restraints, such as horizontal agreements among competitors to fix prices or divide markets, are "per se" unlawful. Others are evaluated under the "rule of reason." But irrespective of whether a plaintiff pursues a per se claim or a rule of reason claim under § 1, the first requirement is to allege a contract, combination in the form of trust or otherwise, or conspiracy.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

HN3[] Sherman Act, Claims

To state a § 1 of the Sherman Act, 15 U.S.C.S. § 1, claim, a formulaic recitation of the elements will not do. The complaint must allege such facts as will nudge the claim across the line from conceivable to plausible. In this regard, parallel conduct, such as competitors adopting similar policies around the same time in response to similar market conditions, may constitute circumstantial evidence of anticompetitive behavior. But mere allegations of parallel conduct, even consciously parallel conduct, are insufficient. Plaintiffs must plead something more, some further factual enhancement, a further circumstance pointing toward a meeting of the minds of the alleged conspirators. That is, plaintiffs must plead evidentiary facts, such as who, did what, to whom (or with whom), where, and when or circumstantial evidence in the form of plus factors that coupled with parallel conduct take a complaint from merely possible to plausible.

Antitrust & Trade Law > Sherman Act > Claims

HN4[] Sherman Act, Claims

Mere participation in trade-organization meetings does not suggest an illegal agreement.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

HN5[] State Regulation, Claims

Where a complaint alleges the same conduct as both a violation of the Sherman Act and a violation of California's Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq., and California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code Cal. Bus. & Prof. Code § 17200 et seq., the determination that the alleged conduct is not an unreasonable restraint of trade under the Sherman Act necessarily implies that the conduct is not unlawful under the Cartwright Act or the "unlawful" prong of the UCL.

Torts > ... > Contracts > Intentional Interference > Elements

HN6[] **Intentional Interference, Elements**

Under California common law, a defendant is ordinarily not subject to liability for intentional interference with contract if the interference consists merely of extending an offer that induces an individual to terminate an at-will relationship. To state a claim for intentional interference with an at-will contract, a plaintiff must plead an independently wrongful act beyond the act of interference itself, i.e., an act "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN7[] **Standards of Review, Abuse of Discretion**

The court of appeals review for abuse of discretion the district court's denial of leave to amend. Although leave to amend a deficient complaint shall be freely given when justice so requires, leave may be denied if amendment of the complaint would be futile. Where the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its claims, the district court's discretion to deny leave to amend is particularly broad.

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Judges: Before: BERZON and BYBEE, Circuit Judges, and GLEASON,[**] District Judge.

Opinion

[*529] MEMORANDUM[*]

Plaintiff Lenhoff Enterprises is a boutique talent agency. Defendants United Talent **[**2]** Agency ("UTA") and International Creative Management Partners ("ICM") are larger talent agencies and, together with two other agencies, comprise what Lenhoff terms the "Big Four" or "Uber" Agencies. Lenhoff sued UTA and ICM, asserting claims for (1) violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*; (2) violation of *California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq.*, and *Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq.*; (3)

[**] The Honorable Sharon L. Gleason, United States District Judge for the District of Alaska, sitting by designation.

[*] This disposition is not appropriate for publication and is not precedent except as provided by *Ninth Circuit Rule 36-3*.

intentional interference with contract under California common law; and (4) intentional interference with prospective economic advantage under California common law. The district court dismissed Lenhoff's third amended complaint with prejudice and denied Lenhoff's motion for reconsideration. We affirm.

1. We have jurisdiction pursuant to *28 U.S.C. § 1291*. ***HN1***[] "We review *de novo* the district court's dismissal of a complaint for failure to state a claim." *AE ex rel. Hernandez v. County of Tulare, 666 F.3d 631, 636 (9th Cir. 2012)*. "In conducting this review, we accept the factual allegations of the complaint as true and construe them in the light most favorable to the plaintiff." *Id.*

2. ***HN2***[] "*Section 1* of the Sherman Act prohibits '[e]very contract, combination in the form of trust or otherwise, or conspiracy, **[*530]** in restraint of trade or commerce among the several States.'" *Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1196-97 (9th Cir. 2012)* (quoting *15 U.S.C. § 1*). The Supreme Court "has repeatedly observed **[**3]** that *Section 1* 'outlaw[s] only unreasonable restraints.'" *Id.* (quoting *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*). Certain restraints—such as horizontal agreements among competitors to fix prices or divide markets—are "per se" unlawful. *Id. at 1197 n.6*. Others are evaluated under the "rule of reason." *Id. at 1197*. But irrespective of "[w]hether a plaintiff pursues a per se claim or a rule of reason claim under *§ 1*, the first requirement is to allege a contract, combination in the form of trust or otherwise, or conspiracy." *William O. Gilley Enters., Inc. v. Atl. Richfield Co., 588 F.3d 659, 663 (9th Cir. 2009)* (quotation marks omitted). The district court found that Lenhoff failed to plead this first requirement of a *§ 1* claim, and we agree.

HN3[] To state a *§ 1* claim, "a formulaic recitation of the elements . . . will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The complaint must allege such facts as will nudge the claim "across the line from conceivable to plausible." *Id. at 570*. In this regard, "parallel conduct, such as competitors adopting similar policies around the same time in response to similar market conditions, may constitute circumstantial evidence of anticompetitive behavior." *In re Musical Instruments & Equip. Antitrust Litig., 798 F.3d 1186, 1193 (9th Cir. 2015)*. "But mere allegations of parallel conduct—even consciously parallel conduct—are insufficient . . . ." *Id.* "Plaintiffs must plead something more, some further factual enhancement, a further circumstance pointing toward **[**4]** a meeting of the minds of the alleged conspirators." *Id.* (quotation marks omitted). That is, "plaintiffs must plead evidentiary facts," such as "who, did what, to whom (or with whom), where, and when," *id. at 1194 n.6* (quotation marks omitted), or "circumstantial evidence in the form of plus factors" that "coupled with parallel conduct . . . take a complaint from merely possible to plausible," *id. at 1194 n.7*; *see also Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048 (9th Cir. 2008)*.

At best, Lenhoff's third amended complaint pleads parallel conduct without alleging the "something more" required to state a claim. With respect to Lenhoff's argument that the Uber Agencies conspired to fix a "3-3-10 packaging fee," the third amended complaint makes only passing reference to the Uber Agencies charging such a fee. This is a bare, conclusory allegation of parallel conduct and so does not adequately state a *§ 1* claim. *See Kendall, 518 F.3d at 1047-48*.

The third amended complaint goes into greater detail with regard to the Association of Talent Agents ("ATA"), a trade association that represents member agencies in negotiations with talent unions and guilds, and "Rule 16(g)." Lenhoff alleges the Uber Agencies acted through representatives at the ATA to allow Rule 16(g) to expire so as to gain access to outside funding and thereby increase **[**5]** their market dominance. Specifically, Lenhoff contends the "who" of its alleged conspiracy is the ATA's Strategic Planning Committee; the "what" is a conspiracy to eliminate Rule 16(g); the "when" is from the Strategic Planning Committee's formation in 1999 onward; and the "where" is the ATA's offices. But these facts amount to nothing more than an allegation that defendants participated in a lawful trade organization, and ***HN4***[] "mere participation in trade-organization meetings . . . does not suggest an illegal agreement." *In re Musical Instruments, 798 F.3d at 1196*.

[*531] The third amended complaint's other allegations concentrate on the Uber Agencies co-packaging scripted television series "almost exclusively" with each other and "coercing" television networks and studios to deal only with them. At the same time, however, the complaint acknowledges a market-based reason for why larger agencies might co-package predominantly amongst themselves: larger agencies "are uniquely and advantageously situated to participate in packaging [scripted television series] because of their large, exclusive, and in-demand talent rosters." Although the complaint attaches exhibits purporting to show the number of times the Uber Agencies co-packaged with each other **[**6]** as opposed to with smaller agencies, these exhibits are not particularly helpful to Lenhoff as they in fact show that the Uber Agencies co-packaged with smaller agencies on several occasions in the relevant timeframe. More fundamentally, the complaint nowhere pleads the evidentiary facts that would nudge its claim across the line from conceivable to plausible. *See* *Twombly, 550 U.S. at 570*. Thus, Lenhoff has not stated a *§ 1* claim.

3. ***HN5***[] Where a complaint alleges the same conduct as both a violation of the Sherman Act and a violation of California's Cartwright Act and UCL, the determination that the alleged conduct is not an unreasonable restraint of trade under the Sherman Act necessarily implies that the conduct is not unlawful under the Cartwright Act or the "unlawful" prong of the UCL. *See* *name.space, Inc. v. Internet Corp. for Assigned Names & Numbers, 795 F.3d 1124, 1131 & n.5 (9th Cir. 2015)*; *William O. Gilley Enters., 588 F.3d at 669*; *County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001)*; *Nova Designs, Inc. v. Scuba Retailers Ass'n, 202 F.3d 1088, 1092 (9th Cir. 2000)*. Lenhoff's claim under the Cartwright Act and the "unlawful" prong of the UCL is therefore deficient for the same reasons given above.

Lenhoff's claims under the "unfair" prong of the UCL fail because it has not adequately alleged—for the same reasons its other claims lack merit—that the Uber Agencies' conduct "threatens an incipient violation of an ***antitrust law***, or violates the **[**7]** policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 544 (Cal. 1999)*; *City of San Jose v. Office of the Comm'r of Baseball, 776 F.3d 686, 691-92 (9th Cir. 2015)*.

4. With respect to Lenhoff's claims ***HN6***[] under California common law, a defendant is ordinarily not subject to liability for intentional interference with contract if the interference consists merely of extending an offer that induces an individual to terminate an at-will relationship. *Reeves v. Hanlon, 33 Cal. 4th 1140, 17 Cal. Rptr. 3d 289, 95 P.3d 513, 519-20 (Cal. 2004)*. To state a claim for intentional interference with an at-will contract, a plaintiff must plead "an independently wrongful act" beyond the act of interference itself—i.e., an act "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id. at 520*.

Although Lenhoff alleges that defendants "poached" two of its clients by promising them more favorable terms, it fails to allege that its contracts with those clients were anything other than at will. Lenhoff's argument that "Rider D"—attached as an exhibit to its complaint—somehow limited these clients' ability to terminate their contracts is meritless. Rider D plainly has nothing to do with contracts **[*532]** for an unspecified duration (as Lenhoff admits **[**8]** these contracts were). Rather, Rider D provides a limited ability to terminate a contract that would otherwise have lasted for a specified duration.

Because Lenhoff did not plausibly allege that its relationship with its clients was other than at will, it was required to plead an independently wrongful act—which it did not do. *See id.* Lenhoff therefore did not state a claim for intentional interference with contract, and its separate claim for intentional interference with prospective economic advantage fails for the same reason. *See id.* (applying the same "independently wrongful act" standard to intentional interference with an at-will contract as to intentional interference with prospective economic advantage). Accordingly, dismissal of Lenhoff's third amended complaint was proper.

5. ***HN7***[] "We review for abuse of discretion the district court's denial of leave to amend." *AE ex rel. Hernandez, 666 F.3d at 636*. "Although leave to amend a deficient complaint shall be freely given when justice so requires, leave may be denied if amendment of the complaint would be futile." *Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010)* (citation omitted). "[W]here the plaintiff has previously been granted leave to amend and has subsequently failed to add the requisite particularity to its **[**9]** claims, the district court's discretion to deny leave to amend is particularly broad." *Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009)* (quotation marks and alteration omitted). Here, the district court permitted Lenhoff to file three amended complaints, and with each amendment, Lenhoff failed to plead its claims with the requisite particularity. Lenhoff provides no reason to

suppose further amendment would be anything but futile: the declarations attached to its opposition to defendants' motions to dismiss do not address the deficiencies identified above and are merely cumulative of allegations already pled in the third amended complaint. Thus, the district court did not abuse its discretion in denying leave to amend. *See* *William O. Gilley Enters., 588 F.3d at 669 n.8* ("[A]ssuming that Gilley could, in the abstract, amend his complaint to state a claim . . . , his repeated failure to do just that suggests that it would be futile to offer him another chance to do so.").

6. Lenhoff filed its notice of appeal while its motion for reconsideration was still pending before the district court and never filed a new or amended notice of appeal after the district court denied its motion. The district court's denial of Lenhoff's motion for reconsideration is therefore not properly before **[**10]** us. *See* *Harris v. Mangum, 863 F.3d 1133, 1137-38 n.1 (9th Cir. 2017)*.

AFFIRMED.

[Unigestion Holding, S.A. v. UPM Tech., Inc.](#)

United States District Court for the District of Oregon

March 30, 2018, Decided; March 30, 2018, Filed

Case No. 3:15-cv-185-SI

Reporter

305 F. Supp. 3d 1134 *; 2018 U.S. Dist. LEXIS 54457 **; 2018-1 Trade Cas. (CCH) P80,334

UNIGESTION HOLDING, S.A., a foreign corporation, d/b/a DIGICEL HAITI, Plaintiff, v. UPM TECHNOLOGY, INC. d/b/a UPM TELECOM, INC, and UPM MARKETING, INC., an Oregon corporation; UPM TELECOM, INC., an Oregon a/b/n; UPM MARKETING, INC., an Oregon a/b/n; BENJAMIN SANCHEZ a/k/a BENJAMIN SANCHEZ MURILLO, an Oregon resident; BALTAZAR RUIZ, an Oregon resident, and TYLER ALLEN, an Oregon resident; and DUY "BRUCE" TRAN, an Oregon resident, Defendants.

Prior History: *Unigestion Holding, S.A. v. UPM Tech., Inc., 160 F. Supp. 3d 1214, 2016 U.S. Dist. LEXIS 12758 (D. Or., Feb. 3, 2016)*

Core Terms

carrier, transport, network, termination, alleges, cards, third-party, telecommunications, customers, common carrier, affirmative defense, monopoly power, switching, offers, argues, transit service, anticompetitive, monopolization, enterprise, antitrust, monopoly, entity, transmission, charges, antitrust claim, counterclaims, motion to dismiss, Communications, wireless, minute

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For Defendants: Kathryn P. Salyer and Eleanor A. DuBay, TOMASI SALYER BAROWAY, Portland, OR; Christopher W. Savage, DAVIS WRIGHT TREMAINE, LLP, Washington, D.C.

Judges: Michael H. Simon, United States District Judge.

Opinion by: Michael H. Simon

Opinion

[*1139] OPINION AND ORDER

Michael H. Simon, District Judge.

Plaintiff Unigestion Holding, S.A., dba "Digicel Haiti," provides mobile telecommunication services in Haiti for profit. Defendants (collectively, "UPM") formerly provided mobile telecommunication services to Haiti for profit. Digicel Haiti alleges that UPM provided these services by using certain practices and technologies to fraudulently access Digicel Haiti's telecommunications network. Digicel Haiti asserts claims against UPM alleging common law fraud, violations of the *Racketeer Influenced and Corrupt Organizations Act* ("RICO") under *18 U.S.C. §§ 1962(b)-(d)*, common law conversion, and common law unjust enrichment. Digicel Haiti filed a complaint against UPM on

February 2, 2015. Since that time, Digicel Haiti has amended its complaint several times, UPM **[**2]** has answered and asserted counterclaims, and each party has moved to dismiss the other's claims. On October 18, 2016, Digicel Haiti filed its second amended complaint ("the Complaint" or "SAC"). On September 11, 2017, UPM filed an amended answer to the SAC, asserting seven affirmative defenses and seven counterclaims. UPM's first and seventh counterclaims include allegations that Digicel Haiti is in violation of the *Communications Act of 1934* **[*1140]** and *§ 2 of the Sherman Act*, respectively. Digicel Haiti now moves to strike UPM's first, second, fifth, sixth and seventh affirmative defenses and dismiss UPM's first and seventh counterclaims. For the following reasons, Digicel Haiti's motion to strike and motion to dismiss are each granted in part and denied in part.

STANDARDS

A. Motion to Strike

An answer must "affirmatively state any avoidance or affirmative defense." *Fed. R. Civ. P. 8(c)(1)*. Such defenses must be stated "in short and plain terms." *Fed. R. Civ. P. 8(b)(1)(A)*. A court may strike an affirmative defense under *Federal Rule of Procedure 12(f)* if it presents an "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. The purpose of a *Rule 12(f)* motion is to avoid spending time and money litigating spurious issues. *Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010)*; *see also* *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)*, *rev'd on other* **[**3]** *grounds*, *510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. The disposition of a motion to strike is within the discretion of the district court. *See* *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt., 921 F.2d 241, 244 (9th Cir. 1990)*. "Motions to strike are disfavored and infrequently granted." *Legal Aid Servs. of Oregon v. Legal Servs. Corp., 561 F. Supp. 2d 1187, 1189 (D. Or. 2008)*; *see also* *Capella Photonics, Inc. v. Cisco Sys., Inc., 77 F. Supp. 3d 850, 858 (N.D. Cal. 2014)* ("Motions to strike are regarded with disfavor because of the limited importance of pleadings in federal practice and because they are often used solely to delay proceedings." (quotation marks and alterations omitted)).

An affirmative defense may be struck if it is insufficient. "'The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.'" *Simmons v. Navajo Cty., 609 F.3d 1011, 1023 (9th Cir. 2010)* (quoting *Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir. 1979))*. "[T]he 'fair notice' required by the pleadings standards only requires describing the defense in 'general terms.'" *Kohler v. Flava Enters., Inc., 779 F.3d 1016, 1019 (9th Cir. 2015)* (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1274 (3d ed. 1998)).

Rule 12(f) also provides that pleadings that are "immaterial" or "impertinent" may be struck by a court. An "immaterial" matter is "that which has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc., 984 F.2d at 1527* (quoting C. Wright, A. Miller, et al., 5C Fed. Prac. & Proc. Civ. § 1382 (3d ed. 2013)). "Impertinent" matters are those "that do not pertain, and are not necessary, **[**4]** to the issues in question." *Id.* Such pleadings are legally insufficient because they clearly lack merit "under any set of facts the defendant might allege." *Polk v. Legal Recovery Law Offices, 291 F.R.D. 485, 489 (S.D. Cal. 2013)* (citation and quotation marks omitted).

B. Motion to Dismiss

A motion to dismiss for failure to state a claim may be granted only when there is no cognizable legal theory to support the claim or when the complaint lacks sufficient factual allegations to state a facially plausible claim for relief. *Shroyer v. New Cingular Wireless Servs., 622 F.3d 1035, 1041 (9th Cir. 2010)*. In evaluating the sufficiency of a complaint's factual allegations, the court must accept as true all well-pleaded material facts alleged in the complaint and construe them in the light most favorable to the non-moving party. *Wilson v. Hewlett-Packard Co., 668 F.3d 1136, 1140* ***[*1141]*** *(9th Cir. 2012)*; *Daniels-Hall v. Nat'l Educ. Ass'n, 629 F.3d 992, 998 (9th Cir. 2010)*. To be entitled to a presumption of truth, allegations in a complaint "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*. All reasonable inferences from the factual allegations must be drawn in favor of the plaintiff. *Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1043 n.2 (9th Cir. 2008)*. The court need not, however, credit the plaintiff's legal conclusions that are couched as factual allegations. *Ashcroft v. Iqbal, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*.

A complaint must contain sufficient **[**5]** factual allegations to "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr, 652 F.3d at 1216*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678* (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

BACKGROUND

For purposes of Digicel Haiti's motion to dismiss counterclaims, the Court accepts as true the following facts alleged in UPM's counterclaims. Certain allegations from Plaintiff's amended complaint also are included as background. In deciding Digicel Haiti's motion to dismiss, the Court gives no presumption of truth to Digicel Haiti's allegations in the amended complaint, except where UPM's argument or counterclaims endorse or rely on Digicel Haiti's allegations.

A. Digicel Haiti's Operations

Digicel Haiti is a wholly owned subsidiary of Digicel Holdings, Ltd., which also owns Digicel USA, Inc. ("Digicel USA") and Digicel Jamaica, Ltd. ("Digicel Jamaica"). Digicel Haiti is the leading provider of telecommunications services in Haiti, where it solely operates and has an estimated 75% market **[**6]** share of local telephone services. Digicel USA operates a set of international telephone switching systems—equipment with the capacity to transmit a call from the United States to an overseas telecommunications network—located in Miami, Florida and New York City, New York.

Digicel Haiti tracks and charges its local customers in Haiti through the use of pre-paid Subscriber Identity Module ("SIM") cards. A SIM card acts as a small circuit board: when the card is placed inside a cellular telephone, the card identifies the device as associated with an individual customer's unique telephone number and account. SIM cards allow customers to access Digicel Haiti's cellular network and, in turn, allow Digicel to charge for communications made from cellular devices containing specific SIM cards. Digicel Haiti's customers can use SIM cards for voice, data, and messaging services on the Digicel Haiti network. Customers can add credits, in the form of minutes, to SIM cards by using, among other methods, vouchers and online "top-ups."

When a user of a Digicel Haiti SIM card makes a local call within Haiti, that user incurs charges of approximately $0.09 per minute of wireless service. If a Digicel **[**7]** Haiti customer travels to the United States and uses his or her Digicel Haiti SIM card to make calls back to Haiti, the user of that SIM card incurs charges of at least $1.99 for each minute of wireless service used. Digicel also offers a Roam-Like-You're-Home ("RLYH") plan. For **[*1142]** an access fee of approximately $20 to $25, the RLYH plan allows registered Digicel Haiti customers to call back to Haiti while traveling in the United States at rates similar to the local rate during the authorized and pre-paid period.

When someone in the United States originates a call to one of Digicel Haiti's subscribers in Haiti, the "third-party carrier"—a United States telecommunications carrier, which does not have the internal capacity to transport a call to Haiti, also sometimes referred to as a "wholesaler"—picks up that phone call from the United States-based originating caller and transports it to one of the Digicel USA switching gateways. From that switching gateway, Digicel USA further transports the call to Haiti, where Digicel Haiti "terminates" the call on its network. The terminating end of a call is the party being called by the party originating the call. On Digicel Haiti's behalf, Digicel **[**8]** Jamaica bills the third-party carrier a rate of $0.23 per minute for all international calls that terminate on Digicel Haiti's network. That fee includes the cost of terminating the call on Digicel Haiti's network and the cost of switching services performed by Digicel USA. Digicel Haiti then pays Digicel USA a fee for its services through intercompany transfer. Digicel Haiti does not authorize international or domestic telephone traffic to enter its telecommunications network in Haiti by any other route or under any other form of agreement.

B. UPM's Operations

UPM is an Oregon corporation that facilitated international calls from the United States to people in Haiti on behalf of third-party carriers, at rates lower than what Digicel Haiti charged. UPM asserts that it essentially resold Digicel Haiti's local and RLYH services within the United States at a discount from approximately April 2014 to November 2014. Due to Digicel Haiti's effective efforts to prevent UPM from reselling Digicel Haiti's services, as described below, UPM no longer facilitates calls to Haiti. UPM business operations involved paying full retail price to acquire large quantities of Digicel Haiti SIM cards from **[**9]** authorized dealers, and then using those cards to facilitate calls to Haiti through two technically distinct platforms: the resale of the RLYH plan and the resale of Digicel Haiti's local wireless services.

The first and most common way that UPM facilitated calls to Haiti was to enroll its Digicel Haiti SIM cards in the RLYH plan for the full retail price. UPM would then assemble the RLYH-enrolled SIM cards into a SIM server. The SIM server was connected to the internet and capable of accessing the wireless networks of AT&T and T-Mobile, the third-party carriers that have roaming arrangements with Digicel Haiti in the United States. Ordinarily, when a third-party carrier's customers called Haiti, the third-party carrier, and ultimately the customer, would have to pay the standard amount—a minimum of $0.23 per minute—for Digicel Haiti to connect the international call to its local network. UPM offered a cheaper way to connect the calls to third-party carriers on the open wholesale "spot" market in the United States. A third-party carrier that elected to use UPM's services would switch a call bound for a Digicel Haiti customer to UPM instead of through Digicel USA's gateway. The third-party **[**10]** carrier's switch would convert the call into an Internet-based protocol packet that carries the call (including the destination number in Haiti) over the internet to one of UPM's SIM servers located in Oregon. UPM's SIM server would then initiate the call to Haiti on the third-party carrier's wireless network. Simultaneously, UPM's SIM server would convert the call into the appropriate format for wireless transmission and essentially program the call to appear to **[*1143]** come from a telephone number associated with one of the RLYH-enrolled Digicel Haiti SIM cards. After the call was made to look like a call on the RLYH plan, it would follow the typical route for calls switched directly to Digicel Haiti: the third-party carrier would route the newly-reformatted call to one of Digicel USA's switches in New York or Miami, Digicel USA would carry the call to Haiti, and Digicel Haiti would terminate the call on its network, charging the associated SIM card at the discounted RLYH rate.

A second, although less common, way in which UPM facilitated international calls to Haiti was by transporting the calls to Digicel Haiti's local Haitian network through Voice-over-Internet-Protocol ("VoIP"). Again, **[**11]** the customer of a third-party carrier would call Haiti, and the third-party carrier's switch would select UPM to handle the call. The call would be sent to a UPM SIM server in Oregon in the same manner described above. Instead of initiating a wireless call to Haiti and converting the call for wireless transmission, however, UPM would leave the call as an Internet-based protocol packet (VoIP format). UPM would use the internet to transmit the call to a receiver in Haiti, known as a Global System for Mobile communications ("GSM") Gateway. The GSM Gateway would format the call for wireless transmission and initiate a wireless call on Digicel Haiti's network in Haiti using the account information associated with a SIM card located in Oregon. Digicel Haiti would then terminate (or complete) the call on its network as a local call, charging the associated SIM card at the local rate.

Digicel Haiti undertook an investigation into the international "resale" of its services. During the investigation, Digicel Haiti discovered that the calling and usage patterns of particular SIM cards were inconsistent with use by individual customers. Digicel Haiti "de-authorized" these SIM cards so that calls **[**12]** associated with these cards could no longer be completed. Because Digicel Haiti de-authorized many of the SIM cards that UPM used to conduct its business, UPM is no longer able to facilitate international calls to Haiti through either RLYH plans or VoIP.

DISCUSSION

A. Motion to Strike

1. Failure to State a Claim and Standing

Digicel Haiti moves to strike UPM's first affirmative defense, failure to state a claim, and second affirmative defense, lack of standing, on the basis that such defenses merely resurrect disputes that this Court has already decided. After full briefing by the parties, this Court previously ruled that Digicel Haiti has standing to bring the claims alleged in the Second Amended Complaint, and that Digicel Haiti has sufficiently stated those claims. Those rulings, however, were in response to UPM's motion to dismiss, which required this Court to accept all allegations in Digicel Haiti's pleading as true. As the case proceeds, however, it may become clear that those factual allegations were imprecise or incorrect. Thus, the fact that the same arguments did not prevail on an earlier motion under a different standard is not a sufficient basis to justify striking them.

A **[**13]** defense that does no more than point out a defect in a plaintiff's prima facie case, however, is a "negative defense" that can be set up by a denial, not an affirmative defense. *Zivkovic v. Southern Calif. Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002)*. "Failure to state a claim" is a negative defense that merely argues that plaintiff has not met its burden in establishing one or more elements of a claim, whatever that burden may be at a given **[*1144]** stage of litigation. Similarly, because plaintiffs must establish standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at successive stages of the litigation," *Lujan v. Dep't of Wildlife, 504 U.S. 555 at 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*, UPM's argument that Digicel Haiti lacks standing is also a negative defense. Because UPM's first and second affirmative defenses are in fact negative defenses, rather than affirmative defenses, it is proper to strike them.

2. Unclean Hands, Restraint on Trade, and Illegality

Digicel Haiti argues that UPM's fifth, sixth and seventh affirmative defenses should be stricken because UPM characterizes as affirmative defenses what should be brought as statutory antitrust counterclaims. In support of its argument, Digicel Haiti cites *Frost v. Shipowners & Merchants Towboat* ***[**14]*** *Co.*, in which a district court struck an antitrust defendant's affirmative defense of "unclean hands" that was predicated on the plaintiff's own anticompetitive activity, *1974 U.S. Dist. LEXIS 8570, 1974 WL 888, at *4 (N.D. Cal. May 10, 1974)*.

Frost, however, does not stand for the proposition that a party bringing an antitrust claim cannot raise an affirmative defense of unclean hands or illegality based on the same facts that form the basis of the antitrust claim. Rather, it stands for the proposition that a defendant *accused of an antitrust violation* cannot raise as an affirmative defense the plaintiff's own anticompetitive activity—whether that activity is characterized as a defense of "unclean hands" or "illegality." *See also* *Berner v. Lazzaro, 730 F.2d 1319, 1322 (9th Cir. 1984)*, *aff'd sub nom.* *Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 105 S. Ct. 2622, 86 L. Ed. 2d 215 (1985)* ("[I]n private antitrust actions, it is the law of this circuit that the doctrine of *in pari delicto* does not apply where the facts show that the plaintiff is less than co-equally responsible for his injury.") Instead, the defendant must bring a separate antitrust claim against the plaintiff. In such a case, each party has an antitrust claim against the other, but neither will have a defense.

This is not the case here. Digicel Haiti accuses UPM of fraud, not an antitrust violation. Fraud is traditionally subject **[**15]** to the affirmative defenses raised by UPM, and Digicel Haiti cites no case law indicating otherwise.

B. Motion to Dismiss Antitrust Claim

UPM alleges that Digicel Haiti has a monopoly in the market for local telephone services in Haiti and it is unlawfully extending that monopoly into the market for transporting calls from the United States to Haiti through anticompetitive conduct, in violation of *§ 2 of the Sherman Act*, *15 U.S.C. § 2*. UPM alleges five different forms of anticompetitive conduct, most of which consist of Digicel Haiti's exclusion of entities like UPM from terminating calls on Digicel Haiti's local network. Digicel Haiti moves to dismiss UPM's antitrust claim on the basis that it is not subject to the extraterritorial application of the Sherman Act, Digicel Haiti is not a common entity with Digicel USA and is thus not an international carrier, UPM has no standing to bring an antitrust claim, and UPM has otherwise failed to allege the elements of a *§ 2* monopoly claim.

1. Extraterritorial application of the Sherman Act

The *Foreign Trade Antitrust Improvements Act* ("FTAIA") generally bars application of the Sherman Act to conduct involving trade or commerce with foreign nations, unless

> (1) such **[**16]** conduct has a direct, substantial, and reasonably foreseeable effect—
>
> **[*1145]** (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.

15 U.S.C. § 6a. *See also* *McGlinchy v. Shell Chem. Co., 845 F.2d 802, 813 n.8 (9th Cir. 1988)* (noting that enactment of *15 U.S.C. § 6a* preempted the previous extraterritoriality test of *Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976)*, but that the statute "did not change the ability of the courts to exercise principles of international comity."). UPM must thus demonstrate a "direct, substantial, and reasonably foreseeable effect" on domestic United States commerce, and that "such effect gives rise" to a *Sherman Act § 2* claim.

The scope of the market that UPM alleges Digicel Haiti is improperly monopolizing, or attempting to monopolize, is not precisely alleged. UPM's allegations are, however, sufficient at this stage to support a conclusion that extraterritorial application of the Sherman Act is appropriate in this case. That market can be approximately described as the market for transporting **[**17]** calls from the United States to Haiti. This market necessarily implicates domestic United States commerce and consumers—whether defined as individuals placing calls to Haiti or third-party carriers seeking call transportation services to Haiti. UPM has alleged that the geographic market affected by Digicel's alleged anticompetitive activities is the entire United States. The RLYH program specifically provides discounted roaming rates for Digicel Haiti customers in the United States placing calls to Haiti, and is thus targeted at United States-based consumers. Digicel's alleged improper monopolization of the United States-Haiti international telecommunications routes has a direct, substantial, and reasonably foreseeable effect on United States consumers.

This Court may still apply the principles of international comity expressed in the *Timerblane* decision. *Id.* Whether Digicel's actions are consistent with or compelled by Haitian law or public policy involves a disputed question of fact, however, and is best resolved at a later stage of litigation. For purposes of the present motion, the FTAIA does not bar the application of the Sherman Act to the entities and commercial activities described **[**18]** in UPM's amended complaint, which is sufficient for this Court to consider Digicel's motion on the merits.

2. Digicel Haiti and Digicel USA are a common entity under the antitrust laws

UPM argues that Digicel Haiti and Digicel USA should be considered a single entity for purposes of antitrust laws because they are wholly-owned subsidiaries of Digicel Holdings, Ltd. As a common enterprise, UPM argues, they have acted jointly to monopolize the market for the transportation of calls from the United States to Haiti. Digicel Haiti objects that it is a wholly distinct company from Digicel USA, and its operations are limited to the provision of local telephone service in Haiti.

In *Copperweld Corp. v. Independence Tube Corp.*, the Supreme Court held that a parent corporation and its wholly-owned subsidiary cannot be held liable for conspiracy with each other under *§ 1 of the Sherman Act*. *467 U.S. 752, 759, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. The Tenth Circuit has extended the reasoning in *Copperweld* to hold that, when two entities "must be treated as a single enterprise for purposes of *§ 1*, [they] must also be treated **[*1146]** as a single enterprise for purposes of *§ 2*." *Lenox MacLaren Surgical Corp v. Medtronic, Inc., 847 F.3d 1221, 1235 (10th Cir. 2017)*. The *Lenox* court specifically rejected the notion that individual, specific defendants must independently **[**19]** satisfy each element of a *§ 2* claim. "Rather," the court held, "in a single-enterprise situation, it is the affiliated corporations' collective conduct—i.e., the conduct of the *enterprise* they jointly compose—that matters; it is the *enterprise* which must be shown to satisfy the elements of a monopolization or attempted monopolization claim." *Id. at 1236*. Although the Ninth Circuit has not expressly adopted this extension of *Copperweld*, in practice it has analyzed sister and parent companies as "part of an integrated entity" whose behavior was jointly subject to a *§ 2* inquiry. *See* *Vollrath Co. v. Sammi Corp., 9 F.3d 1455, 1461 (1993)*. The Court is satisfied that the Ninth Circuit would join the Tenth Circuit in holding that "the related entities' coordinated conduct must be treated as the unitary conduct of the single enterprise which together they form, and it is that aggregated conduct which must be scrutinized under *§ 2*." *Lenox, 847 F.3d at 1236*.

Digicel attempts to distinguish *Copperweld* and *Lenox* on the basis that Digicel Haiti and Digicel USA are sister-subsidiaries, while the corporate relationships in *Copperweld* and *Lenox* were parent-subsidiaries. Because there is no allegation of involvement by a common corporate parent, Digicel argues, the sister-subsidiaries should not **[**20]** be considered a single enterprise for the purposes of antitrust laws. The Ninth Circuit, however, has described *Copperweld* as holding that "companies under common ownership and control cannot initiate *Sherman Act* conspiracy violations among themselves," indicating that *Copperweld*'s reasoning is not limited to parent-subsidiary corporate relationships. *Vollrath Co., 9 F.3d at 1463*.

Applied here, UPM has sufficiently alleged that Digicel USA and Digicel Haiti have engaged in coordinated conduct constituting a single enterprise. UPM alleges that Digicel USA and Digicel Haiti are commonly owned and "operate in tandem" to suppress competition on the United States to Haiti route. Digicel Haiti itself alleges that Digicel Haiti and Digicel USA work closely together in the common enterprise of connecting calls from the United States to Digicel Haiti's network in Haiti. Digicel Haiti bills United States-based third-party carriers a flat rate of $0.23 per minute for every international call that terminates on Digicel Haiti's network. That rate includes the cost of transmitting the call from the United States to Haiti through Digicel USA's gateway. Digicel USA does not bill the third-party carrier for this service. Rather, **[**21]** Digicel Haiti pays Digicel USA a fee for its service through an intercompany transfer. Thus, Digicel Haiti and Digicel USA are not only commonly owned, but engaged in a common enterprise.[1]

3. Standing

To state a claim for monopolization or attempted monopolization, a plaintiff must be "a participant in the same market as the alleged malefactors." *Bhan v. NME Hospitals, Inc., 772 F.2d 1467, 1470 (9th Cir. 1985)*.[2] When analyzing whether two enterprises "participate in the **[*1147]** same market, the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between the services provided by" the enterprises. *Id. at 1470-71*. In certain cases, courts determine whether two enterprises compete in the same market by identifying "the point of competition" between the two enterprises. *See* *Glen Holly Entertainment, Inc. v. Tektronix, Inc., 343 F.3d 1000, 1005 (9th Cir. 2003)* *opinion amended on denial of reh'g*, *352 F.3d 367 (9th Cir. 2003)* (identifying a market

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[1] Going forward, this opinion uses the term "Digicel" to refer to the common enterprise, and "Digicel USA" and "Digicel Haiti" when necessary or appropriate to refer to the distinct corporate bodies.

[2] The question of antitrust standing, and the requirement that an antitrust plaintiff participate in the same market as the defendant, is an outgrowth of the requirement that the plaintiff experienced antitrust injury. The remaining elements of antitrust injury are discussed later in this opinion.

for a product that included manufacturers and rental services where the "point of competition" was the consumer's decision to rent or purchase the product).

Digicel Haiti argues that UPM, by merely reselling telecommunications services offered by Digicel USA and Digicel Haiti, does not participate in the same market as Digicel Haiti, which is in the local telephone services market in Haiti, or Digicel USA, which **[**22]** is in the "switching market." UPM alleges that it, like Digicel, is an international carrier competing with other carriers for the right to transport calls from the United States to other countries, including Haiti. As discussed above, Digicel operates as a single enterprise. As a single enterprise Digicel USA and Digicel Haiti's functions combine to offer a single product that includes the transportation of calls from the United States to Haiti and the termination of those calls on Digicel Haiti's network. UPM has not clearly alleged, however, that it offers a product that is interchangeable with a product offered by Digicel.

As a preliminary matter, UPM does not compete with Digicel to the extent that it resells Digicel's RLYH program, in which it is only a reseller and provides no service that is an interchangeable alternate to that of Digicel. The RLYH resale "market" looks like the "market" of a person who purchases a season pass to a ski resort, and then rents that season pass out to customers for daily use at a rate below the daily rate charged by a ski resort. No matter what technological innovations the reseller innovated to facilitate his resale model, the person who rents **[**23]** out the season pass cannot be said to be competing in the same market as the ski resort, even though both sell daily ski passes. In reselling the RLYH plan, UPM essentially functions as a distributor, and cancelled distributors do not have antitrust standing. *Glen., 343 F.3d at 1010* (discussing the rule that canceled distributors do not have antitrust standing, but finding that the plaintiff at issue was not a distributor).

The other service that UPM offers—using the internet to get calls to Haiti—does appear to be interchangeable with Digicel USA's international switching service as an alternate means to conduct "international transport services." As an FCC opinion illustrates, international transport services are one "input" among others necessary to complete an international call:

> In order to complete a U.S. international call, a U.S. carrier must obtain as inputs various call termination services from foreign carriers in the destination country of the U.S. call, including *international transport services*, inter-city services within the destination country, and *terminating access services within the local exchange of the called party*.

Eastlink international (USA) Inc.; Petition to Modify Regulatory Classification ***[**24]*** *from Dominant to Non-Dominant on the U.S.-Bermuda Route, Memorandum Opinion and Order, 28 F.C.C.R. 8364* (Int'l Bur. 2012) at ¶2 (emphasis added, footnotes omitted). Thus, the completion of an international call requires, at least, both transportation "inputs" and termination "inputs." UPM **[*1148]** argues that it "competed directly, head-to-head, for wholesale carriers' business" when it used the internet to get calls to Haiti. UPM defines this market as "the market for getting calls to Haiti for termination there." UPM thus argues that it competed with Digicel in providing only *international transport services* to third-party carriers.

UPM has not clearly alleged, however, that Digicel actually offers that service to third-party carriers, or that a market for "international transport services" from the U.S. to Haiti as a standalone service actually exists. Digicel's complaint alleges, and UPM seems to accept, that Digicel charges U.S. wholesalers who need to get a call to Haiti a flat rate of $0.23 per minute for calls that terminate on its network, and that flat rate includes the cost of the international transport service that was performed by Digicel USA and the cost of termination on Digicel Haiti's local network. Thus, Digicel offers to third-party carriers all of the inputs necessary **[**25]** to complete an international call as a single, bundled product for which it charges a flat fee. UPM, on the other hand, only competes with Digicel to the extent that it offers an international transport service, which is only one input required to complete an international call. It is not clear from UPM's allegations that there is a market for this single input. More importantly for standing purposes, UPM's standalone transportation service is not interchangeable with Digicel's transportation-termination service, because its transportation service would only partially meet a third-party carrier's needs.

4. Elements of an Antitrust Claim

Digicel also argues that UPM has not sufficiently pleaded an antitrust claim. In order to state an antitrust claim under *§ 2* of the Sherman Act, a plaintiff must show: "(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury." *Somers v. Apple, Inc, 729 F.3d 953, 963 (9th Cir. 2013)*. To state a plausible claim for an attempted monopoly, a plaintiff must show: "(1) specific intent to control prices or destroy competition; (2) predatory or anticompetitive conduct to accomplish the monopolization; (3) dangerous probability **[**26]** of success; and (4) causal antitrust injury." *CollegenNET, Inc. v. Common Application, Inc., 104 F. Supp. 3d 1137, 1145 (D. Or. 2015)*.

a. Monopoly Power in the Relevant Market

Digicel argues that UPM's Sherman Act claim fails because UPM has not alleged that Digicel has monopoly power the relevant market. A plaintiff must generally allege monopoly power in both the relevant product market and the relevant geographic market in which the trade was unreasonably restrained or monopolized. *See E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 441 (4th Cir. 2011)*. Monopoly power, for the purpose of *Section 2* of the Sherman Act, is "the power to control prices or exclude competition." *Forsyth v. Humana, Inc., 114 F.3d 1467, 1475 ((9th Cir. 1997)*, *aff'd sub nom. Humana Inc. v. Forsyth, 525 U.S. 299, 119 S. Ct. 710, 142 L. Ed. 2d 753, (1999)*, *and overruled on other grounds by Lacey v. Maricopa Cnty., 693 F.3d 896 (9th Cir. 2012)*. A common way to establish monopoly power is by "(1) defin[ing] the relevant market, (2) show[ing] that the defendant owns a dominant share of that market, and (3) show[ing] that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run." *Id. at 1476*.

i. Relevant Market

UPM alleges that the relevant geographic market is the entire United States. **[*1149]** UPM does not, however, allege the precise scope of the relevant product market. "[W]ithout a definition of [the relevant product] market there is no way to measure [the defendant's] ability to lessen or destroy competition." **[**27]** *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993)* (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965))*.

It is not clear from UPM's allegations whether the relevant product market that UPM alleges Digicel to have monopolized is limited to the international transportation service or includes both the transportation service and the local termination service. UPM appears to assert a leveraging theory of monopolization, by which Digicel is using its monopoly in the first market, local telephone services in Haiti, to illegally extend its monopoly into a second market, the transportation of calls from the United States to Haiti. Such a theory of monopolization suggests that the second market—the market being unlawfully monopolized—is the market for only transportation, and not termination. In its response brief, UPM reinforced the conclusion that its alleged product market is limited to transportation services when it wrote that Digicel has monopolized "the market for getting calls to Haiti for termination there." This phrasing indicates that the market is for the service of "getting calls to Haiti" and not for the service of "termination there." In its complaint, however, UPM defines the primary relevant product market as the market for transporting all calls from the United States **[**28]** to all telephones in Haiti and the secondary product market as the market for transporting all calls from the United States to all Digicel subscribers in Haiti. By defining the market as including the transportation of calls from the United States "to telephones" or "to all Digicel subscribers," UPM indicates that the product market includes termination services. Thus, the first substantive flaw in UPM's antitrust claim is its failure clearly to define the scope of the relevant product market.

To the extent that UPM alleges that the relevant product market is only the transportation service, UPM has not sufficiently alleged that there is a market for that service. If a hotdog stand includes free condiments and garnishes for any customer who purchased a hotdog, and an entrepreneur set up a condiment and garnish stand across the street, the entrepreneur could not claim to be competing with the hotdog stand in the condiment and garnish market. UPM appears to be attempting something similar here. Digicel includes the cost of transportation, which for purposes of antitrust analysis it performs in-house, in the flat fee that it charges wholesalers that terminate calls on its network in Haiti. **[**29]** UPM does not allege that Digicel offers the switching services performed by Digicel USA on a standalone basis—for example, to transport a third-party carrier's to Haiti for termination on a non-Digicel local Haitian network. Moreover, UPM does not allege that there are customers interested in transportation services alone, or what the cost of such a service is or should be. UPM alleges neither what Digicel nor UPM itself charges to customers just for the transportation service.[3] Based on UPM's counterclaims, **[*1150]** and the portions of Digicel's complaint that UPM endorses, the appropriate customers for pure transportation services might be enterprises like Digicel itself, which can pay for the transportation service provided by UPM or a similar service provider, and then pass that cost along to the third-party carrier paying to terminate on Digicel's local network.[4]

ii. Monopoly Power

Even if UPM had sufficiently defined the relevant product market, UPM has not sufficiently alleged that Digicel has monopoly power in that market. To state a claim for a Sherman Act *§ 2* violation, UPM must allege monopoly power *in the relevant product market*. UPM alleges **[**30]** that "Digicel has acted to illegally extend its local service monopoly to the" market for transporting calls from the United States to Haiti. UPM thus pleads a *§ 2* claim under a "monopoly leveraging" theory, by which a company that has a monopoly in one product market—which may be legitimately obtained—uses its monopoly power in the first market to secure an unlawful monopoly in a second, distinct market. In order to state a claim under a leveraging theory, a plaintiff must sufficiently allege that the defendant either has obtained monopoly power in the second market or, in the case of an attempted monopoly claim, has a "dangerous probability of success" in monopolizing a second market. *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n. 4, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

UPM alleges that "Digicel Haiti has a market share of more than 75% in the provision of local telephone service in Haiti," which is sufficient to allege monopoly power in that market. *See* *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005)* (holding that a market share between seventy-five percent and eighty percent of sales is "more than adequate to establish a prima facie case of power"). UPM has thus sufficiently alleged that Digicel has monopoly power in the local telephone service market in Haiti, the legitimacy of which UPM does not challenge. UPM **[**31]** makes no allegations, however, about Digicel's market power in the United States-to-Haiti call transportation market. Digicel's market share in local network services does not necessarily translate into an equivalent market share in international transportation services. A mere unfair advantage combined with the use of upstream monopoly power is not sufficient to state a claim for a monopoly or attempted monopoly of the second market **[*1151]** under a leveraging theory. *Trinko, 540 U.S. at 415 n. 4* (clarifying that a leveraging theory presumes anticompetitive conduct and, at least, a dangerous probability of monopolization of the second market).

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[3] To the extent that UPM alleges that Digicel charges $0.23 per minute just for the transportation function—it is not clear from UPM's complaint what services UPM alleges the $0.23 to include—that allegation appears to be based on Digicel's allegations in its own complaint. Digicel alleges, however, that the $0.23 per minute fee is a flat fee charged to wholesalers that is considered to *include* the cost of the transportation function that Digicel provides, in addition to the fee for terminating a call on Digicel's network. Neither Digicel nor UPM allege what amount Digicel Haiti pays to Digicel USA for performing the transportation function.

[4] Seen this way, the market for pure international transportation services may resemble a two-sided market. A two-sided platform is one that acts as an intermediary that "caters to two or more distinct 'sides' of users that derive value from interacting with one another; but the firm's service will not attract one side unless there are participating users on the other." Erik Hovenkamp, *Antitrust Policy for Two-Sided Markets* (February 9, 2018), available at SSRN: https://ssrn.com/abstract=3121481. A firm that offers only the international transportation function of international telecommunications requires the participation of two sets of customers: wholesalers with a need to get their calls to a different country, and local service providers who charge the wholesalers to terminate that call in the local country. A new area of ***antitrust law*** appears to be emerging for two-sided markets. This new area, however, does not appear to be applicable here because Digicel is *not* a two-sided platform. It performs its transportation function in-house, for purposes of ***antitrust law***. Because it offers both transportation and termination, it needs only one set of customers—the wholesalers. That UPM appears to offer a two-sided platform, while Digicel offers a single-sided platform reinforces the inference that UPM and Digicel do not compete in the same market.

Because UPM makes no allegations about Digicel's monopoly power in the market for transporting calls from the United States to Haiti, it has not sufficiently alleged monopoly power in the relevant market.

b. Maintenance of Monopoly Power Through Anticompetitive Conduct

In addition to showing monopoly power in the relevant market, plaintiffs must demonstrate "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident" *Trinko, 540 U.S. at 407*. To be considered anticompetitive, the act **[**32]** must "harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *United States v. Microsoft Corp., 253 F.3d 34, 58, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)* (emphasis in original). UPM alleges five ways in which Digicel Haiti has engaged in anticompetitive conduct to protect and extend its local service monopoly and monopoly of the transporting of calls from the United States to Haiti. First, Digicel requires that all international calls destined for a Digicel Haiti subscriber in Haiti be switched though the Digicel USA gateway. Second, Digicel charges $0.23 per minute for calls terminated on its network Haiti, regardless of whether they switched through Digicel USA. Third, Digicel prevents internet-based telephone services from terminating on its wireless network. Fourth, Digicel prevents the resale of Digicel Haiti's RLYH service. Fifth, Digicel failed to report its status as the dominant local carrier in Haiti to the FCC.

UPM's first allegation of anticompetitive behavior, that Digicel requires that all international calls terminated on its local network be switched through its own gateway might constitute an improper tying arrangement. UPM essentially alleges that Digicel will not sell its termination services **[**33]** unless a wholesaler also purchases its transportation services. As explained above, however, UPM has not sufficiently alleged that there is independent consumer demand for international call transportation services as a standalone product. "[N]o tying arrangement can exist unless there is sufficient demand for the purchase of [the tied product] separate from [the tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product.]" *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21-22, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) accord Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 462, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. In this case, the tied product is the switching through Digicel USA's gateway, and the tying product is Digicel's local Haiti network service. Because UPM has not alleged that there is a distinct product market for international call transportation services such that transportation services can be efficiently offered separately from call termination services, Digicel's requirement that calls terminating on its network be switched through its own gateway is not anticompetitive.

UPM's second allegation of anticompetitive conduct falls short for similar reasons. Because Digicel charges $0.23 per minute to all U.S. wholesale carriers, regardless of whether they use the Digicel **[**34]** USA switches to transport the call to Haiti or a transport service like UPM's, UPM argues, no wholesale carrier will elect to use a different transport service because the carrier would then be charged twice **[*1152]** for the transport function—once in Digicel's bundled price and once by the independent transport service. Thus, Digicel argues, those who use Digicel's transport service receive it "for free" while those who use alternative transport services are charged. Like UPM's first allegation of anticompetitive conduct, this billing scheme could be seen as unlawful tying or bundling. "Bundling is the practice of offering, for a single price, two or more goods or services that could be sold separately." *Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)*. Predatory bundling occurs when, "after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them." *Id at 910*. Thus, as with a theory of anticompetitive tying, a plaintiff must sufficiently allege that a defendant is offering two distinct goods for a single price in order to state an antitrust claim under a theory of anticompetitive **[**35]** bundling. UPM has not sufficiently alleged that there is a market for standalone international call transportation services for Digicel's billing scheme to be considered improper bundling. Moreover, UPM has made no allegation that Digicel sold the transportation service—the competitive product—below the cost of performing or delivering that service.

UPM's third and fourth allegations of anticompetitive conduct can be considered together. A firm's refusal to deal with a competitor is not anticompetitive unless it involves "[t]he unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing suggest[ing] a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, 540 U.S. at 409* (emphasis in original). In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the Supreme Court held that a defendant ski resort's refusal to sell daily ski pass tickets, even at the market retail rate, to a competitor ski resort was exclusionary where the defendant had previously engaged in a similar course of dealing with the competitor. *472 U.S. 585, 610-11, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Because the defendant ski resort would presumably make a profit by selling tickets at the market rate to its competitor ski resort, the only **[**36]** rational reason for its refusal to deal was to drive its competitor out of business. *Id. at 609*. In *Trinko*, the Supreme Court declared that *Aspen Skiing* was "at or near the outer boundary of *§ 2* liability" when the conduct at issue is the refusal to cooperate with a rival. *540 U.S. at 409*. "[T]here is no duty to deal under the terms and conditions preferred by [a competitor's] rivals, . . . there is only a duty not to refrain from dealing where the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition," *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1184 (9th Cir. 2016)* (citations omitted).

Digicel's course of dealing with UPM is not presumably profitable, either with regard to the resale of the RLYH service or with regard to UPM's internet-based telephone service terminating on its network, and Digicel had no prior voluntary dealing with UPM or any other internet-based telephone service. Digicel might expect, for example, that an average individual who purchases a RLYH SIM card will make ten calls per week to Haiti, and sells it at a price that reflects that anticipated use. When in the hands of an organization with a business model like UPM's, however, the RLYH card may be **[**37]** used to make hundreds or even thousands of calls to Haiti per week. Such a resale scheme **[*1153]** does not resemble the market-value dealing denied to the plaintiff in *Aspen Skiing*, which was attempting to buy a single-use product—a daily ski pass—at the price fixed by the defendant to reflect the value of that single-use product. Rather, the scheme is more akin to the would-be competitor who buys an unlimited season pass for a ski resort, and then rents that pass out to customers for daily use at less than the cost of a day pass. If the ski resort refused to honor the rented out season passes, such action would be a rational attempt to protect itself from lost profits and hardly anticompetitive.

By refusing to honor its RLYH program with UPM, and thus preventing UPM's resale of the RLYH benefits, Digicel is acting competitively by forsaking an unprofitable deal. Whether the RLYH contract explicitly forbids this form of resale is disputed, and Digicel's refusal to honor UPM's resold RLYH calls may well be in violation of its contract if there were no restrictions on resale. Not all breaches of contract are anticompetitive, however, and when a breach is efficient, meaning that a party chooses **[**38]** to breach to avoid economic loss, it is particularly unlikely that the breach is anticompetitive. For similar reasons, Digicel's refusal to permit UPM or any other internet-based telephone service terminate on its network by reselling access to Digicel's network at the local rate for what is in fact an international call is a competitive business decision. By refusing to deal with UPM, or any other internet-based telephone service, Digicel is not forsaking near-term profits, but rather protecting itself from an unprofitable deal. UPM implicitly concedes as much in its response brief when it argues that, because Digicel was ultimately able to identify the SIM card being used by UPM, "there is no reason that it could not have charged higher per-minute rates for calls made using those services." Perhaps Digicel could have, but it was under no obligation to do so.[5]

Digicel raises no argument that UPM's fifth allegation of anticompetitive conduct—that Digicel Haiti concealed its status as a dominant carrier on the U.S.-Haiti route from the FCC in violation of *§ 214* of the Communications Act of

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[5] UPM's allegations resemble a claim brought under the essential facilities doctrine. *See MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132-33 (7th Cir. 1983)* (finding antitrust liability where the following elements exist: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility"). During oral argument, however, counsel for UPM expressly stated that UPM is not pleading its case under the essential facilities doctrine. ECF 150 at 31. The Court thus does not analyze UPM's claims of anticompetitive activity under the essential facilities doctrine.

1934—is not anticompetitive. Rather, Digicel argues that all of UPM's claims against Digicel under **[**39]** the Communications Act do not apply to Digicel Haiti because Digicel Haiti is not an international common carrier. For reasons explained below, UPM has sufficiently alleged that Digicel Haiti is an international common carrier, and thus subject to the requirements of the Communications Act. Because Digicel raises no argument that this allegedly exclusionary conduct is not anticompetitive, and because UPM's *§ 2* claim fails on other grounds explained above, the Court declines to address whether Digicel's failure to register as an international common carrier is anticompetitive.

c. Antitrust Injury

There are four elements of antitrust injury: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct **[*1154]** unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Somers, 729 F.3d at 963 (9th Cir. 2013)*. "[A] plaintiff must demonstrate injury to competition in the market as a whole, not merely injury to itself as a competitor." *CollegenNET, Inc. v. Common Application, Inc., 104 F. Supp. 3d at 1147*. As explained above, UPM has not alleged anticompetitive conduct. Thus, any injury that UPM alleges that is has suffered does not "flow from that which makes the conduct unlawful." Moreover, because UPM has not sufficiently defined **[**40]** the relevant market—and has specifically failed to identify other participants and consumers in that market—it has alleged injury only to itself, and not competition in that market.

C. Motion to Dismiss Title 47 Claims

UPM's first counterclaim alleges several violations of the Communications Act of 1934 (the "Act"), codified at *47 U.S.C. §§ 151, et seq.* Digicel Haiti argues that the plain text of the Act does not apply to Digicel Haiti because Digicel Haiti does not operate as an international common carrier in the United States. UPM argues that, regardless of any corporate formalities distinguishing Digicel USA from Digicel Haiti, Digicel Haiti offers international telecommunications services and should thus be treated as an international common carrier for the purposes of the Act.

a. Statutory and Regulatory Framework for Telecommunications

The Court begins its analysis of this issue by examining the relevant statutory and regulatory framework. Under the Act, an entity is a "common carrier" or a "telecommunications carrier" when it engages in interstate or foreign communications by offering to transmit information for a fee between points designated by its customers. *See* *47 U.S.C. §§ 153(11)*, *(50)*, *(51)*, *(53)* (defining, respectively, "common **[**41]** carrier," "telecommunications," "telecommunications carrier," and "telecommunications service"); *see also* *AT&T Corp. v. City of Portland, 216 F.3d 871, 877 (9th Cir. 2000)* ("A provider of telecommunications services is a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provides telecommunications to the public, 'regardless of the facilities used.'").

To qualify as a common carrier, a provider of telecommunication services must offer its services to all customers on an equal basis. *Verizon Cal., Inc. v. F.C.C., 555 F.3d 270, 275, 384 U.S. App. D.C. 342 (D.C. Cir. 2009)* (finding that certain entities were common carriers because, among other things, the entities certified that they would "serve[] all similarly situated customers equally"); *see also* *Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1004 (9th Cir. 2010)* (stating that to be a "common carrier" under the FCA, a service provider must be engaged in the provision of services that are "for profit" and "available to the public or other specified users"); *National Asso. of Regulatory Utility Comm'rs v. Federal Communications Com., 525 F.2d 630, 641, 173 U.S. App. D.C. 413 (D.C. Cir. 1976)* (discussing the essential requirement that a common carrier hold itself out to the clientele it is suited to serve).

Under the Act, a "foreign communication" is a "communication or transmission from or to any place in the United States to or from a foreign country." *47 U.S.C. § 153(21)*. FCC regulations refer to a common carrier involved in providing foreign communications **[**42]** as an "international common carrier." *See* *47 C.F.R. § 63.18*. A "foreign carrier" is "any entity that is authorized within a foreign country to engage in the provision of international telecommunications services offered to the public in that country." *47 C.F.R. § 63.09*. The Act does not apply to telecommunications providers that operate only as foreign carriers. *Cable & Wireless P.L.C. v.* **[*1155]** *FCC, 166 F.3d 1224, 1229, 334 U.S. App. D.C. 261 (D.C. Cir. 1999)* ("The Communications Act authorizes the Commission to regulate 'foreign telecommunications.' The Commission claims no authority to directly regulate foreign carriers." (citation omitted)).

Subject to exemptions not relevant here, any entity that operates as a common carrier within the United States, including international common carriers, is required to obtain formal authorization. *47 U.S.C. § 214*; *47 C.F.R. §§ 63.09-63.23*. Such authorizations are known as "*Section 214*" authorizations. Operating as an international common carrier without a *Section 214* authorization violates the Act. *See, e.g.,* *In re PTT Phone Cards, Inc., 29 F.C.C.R. 11531 at ¶7 (2014)*. An international common carrier, operating pursuant to a *Section 214* authorization, may not charge "unjust or unreasonable" rates for the provision of foreign communications. *47 U.S.C. § 201(b)*. Nor may common carriers of any kind

> make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, **[**43]** or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 202(a). The Act applies to "all interstate and foreign communication . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication." *47 U.S.C. § 152(a)*.

Any person damaged by a common carrier's acts or omissions that violate the terms of the Act may recover damages in federal court. *47 U.S.C. §§ 206-207*. Under *§ 206*, if "any common carrier shall do, or cause or permit to be done, any act, matter, or thing" prohibited by the Act, or "shall omit to do any act, matter, or thing" required by the Act, then "such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation," including attorney's fees. *47 U.S.C. § 206*. Under *§ 207*, claims for damages against carriers for violating the Act may be brought in any federal district court with **[**44]** jurisdiction. *47 U.S.C. § 207*.

b. Application

Ruling on the same issue in an earlier motion to dismiss in this case, this Court held that Digicel's own allegations indicated that Digicel Haiti owned and operated the switches in New York and Miami, and was thus properly considered an international carrier. Plaintiff has since amended its complaint to distinguish between the Digicel USA entity, which Digicel Haiti agrees is an international carrier and which has a *Section 214* authorization, and Digicel Haiti itself, which Digicel Haiti maintains operates only in Haiti. Digicel argues that, because Digicel USA and not Digicel Haiti performs the transmission of calls from the United States to Haiti, it is not required to hold a *Section 214* license and is therefore not an international common carrier. Digicel Haiti's own allegations nevertheless indicate that it provides international "telecommunications for a fee . . . to the public." The definition of telecommunications service in the Act does not limit that definition to include only those entities that *perform the transmission* of calls, as Digicel argues. Rather, the Act defines telecommunications services as "the *offering* of telecommunications . . . *regardless of the facilities* **[**45]** *used*." *47 U.S.C. § 153(53)* (emphasis added).

[*1156] Digicel Haiti's own allegations continue to show that Digicel Haiti offers the service of transmitting calls from the United States to Haiti. Digicel Haiti charges third-party carriers in the United States $0.23 per minute for calls from the United States that terminate on Digicel Haiti's network in Haiti. Digicel Haiti alleges that "[t]here is no separate charge to third-party carriers for the use of the Digicel Group's telecommunications capacity between the United States and Haiti, the minimum 23 cents per minute charge for terminating calls on the Digicel Haiti network is considered to cover that transport function as well." Thus, Digicel Haiti offers what can be described as a package of services that includes the transmission of the call data from the United States to Haiti and the termination of the call on Digicel Haiti's network. That Digicel Haiti appears to sub-contract the transmission function to its sister corporation, which it then pays through intercompany transfer, does not change the fact that Digicel Haiti offers the transmission for a fee. Indeed, to the extent that Digicel USA offers a service at all, as alleged in Digicel Haiti's complaint, **[**46]** it offers that service to Digicel Haiti. The inclusion of the phrase "regardless of the facilities used" in the definition of telecommunications service emphasizes that a telecommunications carrier is defined as such by the transmission service it offers, and not how or by whom the transmission is performed. Moreover, Digicel Haiti's RLYH program is specifically designed for customers in the United States to place calls to Haiti at a discounted rate. Regardless of how the transmission function is performed, in offering the RLYH program, Digicel Haiti offers the transmission of a call from the United States to Haiti for a fee and, as such, is an international telecommunications carrier. Digicel Haiti is therefore subject to the Communications Act.

CONCLUSION

Digicel Haiti's Motion to Strike Affirmative Defenses (ECF 132) is GRANTED IN PART and DENIED IN PART. UPM's first and second affirmative defenses are stricken and the motion is denied in all other respects. Digicel Haiti's Motion to Dismiss Counterclaims (ECF 133) is GRANTED IN PART and DENIED IN PART. UPM's seventh counterclaim is dismissed and the motion is denied in all other respects. The Court grants UPM leave to file a second **[**47]** amended answer within 21 days of the entry of this Opinion and Order.

IT IS SO ORDERED.

DATED this 30th day of March, 2018.

/s/ Michael H. Simon

Michael H. Simon

United States District Judge

In re Blue Cross Blue Shield Antitrust Litig.

United States District Court for the Northern District of Alabama, Southern Division

April 5, 2018, Decided; April 5, 2018, Filed

Master File No.: 2:13-CV-20000-RDP; (MDL NO.: 2406)

Reporter

308 F. Supp. 3d 1241 *; 2018 U.S. Dist. LEXIS 58107 **; 2018-1 Trade Cas. (CCH) P80,337; 2018 WL 1640023

IN RE: BLUE CROSS BLUE SHIELD ANTITRUST LITIGATION

Subsequent History: Modified by, Motion granted by *In re Blue Cross Blue Shield Antitrust Litig. (MDL No. 2406), 2018 U.S. Dist. LEXIS 113563 (N.D. Ala., June 12, 2018)*

Appeal denied by *In re Blue Cross Blue Shield Antitrust Litig. Mdl 246, 2018 U.S. App. LEXIS 36905 (11th Cir. Ala., Dec. 12, 2018)*

Prior History: *In re Blue Cross Blue Shield Antitrust Litig., 26 F. Supp. 3d 1172, 2014 U.S. Dist. LEXIS 82795 (N.D. Ala., June 18, 2014)*

Core Terms

Plans, blue cross, Marks, licenses, blue shield, service area, provider, license agreement, trademark, brand, licensees, Sherman Act, horizontal, products, health insurance, allocations, competitors, rule of reason, best efforts, antitrust, territorial, single entity, price fixing, entities, benefits, uncoupling, prices, insurers, compete, output

Judges: **[**1]** R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

[*1246] **MEMORANDUMOPINION SECTION 1 STANDARD OF REVIEW AND SINGLE ENTITY DEFENSE**

I. Introduction

As the Supreme Court has observed, "the 'central evil addressed by Sherman Act *§ 1*' is the 'elimin[ation of] competition that would otherwise exist.'" *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* (quoting Areeda & Hovenkamp ¶ 1462b, at 193-194).

Currently before the court are (1) the parties' respective motions for partial summary judgment on the standard of review applicable to Plaintiffs' claims under *Section 1 of the Sherman Act, 15 U.S.C. § 1* (Docs. # 1348, 1350, 1353), and (2) Subscriber Plaintiffs' motion for partial summary judgment on Defendants' "single entity" defense.

(Doc. # 1434).[1] The motions **[*1247]** have been fully briefed. (Docs. # 1431, 1432, 1435, 1551, 1552, and 1554). And, the parties have conducted discovery that the court found necessary before deciding the appropriate standard of review for the Sherman Act claims. *See* *In re Blue Cross Blue Shield Antitrust Litig., 26 F. Supp. 3d 1172, 1186-87 (N.D. Ala. 2014)*. *See also* *Nat'l Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592, 596 (11th Cir. 1986)*.

II. Relevant Undisputed Facts

The facts set out in this opinion are gleaned from the parties' submissions of facts claimed to be undisputed, their respective responses to those submissions, and the court's own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of the **[**2]** nonmoving party. *See* *Info. Sys. & Networks Corp. v. City of Atlanta, 281 F.3d 1220, 1224 (11th Cir. 2002)*. These are the "facts" for summary judgment purposes only. They may not be the actual facts that could be established through live testimony at trial. *See* *Cox v. Admr. U.S. Steel & Carnegie Pension Fund, 17 F.3d 1386, 1400 (11th Cir. 1994)*. Some familiarity with the Blue Cross and Blue Shield organizations is presumed.

A. The History of Blue Cross and Blue Shield Organization

Nearly one hundred years ago, Justice Holmes reminded us that a "page of history is worth volumes of logic." *N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506, 65 L. Ed. 963, T.D. 3267 (1921)*. In order to properly assess Plaintiffs' claims and Defendants' arguments, the court begins with a discussion of the history of the Blue Cross and Blue Shield organization and the trademarks (the "Blue Marks").[2]

During the Great Depression, the majority of the population was medically underserved because most people simply could not afford hospital and medical care. (Docs. # 1349 at 11; 1431 at 14; 1435 at 10, n. 4).[3] In response, local hospitals and medical societies developed prepaid plans to serve Americans' healthcare needs in local areas. (Docs. # 1349 at 11; 1431 at 14; 1435 at 10). On occasion, a subscriber prepaid at one hospital but desired services from a different hospital at the time of illness. To remedy this problem, multi-hospital plans became the norm. **[**3]** (Docs. # 1349 at 11; 1431 at 15; 1435 at 11).

By 1939, the American Hospital Association ("AHA") issued "Standards for Non-Profit Hospital Service Plans." (Doc. # 1350-13). Under these standards, approval by the AHA's Commission on Hospital Service gave a Plan "permission to identify the plan by using the seal of the American Hospital Association superimposed upon a blue cross." (Docs. # 1350-13 at 5-6; Doc. # 1353-19 at 6). The approval program for Blue Cross Plans was controlled by the Blue Cross Commission. **[*1248]** (Doc. # 1353-5 at 11-12). The AHA standards discouraged the establishment of new Plans where the community was already being "adequately served by existing Blue Cross Plans." (Doc. # 1353-5 at 14). The Blue Cross Commission promoted one Plan per service area to reduce administrative costs through economies of scale, as well as to reduce health care costs by obtaining participation of hospitals on more favorable terms to the Plans. (Doc. # 1431-29 at 13-15).

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[1] Defendants address their single entity defense within their "omnibus" Brief in Support of Defendants' Motion for Summary Judgment on Plaintiffs' *Section 1*, Per Se, and Quick Look Claims. (Doc. # 1353-1 at 28-32).

[2] As will be explained more fully below, the Blue Cross and Blue Shield trademarks play a central role in the business strategy employed by the Defendants in this case. For example, defending the strength of the Blue Marks is ostensibly the justification for many of the alleged restraints challenged by Plaintiffs.

[3] Due to (1) the volume of exhibits filed in support of the parties' respective motions for partial summary judgment, and (2) the parties' inability to cite to CM/ECF page numbers because of the volume of sealed exhibits in this case, in some instances, the court has relied on the parties' respective responses to an opponent's asserted undisputed facts in compiling the relevant undisputed facts referenced in this opinion. That is, where appropriate, if a party has not disputed an asserted undisputed fact, the court has relied on that failure to dispute the asserted undisputed fact as establishing that fact as undisputed for purposes of the instant motions.

The American Medical Association ("AMA") also approved the concept of prepayment plans, and promulgated approval standards for such plans. (Docs. # 1349 at 12; 1431 at 15; 1435 at 13). The AMA set up the Associated Medical Care **[**4]** Plans ("AMCP") "to administer the approval program" for Blue Shield Plans. (Doc. # 1353-7 at 84-85). Medical care plans that met the AMA/AMCP's standards likewise could use a blue shield emblazoned with a caduceus. (Docs. # 1353-20 at 16; 1431 at 15; 1435 at 13).

The taxation of excess profits and the freezing of wage rates during World War II stimulated employer participation in paying the cost of hospitalization and other medical protection for employees. This change enabled employers to give a small wage increase to their employees at very little net cost to themselves by paying part or all of the cost of group health insurance. (Doc. # 1353-4 at 76). After the war, the Taft-Hartley Act established health benefits as a condition of employment (Doc. # 1353-7 at 93), and the National Labor Relations Board ruled that health insurance was "a mandatory subject of collective bargaining." *Cross, W.W., & Co., 77 N.L.R.B. 1162 (1948)*.

In 1947, in an effort to better compete with commercial insurance companies for employer-sponsored plans, Plans started experimenting with syndicates. (Doc. # 1353-7 at 94). Under these arrangements, a Plan in a state where a company's home office was located negotiated benefits at a certain price. (***[**5]*** *Id.*). Plans in other regions or states where the company had operations were given the details of the arrangement, and those Plans could choose to participate in the arrangement. (*Id.*). The "Home" Plan guaranteed full delivery to the company and accepted all or part of the underwriting risk, depending on the cooperating Plans' agreed participation. (*Id.*). "Within five years, some 250 syndicates were providing coverage to about 1.2 million people." (Doc. # 1353-7 at 94). By working together, Plans were able to service national accounts, including the Federal Employees Health Benefit Program. (Doc. # 1353-1 at 16; 1431 at 18; 1435 at 17).

In 1972, the AHA transferred ownership of the Blue Cross Marks to the Blue Cross Association. (Doc. # 1349-1 at 32). On a separate track, the AMA-sponsored AMCP changed its name to the Blue Shield Medical Care Plans, then it became the National Association of Blue Shield Plans, and then later the Blue Shield Association. (Doc. # 1349-1 at 32-33).

At some point in the 1970s, the Blue Cross and Blue Shield Associations concluded that the Blue System needed cohesive national unity, which they believed could be achieved by working together. (Doc. # 1353-55 **[**6]** at 2). The staffs of the two associations began to consolidate in 1977 or 1978 (Doc. # 1349-1 at 33), but the associations did not legally merge until 1981 or 1982. (*Id.*). The associations merged in order to reduce duplication, increase efficiency, reduce administrative costs, enjoy economies of scale, and achieve greater coherence in the Blue Cross and Blue Shield system. (Doc. # 1353-10 at 80). At that time, the Blue Cross and Blue Shield names and Marks were brought under the control of one **[*1249]** organization, the Blue Cross and Blue Shield Association ("the Association"), which was governed by its Member Plans. (Doc. # 1352-43 at 3).

By the early 1980s, the Blue System was suffering from declining reserves, increasing financial instability, decreasing customer satisfaction, and declining business volume. (Doc. # 1349-7 at 9-24). According to the 1982 Long-Term Business Strategy, the Blue Plans viewed "collective strength" as their "only real defense" against business declines. (Doc. # 1349-7 at 23-24).

B. History of the Blue Cross and Blue Shield Marks

In 1934, the St. Paul hospital Plan began using a blue cross symbol. (Docs. # 1349 at 11; 1431 at 15; 1435 at 11). The first use of the **[**7]** Blue Shield Service Mark was by the Western New York Plan, located in Buffalo, New York, in 1939. (Doc. # 1350-35 at 2). Other Plans began using these same symbols as well. (*Id.*; Docs. # 1349 at 11; 1431 at 15; 1435 at 12).

Both the St. Paul and Buffalo Plans acquiesced in, and even encouraged, other Plans to use the Cross and Shield Marks during this time period. (Docs. # 1349 at 11; 1431 at 15; 1435 at 12). The St. Paul Plan allowed Plans in every bordering state (North Dakota, South Dakota, Wisconsin, and Iowa) to use the Blue Cross Marks. (Doc. #

1353-4 at 29-30). The Buffalo Plan allowed Plans in Syracuse and Rochester (locations close to Buffalo) as well as other Plans in New York to use the Blue Shield Mark. (Doc. # 1353-5 at 38).[4]

Between 1939 and 1947, the Shield Mark was used by various organizations for intrastate non-profit prepaid medical plans. (*Id.*). In 1946, the Commission of Associated Medical Care Plans was formed by certain medical plans. (Doc. # 1350-35 at 2). The Blue Shield Medical Care Plans is the successor to AMCP. (Doc. # 1432 at 15). On December 13, 1947, the Blue Shield Medical Care Plans (the "National Organization") formally adopted the Shield Mark as the **[**8]** official service mark for the Organization. (Docs. # 1350-35 at 2; 1353-48). Thereafter, in 1950, Blue Shield Medical Care Plans applied for federal registration of the Blue Shield Marks. (Docs. # 1353-46; Doc. # 1353-48). The Blue Shield Medical Plans had permission from the first user, the Buffalo Plan, to apply for registration. (Docs. # 1353-101; 1436-11 at 135-40). After the application for federal registration, on December 1, 1952, the users of the Shield Mark entered into an Agreement (the "1952 Agreement") relating to the Collective Service Mark "Blue Shield." (*Id.*; Doc. # 1352-227 at 24). Although the Plans "recogni[zed] that the words 'Blue Shield' and the identifying symbol *are* the property of the National Organization," the 1952 Agreement is silent as to the assignment of any rights in the Shield Mark to the National Organization. (Doc. # 1353-48 at 3) (emphasis added). It is also silent as to the creation and/or existence of any exclusive service areas. (*Id.*). Under the 1952 Agreement, the Blue Shield Plans were granted "permission" to use the Blue Shield Marks in interstate and foreign commerce. (*Id.*).

Previously, in 1947 and 1948, the AHA applied for and received federal **[**9]** registrations for the Blue Cross Marks, stating that it had adopted and was using the Marks. (Docs. # 1350-40, 1530-41, and 1530-42). However, at that time, the AHA did not have an assignment from the first user, the St. Paul Plan, and did not receive a formal assignment of the rights to the Blue Cross Mark until 1954. (Doc. # 1436-11 **[*1250]** at 56-57). After registering the Blue Cross Mark, the AHA had existing Plans sign License Agreements. (Doc. # 1353-11 at 7-8).[5] The License Agreements for four Plans -- Connecticut, Minnesota, Wisconsin, and Rockford, Illinois -- were subject to exceptions. (Docs. # 1353-11 at 8; 1353-101). Those Plans retained the right to their state registrations of the Blue Cross name and Mark. (*Id.*).

Hospital Service Corporation of Alabama, the predecessor to Blue Cross Blue Shield of Alabama, first used the Blue Cross Mark in 1939. (Doc. # 1431-91 at 98). It first used the Blue Shield Mark in 1947. (*Id.*).

C. The Structure of Blue Cross and Blue Shield Organization

At present, the Blue Plans are 36 independent companies and each company sells health insurance. (Docs. # 1351 at 10; 1432 at 17). The Blue Cross and Blue Shield Association itself does not underwrite any **[**10]** insurance policies. (Docs. # 1351 at 11; 1432 at 17; 1556 at 9). The governance structure of the Association is set out in its bylaws, which were approved by a vote of the Member Plans. (Docs. # 1351 at 11; 1432 at 17; 1556 at 9; 1532-6). The Plans are governing members of the Association. (Docs. # 1352-39 at 46-47; 1352-6 at 12-14). The Plans may amend or repeal the bylaws and adopt new bylaws. (*Id.*). Each Member Plan has also agreed to be bound by the Association Rules. (Docs. # 1350 at 12; 1432 at 11).

The Association's bylaws recognize that each of its Member Plans is autonomous in its operations. (Docs. # 1351 at 10; 1432 at 17; 1556 at 9; 1532-6). The Plans are financially independent entities. (Docs. # 1556 at 9; 1352-6 at 7). The Blue Cross and Blue Shield License Agreements provide, "Nothing herein contained shall be construed to constitute the parties hereto as partners or joint venturers . . . ." (Doc. # 1350-4 at 6).

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[4] The February 20, 1987 Draft of the White Paper on the Blue Cross and Blue Shield Assembly of Plans recognized that unlicensed and unauthorized use of trademarks can result in abandonment. (Doc. # 1352-227 at 55-56).

[5] There was not a Plan in every state at this time. (Docs. # 1429-11 at 4-5; 1429-14). For example, there were no Plans in Alaska, Nevada, and Vermont. (*Id.*).

The Association is led by a Chief Executive Officer and President who, together with an executive team, are responsible for the day-to-day operations of the Association. (Docs. # 1352-39 at 46-47; 1352-6). The Association's Board of Directors is comprised of **[**11]** the CEO of each of the Member Plans plus the CEO of the Association. (Docs. # 1432 at 18; 1352-6). By majority vote, the Association Board of Directors elects the President of the Association on an annual basis. (*Id.*). The Association Board may also remove the President of the Association by majority vote. (*Id.*). The Blue Plan CEOs have fiduciary responsibilities to both their individual Plan and the Association. (Docs. # 1352-41 at 29-30; 1436-75 at 29).

The Membership Standards of the Association are adopted and amended by an affirmative vote of three-fourths of Plans and an affirmative vote of three-fourths of the total then current weighted vote of all Plans (a "double-three-quarters" vote). (Docs. # 1432 at 11, 19; 1352-127 at 11). The Member Plans may also amend the Association bylaws (*id.*), and the Association's Rules can be eliminated, by a double-three-quarters vote of the Plans. (Doc. # 1432 at 22).

In 1972, the AHA transferred ownership of the Blue Cross Marks to the Blue Cross Association. (Docs. # 1353-57 at 2; 1432 at 15-16). Blue Cross Plans then signed a license agreement with the Blue Cross Association. (Doc. # 1353-11 at 8). Those 1972 license agreements provided:

> The **[**12]** rights hereby granted are exclusive to Plan within the geographical area served by the Plan on the effective date **[*1251]** of this License Agreement, except that BCA itself reserves the right to use the Licensed Marks and Licensed Name in said area, and except to the extent that said area may overlap the area or areas served by one or more other licensed Blue Cross Plans on the effective date of this License Agreement, as to which overlapping areas the rights hereby granted are non-exclusive as to such other Plan or Plans only.

(Doc. # 1353-100 at 2).

In 1982, the Blue Shield Association (the successor to Blue Shield Medical Care Plans) and the Blue Cross Association merged into the Blue Cross and Blue Shield Association. (Doc. # 1432 at 16). As a result of the merger, the Association now owns the Blue Cross and Blue Shield names and Marks (the "Blue Marks"), and it in turn grants licenses to the Member Plans to use the Blue Marks. (Doc. # 1352-41 at 7).

Today, each Plan has signed a License Agreement with the Association. (Docs. # 1352-49 through 1352-128). Each of these License Agreements identifies an exclusive "service area" where a Member Plan may use the Blue Marks. (Docs. # 1352-49 through **[**13]** 1352-128; 1432 at 11, 19-20). The Association has a "Map Book" which memorializes the Plans' defined service areas. (Docs. # 1432 at 20; 1352-164 at 52-53, 241-46, 270). Under the License Agreements, subject to certain exceptions related to National Accounts and Government Programs, the Plans agreed that a "Plan may not use the Licensed Marks and Name outside the Service Area ... ." (Docs. # 1432 at 11, 20; 1352-127; 1352-49 through 1352-128).

Under the License Agreements, the Association may impose monetary fines on a Plan that uses the Blue Marks outside its service area. (Docs. # 1351 at 19; 1432 at 21). After thirty days' written notice and an opportunity to be heard, on a double-three-quarters vote, a Plan's License Agreement may be terminated for continued use of the Marks outside the Plan's service area. (*Id.*). The License Agreements themselves can be modified or terminated by a "double-three-quarters" vote of the Plans. (Docs. # 1352-49 through 1352-128).

Also under the License Agreements, the Association's rules, or both, a Plan generally may not develop a provider network or contract with a healthcare provider outside its service area for services to be provided under the Blue **[**14]** Marks. (Docs. # 1350 at 12; 1432 at 11). However, a Plan may contract with a healthcare provider in a county contiguous to the Plan's service area under certain defined conditions and for limited purposes. (*Id.*). A Plan may also contract with certain types of providers nationwide, such as laboratories, durable medical equipment providers, and specialty pharmacies, but medical professionals, hospitals, and outpatient facilities are not among these types. (*Id.*).

D. History of Service Areas

There have been efforts to enforce exclusivity of the Plans' service areas, but some competition between Plans has been a fact of life from the earliest days of the Blues' organization. (Doc. # 1353-4 at 50).

Since in the 1940s, the service areas of each Plan have been recorded, initially in three-ring binders called service manuals. (Doc. # 1352-164 at 52-53, 241-46, 270). The three-ring service manuals have been replaced by Map Books. (*Id.*). The 1976 version of the Map Book, for example, notes that the area served by the Blue Shield Plan in Alabama was the entire state of Alabama. (Doc. # 1433-7 at 2). These Map Books are not public record. They are considered by the Association to be "highly sensitive," **[**15]** are not distributed to the Plans, and are distributed only to a **[*1252]** limited number of employees. (Doc. # 1553-3 at 2).

The majority of the Plans' service areas are exclusive, *i.e.*, they do not overlap with another Plan's service area. (Doc. # 1432 at 11). In some cases, however, Blue Plans have overlapping service areas. For example, the following overlaps exist:

- Anthem Blue Cross offers Commercial Health Insurance Coverage across California, in the same geographic region as Blue Shield of California. (Docs. # 1436-79 at 8; 1436-81 at 11).
- Regence BlueShield of Idaho and Blue Cross of Idaho both offer Blue branded Commercial Health Insurance Coverage in Idaho. (Docs. # 1436-79 at 8; 1436-81 at 11)
- WellPoint, Inc. (Empire Blue Cross) offers Commercial Health Insurance Coverage in eight counties in upstate New York, where Blue Shield of Western New York (whose parent company is HealthNow) also offers coverage. Lifetime HealthCare, Inc. was also an overlapping Plan in New York. (Docs. # 1436-79 at 8; 1436-81 at 11).[6]

- In Pennsylvania, Highmark BCBS, Capital Blue Cross, Blue Cross of NE Pennsylvania, and Independence Blue Cross are overlapping Plans. (Docs. # 1436-80 at 7; 1436-81 at 11). **[**16]** [7]
- Three Cambia Plans (Regence BlueShield (in Washington), Regence BlueCross BlueShield of Oregon, and Regence BlueShield of Idaho) offer Blue branded Commercial Health Insurance Coverage in all but seven counties of Washington (Ferry, Stevens, Pend Oreille, Spokane, Lincoln, Adams, and Douglas) and Premera offers Commercial Health Insurance (under Blue Cross and/or Blue Shield licenses) in overlapping Washington counties. (Docs. # 1436-79 at 8; 1436-81 at 11).

There have been other instances of overlapping service areas for the Blue Cross Mark (at least for some periods of time) in Illinois, Kentucky, Maryland, New York, North Carolina, Ohio, and Virginia. (Docs. # 1350-27 & 1350-28). There have been other instances of overlapping service areas for the Blue Shield Mark (again, at least for some periods of time) in Illinois, Ohio, and Wisconsin. (Docs. # 1350-27 & 1350-28). Currently, in California, Idaho, and Pennsylvania, different Plans have the right to use different Marks, one the Cross and the other the Shield. In Washington, Plans have licenses to use different Marks, except in one county where two Plans have licenses to use the Shield Mark. In New York, there are fourteen counties **[**17]** with multiple licensees, but in half of those counties, the rights are to different Marks. In Georgia and Ohio, one Plan has a statewide license to use the Blue Marks, and another has a license in a small number of counties. (Doc. # 1432 at 12-13).

In September 1985, Community Mutual Insurance Company ("CMIC") began marketing and selling health insurance under the Blue Cross and Blue Shield Marks in Ohio. (Doc. # 1429-9 at 21). The Association filed a Complaint against CMIC seeking **[*1253]** to enjoin CMIC's marketing and sales outside of its exclusive service area ("ESA"). (*Id.*). Although a temporary restraining order was issued, after an evidentiary hearing, the Association's request for a preliminary injunction against CMIC was denied. (*Id.*). The Ohio Attorney General

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[6] In a letter dated January 16, 2001, Thomas Hartnett, President and CEO of Blue Cross and Blue Shield of Western New York, acknowledged that there had been overlapping service areas for sixty (60) years. (Doc. # 1436-77 at 4). In fact, he expressed the opinion that the Blue brands "are strengthened in overlapping service areas where two Plans are able to compete freely" and they "have done so for many years." (*Id.*).

[7] Whereas Highmark has apparently espoused the idea of a single Blue Plan in Pennsylvania, Capital BlueCross's President and CEO has indicated he has seen an "increase in Blue business overall" in its own overlapping service area. (Doc. # 1436-63 at 2).

intervened in the lawsuit and asserted a counterclaim alleging that the Association's system of allocating ESAs violated antitrust laws. (*Id.*). The Association agreed to dismiss its claims against CMIC if the counterclaim against it was dismissed. (*Id.*). As a condition of that settlement, the Association agreed, for a period of time, not to pursue litigation seeking to enforce the ESAs against any of the Ohio Plans. (Doc. # 1429-9 **[**18]** at 22).

In the 1980s, the Attorney General of Maryland also sued the Association, alleging that its use of ESAs violated federal and state antitrust laws. (Doc. # 1350-21 at 2). The Association agreed to a settlement that allowed two Plans to compete using the Blue Marks throughout the State of Maryland until "completion of the Assembly of Blue Cross and Blue Shield Plans" or January 1, 1991, whichever was later. (Doc. # 1350-21 at 6).

Prior to January 1988, West Virginia had two Blue Plans which were licensed in mutually exclusive service areas in West Virginia. (Doc. # 1551 at 12). These Plans violated the terms of their License Agreements by competing in each other's service areas. (*Id.*) Neither Plan objected to the competition. (Doc. # 1431-4 at 2). Nevertheless, the Association considered various options to address the situation, including a merger between the Plans. (Doc. # 1431-4 at 2).

CEOs of the various Blues have had occasion to address ESAs. For example, a summary of conversations with four Blue CEOs in 1986 recognized that "[t]he major advantage of an exclusive franchise area was seen in the lessening of competition as well as the opportunity to discuss plans and proposals **[**19]** with companies in the same industry knowing that those ideas would not be used against you." (Doc. # 1436-12). And in interviews conducted by the Association in which questions about ESAs were asked, Plan CEOs stated that ESAs create "[l]arger market share because other Blues stay out and do not fragment the market" (Doc. # 1350-22 at 3), and allow for aggressive bargaining. (Doc. # 1350-23 at 3). "In turn, national accounts enjoy local discounts." (*Id.*). One CEO reported that "Plans benefit from the exclusive service areas because it eliminates competition from other Blue Plans" and that without service areas, "there would be open warfare." (Doc. # 1350-24 at 2).

The discovery to this point in the case, while broad, has focused particularly on Alabama. As of 2016, nine Plans, other than Blue Cross and Blue Shield of Alabama ("BCBSA"), had at least 10,000 members who resided in Alabama: Anthem (150,912); HCSC (97,497); Highmark (45,234); BlueCross BlueShield of Tennessee (37,111); Blue Cross Blue Shield of Michigan (29,579); USAble Mutual Insurance Company (Arkansas) (22,705); BCBSM (Minnesota) (16,834); Horizon Healthcare Services (New Jersey) (11,357); and Blue Cross and Blue Shield **[**20]** of North Carolina (10,192). In total, these Plans had in excess of 400,000 members residing in Alabama. (Docs. # 1350 at 17-18; 1432 at 17).

E. History of Blue Rules

Over the past three decades, the Blue Plans and the Association have adopted several strategies and Association rules that are relevant to the Sherman Act claims at issue in this MDL. The court discusses certain of these strategies below.

i. 1982 Long-Term Business Strategy

At the Association's 1982 annual meeting, a "Long-Term Business Strategy" **[*1254]** was presented to the Plans. (Docs. # 1350-15 at 3; 1352-164 at 80-84). In his presentation at the meeting, the Chairman of the Joint Executive Committee, who was appointed to work on an integrated business strategy, reported that "he would try to persuade members that they could not sustain the status quo and that fundamental change is the only realistic option." (Doc. # 1350-15 at 3). The Plans adopted several recommendations contained in the Long-Term Business Strategy, including requiring consolidation and allowing only one Plan per state. (Docs. # 1350-15 at 3; 1352-164 at 80-84). Proposition 1.1 of the Strategy was approved in November 1984 and provided that "[a]ll Plans to be **[**21]** joint Blue Cross and Blue Shield Plans, except when needs dictate otherwise, by the end of 1985." (Docs. # 1350-15 at 3; 1350-18 at 3; 1352-164 at 80-84). Proposition 1.2 of the Strategy, which was also adopted, stated that there should be "[o]nly one Plan per State, except when the Association Board of Directors agrees that business needs dictate otherwise, by the end of 1985." (*Id.*).

ii. 1985 Assembly of Plans

The Assembly of Plans sought to examine and redefine the relationship among the various Plans as well as between the Plans and the Association. (Doc. # 1349-10 at 11-12). In 1990, the Assembly of Plans made recommendations to the Blue Plans regarding Service Marks and ESAs. (Doc. # 1349-8 at 3). Those recommendations included the proposal that the Blue Cross License Agreements and the Blue Shield License Agreements be revised to be essentially identical. (*Id.*). The proposal would involve supplementation of the Blue Cross License Agreement. (Doc. # 1349-8 at 31). But the Blue Shield Agreement was to be essentially replaced with the Blue Cross Agreement, rather than supplemented, as the earlier Shield version "was prepared at a stage when licensing was in its infancy." (Docs. # **[**22]** 1349-8 at 31-32; 1353-48).

The revised 1991 Blue Cross License Agreements resulting from the Assembly of Plans contain the following provision regarding service areas:

> The rights hereby granted are exclusive to Plan within the geographical area(s) served by the Plan on June 30, 1972, and/or as to which the Plan has been so granted a subsequent license, which is hereby defined as the "Service Area," except that BCBSA reserves the right to use the Licensed Marks and Licensed Name in said Service Area, and except to the extent that said Service Area may overlap the area or areas served by one or more other licensed Blue Cross Plans as of said date or subsequent license, as to which overlapping areas the rights hereby granted are nonexclusive as to such other Plan or Plans only.

(Docs. # 1349-8 at 7, 1349-11 at 5). The new Blue Shield License Agreement resulting from the Assembly of Plans contains a virtually identical provision. (Doc. # 1349-8 at 54).

After the advent of the LTBS and AOP, the number of Blue Plans decreased from 114 in 1980, to 77 in 1990, and stands at 36 today. (Doc. # 1350-19 at 3).

iii. The Development of the BlueCard Program

In 1992, the BlueCard program was developed to, **[**23]** at least in part, address inefficiencies in the cooperative methods employed by the Blue Plans, including the lack of a uniform process, dissatisfaction of providers with their receivables, and customer confusion. (Docs. # 1348-6 at 20-21; 1353-53 at 156-68). Under BlueCard, Plans were required to make their local provider discounts available to all Blue Members, even if they lived in another Plan's service area. (Doc. # 1352-44 at 56).

In 1995, Member Plans adopted a license standard requiring all Plans to participate **[*1255]** in BlueCard. (Doc. # 1352-44 at 56). Following the adoption of BlueCard, Blue enrollment ceased declining and started increasing. (Doc. # 1353-68 at 12). BlueCard allowed the Blue Plans to provide subscribers a single point of contact like insureds enjoyed with the national insurers. (Doc. # 1353-61 at 2). BlueCard was another avenue that allowed the Plans to offer nationwide coverage. (Doc. # 1431-66 at 226-27).

Through the BlueCard program, the Plans have agreed that when a contracted provider treats a patient covered by a Home Plan, *i.e.*, a Plan outside the service area in which the provider is located, the Home Plan will reimburse the provider at a rate which equals **[**24]** (at a minimum) the levels received for providers under the provider's contract with its Host Plan, *i.e.*, the local Plan. (Docs. 1350 at 13; 1432 at 11). That is, "[i]n all cases, the [Host Plan] must pass the full amount of the discount/differential received from the provider to the [Home Plan]." (Doc. # 1433-1 at 3). Under BlueCard Rules, an access fee may be charged in connection with processing BlueCard claims, but that fee can be, and is frequently, negotiated or waived. (Docs. # 1433-1 at 8; 1433-12 at 5).

BlueCard is not a "product" which is sold on its own. (Doc. # 1556 at 12). A customer cannot buy access to the BlueCard network without buying a health product. (*Id.*). Further, participation in the BlueCard program is a requirement of the License Agreement between the Association and each individual Plan. (Doc. # 1432 at 12). However, under the Association Rules, a Plan could create a provider network that is not made available to BlueCard-eligible Members or Subscribers. (*Id.*).

There is specific evidence in the *Rule 56* record about BlueCard's effect in Alabama. In the 1980s, prior to the adoption of the BlueCard program, BCBS-AL contracted with twenty-nine providers in counties contiguous **[**25]** to Alabama. (Doc. # 1350-33 at 3-5). At some point, BCBS-AL stopped directly contracting with those providers. (*Id.*). The cessation of direct contracting provided savings for customers for the snapshot in time which was examined. (*Id.*).

iv. 1993 License Agreement Standard 11

In 1993, License Agreement Standard 11 was adopted by a double-three-quarters vote. (Docs. # 1351 at 20; 1352-183 at 46; 1432 at 22). Standard 11 is titled "Transactions Which May Impair the Value of the Marks and Name." (Doc. # 1352-183 at 44). That Standard provides that "[n]either a Plan nor any Larger Controlled Affiliate shall cause or permit an entity other than a Plan or a Licensed Controlled Affiliate thereof to obtain control of the Plan or Larger Controlled Affiliate or to acquire a substantial portion of its assets related to licensable services." (*Id.*). Standard 11 also sets forth certain requirements a Blue Plan must meet to transfer its license to a non-Blue entity. (Docs. # 1351 at 20; 1352-183 at 46; 1432 at 22). When Standard 11 applies, Blue rules provide that a Plan's license may be terminated if the requirements of the Standard are not met. (*Id.*).

v. 1994 Local Best Efforts

In 1994, the Association **[**26]** and the Plans adopted the Local Best Efforts Rule. (Docs. # 1349-15 at 20-21; 1349-16 at 7). Under the Local Best Efforts Rule, at least eighty percent of a Plan's annual health[8] revenue from within its designated **[*1256]** service area must be derived from services offered under the Blue Marks. (*Id.*).

vi. 1996 Acquisition Rules

In 1996, the Association and the Plans adopted acquisition rules to restrict the circumstances under which an adverse party could acquire a Plan. (Docs. # 1349-17 at 17; 1349-18 at 4). These rules prevent a Plan from transferring its license to a non-Blue entity without meeting certain standards. (Doc. # 1349-16 at 16-18).

vii. 1999 Uncoupling Regulations

In 1999, the Association and the Plans adopted Uncoupling Regulations. (Doc. # 1352-1 at 91). Under these Regulations, a Plan may choose to use a name in connection with the Blue Marks; however, if it does so, it may not thereafter "uncouple" that name from the Blue Marks. (*Id.*). For example, a Plan may call itself Acme Blue Cross and Blue Shield, but it may not later use the trade name Acme Health Insurance — it must keep the "Blue" in the trade name. (*Id.*).

viii. 2005 National Best Efforts

In 2005, a National Best Efforts **[**27]** rule was adopted. (Doc. # 1349-21 at 5). This rule requires a Plan to derive at least sixty-six and two-thirds percent of its national health insurance revenue under its Blue brands. (Doc. # 1349-16 at 7). Thus, under the National Best Efforts rule, any health revenue a Blue Plan may generate from

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[8] The Local Best Efforts Rule applies only to health revenue "attributable to health care plans and related services and hospital services . . . offered within the designated Service Area." (Doc. # 1350-10 at 4).

services offered under any non-Blue brand is limited in relation to its Blue brand health revenue. (Doc. # 1432 at 20-21). Nonetheless, many Plans have had significant unbranded business. (Docs. # 1349-23 at 5; 1349-25 at 5-6).

ix. National Accounts

Under the License Agreements, the Association's rules, or both, a Plan may not bid on a National Account headquartered outside its service area using the Blue Marks unless the Plan in whose service area the National Account is headquartered agrees to "cede" the right to bid. (Docs. # 1350 at 11; 1432 at 11). In the limited instances of overlapping service areas, more than one Plan may bid for the business of a National Account. (*Id.*). Plans, including Blue Cross and Blue Shield of Alabama, have requested cedes from each other. (Docs. # 1350 at 11; 1432 at 12). Some of these requests have been granted and some have been denied. (*Id.*). On occasion, **[**28]** a Blue Plan will pay another Plan to cede the right to bid for a national account. (Docs. # 1431-1 at 28; 1551 at 12). Blue Cross and Blue Shield of Alabama has done so multiple times. (*Id.*).

Through collaboration, Plans compete with national insurers for national accounts. (Doc. # 1353-60 at 2). In 2011, the Blue share of the national account market was estimated at forty-six percent. (*Id.*). The top three national insurers -- Aetna, Cigna and United -- which offer healthcare financing plans and/or health insurance and related services in all fifty states (Docs. # 1350 at 18; 1432 at 17), had a combined share of forty-one percent.[9] (Doc. # 1353-60 at 2). Plans also compete with regional insurers. (Doc. # 1353-102 at 54).

F. Present Day Blue Plans

In 2015, fifteen of the Blue Plans were within the top twenty-five insurers in the United States as measured by total membership. (Docs. # 1350 at 18; 1432 at 17). Anthem was the second largest insurer in the country by membership and held Blue Cross and/or Blue Shield licenses in fourteen different states. (*Id.*). HCSC was the fourth or fifth largest insurer in the country **[*1257]** by membership and held Blue Cross and Blue Shield licenses in five states. **[**29]** (*Id.*). Other Blue Plans are among the top ten insurers by membership. (*Id.*). Blue Cross and Blue Shield of Alabama is the largest insurer in Alabama, and the sixteenth largest insurer in the nation by membership. (*Id.*).

One of BCBS-AL's corporate representatives, Tony Carter, testified that he defined BCBS-AL's competitors as follows: "in the broadest of sense, a competitor is anybody that sells a similar product." (Doc. # 1352-211 at 14, 44). When speaking about Anthem's proposed merger with Cigna, and in relation to the prospect of competing for national accounts outside of its fourteen-Blue service area, a representative of Anthem testified as follows:

> [O]ur current market is confined to the 14 states. We have the Blue Cross/Blue Shield license, and we have any number of customers and consultants that express an interest in working with us, and we're prohibited from doing that. To be able to go from — I know we're a national plan. We're a national plan that operates in 14 states. To be an [sic] national plan that operates in 50 states and have unfettered access, without asking permission to have a conversation with a prospect, would be — I don't know — exhilarating, I would say.

(Doc. **[**30]** # 945-1 at 3).

Nationwide, 96 percent of hospitals and 92 percent of physicians are in-network with the Blue Plans. (Docs. # 1353-82 at 6; 1435 at 27). Some subscribers have chosen to contract with the Blues and have favorable comments about the experience (Docs. # 1353-85 at 76-77; 1353-73 at 83), while others have complaints (Docs. # 1431-77 at 182-83; 1431-83 at 97, 258-59). Still others have expressed an interest in additional options and/or more competition for their health insurance needs. (Docs. # 1436-69 at 177-79; 1436-56 at 99).

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9 Unlike the Blue Plans, who are dedicated to their local markets, the national insurers have demonstrated a willingness to pull out of markets and leave populations uninsured. (Doc. # 1353-102 at 56).

Over the years, certain Plan executives have expressed a concern that the ESAs violate antitrust laws. (Docs. # 1352-214 at 3; 1352-218 at 2; 1352-219 at 3; 1431-12 at 2; 1431-25 at 3; 1436-6 at 2). They have also expressed similar concerns about the Best Efforts Rules. (Docs. # 1352-219 at 3, 1436-8 at 2; 1336-5 at 24; 1436-87 at 3; 1436-87 at 3).

III. Summary Judgment Standard

The *Rule 56* summary judgment standard applies to an antitrust suit, just as it applies to any other suit. *Gulf States Reorganization Grp., Inc. v. Nucor Corp., 822 F. Supp. 2d 1201, 1208-09 (N.D. Ala. 2011)* (discussing the Supreme Court's disavowal of cases disfavoring summary judgment in antitrust suits), *aff'd*, *721 F.3d 1281 (11th Cir. 2013)*. Summary judgment is appropriate when the pleadings, depositions, affidavits, **[**31]** and exhibits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*, *(c)*; *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. An issue of fact is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir.1997)*. An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Allen, 121 F.3d at 646*. When evaluating a summary judgment motion, a court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to the non-moving party and determine whether the evidence could reasonably sustain a jury verdict for the non-movant. *Celotex, 477 U.S. at 322-23*; *Allen, 121 F.3d at 646*.

[*1258] The appropriate standard for evaluating the conduct challenged under the Sherman Act --rule of reason or *per se* -- is a question of law for the court to decide. *Food Lion, LLC v. Dean Foods Co., (In re Milk Antitrust Litig.), 739 F.3d 262, 271 (6th Cir. 2014)* ("The district court's decision to use the rule of reason is a question of law ..., which we review de novo."). This legal issue, though, "is predicated on a factual inquiry into the restraint's competitive effect," *Nat'l Bancard Corp., 779 F.2d at 596*, which had previously led this court to defer its ruling on the standard of review at the motion-to-dismiss stage. *Blue Cross Blue Shield, 26 F. Supp. 3d at 1186-87*. While the **[**32]** selection of a mode of analysis (*per se* or rule of reason) is a question of law, sometimes "underpinning that purely legal decision are numerous factual questions." *In re Wholesale Grocery Prods. Antitrust Litig., 752 F.3d 728, 733-34 (8th Cir. 2014)*.

IV. Analysis

The court begins its analysis with a discussion of relevant antitrust principles and cases and then proceeds to apply those principles to the *Rule 56* facts presented by the parties. The court emphasizes that it analyzes the Blues' agreement as a whole to determine the appropriate standard of review. In other words, the court declines to examine the Blues' ESAs, best efforts rules, or brand restrictions in isolation where the *Rule 56* evidence reveals that the Blues, through the Association, enacted new and unique aggregate competitive restrictions on top of the ESAs during the 1990s and 2000s. *Cf. Sealy, 388 U.S. at 357* (emphasizing that the horizontal territorial allocations were "part of 'an aggregation of trade restraints'"). The court expresses no view about whether the ESAs alone qualify as a *per se* Sherman Act violation. The court separately analyzes the BlueCard program and the trademark uncoupling rules.

A. Antitrust Principles

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, **[**33]** in restraint of trades or commerce among the several States . . . ." *15 U.S.C. § 1*. *See also Procaps, S.A. v. Patheon, Inc., 845 F.3d 1072, 1079-80 (11th Cir. 2016)* (describing the interchangeability of use for the terms contract, combination, and conspiracy). The antitrust laws are designed to protect competition, not competitors. *See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (discussing Section 7 of the Clayton Act, 15 U.S.C. § 18); Aquatherm Indus., Inc. v. Fla. Power & Light Co., 145 F.3d 1258, 1262 (11th Cir. 1998) (discussing Section 1 of the Sherman Act). "[T]o establish a Section 1 violation, the plaintiff must first show that there was concerted action between two or more persons -- a 'conscious commitment to a common scheme designed to achieve an unlawful objective'-- in restraint of trade." Procaps, 845 F.3d at 1080 (quoting Monsanto Co. v. Spray—Rite Serv. Corp., 465 U.S. 752, 768, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)).

Of course, it is well-settled that Section 1 only prohibits concerted action that "unreasonably restrain[s] trade." *See, e.g.,* id. at 1081 (citing Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007) (quoting State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)). "The rule of reason is the [presumptive] standard for testing whether a practice restrains trade in violation of § 1." Leegin, 551 U.S. at 885; *see also* Texaco, Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 **[*1259]** (2006). A rule of reason analysis requires the court to weigh all of the circumstances surrounding the practice to determine whether it unreasonably restrains competition. Leegin, 551 U.S. at 885. Among other factors, the court can consider the relevant business, the history, nature, and effect of the challenged restraint, and the market power of the business **[**34]** or businesses imposing the restraint. Id. at 885-86.

Some types of concerted action, however, are deemed unlawful *per se* and are not analyzed under the wide-ranging rule of reason. Id. at 886. "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work . . . ." *Id.* (citing Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)). The Supreme Court has deemed certain types of activity to be *per se* violations of Section 1 of the Sherman Act because "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (quoting Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)). "Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . or to divide markets . . . ." Leegin, 551 U.S. at 886 (internal citations omitted). In particular, horizontal market allocations between competitors lower output and raise prices because "[a] firm that is free from effective competition will reduce its output below the competitive level (whether directly or . . . indirectly by raising price)." Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594 (7th Cir. 1984). As the *Leegin* opinion indicates, the Supreme Court has affirmed the force of the *per se* rule, even in opinions where it has overturned **[**35]** particular applications of that doctrine. Id. at 886-87 (describing *per se* rules for horizontal agreements in an opinion that overruled the *per se* antitrust standard for vertical resale price maintenance agreements). *See also* State Oil, 522 U.S. at 10 (describing the basis for *per se* rules in an opinion that overruled the *per se* unlawfulness of vertical maximum price fixing); Quality Auto Painting Ctr. of Roselle, Inc. v. State Farm Indemnity Co., 870 F.3d 1262, 1271 (11th Cir. 2017) ("Certain classes of conduct . . . are deemed 'per se' violations, which are 'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'") (citation omitted).

The *per se* rule applies to certain forms of business relationships and concerted activity in all industries. Indeed, the Supreme Court has expressly rejected the argument that the *per se* standard should not apply to cases involving the health care industry due to the judiciary's lack of antitrust experience with that industry. Maricopa Cty., 457 U.S. at 349-51. As the Maricopa County opinion explains, otherwise *per se* anticompetitive conduct need not be reexamined under the rule of reason merely because it appears in a new industry. Id. at 350-51. This is true because a rule of reason inquiry into that type of anticompetitive conduct, **[**36]** even in the health care industry, is highly likely to be fruitless. *Id.*

Defendants claim that, to receive the benefit of the *per se* rule, Plaintiffs must show an agreement with no plausible procompetitive benefits, an anticompetitive character confirmed by judicial experience, and a purely horizontal character. (Doc. # 1349 at 34-35). But while there are undoubtedly **[*1260]** agreements that have been found to be *per se* violations that meet all those elements, that assertion does not square with Eleventh Circuit precedent. As our court of appeals has explained, an antitrust plaintiff's ability to proceed on a *per se* theory depends on "whether there was an agreement" to commit conduct that the Supreme Court has held to be unreasonable [*per se*] "because the unreasonableness of the restraint is presumed." *Levine v. Cent. Fla. Med. Affiliates, Inc., 72 F.3d 1538, 1545-46 (11th Cir. 1996)* (citing *Maricopa Cty., 457 U.S. at 344-45*, and *United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 47 S. Ct. 377, 71 L. Ed. 700 (1927))*.

B. *United States v. Sealy, Inc.* and *United States v. Topco Associates, Inc*.

All of the parties agree that *United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)* ("*Sealy*"), and *United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)* ("*Topco*"), are central authorities to consider in determining the appropriate standard of review for the alleged anticompetitive conduct by the Blue Plans and the Association. Plaintiffs contend that *Sealy* and *Topco* are full-force, binding Supreme Court precedents **[**37]** that establish the *per se* illegality of the scheme at the heart of their cases. (Doc. # 1350 at 26, 28) (contending that "this case is on all fours with *Sealy*" and that "the Blues' agreements are even more anticompetitive than the ones found to [be] unlawful *per se* in *Sealy* and *Topco*"); (Doc. # 1351 at 7) (citing *Sealy* and *Topco* for the argument that the trademark licensing conducted by the Association "is unlawful *per se* because it is another way for the competitors to divide and allocate territories, and thereby to agree not to compete"). Defendants, of course, disagree. They assert that *Sealy* and *Topco* present examples of market allocation that cannot be compared to the trademark licenses issued by the Association. (Doc. # 1349 at 47-49). Moreover, Defendants insist that *Sealy* and *Topco* "should be limited to their precise facts" because they are "inconsistent with modern antitrust jurisprudence." (*Id.* at 47 n. 7). Thus, a threshold issue in determining the proper standard of review here revolves around the proper application of *Sealy* and *Topco*.

In *Sealy*, the licensor, Sealy, agreed to allot exclusive territories to its licensees, a group of mattress manufacturers. *388 U.S. at 352*. The licensees agreed to not **[**38]** sell Sealy-branded products outside of their allotted geographic areas. *Id.* Nevertheless, the licensees could sell private label (*i.e.*, non-Sealy) products in any geographic market they chose. *Id.* Sealy's licensees owned "substantially all of its stock," and each director on Sealy's board of trustees had to "be a stockholder or a stockholder-licensee's nominee." *Id.* That board of trustees managed and controlled Sealy's affairs. *Id. at 352-53*. Through the board of trustees and the executive committee, the Sealy licensees controlled "the grant, assignment, reassignment, and termination of exclusive territorial licenses." *Id. at 353*.

As an initial matter, the Supreme Court concluded that Sealy, Inc. was "an instrumentality of the licensees for purposes of the horizontal territorial allocation." *Id. at 354*. It emphasized that the substance of the territorial restraint was horizontal because the actors who controlled the licenses were employees of the manufacturers and the license arrangements were designed to promote the interests of the manufacturers. *Id. at 352-54*. It rejected Sealy's argument that its board members and stockholders acted in a distinct role when making decisions **[*1261]** on behalf of Sealy. *Id. at 353*.

The Supreme Court also observed **[**39]** that Sealy instituted an "aggregation of trade restraints" that included price fixing and territorial allocation. *Id. at 354-55*. Sealy's stockholders implemented price fixing protocols by using Sealy's mechanisms. *Id. at 355-56*. The Supreme Court determined that the stockholders' use of price fixing was evidence that Sealy functioned as an instrumentality, not a separate entity. *Id. at 356*. And, it explained that the territorial allocations enabled the manufacturers' price fixing by providing any Sealy manufacturer "an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions." *Id.* Therefore, the Supreme Court held that the horizontal territorial restraints presented in *Sealy* were unlawful *per se*, "without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness." *Id. at 357-58*.

In *Topco*, a group of small and medium-sized supermarket chains associated together to sell private-label goods under Topco's brand names. *405 U.S. at 598*. The grocery chains formed Topco "to obtain high quality merchandise under private labels in order to compete more effectively with larger national and **[**40]** regional chains." *Id. at 599*. None of the supermarkets associated with Topco held a majority share of its geographic market:

the supermarkets held between 1.5% to 16% market share within their respective geographic areas, and the average market share for Topco members was approximately 6%. *Id. at 600*. The Supreme Court noted that the combined sales of Topco's members were "exceeded by only three national grocery chains." *Id.* The supermarkets owned all of Topco's stock and equally distributed the association's voting rights. *Id. at 598*. Topco's directors were employees of the member supermarkets and usually executive officers in those companies. *Id.* The board of directors selected Topco's officers, and Topco's principal executive officers were required to be directors on the board. *Id. at 598-99*. As such, Topco's members possessed "complete and unfettered control over the operations of the association." *Id. at 599*.

Topco's bylaws allowed for three types of territorial marketing licenses, which included both exclusive and non-exclusive licenses. *Id. at 601-02*. But, as the Court concluded, even nonexclusive territorial licenses "prove[d] to be de facto exclusive." *Id. at 602*. Exclusive territories often were distributed to supermarkets that did not yet operate **[**41]** in those areas. *Id.* A supermarket chain seeking to join Topco had to receive approval from Topco's board of directors and 75% of Topco's members. *Id.* And, if the Topco member closest to the applicant or one who operated within 100 miles of the applicant voted against the applicant, the applicant then needed to receive 85% approval from the membership. *Id.* Topco's high membership thresholds provided a de facto veto for Topco members "in the territorial areas in which they [were] concerned." *Id.*

The Supreme Court held that the territorial restraints instituted by Topco were horizontal restraints, and, thus, *per se* violations of the Sherman Act. *Id. at 608*. It concluded that Topco's territorial allocations were entirely analogous to those in *Sealy* because (1) the licensees owned almost all of the licensor's stock, elected its board of directors, and controlled its business, and (2) the licensor agreed to not allow other competitors to **[*1262]** sell branded products in a designated territory in exchange for the licensee's promise to not expand its sales beyond that area. *Id.* The Supreme Court declined to address whether it would have found Topco's conduct to be anticompetitive under the rule of reason because **[**42]** the rigid *per se* standard does not allow antitrust defendants to justify naked restraints of trade with good intentions or alleged procompetitive benefits. *Id. at 609-10*. Specifically, the Supreme Court rejected the district court's finding that Topco's restrictions on intrabrand competition were justified by the benefits provided to interbrand competition. *Id. at 610-11*.

The holdings in both *Sealy* and *Topco* have remained viable. In 1990, the Supreme Court relied on *Topco* to summarily reverse a judgment by the Eleventh Circuit regarding a horizontal market allocation by bar exam review companies. *See* *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (*per curiam*). In *Palmer*, two bar review companies sold bar review courses in Georgia for approximately four years. *Id. at 47*. One of those companies agreed to exclusively license its brand name to the other and not compete with the licensee in Georgia in exchange for (1) a portion of the student fees paid, and (2) an agreement by the licensee to not compete with the licensor outside of Georgia. *Id.* Thereafter, the licensee substantially increased the price of its course from $150 to over $400. *Id.*

The Supreme Court reiterated its holding in *Topco* that "agreements between competitors to allocate territories to minimize competition **[**43]** are illegal." *Id. at 49* ("[H]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling competition."). It concluded that the bar companies had entered into an unlawful market allocation since they (1) previously competed in Georgia, (2) agreed to allocate the Georgia market to the licensee, and (3) agreed that the licensor would compete in the remainder of the United States and the licensee would not do so. *Id. at 49*. "Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other."[10] *Id. at 49-50*. They are unlawful on their face. *Id.*

Since *Palmer*, the Supreme Court has cited *Topco* as authority to support the *per se* standard applied against certain horizontal restraints. *See* *Leegin, 551 U.S. at 909* (citing *Topco* to support the proposition that "sometimes

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[10] Notably, one of the alleged conspirators in *Palmer*, BRG of Georgia, had never sold bar review courses outside of Georgia and had no apparent intent to do so. 12 Philip R. Areeda & Herbert Hovenkamp, ***Antitrust Law*** § 2030b at 220 n. 7 (3d ed. 2012).

[the Supreme] Court has imposed a rule of *per se* unlawfulness—a rule that instructs courts to find the practice unlawful all (or nearly all) the time"). The Supreme Court also has cited *Palmer* as authority for the application of the *per se* rule to horizontal market allocations. *F.T.C. v. Actavis, Inc., 570 U.S. 136, 133 S.Ct. 2223, 2230, 186 L. Ed. 2d 343 (2013)*; *Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 552-53, 133 S. Ct. 1351, 185 L. Ed. 2d 392 (2013)* (explaining that ***antitrust*** **[**44]** ***law*** "ordinarily forbid[s] market divisions"); *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133-34, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. Additionally, in 2010, the Supreme Court discussed the horizontal agreements at issue in *Sealy* and *Topco* without in any way indicating that either case had been overruled or abrogated by later developments in ***antitrust law***. *See* *Am. Needle, Inc. v.* ***[*1263]*** *Nat'l Football League, 560 U.S. 183, 200-01, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*.

With these antitrust principles and Supreme Court decisions in mind, the court turns to an analysis of the issues in this case.

C. There are Genuine Issues of Fact as to Whether Defendants Are a Single Entity

To state a claim under *Section 1*, a plaintiff must plead two elements: (1) that the defendant was involved in an agreement; and (2) that the agreement unreasonably restrained interstate or foreign trade. *Am. Needle, 560 U.S. at 186*. "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Id.* "The meaning of the term 'contract, combination . . . or conspiracy' is informed by the 'basic distinction' in the Sherman Act 'between concerted and independent action' that distinguishes *§ 1* of the Sherman Act from *§ 2*." *Id. at 190* (quoting *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))* (internal quotation marks omitted). Under *Copperweld*, in certain circumstances, distinct legal entities are incapable **[**45]** of concerted action for the purposes of *Section 1* and must be viewed as a single entity. *467 U.S. at 771*.

"*Section 1* is only concerned with concerted conduct among separate economic actors rather than their independent or merely parallel action;" therefore, it generally does not apply to the actions of single entities. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n, 776 F.3d 321, 327 (5th Cir. 2015)*; *see also* *Am. Needle, 560 U.S. at 195*. However, the Supreme Court has "repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Am. Needle, 560 U.S. at 195*. The "key" consideration is whether the agreement "joins together 'separate decisionmakers,' *i.e.*, 'separate economic actors pursuing separate economic interests.'" *Abraham & Veneklasen Joint Venture, 776 F.3d at 327-28* (quoting *Am. Needle, 560 U.S. at 195*). "If so, then the agreement may 'deprive[ ] the marketplace of independent centers of decisionmaking[.]'" *Id. at 328* (quoting *Am. Needle, 560 U.S. at 195*).

It is undisputed that when Defendants merged the Blue Cross and Blue Shield Associations, they formed a single entity to license the Blue Marks. But this undisputed fact is not dispositive because "competitors are not allowed to make an otherwise horizontal agreement vertical by merely setting up a licensing corporation to 'impose' market-dividing agreements on **[**46]** its licensee-stockholders. 'We seek the central substance of the situation, not its periphery; and in this pursuit, we are moved by the identity of the persons who act, rather than the label of their hats.'" *Abadir & Co. v. First Miss. Corp., 651 F.2d 422, 426 (5th Cir. 1981)* (quoting *Sealy, 388 U.S. at 353*); *see also* *N.C. State Bd. Of Dental Examiners v. F.T.C., 717 F.3d 359, 372 (4th Cir. 2013)*, *aff'd*, *135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)* ("[T]he Board's status as a single entity is not dispositive because '[c]ompetitors "cannot simply get around" antitrust liability by acting "through a third-party intermediary or joint venture."'") (internal quotation marks omitted) (quoting *Am. Needle, 560 U.S. at 202*) (in turn quoting *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 336* ***[*1264]*** *(2d Cir. 2008)* (Sotomayor, J., concurring in judgment))).

Defendants argue that Plaintiffs' *Section 1* claims fail as a matter of law because Defendants operate as a single entity with respect to the governance of the Blue Marks. (Doc. # 1349 at 28). Defendants argue that, although the Plans are separate entities for operational purposes, the court must employ a functional approach to the inquiry. As to trademark enforcement, Defendants argue, they are a single entity because the Association now owns the Blue Marks and is responsible for licensing and protecting those Marks.

Plaintiffs argue that the facts show as a matter of law that Defendants are not a single entity. (Doc. # 1435 at 35-36). They argue that the Supreme **[**47]** Court in *American Needle reversed* the Seventh Circuit's decision, which had found that "single entity" status could be applied on a function-by-function basis.[11] (*Id.* at 36). Moreover, they contend that the facts here are "conspicuously *incompatible* with the notion that the BCBSA and its members are incapable of conspiring." (*Id.*) (emphasis in original).

In *American Needle*, the National Football League formed a corporate joint venture, National Football League Properties ("NFLP"), to manage its intellectual property. The NFLP initially granted nonexclusive licenses to several vendors to sell apparel with team insignias. Later, it granted an exclusive license to Reebok, thus excluding the plaintiff. *Am. Needle, 560 U.S. at 187*. The excluded plaintiff sued alleging antitrust violations. *Id.* The Court held that the licensing activities of the NFLP with regard to the team marks constituted concerted action within the meaning of *Section 1* of the Sherman Act. The Court concluded that "[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned." *Id. at 198*. The Court **[**48]** found that the NFL and its teams were legally capable of conspiring, because they did "not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action," but rather "compete[d] with one another...to attract fans, for gate receipts and for contracts with managerial and playing personnel." *Id. at 196-97*. The fact that the teams were operating independently through a single corporation did not protect their agreement from *Section 1* scrutiny: "Competitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or joint venture.'" *Id. at 202* (quoting *Salvino, 542 F.3d at 336*).

But *American Needle* does not win the day for Plaintiffs on summary judgment either. Here, the Marks at issue are more analogous to licensing of the league's joint NFL mark, rather than the individual teams' marks which were at issue in the case. *American Needle* left open the question of how the case would have been decided if decisions by the NFLP regarding the jointly owned NFL trademarks had been at issue. *560 U.S. at 201*.

The *Rule 56* evidence here shows that certain Plans initially developed "individual" trademark rights. Then, the Plans purposefully integrated those "individual" assets **[*1265]** **[**49]** into the separate Cross and Shield predecessors. (Doc. # 1349 at 31). Later, those entities applied for and received nationwide, federal trademark registrations and "licensed" the Marks back to the Plans employing ESAs based on the areas where the Plans previously used the Marks.[12]

Only in 1982, with the merger of the Blue Cross and Blue Shield Associations, did the Marks even arguably come under the control of a single entity. (Doc. # 1349-1 at 33). Around that time, Defendants formed a single entity and

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[11] In *Abraham & Veneklasen Joint Venture*, the Fifth Circuit acknowledged that a functional approach is appropriate under *American Needle. Abraham & Veneklasen Joint Venture, 776 F.3d at 328*. But, the "key" inquiry underlying even a functional analysis remains the same: are independent centers of decisionmaking being removed from the market? *Id.* (citing *Am. Needle, 560 U.S. at 195*).

[12] Perhaps it may be more precise to say that this activity is what happened on the Blue Cross side. The parties have not drawn the court's attention to *Rule 56* evidence that indicates what occurred with Blue Shield License Agreements prior to the 1991 License Agreements which were developed after the Assembly of Plans. (Docs. # 1349-8 at 31-32; 1353-48). And, on the Blue Cross side, four Plans (Connecticut, Minnesota, Wisconsin, and Rockford, Illinois) retained the right to their state law trademark rights in their Blue Cross License Agreements. (Docs. # 1353-11 at 8; 1353-101).

Moreover, it is not entirely clear on the present record that the Blue Cross and Blue Shield bodies who applied for the respective federal trademarks had the authority to do so at the time the applications were submitted. Both entities represented that they made those applications with permission from the original users, and there is documentary evidence supporting the idea that permission from other concurrent users was given. But the parties have not drawn the court's attention to documents establishing actual assignments of the individual rights to those entities.

deliberately consolidated undisputedly separate Marks into that entity. However, as the court reasoned in *American Needle*:

> [It] is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. An ongoing *§ 1* violation cannot evade *§ 1* scrutiny simply by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled."

Am. Needle, 560 U.S. at 197 (quoting *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951))*.

Plaintiffs have also presented sufficient evidence to create a genuine issue of material fact as to the validity and/or enforceability of the Marks, and it is the licensing of these Marks that constitutes the "function" for **[**50]** which Defendants claim single entity status. There is also evidence that, among the Plans, even with respect to this particular "function," there are deep disagreements about whether service areas based on the Marks should be exclusive. Defendants' own documents show that certain Blue Plan CEOs believed that they could have protected the Marks without the ESAs. (Doc. # 1352-227 at 69). And, not all common law marks were exclusive. The License Agreements themselves recognize that a "Service Area may overlap areas served by one or more other licensed Blue [] Plans . . . as to which overlapping areas the rights hereby granted are nonexclusive as to such other Plan or Plans only." (Docs. # 1349-8 at 7; 1349-11 at 5).

There is also evidence in the record that, apart from the Blue Plans' ESAs (which are ostensibly based on the Marks), the Blues would be competitors under the Blue brand in the health insurance market. That is, it is genuinely disputed whether even related to this applicable function -- enforcing trademarks -- Defendants are acting as a single entity. A trier of fact could determine that Defendants remain "'separately controlled, potential competitors with economic interests **[**51]** that [are] distinct from [the Association's] financial well-being.'" *Robertson v. Sea Pines Real Estate Companies, Inc., 679 F.3d 278, 286 (4th Cir. 2012)* (quoting *Am. Needle, 560 U.S. at 201*). "[Courts] have repeatedly **[*1266]** found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Am. Needle, 560 U.S. at 191* (citing, *inter alia, Sealy* and *Topco*).

Under these facts, the court cannot say, as a matter of law, whether Defendants' conduct can be shielded by the single entity defense. Because there remain genuine issues of material fact as to whether Defendants operate as a single entity as to the enforcement of the Blue Marks, the parties' respective motions for summary judgment on the single entity defense are due to be denied.

D. The Blues' Geographic Market Allocations

Plaintiffs' first *Section 1* theory is that the Defendant Blue Plans committed a *per se* violation of the Sherman Act when they agreed to allocate geographic markets for the sale of commercial health insurance and/or commercial healthcare financing services.[13] (Docs. # 1082 at ¶ 815; 1083 at ¶¶ 340, 469). Provider Plaintiffs also claim that the Blue Plans allocated geographic markets for the purpose of contracting with health care service **[**52]** providers. (*See* Doc. # 1083 at ¶¶ 323, 469). Both Provider and Subscriber Plaintiffs argue that the geographic market allocations constitute *per se* anticompetitive conduct under *Sealy* and *Topco*. (*See* Docs. # 1350 at 22-29; 1351 at 24-32).

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[13] Provider Plaintiffs describe one facet of the alleged anticompetitive conspiracy as an agreement concerning healthcare financing services because the agreement allegedly concerns fully insured plans and Administrative Service Only ("ASO") plans. (Doc. # 1083 at ¶ 340). In contrast, Subscriber Plaintiffs indicate that ASO plans are not available substitutes for all Subscribers because they are not viable options unless the Subscriber (or his/her group plan) can afford to self-insure. (Doc. # 1082 at ¶ 553).

Defendants, in turn, advance five arguments in support of their position that the geographic market distributions should be analyzed under the rule of reason. First, they insist that the Association's rules, including the ESAs, have plausible procompetitive benefits because they have facilitated the creation of new and unique products. (Doc. # 1349 at 35-41). Second, Defendants claim that the ESAs are procompetitive because they "incentivize Plans to focus on local needs of their members and providers." (*Id.* at 41-42). Third, they argue that courts lack experience with the types of service areas at issue in this case because the service areas "arose organically" from the predecessors to the current Plans use of common law trademarks. (*Id.* at 45-47). Fourth, Defendants contend *Topco* and *Sealy* are distinguishable from the service areas at issue here because (1) the Blue Plans productively cooperate, (2) the Plans owned common law trademark rights in their service areas before **[**53]** the challenged agreement was formed, (3) the Plans have never entered into a naked price fixing agreement like the one in *Sealy*, (4) the commercial health insurance industry is more complex than the industries at issue in *Sealy* or *Topco*, and (5) the defendants in *Sealy* and *Topco* "actively modified territories throughout the conspiracy." (*Id.* at 47-49). Finally, Defendants assert that the challenged restraints are not purely horizontal because some restraints are historically the product of vertical arrangements between insurance plans and the AHA or AMA. (*See id.* at 52-53).

Plaintiffs insist that the Blue Plans' ESAs qualify as *per se* anticompetitive conduct under *Topco* and *Sealy*. While, to be sure, several similarities exist between the market allocations here and those presented in *Topco* and *Sealy*, the court need not decide whether the Blue Plans' service **[*1267]** area allocations alone constitute a *per se* violation of *Section 1*. This is the case because, like *Sealy*, Plaintiffs have presented evidence of an aggregation of competitive restraints -- namely, the adoption of ESAs *and*, among other things, best efforts rules -- which, considered together, constitute a *per se* violation of the Sherman Act. The court explains the **[**54]** reasoning behind this conclusion below.

1. The Association is a Licensee-Controlled Entity, Not a Vertical Licensor

The Blues contend that the Association is a vertical licensor and therefore the court is presented with vertical restraints, not horizontal ones. But that argument is off the mark. The Association's own bylaws demonstrate that the Association is funded and controlled by the Blue Plans, who receive licenses to use the Blue Marks. The licensees are deemed regular members of the Association and pay monthly dues to the Association that are set by a three-quarters licensee vote. (Doc. # 1352-6 at 7, 9). The Association's Board of Directors consists of the CEOs of all licensee Plans and the president of the Association. (*Id.* at 12-13). *Cf. Sealy, 388 U.S. at 352* (explaining that Sealy's directors had to either be a stockholder or a stockholder's nominee). A director can only be removed by a three-quarters vote of the other licensees and a three-quarters weighted vote of the licensees based on dues paid. (Doc. # 1352-6 at 13). Amendments to the Association's bylaws require approval by a three-quarters vote of the licensees and a three-quarters weighted vote of the licensees. (*Id.* at 26). Indeed, the Association describes **[**55]** itself as an organization controlled by the Blue Plans; the Association's training materials for directors state that "Member Plans have the authority to establish or change the constitutional framework or matters that affect fundamental aspects of the Blue System." (Doc. # 1352-48 at 3). *Cf. Sealy, 388 U.S. at 353* (explaining that Sealy's licensees were directly in control of its operations "without even the semblance of insulation"). For these reasons, the court finds the Association is comparable to the licensee-controlled entities in *Sealy* and *Topco*. Thus, the ESAs established by the Association must be examined as horizontal allocations, not vertical ones.

In addition, the undisputed record evidence also reveals that the Blue Plans control the terms of each Blue's License Agreement. The Blue Plans must act collectively "to alter the License Agreement's basic brand principles," but the Board of Directors -- comprised of Blue Plan executives -- possess the authority to amend or add regulations to use of the trademarks. (Doc. # 1352-48 at 5). Indeed, the Blue Plans vote on and approve amendments to the licensing agreements. (Doc. # 1352-164 at 138-39).

At oral argument, Defendants insisted that the Supreme **[**56]** Court's *American Needle* opinion limited the application of *Topco* and *Sealy* to licensor entities that are formalistic shells or sham entities. (Doc. # 1613 at 83-84). The court disagrees.In *American Needle*, the Supreme Court explained that the licensees in *Sealy* and *Topco* had conducted concerted action through agreements made with the licensor firm because the licensees acted based upon interests separate from those of the licensor firm. *560 U.S. at 200*. The Court further explained that such conduct implicates *Section 1* of the Sherman Act because "intrafirm agreements may simply be a formalistic shell for ongoing concerted activity." *Id. at 200-01*. *American Needle* discussed *Sealy* and *Topco* in relation to the single entity defense, not in the context of the *per se* rule established in those cases. And, while *American Needle* explained the policy rationale for holding parties within an entity liable for conduct committed for **[*1268]** their separate interests, it did not expressly limit the scope of *Sealy*'s and *Topco*'s development of the *per se* rule in market allocation cases to instances where the licensor firm merely acts as a formalistic shell. *See id. at 200-01*.

Defendants claim that the service areas arose from either common law trademark rights **[**57]** or plan requirements imposed vertically by the AHA and AMA. (Doc. # 1349 at 52). The court is not persuaded. First, at best, it is disputed whether the AHA or AMA required ESAs as a condition of insurance plan certification in the 1930s and 1940s. Indeed, the AHA's 1946 standards for approval of new Blue Plans only provided that new Blue Cross Plans should not be established in markets that were already served adequately by existing Plans. (Doc. # 1353-5 at 14). Moreover, the AMA's 1947 preliminary standards merely provided that the Plan was required to obtain the approval of the appropriate local or state medical association. (Doc. # 1353-6 at 82). Overlapping service areas existed at the time the AHA and AMA exercised ultimate control over certification. (*See* Doc. # 1353-5 at 19) (discussing the Blue Cross Commission's reluctance to enforce exclusive area requirements and observing "a number of [ ] instances of plans serving the same areas"). (*See also* Docs. # 1353-4 at 27, 32; 1353-5 at 27) (discussing areas where Blue Cross Plans and Blue Shield Plans competed in 1947). Thus, Defendants' insistence that the ESAs were a vertically-imposed condition of AHA or AMA certification is **[**58]** misplaced.

Second, Defendants' focus on the alleged vertical restraints imposed in the 1940s and 1950s disregards the effects wrought by the Long-Term Business Strategy and the Assembly of Plans in the 1980s. The Long-Term Business Strategy provided that all Blue Cross Plans and Blue Shield Plans in a geographic area would merge into one entity by the end of 1985. (Doc. # 1352-164 at 81-82). To facilitate this, the Association directed the chief executive officers of certain Plans to produce a merger table by no later than July 1983. (Doc. # 1352-164 at 81). The Association's representative has acknowledged that the Long-Term Business Strategy factored into the consolidation of Blue Cross and Blue Shield Plans,[14] which also constituted a consolidation of the service areas for those respective Plans. (Doc. # 1352-164 at 85). Likewise, during the Assembly of Plans, the Blue Plans approved amendments to the licensing agreements between the Association and each Plan. (Doc. # 1352-164 at 138-39). For these reasons, the court cannot conclude that the allocation of ESAs reflects conduct by a vertical licensor. Rather, the *Rule 56* evidence in the record supports the proposition that the allocation of **[**59]** areas was the result of the Association's plan to (1) consolidate Blue Cross and Blue Shield Plans and (2) issue new licensing agreements reflecting the competitive restraints agreed to by a majority of the Blue Plans.

2. The ESAs in Which Blue Plans May Sell Blue-Branded Insurance are At Least as Anticompetitive as the Exclusive Sales Areas at Issue in *Sealy* and *Topco*

As in *Sealy* and *Topco*, the Blue Plans entered into licensing agreements whereby **[*1269]** they agreed to only sell branded health insurance plans and related products within a certain geographic region. (*See, e.g.*, Doc. # 1352-49 at 3-4) (1991 Blue Cross license agreement for BCBS-AL). As a condition of these licenses, the Blue Plans explicitly agreed to not sell health insurance plans and services with the Blue Marks outside of their respective geographic service areas. (*E.g., id.* at 5). These license conditions between the Association and the individual Blue Plans are directly comparable to the license conditions enacted by the defendants in *Sealy* and *Topco. Topco, 405 U.S. at 602*; *Sealy, 388 U.S. at 352*.

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[14] Indeed, the Association sent its executives to states with separate Blue Cross and Blue Shield insurance Plans to confer with their executives about the Long-Term Business Strategy. (Doc. # 1352-164 at 86-87). And, Association employees "may have served as mediators" that resolved issues arising during the mergers. (*Id.*). The Association's representative testified that its employees assisted in Plan mergers before the Long-Term Business Plan went into effect. (*Id.* at 87).

Furthermore, as in *Sealy*, the Blue Plans have instituted at least two additional restraints of trade along with the ESAs: they have limited the output of non-branded health insurance and related **[**60]** health financing products by the licensees within the licensee's service area(s), and they have limited the output of non-branded health insurance and related health financing products by the licensees nationwide. (*See* Docs. # 1349-15 at 20-21; 1349-16 at 7; 1349-21 at 5). *See also* *Sealy, 388 U.S. at 354-55* (discussing the aggregation of territorial and price fixing restraints conducted by Sealy). In this respect, the restraints of trade created by the Licensing Agreements and the Association's rules appear even more restrictive than those at issue in *Topco* and *Sealy* because the licensees in those cases remained free to sell any amount of non-branded products. *United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1037 (N.D. Ill. 1970)* (stating that Topco's licensees could expand by using another source of private brands and that the market allocations did not "have an appreciable influence on the decision of Topco members as to whether or not to expand"), *rev'd, Topco, 405 U.S. at 612*; *Sealy, 388 U.S. at 352* (noting that Sealy's licensees could sell private label products wherever they chose to do so). In contrast, here, there are strict limits placed on the volume of non-branded health insurance products the Blue Plans may sell both inside and outside their service areas. The record reveals that, before the Association enacted **[**61]** the National Best Efforts rule, an attorney representing Anthem's predecessors expressed "significant doubt whether, under the antitrust laws, an association like BCBSA *could* lawfully bar members from engaging in unbranded business outside their exclusive territories." (Doc. # 1555-1 at 7). In light of *Sealy* and *Topco*, that attorney's doubts were well founded.

3. Defendants' Attempts to Distinguish Their Licensing Agreements from Those in *Sealy* and *Topco* are Unavailing.

Defendants argue that there are several reasons why the ESAs created by the Licensing Agreements should not be subjected to *per se* review under *Topco* and *Sealy*. But none of these arguments are availing.

i. Unique Product

Defendants contend that the ESAs, along with other rules at issue in this case, facilitate the creation of new health insurance products. (*See* Doc. # 1352 at 36-41). In particular, Defendants claim that the Blue System provides "nationwide healthcare products available to all Blue subscribers and providers, including BlueCard, the Federal Employee Program, Blue Distinction and Blue365." (*Id.* at 37). According to Defendants, the Blue Plans require integrative mechanisms to produce a product for large national employee **[**62]** groups. (*Id.* at 38). They insist that a "new product exception" to the *per se* horizontal market allocation standard applies even in cases where cooperation is not necessary to create the product. (*Id.* at 39). Thus, they say, "[i]f the parties are doing more **[*1270]** than just allocating markets for the sole purpose of stifling competition, the rule of reason governs." (*Id.* at 40).

Defendants compare the nationwide health insurance they offer to the joint licenses created in *Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("*BMI*"), but in doing so they seek to stretch that case far past its moorings. In *BMI*, the antitrust plaintiffs mounted a challenge to blanket music licenses. The Supreme Court recognized that the long history of antitrust cases concerning blanket licenses counseled against *per se* treatment of them. *441 U.S. at 10-16* (describing a consent decree entered into by the Government and one blanket license issuer in 1941, modifications to that consent decree, antitrust suits brought against the blanket licenses, and Congress's approval of similar blanket licenses in the *Copyright Act*). The Court also explained that the market for copyrighted music only existed because of copyright legislation and expressed doubt that those measures granted by Congress which were "reasonably **[**63]** necessary to effectuate the [copyright] rights" could be deemed *per se* violations of the Sherman Act. *Id. at 18-19*. The Court determined that the blanket license sellers provided a different product than the individual copyright holders could offer for at least three reasons: (1) the product included an aggregating service; (2) the license purchaser could immediately use all products covered by the license without conducting individual negotiations; and (3) the license purchaser had greater flexibility in music choices than a purchaser who obtained licenses for individual songs. *Id. at 21-23*. Ultimately, the Supreme Court held that "[j]oint ventures and other cooperative arrangements are not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id. at 23*.

But here, *BMI* does not provide the assistance Defendants covet because, simply stated, they cannot claim they produce a unique product. The market allocations at issue are not necessary to market, sell, or produce health insurance. Insurers offered health insurance benefits on a nationwide scale in the 1940s and 1950s, although at that time they only offered indemnity benefits, not service **[**64]** benefits. (*See* Doc. # 1353-7 at 71) (discussing insurers' ability to offer uniform rates, uniform benefits, and one-stop shopping through indemnity plans). By the 1980s, the Blue Plans' market share, including their share of national health insurance accounts, had decreased because other insurers were able to provide health insurance services to those accounts. (Docs. # 1349-7 at 9-24; 1352-164 at 80-84). The plan to go to ESAs constituted a new marketing/sales strategy, not a new product. The products remain exactly the same — commercial insurance and insurance services. Thus, Defendants cannot rely on *BMI*'s unique product defense to foreclose application of the *per se* rule.

Defendants contend that, because the *Rule 56* record does not indicate that the national insurers offer products in all areas of all fifty states, other national insurers do not offer the same products as they do (or even similar ones). (Doc. # 1432 at 17). This argument fails to account for the Blues' sale of health insurance policies on a national scale well before the market allocations were implemented in the 1980s. The Blues offered a similar health insurance product -- through syndicates and with open provider networks **[**65]** -- both before and after the alleged allocations of markets; therefore, it cannot be said that the market allocations were *necessary* to market **[*1271]** the Blues' health insurance product at all. *Cf. BMI, 441 U.S. at 23*. At most, Defendants' argument indicates that the Blues' agreement has permitted them to offer a product (and, to be clear, it is precisely the same product — health insurance) in a more attractive manner. That argument does not establish, though, that the ESAs are necessary to provide health insurance or health insurance services.[15]

ii. Cooperative Ventures

Defendants next seek to compare their collaboration through the Association and the accompanying geographic market allocations to the market allocations analyzed under the rule of reason by the Supreme Court in *F.T.C. v. Actavis, 570 U.S. 136, 133 S. Ct. 2223, 186 L. Ed. 2d 343 (2013)*, and by the Eleventh Circuit in *Procaps*. Neither analogy convinces the court to depart from the Supreme Court's on-point precedents in *Sealy* and *Topco*. As an initial matter, the *Actavis* opinion addressed a monopolization claim under the *Federal Trade Commission Act*, not a market allocation claim under *Section 1* of the Sherman Act. *133 S. Ct. at 2229-30*. Moreover, the Supreme Court recognized that the value of patent settlements and patent litigation **[**66]** problems counseled in favor of allowing reverse payment patent settlements. *Id. at 2234*. In rejecting the FTC's requested quick look standard, the Court determined that reverse payment settlements are sufficiently complex to warrant analysis under the rule of reason. *Id. at 2237-38*. Thus, while a reverse payment patent settlement can technically be construed as a market allocation in favor of one settling party, nothing in *Actavis* hints that horizontal geographic market allocations, such as those at issue here, are to be analyzed under the rule of reason.

Admittedly, unlike *Actavis*, the *Procaps* opinion addressed a complaint attacking an actual market allocation scheme. *Procaps, 845 F.3d at 1079*. Yet, *Procaps* involved allegations about a unique, unorthodox allocation. Procaps and Patheon were each involved in the market for softgel services and entered into a joint venture. *Id. at 1077-78*. Thereafter, Procaps filed suit under the Sherman Act against its former joint venture partner, Patheon, alleging that Patheon's acquisition of another player in the softgel industry, Banner, violated *Section 1* of the Act. *Id. at 1078-79*. Procaps specifically alleged that Patheon's acquisition of Banner placed Patheon in direct competition

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[15] Defendants' reliance on *American Needle* and *NCAA* is also unavailing with regard to the ESAs at issue here. Both *American Needle* and *NCAA* recognized that rule of reason analysis was appropriate in those cases because they concerned sports leagues, in which collaboration between competitors is essential to creating any product at all. *American Needle, 560 U.S. at 202-03*; *NCAA, 468 U.S. at 101-02*. The very existence of the national health insurers against whom the Blue Plans compete shows that collusion between competitors is not essential to the sale of health insurance.

with Procaps, thus transforming the parties' **[**67]** legitimate joint venture into a *per se* illegal horizontal restraint. *Id. at 1079*. The Eleventh Circuit held that the scheme presented by the plaintiff did not reflect any concerted action proscribed by *Section 1*. *Id. at 1081-82*. Alternatively, it upheld the summary judgment entered against Procaps on the ground that there was no proof of anticompetitive effects of the alleged market restraint. *Id. at 1082*. The Eleventh Circuit declined to apply the *per se* market allocation rule reiterated in the Supreme Court's *Palmer* decision because the agreement at issue involved an alleged procompetitive joint venture that the plaintiff claimed became anticompetitive in light of the defendant's subsequent unilateral conduct. *Id. at 1082-84*. That limited distinction of the *per se* rule's application in *Topco, Sealy*, and *Palmer* does not apply here.

[*1272] E. National Best Efforts

The alleged scheme at issue here is not limited to Defendants' use of ESAs standing alone. As Subscribers point out, "there is more." (Doc. # 1351 at 32). In addition to allocating geographic markets through their use of ESAs, Defendants have developed additional rules which place added restraints on the Plans' ability to compete, and not only with each other.

The National Best Efforts rule, **[**68]** implemented in 2005, requires a Plan to derive at least sixty-six and two-thirds percent (66 2/3%) of its national health insurance revenue from its Blue brand. (Doc. # 1349-16 at 7). Thus, any health revenue a Blue Plan may generate from services offered under any non-Blue brand is limited in relation to its Blue branded health revenue. (Doc. # 1432 at 20-21). The National Best Efforts rule, therefore, operates as an output restriction on a Plan's non-Blue brand business.

"An agreement which has the purpose and effect of reducing output is illegal under *§ 1* of the Sherman Act." *A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 247 (3d Cir. 2001)* (collecting cases). "Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal per se' approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.'" *NCAA, 468 U.S. at 100* (quoting *BMI, 441 U.S. at 19-20*).

Defendants have largely defended their ESAs as incidental to trademark rights. But there is nothing in the *Rule 56* record which indicates that there is any valid connection between trademark rights and the National Best Efforts rule. **[**69]** The rule specifically restrains the Plans' ability to compete under *non-Blue* brands. This output limitation is separate from the limits related to ESAs, which prohibit the Blue Plans from competing, and thus earning revenue, outside of their area under their Blue brands.

Defendants argue that the National Best Efforts rule is not properly viewed as an output restriction because the rule leaves Plans plenty of "headroom" to compete under non-Blue brands. (Doc. # 1349 at 44). They also argue that the National Best Efforts restriction on competition under non-Blue brands generates plausible procompetitive benefits, such as "promot[ing] collaboration among Plans, encourag[ing] Plans to invest in the Blue Marks, and prevent[ing] transfer of the immense goodwill associated with the Blue Marks to other brands." (Doc. # 1556 at 41-42). The fact remains, however, that the rule places a limit on the revenue a Plan can earn under a non-Blue brand. The fact that the National Best Efforts rule imposes a relative limit, rather than an absolute limit (Doc. # 1432 at 52), is of no moment. It constitutes a limit or a restriction on the volume (output) of a Plan's non-Blue business. Thus, there is little **[**70]** question that, properly analyzed, the National Best Efforts rule is an output restriction.

Output restrictions have been called one of the "most important per se categories," along with naked horizontal price-fixing and market allocation. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 61 (1st Cir. 2004)* (citing *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993))*; *see also* *Xcaliber Int'l Ltd. LLC v. Atty. Gen. State of La., 612 F.3d 368, 375 (5th Cir. 2010)* (monopolization, price fixing, territorial divisions, output restrictions, group boycotts, and refusals to deal are considered pernicious to competition and, with **[*1273]** the exception of monopolization, are generally considered *per se* violations of the antitrust laws). In this case, a number of these "most important" *per se* categories of restrictions have been aggregated.

The court acknowledges that, in *NCAA* and *BMI*, the *per se* rule was not applied to the particular output restrictions presented under the unique facts of those cases. Indeed, the restraints in those cases were "essential if the product was to be available at all." *NCAA, 468 U.S. at 100*; *see also* *BMI, 441 U.S. at 24* . But that is not the situation here. The National Best Efforts restrictions on non-Blue brand business clearly are not necessary for the product to be "available at all." Health insurance is regularly made available to consumers without such restraints. And, similarly, it is made available in a national **[**71]** market by the National Insurers without any such restrictions. Importantly, it was available from Defendants without the National Best Efforts rule until 2005. (Doc. # 1349-21 at 5).

The undisputed evidence before the court establishes that, in 2005, Defendants adopted the National Best Efforts rule placing an output restriction on a Plan's non-Blue business. Defendants' National Best Efforts rule limits the extent to which the Plans can compete with Blue branded business under non-Blue marks. Whether the National Best Efforts rule benefitted the Plans' Blue branded business "is irrelevant. ... [Defendants have] no authority under the Sherman Act to determine the respective values of competition in various sectors of the market." *Garot Anderson Agencies, Inc. v. Blue Cross & Blue Shield United of Wis., 1993 U.S. Dist. LEXIS 3446, 1993 WL 78756, at *12 (N.D. Ill. Feb. 26, 1993)* (citing *Topco, 405 U.S. at 610-11*). Here, the National Best Efforts rule constitutes a *per se* violation of the Sherman Act, particularly when layered on top of other restrictions Defendants have placed on competition.[16]

F. BlueCard

Provider Plaintiffs (but not Subscribers) have also mounted a challenge to Defendants' BlueCard program. In particular, Providers assert that the BlueCard program constitutes a horizontal price fixing agreement and a group boycott. The court analyzes **[**72]** the standard of review that applies to each of these claims, in turn.

1. BlueCard as Price Fixing

Provider Plaintiffs argue that the BlueCard program constitutes horizontal price fixing and base that assertion on the following contentions: (1) BlueCard requires a health care provider who desires to enter the BlueCard network (and serve as an in-network provider for a Blue Plan) to agree to accept certain provider rates from each Blue Plan (note: this limits a provider's ability to negotiate different rates with various Blue Plans); (2) the Blue Plan Defendants have agreed that they will not pay any provider a different rate than the rate negotiated by the in-area Blue Plan; and (3) the Blue Plans are prohibited from negotiating separate contracting agreements with providers outside of their licensed area(s) for provision of health care services to Blue Cross and Blue Shield subscribers. (Doc. # 1350 at 30-31). According to Provider Plaintiffs, this set of agreements "completely eliminate[ ] the **[*1274]** possibility of price competition among the Blues for providers' services."[17] (*Id.* at 31).

In response, Defendants insist that application of the *per se* price fixing rule is limited to situations where **[**73]** conspirators preset prices between themselves. (Doc. # 1432 at 55). According to Defendants, the BlueCard

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[16] While Plaintiffs have not pressed the issue in this set of motions, the court notes the existence of the Local Best Efforts rule but does not address whether it is part of the aggregation of trade restraints addressed in this opinion, including the ESAs and the National Best Efforts rule. The court reserves that question of whether the Local Best Efforts rule is a *per se* Sherman Act violation in isolation.

[17] At oral argument, the court noted that the BlueCard program consists of two sets of agreements: (1) agreements between Providers and their in-state Blue Plans to enter the Blue provider network for health care services at a particular price; and (2) agreements between the Blue Plans, through the Association, which establish the rules and procedures for BlueCard and set a fixed price for Provider services based on the rate negotiated by an in-state Blue Plan. Provider Plaintiffs agreed that they are challenging the latter category of agreements, not the former. To be sure, if they had challenged the former category of agreements between providers and Blue Plans, those agreements clearly would not constitute "price fixing" for purposes of the Sherman Act. *See* *Levine, 72 F.3d at 1548* (holding that a buyer network does not engage in price fixing prohibited by the Sherman Act if it agrees on a maximum price it is willing to pay for a product and sellers decide whether to accept that price).

program should be analyzed as a joint purchasing agreement. (*Id.* at 56). Defendants also insist that the court should not analyze the BlueCard program under a *per se* price fixing rule because the program offers significant procompetitive benefits. (*Id.* at 57). These claimed procompetitive benefits include: (1) access to high-quality insurance products with a local focus, broad provider networks, and competitive premiums; (2) access to a nationwide patient volume for health care providers; and (3) "prompt payments, ease of claims processing[,] and lower administrative costs." (Doc. # 1349 at 43).

In reply, Provider Plaintiffs argue that price fixing does not require the conspirators to agree on a specific price. (Doc. # 1557 at 25). They distinguish the agreements forming the BlueCard program from joint-purchasing agreements because (1) the agreements are related to the ESAs established by the Licensing Agreements, (2) the Blue Plans use the ESAs to create local monopolies, and (3) the lower provider prices obtained through the Blues' alleged monopolistic conduct are shared with other Plans. (*Id.* **[**74]**).

It is axiomatic that horizontal price-fixing schemes are *per se* violations of the Sherman Act. *See* *All Care Nursing Serv., Inc. v. High Tech Staffing Servs., 135 F.3d 740, 746 (11th Cir. 1998)*; *Dagher, 547 U.S. at 5*. Price fixing schemes violate the Sherman Act whether committed by sellers or buyers of goods and services. *All Care Nursing, 135 F.3d at 747* (citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 233-37, 68 S. Ct. 996, 92 L. Ed. 1328 (1948))*. And, the Supreme Court has broadly defined price fixing to include any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*.

At the same time, the court recognizes that not all agreements between competitors that affect prices may be deemed price fixing. *All Care Nursing, 135 F.3d at 747* (quoting *BMI, 441 U.S. at 23*). For example, in *All Care Nursing*, the Eleventh Circuit held that a preferred provider network of contract nurses did not qualify as a *per se* price fixing scheme because (1) all contract nursing agencies in the geographic area could submit bids to the provider network, (2) the nursing agencies could provide services to the hospitals in the preferred provider network if preferred agencies could **[*1275]** not meet the hospitals' demand, and (3) the nursing agencies in the provider network could leave the network if market conditions favored doing so.[18] *Id. at 747-48*.

Pricing decisions within a legitimate **[**75]** joint venture between competitors also do not constitute *per se* violations of the Sherman Act. *Dagher, 547 U.S. at 8*. Such a joint venture is considered a single firm for purposes of making pricing decisions if "persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Id. at 6* (quoting *Maricopa County, 457 U.S. at 356*). This is so even if the joint venture sets prices and sells products under multiple brands used by the competitors that established the joint venture. *Id. at 6-7* (explaining that such pricing decisions should be challenged under the rule of reason, not the *per se* standard).

Cooperative purchasing arrangements also do "not necessarily stifle competition," as they can be used by purchasers to "exploit[ ] the productive efficiencies that result from conducting business on a larger scale." *N. Jackson Pharmacy, Inc. v. Caremark RX, Inc., 385 F. Supp. 2d 740, 747 (N.D. Ill. 2005)* (quoting Roger D. Blair & Jeffrey L. Harrison, *Monopsony:* ***Antitrust Law*** *and Economics* 93-94 (1993)). Of course, such agreements also can allow competitors to exploit their monopsony power by driving prices below competitive levels. *Id.* (quoting Blair & Harrison, *Monopsony* at 93-94). In *North Jackson Pharmacy*, the court determined the type of cooperative purchasing conducted by the defendant, a pharmacy **[**76]** benefits manager, by analyzing whether the cooperative purchasing agreement was an ancillary restraint to a larger productive enterprise or a mere naked restraint between competitors. *Id.* It determined that the cooperative purchasing conducted by the pharmacy benefits manager must be analyzed under the rule of reason, not a *per se* standard, because (1) the benefits manager likely was able to lower prices through economies of scale, (2) the Federal Trade Commission had analyzed a merger conducted by the benefit manager and had found a low likelihood of monopsony in the relevant

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[18] Providers have maintained throughout these actions that it is not feasible for Alabama Providers to forgo entering the BlueCard Provider network due to the Blues' overwhelming market share in Alabama. (*See, e.g.*, Doc. # 1613 at 34-35).

market, and (3) the agreement at issue was one likely to produce lower consumer prices in the short term.[19] *Id. at 749-50*.

[*1276] Here, Provider Plaintiffs do not present a classic price fixing scheme in which the competitors preset prices for purchasing goods between themselves. *Cf. Maricopa Cty., 457 U.S. at 335-36* (addressing a maximum fee schedule set by physicians for health services). Rather, they challenge an agreed set of rules whereby prices for healthcare services paid by the entire group of Blue Cross and Blue Shield insurers -- all 36 separate Blue entities -- are set **[**77]** by negotiations between a provider and its in-state Blue Plan. Moreover, the Blue Plans have agreed to not negotiate with health care providers unless they operate within a Blue Plan's ESA or in a contiguous county. While the court recognizes that concerted activity can qualify as *per se* price fixing in the absence of preset prices, *see Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)* (applying *per se* horizontal price fixing standard to horizontal agreement to not provide credit to purchasers), the cooperative integration at the heart of the BlueCard program requires more detailed review.

Like a joint venture, the Blue Plans have integrated certain assets to create the BlueCard program. They have agreed to integrate their best provider networks into BlueCard and to allow other Blue Plans access to their best provider discounts. (*See* Docs. # 1431-30 at 4; 1431-32 at 4). Moreover, like a joint venture, the Blue Plans share a significant degree of opportunities for profit and risks of loss by relying on the BlueCard program, rather than independent negotiations, to obtain discounted provider rates. *Cf. Dagher, 547 U.S. at 6*. If a Blue Plan in a particular area negotiates particularly well with the health care providers in that area and obtains above-average **[**78]** discounts, then the other Blue Plans also receive the benefit of those discounts. But, if a Blue Plan in another area performs poorly in its provider negotiations and secures below-average discounts, then the other Blue Plans pay the higher-than-average costs for health care services. The similarities between the integrative aspects of the BlueCard program and a traditional joint venture weigh in favor of applying the rule of reason to Provider Plaintiffs' price fixing claims based on that program.

Finally, as *North Jackson Pharmacy* explains, cooperative purchasing arrangements between competitors can have procompetitive and anticompetitive effects. *385 F. Supp. 2d at 747*. They can allow purchasers to obtain the benefits of economies of scale, or they can allow purchasers to coerce suppliers into offering below-competitive prices for products. Given the plausible procompetitive benefits of the BlueCard program, Provider Plaintiffs' price fixing claims are due to be analyzed under the rule of reason, even though the Blue Plans arguably have pegged prices for services provided to out-of-state Blue Plans to those negotiated by the in-state Blue Plan.[20]

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[19] In *North Jackson Pharmacy*, the court also noted a judicial hesitancy to interfere with cooperative arrangements in the health care industry and this concern served as its final rationale for applying the rule of reason to the Sherman Act claims against the pharmacy benefits manager. *385 F. Supp. 2d at 750* (quoting *Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 931 (1st Cir. 1984)* (Breyer, J.)). Several Eleventh Circuit opinions have expressed a similar reluctance to apply *per se* antitrust standards to restrictive practices performed in the health care industry. *See All Care Nursing, 135 F.3d at 748* (declining to apply the *per se* group boycott rule against a preferred provider network because a recognized history of anticompetitive effect did not exist "for health-care preferred-provider programs"); *Levine, 72 F.3d at 1550-51* (declining to apply the *per se* group boycott rule to multiprovider networks, in part because the Department of Justice had determined that it lacked sufficient experience with such networks to provide a formal policy regarding them). But, in *Maricopa County*, the Supreme Court expressly rejected the argument that the *per se* price fixing rule should not be applied to the price list at issue because of the judiciary's lack of experience with the health care industry. *457 U.S. at 349-51*. Likewise, the Court rejected the assertion "that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation." *Id. at 351*. In accordance with *Maricopa County,* this court does not believe that any quirks unique to the health care industry, standing alone, justify application of the rule of reason to the alleged price fixing agreements challenged in Provider Plaintiffs' claims regarding BlueCard.

[20] Again, it is noteworthy that Subscriber Plaintiffs do not challenge BlueCard as an antitrust violation. This *may* prove significant. Recently, the Supreme Court granted *certiorari* to review the application of the Sherman Act to two-sided platforms that unite distinct yet interrelated groups of customers. ***Ohio v. American Express Co., 138 S. Ct. 974, 200 L. Ed. 2d 217 (S. Ct. argued 2018)***. The *American Express* case concerns the credit card market, not the health insurance market. The Second Circuit held -- based in part on the parties' agreement -- that the *Section 1* Sherman Act claims in ***[**79]*** *American Express* are to be analyzed under the rule of reason. *United States v. Am. Express Co., 838 F.3d 179, 195-96 (2d Cir. 2016)*, *cert. granted sub. nom,* ***Ohio***

[*1277] 2. BlueCard as Group Boycott

At oral argument, Provider Plaintiffs asserted that the BlueCard program constitutes a group boycott because the Blue Plans "all agreed [ ] that as a Blue they will not contract with providers outside their service area." (Doc. # 1613 at 29). Although the group boycott claim is not discussed at depth in the parties' summary judgment briefs, the court will address it here. After careful review, the court determines that more evidentiary submissions will be required to determine the appropriate standard of review for the group boycott claims.

The Eleventh Circuit has recognized that certain group boycotts constitute *per se* **[*1278]** violations of the Sherman Act. *All Care Nursing, 135 F.3d at 746*. Yet, the Eleventh Circuit has also echoed the Supreme Court's caution against expanding the group boycott *per se* rule, as "[n]ot all concerted refusals to deal are predominantly anticompetitive." *Id. at 748* (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*). Group boycotts generally are only subjected to a *per se* analysis if (1) the boycott blocks access to a necessary product, facility, or market for competition, or (2) if the boycotting firms possess market power within the relevant market. *Id.* ***[**80]*** (quoting *Nw. Wholesale Stationers, 472 U.S. at 294*). Thus, "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Nw. Wholesale Stationers, 472 U.S. at 296*.

At this stage, neither Provider Plaintiffs nor Subscriber Plaintiffs (in connection with any other claim) have established Defendants' market power over a particular market which is the subject of the alleged group boycott against health care providers. *Cf. Nw. Wholesale Stationers, 472 U.S. at 296*. Nor have Plaintiffs pointed to an element of the market that the Blue Plans exclusively control. *Cf. id.* Because Plaintiffs have not shown that the undisputed evidence establishes at least one of these two predicate facts, the court must review the alleged boycott of health care providers and services outside of a particular Blue Plan's service area under the rule of reason.[21] *All Care Nursing, 135 F.3d at 748-49*; *Retina Assocs., P.A. v. S. Baptist Hosp. of Fla., Inc., 105 F.3d 1376, 1381 (11th Cir. 1997)*; *Levine, 72 F.3d at 1550*; *F.T.C. v. Ind. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*.

G. Trademark Uncoupling Rules

In their summary judgment papers, Subscriber Plaintiffs briefly argue that the Association's restrictions on the use of trade names that have been used in conjunction with a Blue Mark are *per se* violations of the Sherman Act. (Doc. # 1351 at 36-38). Subscriber Plaintiffs **[**81]** insist that the trade name restriction is analogous to a horizontal market allocation because (1) the trade name restraint was instituted in 1999, and (2) the Blue Plans would commit a *per se* violation of the Sherman Act if they agreed to not compete with each other in certain areas using their individualized trade names. (*Id.* at 37).

Defendants respond that the "uncoupling rules" are not analogous to geographic market allocations because they prevent a Blue Plan from independently using any trade name that has been associated with the Blue Marks

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v. Am. Express Co., 138 S. Ct. 355, 199 L. Ed. 2d 261 (2017). The court does not address here whether any market at issue in this case can be characterized as a two-sided market, nor does the court discuss whether that characterization would affect a determination of whether to apply a *per se* or rule of reason standard. But it will be worth seeing what the Supreme Court has to say in its *American Express* decision.

[21] The court also may need to consider plausible procompetitive benefits of the type of boycott alleged in this action before determining whether the group boycott is subject to *per se* review. *See Levine, 72 F.3d at 1550-51* (declining to apply a *per se* boycott standard to a multiprovider network because the Department of Justice had decided that it lacked sufficient experience with such entities to promulgate a formal antitrust policy); *Diaz v. Farley, 215 F.3d 1175, 1183-84 (10th Cir. 2000)* (discussing the possible procompetitive benefits of an alleged boycott against anesthesiologists at a particular hospital and the need for caution in antitrust analysis of professional health care).

nationwide. (Doc. # 1432 at 54). Moreover, Defendants claim that the rule was adopted for a procompetitive purpose and that it falls within the Association's rights as the trademark holder and licensor. (*Id.* at 54-55). Although this issue may have been under-briefed, the court is inclined to find, upon its initial review, that the uncoupling rules are subject to a rule of reason analysis.

In 1999, the Association's Board of Directors voted to recommend the uncoupling rules for distinguishing words and symbols used alongside the Blue Marks.[22] (Doc. # 1433-5 at 15-21). In their simplest application, the uncoupling rules prevent a Blue Plan from using a trade name with **[**82]** the Blue Marks and then using the same trade name to sell another health care service product without the Blue Marks. (Doc. # 1433-5 at 16, 18-19). They also prohibit the Blue Plans from using unique words and symbols associated with products sold under the Blue Marks to sell non-branded health care service products. (*Id.* at 17-18). The rules do not apply to certain tag lines approved in advance by the Association, joint advertising ventures with non-Blue entities approved by the Association, or the sale, marketing, and administration of products other than core health care products and services. (*Id.* at 18-19).

Subscriber Plaintiffs refer to the uncoupling rules as agreements not to compete, but they are actually more similar in substance to trademark agreements between competitors. Thus, the Second Circuit's analysis of restrictive trademark agreements in *Clorox Company v. Sterling Winthrop, Inc., 117 F.3d 50 (2d Cir. 1997)* is instructive. There, the producers of Pine-Sol branded products and Lysol branded products had entered into a series of agreements that restricted the products to be sold under the Pine-Sol trademark and limited when they could be promoted as disinfectants. *117 F.3d at 53-54*. After the parties entered into their trademark agreement, Clorox purchased the Pine-Sol assets **[**83]** and challenged the limitations on use of the Pine-Sol trademark under *Sections 1* and *2* of the Sherman Act. *Id. at 54*. The Second Circuit held that the trademark agreement between Lysol's and Pine-Sol's producers was to be examined under the rule of reason because (1) trademark agreements are favored by courts, (2) trademark agreements that regulate use of competing trademarks are distinguishable from trademark agreements "that in reality serve to divide markets," and (3) the agreement presented there did not create a *per se* antitrust violation, such as price fixing, market division, or a group boycott. *Id. at 55-56*.

The trademark restrictions created by the uncoupling rules in this litigation are substantially similar to those analyzed under the rule of reason in *Clorox*. As the *Clorox* court noted, the uncoupling rules restrain independent competitors from using trademarks for particular products, **[*1279]** but they do not restrain competitors from selling products under other brands or trademarks. (Those restrictions were put in place by other Assocation rules, as discussed above.) Subscriber Plaintiffs characterize the trade name uncoupling rule as an "absolute prohibition on the use of individualized trade names that have **[**84]** previously been used in conjunction with the Blue Marks" (Doc. # 1351 at 37), but a review of the uncoupling rules reveals that the Blue Plans are only prohibited from using the trade names for the sale of certain core health insurance products and services. Thus, the trade name uncoupling rule is analogous to the trademark agreement in *Clorox*, which restricted Pine-Sol's owner from using that name in connection with certain cleaning and disinfecting products. *Cf*. *117 F.3d at 53-54*. These rules are not "naked" agreements between competitors (*i.e.*, the Blue Plans). That is, the rules are not simply reciprocal agreements between the Blues to not use their trade names associated with the trademarks. Rather, the *Rule 56* evidence shows that the rules are intended to protect the strength of the Blue Marks by preventing the transfer of goodwill in the Blue Marks to other unique marks created by an individual Blue Plan. (Doc. # 1436-27 at 248-49). Because the record does not show that the uncoupling rules were used to effectuate a *per se* antitrust violation, and the uncoupling rules have potential procompetitive benefits (*i.e.*, preventing the transfer of goodwill), the uncoupling rules do not fall within a category **[**85]** of *per se* restraints under the Sherman Act.[23]

IV. Conclusion

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[22] During that same meeting, the Board of Directors endorsed a monetary sanctions program for violations of the Licensing Agreements. (Doc. # 1433-5 at 33-35).

[23] In light of the parties' sparse briefing on the uncoupling rules, the court need not decide -- and does not decide -- whether the uncoupling rules are part of the aggregate of restraints of trade connected to the Blues' ESAs. *Cf.* *Sealy, 388 U.S. at 354-56*.

The Supreme Court jealously guards the precedential effect of its opinions. This is even true in ***antitrust law***, where the economic principles of competition policy are subject to continual evolution. The Supreme Court has specifically cautioned district courts and appellate courts against reading the tea leaves and predicting which antitrust precedents are now disfavored. *See* *State Oil, 522 U.S. at 20* (commending the court of appeals for applying the precedential opinion at issue because "it is [the Supreme Court's] prerogative alone to overrule one of its precedents"). And the Eleventh Circuit has abided by that guidance in antitrust cases. *See, e.g.,* *Major League Baseball v. Crist, 331 F.3d 1177, 1188-89 (11th Cir. 2003)* (holding that the "business-of-baseball exemption" preempted a state-law antitrust action against Major League Baseball and baseball clubs, and commenting that the court had no choice but to apply the exemption "[a]s an intermediate appellate court"); *Prof'l Baseball Sch. & Clubs, Inc. v. Kuhn, 693 F.2d 1085, 1085-86 (11th Cir. 1982)* (affirming the dismissal of an antitrust suit concerning the business of minor league baseball, but describing the business-of-baseball exemption as "anomalous"). Today, the court faithfully applies *Sealy* and *Topco* to the *Rule 56* record before it and determines **[**86]** that, in navigating the antitrust landscape in this case, those decisions and their progeny remain polestars. Thus, the court concludes that Defendants' aggregation of a market allocation scheme together with certain other output restrictions is due to be analyzed under the *per se* standard of review. Having said that, BlueCard and other alleged *Section 1* violations are due to be analyzed under the Rule of Reason. An Order consistent with this Memorandum Opinion will be entered.

[*1280] **DONE** and **ORDERED** this April 5, 2018.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

[Henderson v. MTC Fin. Inc.](#)

United States District Court for the Northern District of California

April 6, 2018, Decided; April 6, 2018, Filed

No. C 17-03815 JSW

Reporter

2018 U.S. Dist. LEXIS 235663 *; 2018 WL 10582120

CHARLES HENDERSON, Plaintiff, v. MTC FINANCIAL INC. dba TRUSTEE CORPS, JPMORGAN CHASE BANK, N.A., and DOES 20, inclusive, Defendants.

Core Terms

alleges, borrower, motion to dismiss, amended complaint, servicer, mortgage, modification, injunctive, declaration, pleadings, damages, motion to strike, cause of action, recorded, default, Notice, unfair

Counsel: **[*1]** For Charles Henderson, Plaintiff: Vartkes Artinian, LEAD ATTORNEY, B&D Law Group, Los Angeles, CA USA; Helen Quan, Michael Avanesian, JT Legal Group, APC, Glendale, CA USA.

For Jpmorgan Chase Bank, N.A., Defendant: John Douglas Freed, LEAD ATTORNEY, Davis Wright Tremaine LLP, San Francisco, CA USA; Joseph Edward Addiego, III, Davis Wright Tremaine LLP, San Francisco, CA USA.

Judges: JEFFREY S. WHITE, UNITED STATES DISTRICT JUDGE.

Opinion by: JEFFREY S. WHITE

Opinion

ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT

Now before the Court is the motion to dismiss and motion to strike the amended complaint filed by Defendant JPMorgan Chase Bank, N.A. ("Chase"). Having carefully reviewed the parties' papers, considered their arguments, and the relevant legal authority, and good cause appearing, the Court GRANTS Chase's motion to dismiss.

BACKGROUND

Plaintiff Charles Henderson alleges that in December 2004, he financed property located at 1426 9th Avenue in Oakland, California (the "Property") with a loan in the amount of $222,500 and executed the Deed of Trust ("DOT") to act as security for the loan. (*See* Amended Complaint ¶ 16, Ex. A.) On December 19, 2012, after Plaintiff's failure to pay on the loan, Chase issued a Notice **[*2]** of Default ("NOD") and a Notice of Trustee's Sale ("NOS") pursuant to the DOT. (*Id.* ¶ 19, Ex. C.) The NOD indicates that Plaintiff defaulted on the loan secured by the DOT in August 2012.

On May 10, 2017, Chase caused the NOS to be recorded with the Alameda County Recorder, which indicated that Plaintiff had an unpaid principal balance and costs in amount of $188,518.24. (*Id.* ¶ 20, Ex. D.) Plaintiff alleges that Chase failed to make the required pre-foreclosure contact with him prior to recording the NOD or the DOS. (*Id.* ¶¶

21-23.) However, Plaintiff attaches Chase's declaration of compliance, stating that Chase had "tried with due diligence but was unable to contact the borrowed to discuss the borrower's financial situation and to explore options for the borrower to avoid foreclosure as required by *Cal. Civ. Code Section 2923.5*." (*Id.*, Ex. C.)

In his amended complaint, Plaintiff adds facts tending to show that, as a result of missing two mortgage payments and being denied a modification, Plaintiff had to file for Chapter 13 bankruptcy in June of 2013, and a bankruptcy plan was confirmed on July 18, 2013. (*Id.* ¶ 30.) Plaintiff contends that in the bankruptcy proceedings, Chase filed a "Response to Notice of Final **[*3]** Cure Payment" which stated that Plaintiff had cured his pre-petition default, but remained in default with regard to his post-petition arrearages. (*Id.* ¶¶ 33-35.) Although Plaintiff apparently objects to the Response filed by Chase in the bankruptcy matter, he failed to address the issue before the bankruptcy court and instead raises that issue here.

Based on these facts, Plaintiff alleges five causes of action against Chase for violations of *California Civil Code Sections 2923.5*, *2923.6*, *2923.7*, *2924.12*, and violation of the Unfair Competition Law, *California Business and Professions Code Section 17200*.

The Court shall address additional relevant facts in the remainder of its order.

ANALYSIS

A. Legal Standard for Motion to Dismiss.

A motion to dismiss is proper under *Federal Rule of Civil Procedure 12(b)(6)* where the pleadings fail to state a claim upon which relief can be granted. The Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008)*. Even under the liberal pleading standard of *Federal Rule of Civil Procedure 8(a)(2)*, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (citing *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)*).

Pursuant to *Twombly*, a plaintiff must not **[*4]** merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id. at 570*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citing *Twombly, 550 U.S. at 556*). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990)*; *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc., 911 F.2d 242, 246-47 (9th Cir. 1990)*.

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion." *Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994)*, *overruled on other grounds*, *Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)* (citation omitted). However, documents subject to judicial notice may be considered on a motion to dismiss. In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *See Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir. 1986)*, *overruled on other grounds by Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)*. The Court may review matters that are in the public record, including pleadings, orders and other papers filed in court. *See id.*

B. Legal Standard for Motion to Strike.

Federal Rule of Civil Procedure 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." *Fed. R. Civ. P. 12(f)*. "Immaterial matter is that which **[*5]** has no essential or important relationship to the claim for relief or the defenses being pleaded." *Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993)* (internal quotations and citations omitted), *rev'd on other grounds by* *Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*. "Impertinent matter consists of statements that do not pertain, and are not necessary, to the issues in question." *Id.* (internal quotations and citations omitted). In order to show that a defense is insufficient, "the moving party must demonstrate that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." *Securities & Exchange Comm'n v. Sands, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995)*.

Motions to strike are regarded with disfavor because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice. *Cal. Dep't of Toxic Substances Control v. Alco Pac., Inc., 217 F. Supp. 2d 1028, 1033 (C.D. Cal. 2002)*. Ultimately, the decision about whether to strike allegations is a matter within the Court's discretion. *Id.* In addition, in the absence of prejudice to the opposing party, courts should freely grant leave to amend. *Barnes v. AT &T Pension Benefit Plan, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010)* (citing *Wyshak v. City Nat'l Bank, 607 F.2d 824, 826 (9th Cir. 1979)*).

C. Claim for Violation of *California Civil Code Section 2923.5*.

In the original complaint, Plaintiff alleged a violation of a provision of the California Civil Code that was not yet effective. In his amended complaint, Plaintiff alleges a violation of a related code **[*6]** section, *California Civil Code Section 2923.5*, which requires that the mortgage servicer contact the borrower and that the notice of default include a declaration stating that an authorized agent of the mortgage servicer "has tried with due diligence to contact the borrower." *Cal. Civ. Code § 2923.5(b)*.

Plaintiff alleges that this provision was violated because, although a declaration indicating that Chase had complied with the provision was indeed attached to the NOD, "[t]his pre-printed declaration was false because Plaintiff has no records or recollection that Chase attempted to contact him." (Amended Complaint ¶ 45.) The provision requires that the mortgage servicer include a declaration indicating that an authorized agent has contacted or attempted to contact the borrower. Because such a declaration was attached to the NOD, Plaintiff cannot maintain a claim that the provision was violated. (*See id.*, Ex. C.)[1] Accordingly, Chase's motion to dismiss Plaintiff's claim for violation of *California Civil Code Section 2923.5* is GRANTED with prejudice.

D. Claim for Violation of *California Civil Code Section 2923.6*.

Pursuant to *California Civil Code Section 2923.6*, the mortgage servicer shall not record a NOD or conduct a trustee sale until the servicer makes a written determination that the borrower is not eligible for a first lien modification or workout **[*7]** plan. In its first order granting the motion to dismiss the original complaint, this Court indicated that Plaintiff had "failed to plead sufficient facts to demonstrate that he even applied for or submitted a complete application for a loan modification." (Dkt. No. 17, Order dated October 2, 2017 ("Order") at 1.) In his amended complaint, Plaintiff now alleges that he began his loan modification process in early 2013 and, after submitting all requested documents, was informed over the telephone that his modification was denied. (Amended Complaint ¶¶ 56-58.) Plaintiff fails to allege specific dates of this telephonic denial, but does indicate that "[a]s a result" of the loan modification denial, he filed for Chapter 13 bankruptcy protection in June of 2013. (*Id.* ¶ 30.) Thus, the alleged denial must have occurred prior to June 2013, which is four years prior to the filing of this suit. Accordingly, Plaintiff's claim for violation of *Section 2923.6* is time-barred. In addition, Plaintiff's conclusory allegations fail to set out sufficient specific facts from which to ascertain that Plaintiff submitted a complete application for loan modification which is a necessary prerequisite to make out such a claim. **[*8]** Because the claim is time-barred,

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[1] Regardless, any claim based upon the NOD would be barred by the statute of limitations and would have expired in December 2015, three years after the NOD's issuance. In his amended complaint, Plaintiff has still not pled facts sufficient to toll the applicable statute of limitations period based upon the discovery rule.

however, Chase's motion to dismiss Plaintiff's claim for violation of *California Civil Code Section 2923.6* is GRANTED with prejudice.

E. Claim for Violation of *California Civil Code Section 2923.7*.

California Civil Code Section 2923.7 provides that "[u]pon request from a borrower who requests a foreclosure prevention alternative, the mortgage servicer shall promptly establish a single point of contact and provide to the borrower one or more direct means of communication with the single point of contact." *Cal. Civ. Code § 2923.7(a)*. The Court maintains that the allegations remain insufficient to trigger the requirements of this provision. (*See* Order at 1-2; *see also* *Greene v. Wells Fargo Bank, N.A., No. 15-cv-0048-JSW, 2015 U.S. Dist. LEXIS 60203, 2015 WL 2159460, at *4 (N.D. Cal. May 7, 2015)* (holding that borrower must allege that she specifically requested a single point of contact be provided).) Also, similar to his other claims, Plaintiff's claim for violation of *Section 2923.7* is time-barred and, after two opportunities to do so, he still alleges no facts from which to ascertain that the claim persists after the expiration of the three year statute of limitations. Accordingly, Chase's motion to dismiss Plaintiff's claim for violation of *California Civil Code Section 2923.7* is GRANTED with prejudice.

F. Claim for Violation of *California Civil Code Section 2924.12*.

In his fourth cause of action, Plaintiff alleges that he is entitled to declaratory **[*9]** relief pursuant to *California Civil Code Section 2924.12*. Under that provision, where "a trustee's deed upon sale has not been recorded, a borrower may bring an action for injunctive relief to enjoin material violation of *Section 2923.55*, *2923.6*, [or] *2923.7* . . . . Any injunction shall remain in place and any trustee's sale shall be enjoined until the court determines that the mortgage servicer . . . has corrected and remedied the violation . . . ." *Cal. Civ. Code § 2924.12(a)*.

Section 2924.12 does not independently create a cause of action for an injunction, but rather by its terms provides for injunctive relief as a remedy for violation of the other foreclosure-related statutes. *See e.g.,* *Hart v. Bayview Loan Servicing, No. 16-cv-01309 CAS, 2016 U.S. Dist. LEXIS 63659, 2016 WL 2758245, at *4 (C.D. Cal. May 10, 2016)*. Because the Court has dismissed the predicate claims, there is no standalone claim for injunctive relief pursuant to *Section 2924.12*. Accordingly, Chase's motion to dismiss Plaintiff's claim for violation of *California Civil Code Section 2924.12* is GRANTED with prejudice.

G. Claim for Violation of *California Business and Professions Code Section 17200*.

Plaintiff's fifth cause of action alleges that Chase engaged in conduct that violated *California Business and Professions Code section 17200* ("*Section 17200*"), which prohibits activities of unfair competition, including "any unlawful . . . business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*.

"A plaintiff alleging unfair business practices under these **[*10]** statutes must state with reasonable particularity the facts supporting the statutory elements of the violation." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708 (1993)*. In order to state a claim under *Section 17200*, Plaintiff must have suffered an injury in fact and must have lost money or property. *See* *Cal. Bus. & Prof. Code § 17204*; *see also* *Californians for Disability Rights v. Mervyn's, LLC, 39 Cal. 4th 223, 227, 46 Cal. Rptr. 3d 57, 138 P.3d 207 (2006)* (holding that after Proposition 64, a private person has standing to sue only if he or she "has suffered injury in fact and has lost money or property as a result of such unfair competition"). The California Supreme Court has explained that the purpose of Proposition 64 "was to confine standing to those actually injured by a defendant's business practices and to curtail the prior practice of filing suits on behalf of '"clients who have not used the defendant's advertising, or had any other business dealing with the defendant . . ."' *See* *Jenkins, 216 Cal. App. 4th at 521*.

Here, Plaintiff has failed to allege any facts establishing that Chase acted unlawfully, fraudulently, or unfairly. There is no allegation that Chase's conduct would constitute a violation of ***antitrust law*** and no other remaining claims upon which to predicate liability. *See* *Puentes v. Wells Fargo Mortgage, Inc., 160 Cal. App. 4th 638, 643-44, 72 Cal. Rptr. 3d 903 (2008)* ("*[S]ection 17200* 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently **[*11]** actionable"). Additionally, Plaintiff allegations that he suffered "substantial irreparable harm" due to Chase's acts are merely conclusory and do not demonstrate that Plaintiff has suffered any actual monetary loss due to the alleged conduct. (*See* Amended Complaint ¶ 78.) Plaintiff fails to state a claim upon which relief can be granted on the predicate civil code claims and makes only a conclusory allegation that Chase's conduct is "immoral, unethical, oppressive, unscrupulous or substantially injurious to customers." (*See id.* ¶ 76, citing *Paduano v. American Honda Motor Co., Inc., 169 Cal. App. 4th 1453, 1469, 88 Cal. Rptr. 3d 90 (2009)*.) Accordingly, Chase's motion to dismiss Plaintiff's claim for violation of *California Business and Professions Code Section 17200* is GRANTED with prejudice.

H. Motion to Strike Request for Damages.

Chase also moves to strike Plaintiff's demand for general damages, compensatory damages, interest, and consequential damages. (*See* Amended Complaint at 16.) However, Plaintiff's claims are premised upon pre-foreclosure violations and the only remedy available under those provisions in an injunction to allow the servicer to correct material violations of the statute. *See* *Cal. Civ. Code § 2924.12(b)* (Only "[a]fter a trustee's deed upon sale has been recorded, a mortgage servicer . . . shall be liable to a borrower for actual economic **[*12]** damages . . . resulting from a material violation of *Section 2923.55*, *2923.6*, [or] *2923.7* . . . ."). The only relief available for a breach of *Section 17200* are injunctive relief and restitution. *See* *Cel-Tech Communications, Inc. v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 179, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Accordingly, Chase's motion to strike Plaintiff's demand for damages is GRANTED.

CONCLUSION

Based on the foregoing reasons, and having given Plaintiff two opportunities to address the deficiencies in pleading, the Court GRANTS Chase's motion to dismiss and to strike without leave to amend.[2]

IT IS SO ORDERED.

Dated: April 6, 2018

/s/ Jeffrey S. White

JEFFREY S. WHITE

UNITED STATES DISTRICT JUDGE

End of Document

[2] The Court notes that Defendant MTC Financial Inc, dba Trustee Corps ("MTC Financial"), has not appeared in this matter. Therefore, the Court ISSUES this Order to Show Cause why MTC Financial should not be dismissed for Plaintiff's failure to prosecute the matter against them by no later than April 27, 2018.

Safransky v. Fossil Grp., Inc.

United States District Court for the Southern District of California

April 9, 2018, Decided; April 9, 2018, Filed

Case No.: 17cv1865-MMA (NLS)

Reporter

2018 U.S. Dist. LEXIS 60946 *; 2018 WL 1726620

TIMUR SAFRANSKY, on behalf of himself and all others similarly situated, Plaintiff, v. FOSSIL GROUP, INC.; and FOSSIL STORES I, INC., Defendants.

Core Terms

allegations, prices, consumer, products, advertising, Outlet, price tag, discount, tags, deceptive, plaintiff's claim, unfair, misleading, motion to dismiss, restitution, equitable relief, signage, cases, misrepresentations, bag, purchasers, in-store, courts, injunctive relief, marks, labeling, challenges, prevailing, violations, purported

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Pursuant to *Fed. R. Civ. P. 12(b)(1)*, a party may seek dismissal of an action for lack of subject matter jurisdiction either on the face of the pleadings or by presenting extrinsic evidence. Where the party asserts a facial challenge, the court limits its inquiry to the allegations set forth in the complaint. If the challenge to jurisdiction is a facial attack the plaintiff is entitled to safeguards similar to those applicable when a *Rule 12(b)(6)* motion is made. Lack of standing is a defect in subject-matter jurisdiction and may be properly challenged under *Rule 12(b)(1)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

A *Fed. R. Civ. P. 12(b)(6)* motion to dismiss tests the sufficiency of the complaint. A pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. However, plaintiffs must also plead enough facts to state a claim to relief that is plausible on its face. *Fed. R. Civ. P. 12(b)(6)*. The plausibility standard thus demands more than a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement. Instead, the complaint must contain allegations of underlying facts sufficient to give fair notice and to enable the opposing party to defend itself effectively.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN3[] **Motions to Dismiss, Failure to State Claim**

In reviewing a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, courts must assume the truth of all factual allegations and must construe them in the light most favorable to the nonmoving party. The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. Similarly, conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN4[] **Motions to Dismiss, Failure to State Claim**

In determining the propriety of a *Fed. R. Civ. P. 12(b)(6)* dismissal, courts generally may not look beyond the complaint for additional facts. A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment. Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN5[] **Heightened Pleading Requirements, Fraud Claims**

In alleging fraud or mistake, the plaintiff must state with particularity the circumstances constituting fraud or mistake. *Fed. R. Civ. P. 9(b)*. Failure to satisfy this heightened pleading requirement can result in dismissal of the claim. In general, the plaintiff's allegations of fraud or mistake must be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong. This heightened pleading standard requires the plaintiff to allege fraud or mistake by detailing the who, what, when, where, and how" of the misconduct charged. In other words, the plaintiff must specify the time, place, and content of the alleged fraudulent or mistaken misconduct. However, malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. *Fed. R. Civ. P. 9(b)*.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

HN6[] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) may be relaxed as to matters within the opposing party's knowledge. In those cases, a pleading is sufficient under *Rule 9(b)* if it identified the circumstances constituting fraud so that a defendant can prepare an adequate answer from the allegations.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN7[] State Regulation, Claims

Standing under California's Unfair Competition Law (UCL) and the False Advertising Law (FAL) is limited to any person who has suffered injury in fact and has lost money or property as a result of unfair competition. Cal. Bus. & Prof. Code §§ 17204, 17535. When a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury. Any plaintiff who has standing under the UCL's and FAL's lost money or property requirement, a fortiori, have suffered any damages for purposes of establishing Consumer Legal Remedies Act, *Cal. Civ. Code § 1750 et seq.*, standing.

Constitutional Law > ... > Case or Controversy > Standing > Elements

HN8[] Standing, Elements

To establish U.S. Const. art. III standing, a plaintiff must show that he or she suffered an injury in fact, that the injury is fairly traceable to the challenged conduct, and that it is likely and not just speculative that the injury will be redressed by a favorable decision. To establish an injury in fact, the harm suffered by a plaintiff must be concrete and particularized, and there must be a sufficient likelihood that he or she will again be wronged a similar way. A plaintiff must establish a real and immediate threat of repeated injury.

Constitutional Law > ... > Case or Controversy > Standing > Elements

Constitutional Law > ... > Case or Controversy > Standing > Particular Parties

HN9[] Standing, Elements

Davidson held that a previously deceived consumer may have constitutional standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase, because the consumer may suffer an actual and imminent threat of future harm. In some cases, the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product she would like to. In other cases, the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved.

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN10[] False Advertising, State Regulation

California's False Advertising Law, Business & Professions Code prohibits any unfair, deceptive, untrue, or misleading advertising. Cal. Bus. & Prof. Code § 17500. This statute makes it unlawful for a business to disseminate any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading. The statute has been interpreted broadly to encompass not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Consequently, even a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under this section.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN11[] **Trade Practices & Unfair Competition, State Regulation**

California's Unfair Competition Law (UCL) prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. Cal. Bus. & Prof. Code § 17200. The UCL provides a separate theory of liability under each of the three prongs: unlawful, unfair, and fraudulent. The UCL expressly incorporates the False Advertising Law's prohibition on unfair advertising as one form of unfair competition.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN12[] **Trade Practices & Unfair Competition, State Regulation**

California's Consumer Legal Remedies Act (CLRA) prohibits unfair methods of competition and unfair or deceptive acts or practices. *Cal. Civ. Code § 1770*. Specifically, the CLRA prohibits, among other things, advertising goods or services with intent not to sell them as advertised and making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions. *Cal. Civ. Code § 1770(a)(9)*, *(13)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN13[] **Trade Practices & Unfair Competition, State Regulation**

To state a claim under the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, the False Advertising Law, *Cal. Bus. & Prof. Code § 17500 et seq.*, and Consumer Legal Remedies Act, *Cal. Civ. Code § 1750 et seq.*, a plaintiff must allege that the defendant's purported misrepresentations are likely to deceive a reasonable consumer. A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances. Likely to deceive implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled. In determining whether a statement is misleading under the statute, the primary evidence in a false advertising case is the advertising itself.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN14[] **Trade Practices & Unfair Competition, State Regulation**

Courts applying the reasonable consumer test to businesses' use of comparative reference prices under the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, the False Advertising Law, *Cal. Bus. & Prof. Code § 17500 et seq.*, and Consumer Legal Remedies Act, *Cal. Civ. Code § 1750 et seq.*, have distinguished between two categories: exclusive product cases and non-exclusive product cases. In exclusive product cases, a store, usually an outlet store, sells a lower-price, different version of a product sold in a traditional retail store. The outlet uses the price of the product made for the retail store as a comparative reference price on price tags but the product actually sold in the outlet store is made exclusively for the outlet and is never sold for the comparative reference price at a traditional retail store. In non-exclusive product cases, more than one retailer offers the product at issue for sale. Because other retailers offer the same product for sale, there are legitimate prices to which to compare the defendant's comparative reference price. In exclusive product cases, courts generally find that a plaintiff can proceed with his or her claims.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN15[] **Deceptive & Unfair Trade Practices, State Regulation**

Section 1770(a)(9) of the California Civil Code prohibits advertising goods or services with intent not to sell them as advertised. *Cal. Civ. Code § 1770(a)(9)*. *Section 1770(a)(13)* prohibits making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions. *Cal. Civ. Code § 1770(a)(13)*. Moreover, the Consumer Legal Remedies Act provides relief to a consumer who suffers any damage as a result of the use or employment by a person of a method, act, or practice declared to be unlawful by *Section 1770*. *Cal. Civ. Code § 1780(a)*.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

HN16[] **State Regulation, Claims**

With respect to the "unfairness" prong, the California Supreme Court has defined the word "unfair" under the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, to mean conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition. Many courts utilize a three-part test set forth in Camacho v. Auto. Club of S. Cal. Under this test, courts consider factors including: (1) whether the consumer injury is substantial; (2) whether the injury is outweighed by any countervailing interests; and (3) whether the injury is one that consumers themselves could not reasonably have avoided. Notably, whether a practice is unfair is generally a question of fact which requires consideration and weighing of evidence from both sides and which usually cannot be made on demurrer.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN17[] **Trade Practices & Unfair Competition, State Regulation**

The U.S. District Court for the Southern District of California finds persuasive the Covell court's reasoning. In Covell, the court explained that if plaintiff ultimately prevails on her claims, she will still need to show that equitable relief is the only way to remedy a specific type of injury suffered by herself or the class. However, she may be able to do so by, for example, arguing that injunctive relief is the only way to protect the class from future deceptive behavior.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > False Advertising > State Regulation

HN18[] **State Regulation, Claims**

Courts have very broad discretion to determine an appropriate remedy as long as it is supported by the evidence and is consistent with the purpose of restoring the plaintiff the amount that the defendant wrongfully acquired. The court's discretion is not entirely unbounded, however, because restitution under the Unfair Competition Law, *Cal. Bus. & Prof. Code § 17200 et seq.*, the False Advertising Law, *Cal. Bus. & Prof. Code § 17500 et seq.*, must be of a measurable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measurable amount must be supported by evidence.

Counsel: **[*1]** For Timur Safransky, on behalf of himself and all others similarly situated, Plaintiff: Zev Benjamin Zysman, LEAD ATTORNEY, Law Offices of Zev B. Zysman, APC, Encino, CA.

For Fossil Group, Inc., Fossil Stores I, Inc., Defendants: Stephanie A. Sheridan, LEAD ATTORNEY, Steptoe & Johnson LLP, San Francisco, CA.

Judges: HON. MICHAEL M. ANELLO, United States District Judge

Opinion by: MICHAEL M. ANELLO

Opinion

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

[Doc. No. 11]

Plaintiff Timur Safranksy ("Plaintiff") filed a First Amended Class Action Complaint ("FAC") against Defendants Fossil Group, Inc. and Fossil Stores I, Inc. (collectively, "Defendants"), alleging violations of California's Unfair Competition Law, Business & Professions Code *§ 17200 et seq.* ("UCL"), False Advertising Law, Business & Professions Code *§ 17500 et seq.* ("FAL"), and *Consumer Legal Remedies Act, Civil Code § 1750 et seq.* ("CLRA"). *See* FAC. Defendants move to dismiss Plaintiff's FAC for failure to state a claim and lack of standing pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)*. Doc. No. 11. Plaintiff filed an opposition to Defendants' motion, to which Defendants replied. Doc. Nos. 13, 14. The Court found the matter suitable for determination on the papers and without oral argument pursuant to Civil *Local Rule 7.1.d.1*. Doc. No. 18. For **[*2]** the reasons set forth below, the Court **DENIES** Defendants' motion to dismiss.

BACKGROUND[1]

Plaintiff Timur Safransky is an individual and resident of San Diego County, California. FAC ¶ 25. Defendant Fossil Group, Inc. is a Delaware corporation with its principal place of business in Richardson, Texas. *Id. ¶ 26*. Defendant Fossil Stores I, Inc. is a Delaware corporation with its principal place of business in Richardson, Texas. *Id. ¶ 27*.

On November 16, 2016, Plaintiff visited the Fossil Outlet Store located at the Carlsbad Premium Outlets in Carlsbad, California. *Id. ¶ 34*. Plaintiff "observed a large exterior window display that advertised 'Entire Store Up To

[1] Because this matter is before the Court on a motion to dismiss, the Court must accept as true the allegations set forth in the FAC. *See* *Hosp. Bldg. Co. v. Trs. Of Rex Hosp., 425 U.S. 738, 740, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*.

40% Off' and an additional '20% Off' the entire purchase." *Id.* Once Plaintiff entered the store, he noticed "prominent" signage on top of or near almost each piece of merchandise advertising a "discounted % off," or a "discounted whole-price" reduction for each item offered for sale. *Id. ¶ 35*. Believing that he was able to pay significantly less than the price listed on the price tag, Plaintiff purchased an item. *Id.* Specifically, Plaintiff purchased a Travis Workbag "bearing a Reference Price of '$198.00' on the price tag" after **[*3]** observing a sign which indicated that the bag was on sale for "40% Off Ticketed Price." *Id. ¶¶ 36-37*. Plaintiff attaches as Exhibit E a true and correct copy of the price tag attached to the Travis Workbag. *Id. ¶ 36*; *see also* FAC, Exh. E. Notably, the price tag says "LIKE STYLE" below the $198.00 figure.[2] Relying on this advertising, Plaintiff purchased the bag. *Id. ¶ 38*.

Upon check-out, Defendants provided Plaintiff with a sales receipt containing the allegedly misrepresented price. *Id. ¶ 39*. Specifically, the receipt states "REGULAR PRICE" in large, all-caps lettering directly below the name of the item "TRAVIS WORKBAG." FAC, Exh. F. The regular price corresponds with the $198.00 figure. *See id.* With a 40% discount, and an additional 20% off of the entire purchase price, Plaintiff paid a total of $102.64. *See id.*

Plaintiff alleges that Defendants intentionally misrepresent prices for items with the Like Style tags because such prices are "overstated and d[o] not represent a bona fide price at which Fossil Outlet Products were previously sold." FAC ¶ 6. Additionally, Plaintiff alleges that the advertised prices on the Like Style tags were never the "prevailing market retail price within **[*4]** the three months immediately preceding the publication of the advertised former prices, as required by California law." *Id.* The prices listed on the Like Style tags are "fictional creations intentionally designed to enable Defendants' phantom markdowns." *Id. ¶ 7*. Further, Plaintiff claims that the "Fossil Outlet Products sold at Fossil Outlet Stores are designed and manufactured for, and sold *exclusively* by, those stores[.]" *Id. ¶ 40* (emphasis in original). The Fossil Outlet Products "were never sold—or even intended to be sold—at the Reference Price advertised on the price tags." *Id.* Plaintiff contends that he and other consumers "have no realistic way to know which—if any—of Defendants' price tags and sale prices are not false or deceptive." *Id. ¶ 49*.

After Plaintiff purchased the Travis Workbag, Plaintiff conducted an investigation which revealed that Defendants "very subtly mark the items exclusively made for the Fossil Outlet Stores by including in smaller font the words 'Like Style' on the price tags attached to the Fossil Outlet Products." *Id. ¶ 28*. Plaintiff asserts that Defendants "intentionally designed the price tags this way so that their employees would be able to determine **[*5]** internally within the company those products that were made exclusively for the Fossil Outlet Store." *Id.*

Plaintiff brings this action "on behalf of himself and other similarly situated consumers who have purchased one or more Fossil Outlet Products at Fossil Outlet Stores in California that were deceptively represented as discounted from false former prices[.]"[3] *Id. ¶ 21*. Plaintiff seeks to "halt the dissemination of this false, misleading, and deceptive pricing scheme, to correct the false and misleading perception it has created in the minds of consumers, and to obtain redress for those who have purchased such products." *Id.* Plaintiff seeks restitution and other appropriate equitable remedies, including an injunction under the UCL and FAL, and restitution, damages, and an injunction under the CLRA. *Id.* Defendants move to dismiss Plaintiff's FAC on the grounds that Plaintiff lacks standing under *Rule 12(b)(1)*, and fails to allege sufficient facts under *Rule 12(b)(6)* as well as *Rule 9(b)*'s heightened pleading standard. *See* Doc. No. 11-1.

LEGAL STANDARDS

A. *Rule 12(b)(1)*

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[2] The Court hereinafter refers to the price tags attached to items for sale at Defendants' stores as the "Like Style tags."

[3] Plaintiff expressly excludes any Fossil Outlet Products sold at Fossil Outlet Stores that advertised a price that was a prevailing market retail price within three months preceding. *See id.* ¶ 28.

HN1[] Pursuant to *Rule 12(b)(1)*, a party may seek dismissal of an action for lack of subject matter jurisdiction "either on the face of the pleadings or by presenting extrinsic evidence." **[*6]** *Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)*; *see also* *White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)*. Where the party asserts a facial challenge, the court limits its inquiry to the allegations set forth in the complaint. *Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*. "If the challenge to jurisdiction is a facial attack . . . the plaintiff is entitled to safeguards similar to those applicable when a *Rule 12(b)(6)* motion is made." *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of the Interior, 905 F. Supp. 2d 1158, 1167 (E.D. Cal. 2012)* (internal citation and quotation omitted). "Lack of standing is a defect in subject-matter jurisdiction and may be properly challenged under *Rule 12(b)(1)*." *Wright v. Incline Village Gen. Imp. Dist., 597 F. Supp. 2d 1191, 1199 (D. Nev. 2009)* (citing *Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986)*).

B. *Rule 12(b)(6)*

HN2[] A *Rule 12(b)(6)* motion to dismiss tests the sufficiency of the complaint. *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001)*. A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." *Fed. R. Civ. P. 8(a)(2)*. However, plaintiffs must also plead "enough facts to state a claim to relief that is plausible on its face." *Fed. R. Civ. P. 12(b)(6)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. The plausibility standard thus demands more than a formulaic recitation of the elements of a cause of action, or naked assertions devoid of further factual enhancement. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Instead, the complaint "must contain allegations of underlying facts sufficient to give fair notice and to enable the opposing party to defend itself effectively." *Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011)*.

HN3[] In reviewing a motion to dismiss under *Rule 12(b)(6)*, courts must assume the truth of all factual allegations and must construe them **[*7]** in the light most favorable to the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996)*. The court need not take legal conclusions as true merely because they are cast in the form of factual allegations. *Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987)*. Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998)*.

HN4[] In determining the propriety of a *Rule 12(b)(6)* dismissal, courts generally may not look beyond the complaint for additional facts. *United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)*. "A court may, however, consider certain materials—documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice—without converting the motion to dismiss into a motion for summary judgment." *Id.; see also* *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)*. Where dismissal is appropriate, a court should grant leave to amend unless the plaintiff could not possibly cure the defects in the pleading. *Knappenberger v. City of Phoenix, 566 F.3d 936, 942 (9th Cir. 2009)*.

C. *Rule 9(b)*[4]

HN5[] In alleging fraud or mistake, the plaintiff must "state with particularity the circumstances constituting fraud or mistake." *Fed. R. Civ. P. 9(b)*. Failure to satisfy this heightened pleading requirement can result in dismissal of the claim. *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1107 (9th Cir. 2003)*. In general, the plaintiff's allegations of fraud or mistake must be "specific enough to give defendants notice of the particular misconduct . . . so that **[*8]** they can defend against the charge and not just deny that they have done anything wrong." *Id. at 1106*. This heightened pleading standard requires the plaintiff to allege fraud or mistake by detailing "the who, what, when, where, and how" of the misconduct charged. *Id. at 1106-07*. In other words, the plaintiff must specify the time,

[4] The parties acknowledge that *Rule 9(b)*'s heightened pleading standard applies to Plaintiff's claims.

place, and content of the alleged fraudulent or mistaken misconduct. *See id.* However, "malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Fed. R. Civ. P. 9(b)*.

Moreover, ***HN6***[] "*Rule 9(b)* 'may be relaxed as to matters within the opposing party's knowledge.'" *Rubenstein v. Neiman Marcus Grp. LLC, 687 F. App'x 564, 567 (9th Cir. 2017)* (quoting *Moore v. Kayport Packaging Express, Inc., 885 F.2d 531, 540 (9th Cir. 1989))*. "In those cases, a 'pleading is sufficient under *Rule 9(b)* if it identified the circumstances constituting fraud so that a Defendant can prepare an adequate answer from the allegations.'" *Id.* (quoting *Moore, 885 F.2d at 540*).

Discussion

I. Motion to Dismiss Pursuant to *Rule 12(b)(1)*

As an initial matter, Defendants argue that Plaintiff lacks standing for three reasons: (1) Plaintiff lacks statutory standing because he has failed to allege reliance on the phrase "Like Style"; (2) Plaintiff lacks statutory standing to assert claims on behalf of purchasers who bought different Fossil Outlet products than the Travis Workbag; and (3) Plaintiff lacks Article III **[*9]** standing to seek injunctive relief because he is "no longer at risk of being deceived by Fossil's 'Like Style' pricing." Doc. No. 11-1 at 8. The Court addresses Defendants' arguments in turn.

1. Plaintiff's Statutory Standing to Assert Personal Claims

First, Defendants contend that Plaintiff lacks statutory standing under the UCL, FAL, and CLRA because he does not allege reliance on the phrase "Like Style" that appeared on the price tag of the Travis Workbag that he purchased. *See* Doc. No. 11-1 at 11. Thus, Defendants claim that Plaintiff has not sufficiently alleged that he relied on the alleged misrepresentation. *See id.*

HN7[] "Standing under the UCL and FAL is . . . limited to any person 'who has suffered injury in fact and has lost money or property' as a result of unfair competition." *Azimpour v. Sears, Roebuck & Co.. ("Azimpour I"), No. 15-CV-2798-JLS-WVG, 2016 U.S. Dist. LEXIS 188844, 2016 WL 7626188, at *3 (S.D. Cal. Oct. 17, 2016)* (quoting *Cal. Bus. & Prof. Code §§ 17204*, *17535*). In *Hinojos v. Kohl's Corp.*, the Ninth Circuit held that "when a consumer purchases merchandise on the basis of false price information, and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the UCL and FAL because he has suffered an economic injury." **[*10]** *718 F.3d 1098, 1107 (9th Cir. 2013)*. Further, the Ninth Circuit "conclude[d] that any plaintiff who has standing under the UCL's and FAL's 'lost money or property' requirement, *a fortiori*, have suffered 'any damages' for purposes of establishing CLRA standing." *Id. at 1108* (emphasis in original).

Here, Defendants' argument that Plaintiff fails to allege that he relied on the words "Like Style" is misplaced. It is Defendants' alleged pricing scheme—the juxtaposition of the price listed on the Like Style tags and the in-store signage representing a certain percentage discount—that Plaintiff challenges. Plaintiff alleges that he relied on Defendants' misrepresentations when making his purchase. Specifically, Plaintiff purchased the Travis Workbag, bearing a price of "'$198.00' on the price tag," after observing "signage above the subject item that advertised a percentage discount, clearly indicating that the item was being sold at a significant discount off the Reference Price." FAC ¶¶ 36, 37. The signage above the Travis Workbag "represented that the bag was on sale for '40% Off Ticketed Price.'" *Id. ¶ 37*. Plaintiff asserts that he relied on Defendants' advertising and "believ[ed] that he was receiving a significant discount," so **[*11]** he "decided to purchase the item[.]" *Id. ¶ 38*. However, Plaintiff claims that he did not actually receive a discount because "the prevailing market retail price for the subject bag during the three months immediately prior to Plaintiff's purchase of the item was never at the represented former Reference Price." *Id.* Moreover, "Plaintiff would not have purchased the bag in the absence of Defendants' misrepresentations." *Id.* Taking Plaintiff's allegations as true, Plaintiff has sufficiently alleged that he suffered economic injury as a result of Defendants' conduct. Thus, the Court finds "[s]uch allegations satisfy reliance as to Plaintiff's in-store purchase." *Azimpour I, 2016 U.S. Dist. LEXIS 188844, 2016 WL 7626188, at *4*.

Accordingly, the Court finds that Plaintiff has statutory standing to assert his personal claims. *See Rubenstein, 687 F. App'x at 566* ("Rubenstein has both Article III and statutory standing because she sufficiently alleged economic injury and actual reliance on the Compared To prices affixed to the goods she purchased at Neiman Marcus's Last Call store."); *see also Covell v. Nine West Holdings, Inc., No. 17-CV-1371-H-JLB, 2018 U.S. Dist. LEXIS 12437, 2018 WL 558976, at *5 (S.D. Cal. Jan. 25, 2018)* (concluding that the plaintiff has statutory standing because she alleges that she only purchased the shoes because she believed she was receiving **[*12]** a significant discount, did not in fact receive a discount, and would not have purchased the shoes but for the allegedly deceptive price tags).

2. Plaintiff's Standing to Represent Individuals Who Purchased Different Items

Second, Defendants assert that Plaintiff lacks statutory standing to assert claims on behalf of customers "who purchased different items, at different prices, and with different 'Like Style' comparisons." Doc. No. 11-1 at 6. In response, Plaintiff contends this inquiry should be conducted at the class certification stage. *See* Doc. No. 13 at 7. Moreover, Plaintiff asserts that he "has standing to sue for all products on behalf of all consumers who were exposed to the same, uniform pricing scheme, regardless of the type of product purchased." *Id.* at 11.

"In the Ninth Circuit, there is 'no controlling authority' on whether a plaintiff in a class action has standing to assert claims based on products he did not purchase." *Dennis v. Ralph Lauren Corp., No. 16-CV-1056-WQH-BGS, 2017 U.S. Dist. LEXIS 140156, 2017 WL 3732103, at *6 (S.D. Cal. Aug. 29, 2017)* (quoting *Morales v. Unilever United States, Inc., No. 13-CV-2213-WBS-EFB, 2017 U.S. Dist. LEXIS 140156, 2014 U.S. Dist. LEXIS 49336, 2014 WL 1389613, at *4 (E.D. Cal. Apr. 9, 2014))*. However, "[t]he majority of the courts that have carefully analyzed the question hold that a plaintiff may have standing to assert claims for unnamed class members **[*13]** based on products he or she did not purchase so long as the products and alleged misrepresentations are substantially similar." *Cortina v. Goya Foods, Inc., 94 F. Supp. 3d 1174, 2015 WL 1411336, at *18 (S.D. Cal. 2015)* (quoting *Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012)* (noting where composition of the product is less important, "cases turn on whether the alleged misrepresentations are sufficiently similar across product lines")).

In a similar case, this Court found that the plaintiff had standing to sue on behalf of purchasers of other Nordstrom Rack items with "Compare At" tags because "the characteristics and format that Plaintiff complains of remain consistent across such tags." *Branca v. Nordstrom, Inc., No. 14-CV-2062-MMA-JMA, 2015 U.S. Dist. LEXIS 176888, 2015 WL 10436858, at *5 (S.D. Cal. Oct. 9, 2015)*. The Court noted that "all of the products are marketed to the same consumers, Nordstrom Rack shoppers. Thus, product composition is of little importance and the similarity amongst the purported misrepresentations is most important[.]" *Id.*

Moreover, numerous district courts have also concluded that a plaintiff has standing to sue on behalf of items he or she did not purchase if the alleged misrepresentations are sufficiently similar. *See Dennis, 2017 U.S. Dist. LEXIS 140156, 2017 WL 3732103, at *7* (concluding that the plaintiff "has demonstrated sufficient similarities in the Defendants' alleged pricing scheme **[*14]** to avoid dismissal of any claims at this stage of the proceedings."); *Azimpour v. Sears, Roebuck & Co. ("Azimpour II"), No. 15-CV-2798-JLS-WVG, 2017 U.S. Dist. LEXIS 63516, 2017 WL 1496255, at *5 (S.D. Cal. Apr. 26, 2017)* (finding that the "Plaintiff has standing to sue on behalf of purchasers of other Sears items bearing in-store price tags similar to those relied upon by Plaintiff because he is challenging the pricing scheme, not the product."); *Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000, 1001 (N.D. Cal. 2012)* (finding that although the plaintiff purchased only two of the many flavors of smoothie kits, the plaintiff had standing to bring claims on behalf of purchasers of the other flavors because "the same alleged misrepresentation was on all of the smoothie kit[s] regardless of flavor; all smoothie kits [were] labeled 'All Natural,' and all smoothie kits contain[ed] allegedly non-natural ingredients."); *Astiana v. Dreyer's Grand Ice Cream, Inc., Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 U.S. Dist. LEXIS 101371, 2012 WL 2990766, at *13 (N.D. Cal. July 20, 2012)* (concluding that the plaintiffs had standing to sue based on flavors of ice cream they did not purchase because many of the contested ingredients were the same across all of the ice creams at issue and their labels were nearly identical).

Defendants rely primarily on *Nunez v. Saks Inc.* ("*Nunez II*"), where **[*15]** the district court dismissed the plaintiff's complaint with prejudice. *No. 15-CV-2717-JAH-WVG, 2017 U.S. Dist. LEXIS 198155, 2017 WL 5973341, at *5 (S.D. Cal. Dec. 1, 2017)*. There, the plaintiff sought to represent a class of individuals "who purchased a Saks Fifth

Avenue labeled product from OFF 5TH locations in California after being exposed to material from Saks's marketing campaigns." *2017 U.S. Dist. LEXIS 198155, [WL] at *3*. In dismissing the plaintiff's first amended complaint, the court found that the plaintiff lacked standing to assert claims on behalf of individuals who purchased different items because the plaintiff failed to support his allegation of a "misleading and deceptive pricing scheme" with allegations of his own "exposure to misleading advertising[.]" *Nunez v. Saks Inc. ("Nunez I"), No. 15-CV-2717-JAH-WVG, 2017 U.S. Dist. LEXIS 125296, 2017 WL 1184058, at *5 (S.D. Cal. Mar. 22, 2017)*. In dismissing the plaintiff's third amended complaint with prejudice, the district court briefly concluded that the "Plaintiff's TAC did not remedy the deficiencies of the FAC." *Nunez II, 2017 U.S. Dist. LEXIS 198155, 2017 WL 5973341 at *4*; *see also* *Johns v. Bayer Corp., No. 9-CV-1935-DMS-JMA, 2010 U.S. Dist. LEXIS 10926, 2010 WL 476688, at * (S.D. Cal. Feb. 9, 2010)* (concluding the plaintiff lacks standing because "he cannot expand the scope of his claims to include a product he did not purchase or advertisements relating to a product he did not rely upon.").

A recent decision from this district is particularly **[*16]** instructive on this issue. In *John v. AM Retail Group, Inc.*, the same judge that decided *Nunez* found that the primary reason for dismissal, "and the distinguishing factor between *Nunez* and the present case, was that the *Nunez* plaintiff sought to bring claims for a wide range of deceptive advertising—print, in-store, and online—yet failed to allege his own personal exposure to that misleading advertising, even for the shoes that he purchased." *No. 17-CV-JAHBGS, 2018 U.S. Dist. LEXIS 45820, 2018 WL 1400718, at *4 (S.D. Cal. Mar. 20, 2018)*. The court noted that in contrast, the allegedly deceptive advertising alleged by the plaintiff in *John* "is far less comprehensive, only including Defendant's in store signage that purported to offer a substantial discount off of the 'Ticket' price." *Id.* Additionally, the plaintiff "actually alleged that he was exposed to the deceptive advertising and affirmatively relied on such when making his purchase decision." *Id.* The court concluded that the plaintiff's allegations "are sufficient to distinguish this case from *Nunez*." *Id.*

Here, Plaintiff alleges that "most, if not all Fossil Outlet Products sold in the Fossil Outlet Stores are subject to the *same* fraudulent pricing scheme[.]" FAC ¶ 10 (emphasis added). Moreover, Plaintiff's investigation **[*17]** revealed that "Defendants' deceptive advertising practices were *systematic* and *pervasive* at Fossil Outlet Stores as Fossil Outlet Products remain continuously discounted from the Reference Price listed on the tag price or they are not offered for sale at their Reference Price . . . for any substantial period of time, and in most cases, not at all[.]" *Id. ¶ 40* (emphasis added). Unlike *Nunez II*, Plaintiff alleges that he seeks to represent individuals who were exposed to the same type of in-store, deceptive advertising and labeling that he was exposed to. Thus, Plaintiff's allegations are more analogous to *John* because the deceptive advertising alleged only included Defendants' in-store signage offering discounts from the price listed on the products' price tags. *Id. ¶ 6*.

Moreover, similar to *Branca*, Plaintiff's claims do not depend on what type of product an individual purchased from a Fossil Outlet Store. Nor do Plaintiff's allegations "relate to the exact prices, percentages of savings listed on the tags, or specific characteristics of the underlying products, which would vary by product." *Branca, 2015 U.S. Dist. LEXIS 176888, 2015 WL 10436858, at *5*.[5] Rather, Plaintiff's claims depend on Fossil Outlet Products bearing the Like Style tags, and **[*18]** the surrounding in-store signage, similar to those relied upon by Plaintiff. Plaintiff challenges the alleged pricing scheme—not the actual product sold by Fossil Outlet Stores or the exact price or percentage of savings listed on the product's tag.

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[5] Defendants urge the Court to "follow its decisions in *Oxina* and *Alaei* rather than *Branca*[.]" Doc. No. 11-1 at 7 n.1. Both cases, however, are inapposite. In *Oxina v. Lands' End, Inc.*, this Court found that the plaintiff lacked standing to bring claims on behalf of all purchasers of the defendant's apparel because the purported misrepresentation—"Made in USA"—was listed on the defendant's website and the Court could not distinguish which items the "Made in USA" statement was mistakenly applied to and where each item of apparel also had its own unique physical tag that affected the Court's assessment of the statement on the website. *No. 14-CV-2577-MMA-NLS, 2015 U.S. Dist. LEXIS 94847, 2015 WL 4272058, at *6 (S.D. Cal. June 19, 2015)*. Thus, unlike this case, the purported misrepresentations as well as the products themselves varied from item to item. Moreover, in *Alaei v. Kraft Heinz Food Co.*, a case where the composition of the product, in addition to the product's advertising, was at issue, the Court found that based upon the plaintiff's allegations, it could not "determine whether the unpurchased products are sufficiently similar to Heinz 57 Sauce to confer standing upon Plaintiff[.]" *No. 15-CV-2961-MMA-DHB, 2016 U.S. Dist. LEXIS 63914, at *8 (S.D. Cal. Apr. 22, 2016)*. Here, however, Plaintiff's exhibits demonstrate that Fossil Outlet Stores utilized the same allegedly deceptive labeling practice across numerous products—not just the product Plaintiff purchased. *See* FAC, Exhs. A-E.

Accordingly, the Court finds that Plaintiff has standing to sue on behalf of purchasers of other Fossil Outlet Products with uniform price tags and in-store signage that purported to offer a substantial discount because Plaintiff is challenging "the same basic mislabeling practice" across products. *Astiana, 2012 U.S. Dist. LEXIS 101371, 2012 WL 2990766, at *13*; *see also* *Dennis, 2017 U.S. Dist. LEXIS 140156, 2017 WL 3732103, at *7* ("Defendants' contentions regarding the differences in purchases and advertisements are best addressed at the class certification stage rather than the motion to dismiss stage.").

3. Plaintiff's Standing to Seek Injunctive Relief

Third, Defendants assert that Plaintiff lacks standing to seek injunctive relief because he is no longer at risk of being deceived by Fossil's "Like Style" pricing. Doc. No. 11-1 at 8. Plaintiff contends that consumers can have standing to seek injunctive relief under the UCL, despite having learned of the wrongful conduct at issue. *See* ***[*19]*** Doc. No. 13 at 22.

HN8[] To establish Article III standing, a plaintiff must show that he or she suffered an "injury in fact," that the injury is "fairly traceable" to the challenged conduct, and that it is "likely" and not just "speculative" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. To establish an injury in fact, the harm suffered by a plaintiff must be "concrete and particularized," *id. at 560*, and there must be "a sufficient likelihood that [he or she] will again be wronged a similar way," *Bates v. UPS, 511 F.3d 974, 985 (9th Cir. 2007)* (quoting *City of Los Angeles v. Lyons, 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983))*. A plaintiff "must establish a 'real and immediate threat of repeated injury.'" *Bates, 511 F.3d at 985* (quoting *O'Shea v. Littleton, 414 U.S. 488, 496, 94 S. Ct. 669, 38 L. Ed. 2d 674 (1974))*.

The Ninth Circuit recently addressed the split of authority among district courts regarding whether a plaintiff, who seeks to enjoin a seller or manufacturer from making false or misleading misrepresentations about an item the plaintiff previously purchased, must be able to establish that he would likely purchase the item again to satisfy the standing requirement. *See* *Davidson v. Kimberly-Clark Corp., 873 F.3d 1103, 1113 (9th Cir. 2017)*. ***HN9***[] In *Davidson*, the Ninth Circuit held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was **[*20]** false at the time of the original purchase, because the consumer may suffer an actual and imminent . . . threat of future harm." *Id. at 1115* (internal quotation marks and citations omitted). The Ninth Circuit noted that in some cases, "the threat of future harm may be the consumer's plausible allegations that she will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product she would like to." *Id.* In other cases, "the threat of future harm may be the consumer's plausible allegations that she might purchase the product in the future, despite the fact it was once marred by false advertising or labeling, as she may reasonably, but incorrectly, assume the product was improved." *Id.* "Either way, we . . . are not persuaded that injunctive relief is *never* available for a consumer who learns after purchasing a product that the label is false." *Id.* (internal quotation marks and citation omitted) (emphasis in original).

Here, Plaintiff alleges that he "would not have made such purchase, but for Defendants' false representations and fraudulent omissions of the Reference Price of the item he purchased, as compared with the supposedly discounted price at **[*21]** which the Fossil Outlet Store offered the item for sale." FAC ¶ 16. Moreover, Plaintiff claims he "would purchase Defendants' products in the future . . . if price tags accurately reflect 'former' prices and discounts." *Id. ¶ 49*. However, Plaintiff, and other consumers, currently "have no realistic way to know which—if any—of Defendants' price tags and sale prices are not false or deceptive." *Id.* Accepting Plaintiff's allegations as true, the Court finds that Plaintiff sufficiently alleges that he desires to purchase Fossil Outlet Products, but does not purchase such products because he has no way of knowing whether Defendants' price tags and sale prices are deceptive. Similar to *Davidson*, such allegations "constitute[] a 'threatened injury [that is] certainly impending,' thereby establishing Article III standing to assert a claim for injunctive relief." *873 F.3d at 1116* (quoting *Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013))*; *cf.* *John, 2018 U.S. Dist. LEXIS 45820, 2018 WL 1400718, at *7* (finding the plaintiff lacks standing to assert claims for injunctive relief because the plaintiff's "sole allegation pertaining to the prospect of future harm is that he may in the future shop at Defendant's outlet store.") (internal quotation marks omitted).

Accordingly, the Court finds that Plaintiff has standing **[*22]** to pursue injunctive relief. *See* *Davidson, 873 F.3d at 1115-16* ("Were injunctive relief unavailable to a consumer who learns after purchasing a product that the product's label is false, California's consumer protection laws would be effectively gutted[.]").

II. Motion to Dismiss Pursuant to *Rules 9(b)* and *12(b)(6)*

In his FAC, Plaintiff alleges that Defendants engage in a misleading and deceptive pricing scheme by representing, on the price tags of Fossil Outlet Products, prices that "were overstated and did not represent a bona fide price at which Fossil Outlet Products were previously sold." FAC ¶ 6. "Defendants convey their deceptive pricing scheme through in store signage offering steep discounts from the Reference Price listed on the products' price tags in the Fossil Outlet Stores," which are "fake reference prices" and "utilized only to perpetuate Defendants' fake-discount scheme." *Id.* ¶ 7. Defendants move to Dismiss Plaintiff's FAL, UCL, and CLRA claims under *Rules 12(b)(6)* and *9(b)*, and further contend that Plaintiff is not entitled to equitable relief or restitution. The Court considers each argument in turn.

1. Legal Standards

a. California's FAL, UCL, and CLRA

HN10[] California's FAL prohibits any "unfair, deceptive, untrue, or misleading advertising." **[*23]** *Cal. Bus. & Prof. Code § 17500*. The FAL provides, in relevant part:

> No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.

Cal. Bus. & Prof. Code § 17501. "This statute makes it unlawful for a business to disseminate any statement 'which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading[.]'" *Arevalo v. Bank of Am. Corp., 850 F. Supp. 2d 1008, 1023-24 (N.D. Cal. 2011)* (internal citation omitted). "The statute has been interpreted broadly to encompass not only advertising which is false, but also advertising which, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. . . . Consequently, even a perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under this section." *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1162 (9th Cir. 2012)* (internal citations, quotations, and alterations omitted).

HN11[] California's UCL **[*24]** prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." *Cal. Bus. & Prof. Code § 17200*. The UCL provides a separate theory of liability under each of the three prongs: "unlawful," "unfair," and "fraudulent." *Stanwood v. Mary Kay, Inc., 941 F. Supp. 2d 1212, 1222 (C.D. Cal. 2012)* (citing *Lozano v. AT & T Wireless Servs., Inc., 504 F.3d 718, 731 (9th Cir. 2007))*. "The UCL expressly incorporates the FAL's prohibition on unfair advertising as one form of unfair competition." *Hinojos, 718 F.3d at 1103*. Accordingly, any violation of the FAL also violates the UCL. *Williams v. Gerber Prods.Co., 552 F.3d 934, 938 (9th Cir. 2008)* (citing *Kasky v. Nike, Inc., 27 Cal. 4th 939, 950, 119 Cal. Rptr. 2d 296, 45 P.3d 243 (2002))*.

Lastly, ***HN12***[] California's CLRA prohibits "unfair methods of competition and unfair or deceptive acts or practices." *Cal. Civ. Code § 1770*. Specifically, the CLRA prohibits, among other things, "[a]dvertising goods or services with intent not to sell them as advertised" and "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions." *Cal. Civ. Code § 1770(a)(9)*, *(13)*.

b. The Reasonable Consumer Test

HN13[] To state a claim under the FAL, UCL, or the CLRA, a plaintiff must allege that the defendant's purported misrepresentations are likely to deceive a reasonable consumer. *See Williams, 552 F.3d at 938* (explaining that unless the advertisement at issue targets a particularly vulnerable group, courts must evaluate claims for false or misleading advertising from the perspective **[*25]** of a reasonable consumer). "A reasonable consumer is 'the ordinary consumer acting reasonably under the circumstances.'" *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1161-62 (9th Cir. 2012)* (quoting *Colgan v. Leatherman Tool Grp., Inc., 135 Cal. App. 4th 663, 682, 38 Cal. Rptr. 3d 36 (Ct. App. 2006))*. "Likely to deceive implies more than a mere possibility that the advertisement might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner." *In re Sony Gaming Networks and Customer Data Sec. Breach Litig., 903 F. Supp. 2d 942, 967 (S.D. Cal. 2012)* (citing *Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496, 508, 129 Cal. Rptr. 2d 486 (2003))*. Rather, "the phrase indicates that the ad is such that it is probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled." *Lavie, 105 Cal. App. 4th at 508*. "In determining whether a statement is misleading under the statute, the primary evidence in a false advertising case is the advertising itself." *Bruton v. Gerber Products Co., 961 F. Supp. 2d 1062, 1092 n.20 (N.D. Cal. 2013)* (quoting *Colgan, 135 Cal. App. 4th at 679*) (internal quotation marks omitted).

HN14[] As a general matter, courts applying the reasonable consumer test to businesses' use of comparative reference prices have distinguished between two categories: "exclusive product" cases and "non-exclusive product" cases. *Sperling v. Stein Mart, Inc., F. Supp. 3d , No. 15-CV-1411-AB-KKx, 291 F. Supp. 3d 1076, 2018 U.S. Dist. LEXIS 61770, 2018 WL 1214736, at *5 (C.D. Cal. Feb. 23, 2018)*. In exclusive product cases, a store, usually an outlet store, "sells a lower-price, different version of a product sold in a traditional retail store." *2018 U.S. Dist. LEXIS 61770, [WL] at *6*. "The outlet uses the price of the product made for the retail store as a comparative **[*26]** reference price on price tags" but the product actually sold in the outlet store "is made exclusively for the outlet and is never sold for the comparative reference price at a traditional retail store." *Id.* In contrast, in non-exclusive product cases, "more than one retailer offers the product at issue for sale. Because other retailers offer the same product for sale, there are legitimate prices to which to compare the defendant's comparative reference price." *Id.* In exclusive product cases, "courts generally find that a plaintiff can proceed with his or her claims." *Id.* This result "makes sense" because in exclusive product cases, where the outlet products "were never sold in traditional retail stores for the comparative reference prices presented on the price tags," it is "deceptive to use the full retail items as price comparators for those products." *Id.*[6]

2. Analysis

a. Rule 9(b)

Defendants argue Plaintiff's FAC does not meet the heightened pleading standards under *Rule 9(b)* because: (1) Plaintiff fails to plead the circumstances of his purchase with particularity; (2) reasonable consumers would not be deceived by the **[*27]** Like Style tags; and (3) Plaintiff does not allege facts to support his claims that Defendants' prices are deceptive. The Court addresses Defendants' arguments below.

First, Defendants contend that Plaintiff "does not claim to have viewed or relied on 'Like Style' before making his purchase, does not claim where he saw any such representation, and does not state how he interpreted this phrase, or identify any other statement that he found material." Doc. No. 11-1 at 11. Thus, Defendants claim that Plaintiff fails to allege the who, what, when where, and how of the alleged misconduct.

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[6] Defendants argue that Plaintiff "ignores" the Ninth Circuit's recent and "significant decision" in *Sperling v. DSWC, Inc. ("DSW"), 699 Fed. Appx. 654 (9th Cir. 2017)*, and instead focuses on the Ninth Circuit's 2017 *Rubenstein* decision, "which was decided before *Sperling* and runs contrary" to *In re GlenFed, Inc., Sec. Litig., 42 F.3d 1541 (9th Cir. 1994)* (en banc) and its progeny. Doc. No. 14 at 4. The Court disagrees. Defendants fail to note that *DSW*, unlike *Rubenstein*, is a non-exclusive product case. *See Sperling, F. Supp. , 2018 U.S. Dist. LEXIS 61770, 2018 WL 1214736, at *6-7* (noting that *Rubenstein* is an exclusive product case, while *DSW* is a non-exclusive product case). Thus, because this is an exclusive product case, Plaintiff's reliance on *Rubenstein* is appropriate.

The Court finds Plaintiff's allegations are sufficient to support his claim that the Like Style tags are deceptive. In his FAC, Plaintiff alleges that on November 16, 2016 (the "when"), Plaintiff (the "who") purchased a Travis Workbag, Style SBG1136200 at a Fossil Outlet Store in Carlsbad, California (the "where"). *See* FAC ¶¶ 34-37. Plaintiff claims that Defendants misled customers through the prices on the Like Style tags and instore signage (the "what"). *Id.* ¶ 37. Regarding the "how," Plaintiff further alleges that the Travis Workbag had a price tag attached to it, bearing a price of $198.00. *Id.* ¶ 36. **[*28]** Plaintiff also "observed signage" at the store "above the subject item" which represented that the bag was on sale for "40% Off Ticketed Price" and another sign indicating "20% Off" entire purchase price. *Id.* ¶¶ 37, 34. Plaintiff alleges that he "reasonably believed the truth of the represented price attached to the price tag[.]" FAC ¶ 17. Believing that he "was receiving a significant discount from the Reference Price listed on the price tag by purchasing the bag, Plaintiff decided to purchase the item and proceeded to the cash register where he did in fact purchase the item." *Id.* ¶ 38.

Defendants emphasize that Plaintiff does not claim to have relied on the phrase "Like Style" before making his purchase or "identify any other statement that he found material." Doc. No. 11-1 at 11. Defendants rely primarily on *Chase v. Hobby Lobby Stores, Inc.* ("*Chase I*") in support of this argument. *No. 17-CV-881-GPC-BLM, 2017 U.S. Dist. LEXIS 162909, 2017 WL 4358146 (S.D. Cal. Oct. 2, 2017)*. In *Chase I*, the plaintiff purchased a photo frame after observing a sticker listing the "Marked" price as $17.99, and a placard next to the photo frame that stated "Photo Frames 50% OFF the Marked Price." *2017 U.S. Dist. LEXIS 162909, [WL] at *1*. The defendant introduced as an exhibit the placard which the plaintiff referenced **[*29]** in her complaint, which stated "Photo Frames ALWAYS 50% OFF THE MARKED PRICE*." *2017 U.S. Dist. LEXIS 162909, [WL] at *8*. The asterisk directed consumers to a disclaimer in smaller print on the placard that stated "DISCOUNTS PROVIDED EVERY DAY; MARKED PRICES REFLECT GENERAL U.S. MARKET VALUE FOR SIMILAR PRODUCTS." *Id.* In concluding that the plaintiff did not sufficiently allege the "how" of the defendant's alleged misrepresentation, the court explained that the plaintiff did not plead whether she saw the word "ALWAYS," whether she saw the asterisk, or whether she even read the disclaimer at issue. *See* *2017 U.S. Dist. LEXIS 162909, [WL] at *8-9*.

Chase I, however, is distinguishable for several reasons. First, the court did not find that the plaintiff failed to sufficiently allege the "how" of the misrepresentation by failing to address how she interpreted the term "Marked" on the price tag. Rather, the court focused on the language printed on the placard. Second, unlike *Chase I*, there is no lengthy disclaimer or asterisk directing Plaintiff to language expressly stating that the price listed on the price tag reflects the "VALUE FOR SIMILAR PRODUCTS." *2017 U.S. Dist. LEXIS 162909, [WL] at *8*. The photos of Defendants' in-store signage, attached as exhibits to the FAC, state "TAKE 50% OFF LOWEST TICKETED **[*30]** PRICE" and "SALE $129." FAC Exhs. A, C. Third, Plaintiff attaches a true and correct copy of the price tag attached to the bag that he purchased on November 16, 2016. *See* FAC, Exh. E. Below the "$198.00" figure, the price tag includes the phrase "LIKE STYLE." *Id.* Plaintiff expressly alleges that after reviewing the price tag attached to the Travis Workbag, he believed the price tag referred to the regular ticketed price of the item. FAC ¶¶ 17, 37-38. Plaintiff "understood the Reference Price representation to indicate a true former price of the identical item, as sold at a mainline Fossil retail store." FAC ¶ 17. Thus, in construing Plaintiff's allegations in the light most favorable to him, Plaintiff read the price tag and concluded that the price listed reflected the regular price of the Travis Workbag. *See* *Knapp v. Art.com, Inc., No. 16-CV-768-WHO, 2016 U.S. Dist. LEXIS 78128, 2016 WL 3268995, at *5 (N.D. Cal. June 15, 2016)* ("Viewed in the light most favorable to the nonmoving party, these allegations are sufficient to plausibly establish that Knapp interpreted the '40% off' language as advertising a discount from Art.com's former prices. Indeed, it is not clear how else Knapp could have reasonably understood the [language.]").

Further, Plaintiff explains that **[*31]** he is not challenging the use of the phrase "Like Style;" rather, Plaintiff challenges Fossil's pricing scheme "whereby Fossil systematically and routinely represented its Fossil Outlet Products as being offered to the consumer at a significant discount, when the purported discounts were, in fact, false." Doc. No. 13 at 12. Thus, the Court is mindful that the gravamen of Plaintiff's claims concern the allegedly deceptive pricing scheme. The Court finds that "[t]he pricing scheme has been alleged with requisite specificity to inform both the Court and Defendant as to the 'who, what, when, where, and how' of the alleged fraud." *John, 2018 U.S. Dist. LEXIS 45820, 2018 WL 1400718, at *7* (citing *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003))*.

Accordingly, the Court finds that Plaintiff's allegations, at this stage of the proceedings, are sufficient to satisfy Rule 9(b). *See* Rubenstein, 687 F. App'x at 567 (finding that the plaintiff had satisfied 9(b)'s "how" requirements by alleging that the defendant's use of "Compared To price tags . . . misled consumers into believing that the Compared To prices were charged by either [defendant] or other merchants in the vicinity for comparable products[.]"); *see also* John, 2018 U.S. Dist. LEXIS 45820, 2018 WL 1400718, at *7 (finding the plaintiff has met the Rule 9(b) standard by including the date he purchased the product, the store where he purchased **[*32]** the product, a description of the purchased product, a description of the advertising he relied upon when purchasing the wallet, and pictures attached as exhibits depicting the products and their corresponding advertisements).

Second, Defendants argue that Plaintiff's claims fail under Rule 9(b) because he "does not allege how reasonable consumers would interpret the phrase 'Like Style.'" Doc. No. 11-1 at 13. Specifically, Defendants contend that "reasonable consumers ***would not*** interpret 'Like Style' to mean a former price." *Id.* (emphasis in original).

In *Chase v. Hobby Lobby Stores, Inc.* ("*Chase II*"), the court found that the plaintiff "adequately redressed the deficiencies in her prior complaint" by alleging that she did not notice the word "always" on the placard, nor did she notice or read any disclaimer or other language on the placard. No. 17-cv-881-GPC-BLM, 2018 U.S. Dist. LEXIS 21165, 2018 WL 786743, at *4 (S.D. Cal. Feb. 8, 2018). The court indicated that "[t]aking Plaintiff's alleged facts as true and drawing all reasonable inferences in favor of the plaintiff, . . . it is plausible that a 'reasonable consumer' could have been misled by plaintiff's advertising" and could have believed that the defendant previously sold the item for the marked price. *Id.*

Here, the Court **[*33]** finds that it is plausible that reasonable consumers could understand the prices on the Like Style tags "to be a valid representation of a true former price on the identical product." FAC ¶ 18; *see* Stathakos v. Columbia Sportswear Co., No. 15-CV-4543-YGR, 2016 U.S. Dist. LEXIS 58310, 2016 WL 173001, at *4 (N.D. Cal. May 2, 2016) (The Court finds that it is facially plausible that plaintiffs and other reasonable consumers would understand the Reference Prices at issue here to refer to former prices for the same product than comparable prices for similar products."). The court in Chase II found that reasonable consumers could have been misled by the defendant's advertising even where a lengthy disclaimer appeared on the in-store signage indicating the photo frames are "ALWAYS" 50% off, and that the marked prices refer to the value of similar products. Here, however, there is no such explicit disclaimer. Defendants claim reasonable consumers would read the price in connection with the "Like Style" language and understand the price to be comparison to the price of a similar item—not a former price for the identical item. *See* Doc. No. 11-1 at 14. The Court is not persuaded. By Defendants' own admission, "[t]he word 'like,' in adjective form, means 'having the *same* ***[*34]*** or similar qualities.'" *Id.* (emphasis added). Thus, far from Defendants' argument that the meaning of "Like Style" "defies common sense," it is entirely plausible that a reasonable consumer would understand the price listed on the Like Style tags to represent a former price for the *same* item. Doc. No. 14 at 7.

Moreover, as Plaintiff notes, it is not the phrase "Like Style" that Plaintiff challenges. Instead, Plaintiff challenges Defendants' alleged use of a fictitious price on the price tag to inflate the discounts they offer to consumers. *See* Doc. No. 13 at 12-13 n.1. At this stage of the proceedings, the Court finds that it is plausible that reasonable consumers would understand the price listed on the Like Style tags as referring to a former price of the same product. Moreover, "whether [the price tags] actually were misleading is a matter for another day." Covell, 2018 U.S. Dist. LEXIS 12437, 2018 WL 558976, at *4. As the Ninth Circuit has noted, "[w]here, as here, the reasonable consumer test applies to a plaintiff's underlying claims, it is a 'rare situation in which granting a motion to dismiss is appropriate.'" Rubenstein, 687 F. App'x at 566 (quoting *Williams, 552 F.3d at 939*); *see also* Reid v. Johnson & Johnson, 780 F.3d 952, 958 (9th Cir. 2015) (stating that the reasonable consumer standard raises questions of fact that are appropriate for resolution **[*35]** on a motion to dismiss only in "rare situations.").

Third, Defendants claim Plaintiff has not pleaded "any facts" to support his contention that the $198.00 price was inaccurate. Doc. No. 11-1 at 16. As Plaintiff correctly notes, Plaintiff is "not required to plead that [he] has conducted a pre-suit investigation—or include the results of such investigations—in every case, particularly where the information is not within the personal knowledge of the pleader." Stathakos, 2016 U.S. Dist. LEXIS 58310, 2016 WL 1730001, at *4.

With respect to the Travis Workbag Plaintiff purchased allegedly in reliance on the price listed on the Like Style tag and 40% off representation, Plaintiff alleges that the price listed "was never the prevailing market retail price in the preceding 90 days before Plaintiff's purchase." FAC ¶ 40. Moreover, with respect to the class allegations, Plaintiff alleges that "Defendants' deceptive advertising practices were systematic and pervasive at Fossil Outlet Store as Fossil Outlet Products remain continuously discounted from the Reference Price listed on the tag price" or such products "are not offered for sale at their Reference Price (the purported 'Regular Price') for any substantial period of time, and in most cases, not at **[*36]** all[.]" *Id.* Plaintiff alleges that Fossil Outlet Products sold at Fossil Outlet Stores "are designed and manufactured for, and sold *exclusively* by, those stores, which means that such items were never sold—or even intended to be sold—at the Reference Price advertised on the price tags." *Id.* (emphasis in original). Further, Plaintiff did conduct an investigation and attaches to his FAC examples of the products Plaintiff investigated and determined to be continuously discounted from the price listed on the Like Style tags for the preceding 90 days. *See* FAC, Exhs. A-D. Thus, "Defendants' implicit request to engage in merits analysis relative to plaintiff['s] investigation is premature." *Stathakos, 2016 U.S. Dist. LEXIS 58310, 2016 WL 1730001, at *4*.

Accordingly, taking Plaintiff's allegations as true, which the Court must at this stage of the proceedings, the Court finds that Plaintiff's allegations are sufficient to satisfy *Rule 9(b)*. *See Rael v. New York & Co., No. 16-CV-369-BAS-JMA, 2017 U.S. Dist. LEXIS 110774, 2017 WL 3021019, at *4 (S.D. Cal. July 17, 2017)* (concluding that the plaintiff's allegations satisfy *Rule 9(b)* because they "give[] Defendants notice as to the basis for Plaintiff's claim that the 70% off representation was false, and the information about the discounts offered by Defendants is primarily within the Defendants' knowledge."); **[*37]** *Stathakos, 2016 U.S. Dist. LEXIS 58310, 2016 WL 1730001, at *4* (finding the plaintiffs' allegations sufficient where the plaintiffs "alleged that there should have been no reference price because the products at issue were sold exclusively at Columbia Outlet stores and were *not* previously sold at the higher Reference Price at all.") (emphasis in original).

b. Rule 12(b)(6)

Additionally, Defendants claim that Plaintiff fails to state a claim pursuant to *Rule 12(b)(6)* under the CLRA, FAL, and UCL. *See* Doc. No. 11-1 at 19-21.

Defendants first argue that Plaintiff fails to state a claim under *subdivisions (a)(9)* and *(a)(13)* of the CLRA. *See id.* at 19. Specifically, Defendants claim that Plaintiff fails to state a claim under *section (a)(9)* because "he does not allege that Fossil falsely advertised the *goods* that he purchased—instead, he merely contends that the *price* for the bag he bought was deceptive." Doc. No. 11-1 at 19 (emphasis in original). Moreover, Defendants assert Plaintiff fails to state a claim under section *(a)(13)* because "the FAC does not identify any representations by Fossil regarding 'price reductions.'" *Id.* Further, Defendants claim Plaintiff's CLRA claim fails because Plaintiff does not allege he suffered any damage as a result of Defendants' allegedly deceptive pricing scheme.

HN15[] *Section 1770(a)(9) of the California Civil Code* prohibits **[*38]** "[a]dvertising goods or services with intent not to sell them as advertised[.]" *Cal. Civ. Code § 1770(a)(9)*. *Section 1770(a)(13)* prohibits "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions[.]" *Cal. Civ. Code § 1770(a)(13)*. Moreover, the CLRA provides relief to a "consumer who suffers any damage as a result of the use or employment by a person of a method, act, or practice declared to be unlawful by *Section 1770*." *Cal. Civ. Code § 1780(a)*.

Here, the Court finds Plaintiff's allegations are sufficient to state a claim for violations of the CLRA. With respect to *§ 1770(a)(9)*, Plaintiff expressly alleges that the misrepresentation at issue pertains to the purported regular price and discounted price falsely advertised across all items sold at Fossil's Outlet Stores. *See* FAC ¶¶ 6-7, 9-10, 98-104. Moreover, with respect to *§ 1770(a)(13)*, Plaintiff alleges that the prices listed on the Like Style tags did not accurately reflect a true former price for the same product, and that the purported discounts were false because the product was never sold at the price listed on the tags. *See id.* ¶¶ 7, 9-10, 98-104. Finally, Plaintiff sufficiently alleges that he suffered damage, as he claims he would not have purchased the bag in the absence of Defendants' misrepresentations. **[*39]** *Id.* ¶ 38; *see Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 120 Cal. Rptr. 3d 741, 246*

P.3d 877, 890 (Cal. 2011) (concluding that a consumer's allegation that "he or she would not have bought the product but for the misrepresentation" is "sufficient to allege economic injury.").

Second, Defendants argue that Plaintiff fails to state a claim under the FAL because Plaintiff does not allege an "untrue or misleading" representation, nor does Plaintiff allege any facts to show that the price on the Like Style tag was not the prevailing price within the preceding 90 days of his purchase. Doc. No. 11-1 at 20. However, the FAC alleges specific representations and why those representations are false and misleading that are sufficient to state a claim for violations of the FAL. *See* FAC ¶¶ 6-10, 89-97.

Third, Defendants assert that Plaintiff fails to state a claim under the UCL's "unfairness" or "unlawfulness" prongs because Plaintiff has not alleged any conduct by Fossil that offends an established public policy or that violates any underlying law. *See* Doc. No. 11-1 at 20. With respect to the "unlawfulness" prong, because the Court finds that Plaintiff sufficiently alleges a violation of the FAL and the CLRA, "Plaintiff also adequately alleges a violation of the UCL 'unlawful' prong." *Rael, 2017 U.S. Dist. LEXIS 110774, 2017 WL 3021019, at *5*; *see* **[*40]** *also Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 83 Cal. Rptr. 2d 548, 973 P.2d 527, 539-40 (Cal. 1999)* ("By proscribing any unlawful business practice, [the UCL] borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable.") (internal quotation marks and citation omitted)).

HN16[] With respect to the "unfairness" prong, the California Supreme Court has defined the word "unfair" under the UCL to mean conduct that "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech, 973 P.2d at 544*. Lower courts, however, "have struggled to apply these rules in the context of consumer cases." *Rael, 2017 U.S. Dist. LEXIS 110774, 2017 WL 3021019, at *5*. Many courts utilize a three-part test set forth by the appellate court in *Camacho v. Auto. Club of S. Cal., 142 Cal. App. 4th 1394, 48 Cal. Rptr. 3d 770, 777 (Cal. Ct. App. 2006)*. Under this test, courts consider factors including: (1) whether the consumer injury is substantial; (2) whether the injury is outweighed by any countervailing interests; and (3) whether the injury is one that consumers themselves could not reasonably have avoided. *See id.* Notably, "[w]hether a practice is . . . unfair is generally a question of fact which requires consideration and weighing **[*41]** of evidence from both sides and which usually cannot be made on demurrer." *Klein v. Chevron U.S.A., Inc., 202 Cal. App. 4th 1342, 137 Cal. Rptr. 3d 293, 321 (Cal. Ct. App. 2012)* (internal quotation marks and citations omitted).

Here, Plaintiff alleges that the prices represented on the price tags were overstated and did not reflect a bona fide price at which the products were sold. FAC ¶ 6. Additionally, Plaintiff alleges that the advertised prices were not prevailing market retail prices within the three months immediately preceding the publication of the advertised prices. *Id.* Further, Plaintiff alleges that he, "like other Class members, was lured in, relied on, and was damaged by these pricing schemes that Defendants carried out." *Id. ¶ 18*. Thus, taking Plaintiff's allegations as true, the Court finds that Plaintiff has alleged Defendants engaged in conduct sufficient to meet the "unfair" prong as defined in *Camacho*. *See Rael, 2017 U.S. Dist. LEXIS 110774, 2017 WL 3021019, at *5* ("At this stage of the proceedings the Court finds Plaintiff's allegations that Defendants' false sales substantially injured consumers by inducing them to buy products they would not otherwise have purchased . . . is sufficient to meet the 'unfair' prong as defined in *Camacho*.").

c. Equitable Relief and Restitution

Defendants further argue that Plaintiff "is not **[*42]** entitled to any of the relief he seeks." Doc. No. 11-1 at 21. Specifically, Defendants claim Plaintiff's claim for equitable relief under the UCL, FAL, and CLRA fails and that Plaintiff is not entitled to restitution.

Defendants first contend that Plaintiff's claims for equitable relief under the UCL, FAL, and CLRA fail because "Plaintiff does not allege that he lacks an adequate remedy at law." Doc. No. 11-1 at 21. Defendants claim "Plaintiff's CLRA damages claim prevents him from establishing that there is no adequate remedy at law available to him." *Id.* at 21-22. Thus, Defendants request the Court dismiss Plaintiff's request for equitable relief. Plaintiff argues that he is entitled to plead equitable relief in the alternative at the pleading stage, and that he sufficiently alleges the necessity for equitable relief where an award of damages alone would not rectify the harm. Doc. No. 13 at 20.

District courts are split on whether a plaintiff's claims for equitable relief should be dismissed at the pleading stage. *Compare* Munning v. Gap, Inc., 238 F. Supp. 3d 1195, 1204 (N.D. Cal. 2017) (dismissing the plaintiff's claims for equitable relief because the plaintiff has an adequate remedy at law), *with* Covell, 2018 U.S. Dist. LEXIS 12437, 2018 WL 558976, at *8 (declining to dismiss the plaintiff's claims for equitable **[*43]** relief at the pleading stage). As Plaintiff points out, Section 17205 of the Business and Professions Code states that unless "otherwise expressly provided, the remedies or penalties provided by [the UCL] are *cumulative* to each other and to the remedies or penalties available under all other laws of [California]." Cal. Bus. & Prof. Code § 17205 (emphasis added). "Put simply, a plaintiff seeking damages is not automatically precluded from obtaining UCL relief." Covell, 2018 U.S. Dist. LEXIS 12437, 2018 WL 558976, at *7. One district court recently explained that "plaintiffs may seek injunctive and/or restitutionary equitable relief separate and apart from the same underlying claims . . . in which plaintiffs seek monetary damages." Estakhrian v. Obenstine, 233 F. Supp. 3d 824, 846 (C.D. Cal. 2017).

Here, **HN17**[] the Court finds persuasive the Covell court's reasoning. In *Covell*, the court explained that "[i]f Plaintiff ultimately prevails on her claims, she will still need to show that equitable relief is the only way to remedy a specific type of injury suffered by herself or the class. However, she may be able to do so by, for example, arguing that injunctive relief is the only way to protect the class from future deceptive behavior." 2018 U.S. Dist. LEXIS 12437, 2018 WL 558976, at *8; *see also* Aberin v. Am. Honda Motor Co., No. 16-CV-4384-JST, 2018 U.S. Dist. LEXIS 49731, at *26 (N.D. Cal. Mar. 26, 2018) ("This Court joins the many other courts, however, that have reached **[*44]** the opposite conclusion, finding no bar to the pursuit of alternative remedies at the pleading stage."); Adkins v. Comcast Corp., No. 16-CV-5969-VC, 2017 U.S. Dist. LEXIS 137881, 2017 WL 3491973, at *3 (N.D. Cal. Aug. 1, 2017) ("[T]his Court is aware of no basis in California or federal law for prohibiting the plaintiffs from pursuing their equitable claims in the alternative to legal remedies at the pleading stage."). Plaintiff expressly alleges that "[t]his deception will continue if Defendants are not enjoined from continuing their pricing scheme." FAC ¶ 18; *cf.* Gomez v. Jelly Belly Candy Co., No. 17-CV-575-CJC-FFM, 2017 U.S. Dist. LEXIS 134188, at *4 (C.D. Cal. Aug. 18, 2017) (noting that the plaintiff "has not even alleged facts that could support a future finding that monetary relief is insufficient to compensate her for the alleged harm."). Accordingly, the Court "declines to dismiss Plaintiff's claims for equitable relief." Covell, 2018 U.S. Dist. LEXIS 12437, 2018 WL 558976, at *8.

Second, Defendants assert that Plaintiff is not entitled to restitution because Plaintiff "does not allege that the bag he purchased was damaged or otherwise worth less than what he paid[.]" Doc. No. 11-1 at 25. Plaintiff argues that Defendants' challenge is misplaced and that Defendants are attempting "to elevate the pleading standard to require Plaintiff to presently identify and commit to a restitution calculation method." Doc. No. 13 at **[*45]** 23.

HN18[] Courts have "very broad discretion to determine an appropriate remedy as long as it is supported by the evidence and is consistent with the purpose of restoring the plaintiff the amount that the defendant wrongfully acquired." Astiana v. Kashi Co., 291 F.R.D. 493, 506 (S.D. Cal. 2013). "The court's discretion is not entirely unbounded, however, because 'restitution under the [UCL and FAL] must be of a measureable amount to restore to the plaintiff what has been acquired by violations of the statutes, and that measureable amount must be supported by evidence.'" Russell v. Kohl's Dep't Stores, Inc., No. 15-CV-1143-RGK-SPx, 2015 U.S. Dist. LEXIS 176123, 2015 WL 12781206, *2 (C.D. Cal. Oct. 6, 2015) (quoting Colgan, 135 Cal. App. 4th at 698).

Here, Plaintiff alleges that he "would not have purchased the bag in the absence of Defendants' misrepresentations." FAC ¶ 38. "Defendants have been unjustly enriched at the expense of Plaintiff and members of the proposed class." Id. ¶ 76. Thus, Plaintiff seeks "restitution and other appropriate equitable remedies, including an injunction under the UCL and FAL; and restitution, damages, and injunction under the CLRA." Id. ¶ 21. These allegations are "sufficient to state a claim for restitution under the UCL." Azimpour II, 2017 U.S. Dist. LEXIS 63516, 2017 WL 1496255, at *9. "[W]hether Plaintiff can submit sufficient evidence of a measurable amount of restitution is a premature **[*46]** determination at the pleading stage." *Id.; see also* John, 2018 U.S. Dist. LEXIS 45820, 2018 WL 1400718, at *8 (denying the defendant's motion to dismiss the plaintiff's claims for restitution where the plaintiff alleged that he would not have purchased the wallet without the misrepresentation made by the defendant, and that the defendant was unjustly enriched as a result of selling merchandise offered at a false discount); *Russell, 2015 U.S. Dist. LEXIS 176123, 2015 WL 12781206, at *5* ("Even though Plaintiffs have not alleged that the price they paid exceeds the value of the merchandise they purchased, they have still alleged sufficient facts to support a claim for restitution under the UCL and FAL.").

CONCLUSION

Based on the foregoing, the Court **DENIES** Defendants' motion to dismiss in its entirety.

IT IS SO ORDERED.

Dated: April 9, 2018

/s/ Michael M. Anello

HON. MICHAEL M. ANELLO

United States District Judge

[Sourceone Dental, Inc. v. Patterson Cos., Inc.](#)

United States District Court for the Eastern District of New York

April 10, 2018, Decided; April 12, 2018, Filed

15-cv-5440 (BMC) (GRB)

Reporter

310 F. Supp. 3d 346 *; 2018 U.S. Dist. LEXIS 68157 **; 2018-1 Trade Cas. (CCH) P80,354; 2018 WL 1891489

SOURCEONE DENTAL, INC., Plaintiff, - against - PATTERSON COMPANIES, INC. and BENCO DENTAL SUPPLY COMPANY, Defendants.

Prior History: *Sourceone Dental, Inc. v. Patterson Cos., 2017 U.S. Dist. LEXIS 221806 (E.D.N.Y., Feb. 3, 2017)*

Core Terms

attend, dental, convention, defendants', communications, manufacturers, competitors, conspiracy, announced, dentists, email, associations, summary judgment, distributors, antitrust, boycott, summary judgment motion, Sherman Act, inter-firm, conspire, plans, deposition, Supplies, team, business relationship, tortious interference, aiding and abetting, pulling, Perks, partnerships

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Judges: Brian M. Cogan, United States District Judge.

Opinion by: Brian M. Cogan

Opinion

[*352] **MEMORANDUM DECISION & ORDER**

COGAN, District Judge.

Plaintiff SourceOne, Inc. has sued fellow dental-supplies distribution companies Patterson Companies, Inc. and Benco Dental Supply Company, accusing them of violating *§ 1* of the Sherman Act. SourceOne contends that defendants conducted a group boycott against SourceOne's distribution partners and pressured manufacturers **[**3]** and at least one individual dentist to join the boycott. SourceOne also brought various state-law claims based on the same conduct. Before the Court are defendants' motions for summary judgment on all of SourceOne's claims.

Because SourceOne has produced evidence that tends to exclude the possibility that defendants acted independently (in other words, evidence that the inference that defendants conspired is reasonable in light of the competing inference of independent action), defendants' motions for summary judgment on the Sherman Act claim are DENIED. Defendants' motions for summary judgment on plaintiff's damages claim are also DENIED. As to the state-law claims, the Court concludes that under applicable law, SourceOne has demonstrated a genuine issue of material fact as to its civil-conspiracy and tortious-interference claims, and therefore defendants' motions for summary judgment are DENIED as to those claims. However, the Court concludes that the applicable state law would not recognize an aiding-and-abetting claim in this context, so defendants' motions for summary judgment are GRANTED as to that claim.

BACKGROUND

SourceOne alleges that dental-supplies distributors Patterson and **[**4]** Benco, as well as distributor Henry Schein, Inc. (which was originally named in the complaint but which settled with SourceOne), conspired to exclude it from the market and took overt acts in furtherance of that conspiracy by boycotting the Texas and Arizona Dental Associations' annual meetings and by **[*353]** pressuring manufacturers and individual dentists not to do business with SourceOne. The following is a non-exhaustive summary of the key evidence. As is required on a motion for summary judgment, the Court views the contested facts in the light most favorable to SourceOne.

I. Texas Dental Association's 2014 Meeting

SourceOne alleges that defendants formed the conspiracy sometime between October 2013 and January 2014. In October 2013, the Texas Dental Association (TDA) launched "TDA Perks Supplies," a TDA-branded online marketplace for dental supplies and equipment created through a partnership with SourceOne. Defendants found out about TDA Perks Supplies in mid-October 2013.

Sometime before October 23, 2013, Ron Fernandez, Benco's regional manager for San Antonio, Austin, and Houston, called John Hyden, Patterson's San Antonio regional manager, to discuss the TDA's upcoming annual meeting **[**5]** and whether their respective companies would be attending in light of the TDA's partnership with SourceOne. Fernandez testified at his deposition that one of his goals during this discussion was to identify whether Patterson would be attending the TDA meeting to avoid placing Benco at a competitive disadvantage if it pulled out of the TDA meeting and Patterson attended. Fernandez told Hyden that Benco was considering pulling out of the 2014 TDA, and asked Hyden if Patterson planned to do the same. Fernandez testified that he offered information to Hyden to induce Hyden to share similar information. Fernandez discussed what Hyden told him with others at Benco, and Hyden discussed the call with Clint Edens, his supervisor at Patterson.

On October 23, 2013, Clint Edens, Patterson's decision-maker on attending the TDA meeting, emailed his superiors, informing them that "[a]s for Patterson, we have briefly discussed this TDAPerks site (not the source) with our dealer competitors at the local San Antonio & Houston level . . . I am committed to pulling from the TDA if they do not reconsider competing with us via TDA perks [*sic*]." Glenn Showgren, a manager at Schein, also reported internally **[**6]** as early as October 31, 2013 that Patterson, Benco, and another distributor, Burkhart, were considering pulling out of the 2014 TDA meeting.

Sometime before November 20, 2013, Randall McLemore, Schein's Dallas branch manager, visited his Patterson counterpart, Bob Ingersoll, to discuss the TDA annual convention. At his deposition, McLemore conceded that this in-person conversation with Ingersoll violated Schein's antitrust policy.

By December 11, 2013 (before Patterson had publicly announced that it would pull out of the 2014 TDA), Benco's Fernandez claimed that Patterson had already decided not to attend based on a conversation he had with a Patterson manager "about three weeks ago." That same day, Fernandez told Barrett Spencer, a Benco salesperson, in a text message: "I have been talking to the directors of Schein and Patterson. We are going to be taking a stand together against them [the TDA]."

Patterson announced that it would not attend the 2014 TDA meeting on December 13, 2013. Immediately after Patterson's announcement, a regional manager at Schein informed his supervisor that Patterson had dropped out of the 2014 TDA convention and that "I firmly believe they made the move expecting **[**7]** us to follow suit."

Dave Steck, a Schein vice president, later echoed this same sense of obligation to Patterson, or at least an obligation to keep Patterson apprised of Schein's decision. In late December 2013 or early January 2014, **[*354]** Dave Misiak, then-Vice President of Sales at Patterson, called Steck to tell him that Patterson was not going to attend the 2014 TDA convention and asking Steck if Schein was attending. Steck testified that, although he had known Misiak for five or six years, it was "unusual" for Misiak to contact him. Steck told Misiak that Schein had not yet decided, but that Steck would let Misiak know once it had. Steck testified at his deposition that he felt some obligation to tell Misiak Schein's final decision because Misiak had told him of Patterson's plans. Steck testified that he informed his boss, Tim Sullivan, of the call because he thought it was important for Sullivan to know of Patterson's plans for the 2014 TDA.

A few weeks after the Misiak-Steck call, on January 21, 2014, Schein's Steck told his employees in an internal email that he needed to inform Patterson about whether Schein was attending the 2014 meeting ("Guys, I have to get back to PDCO on whether **[**8]** or not we are attending the TDA."). That same day, Steck emailed Misiak at Patterson to say that he would "be calling you to let you know about our decision on the matter we recently discussed in the next couple of days." In the same email thread, Misiak expressed outrage to Tim Rogan, another Patterson higher-up, because Steck "already told me that they were out. Full blown!" Rogan replied to Misiak immediately: "That sucks. You should call him. 'Thought I could trust you' type of conversation."

On April 8, 2014 (the day before Schein and Benco officially announced that they were not attending the 2014 TDA), Mike Rowe, Benco's Director of Sales, rejected a suggestion from Fernandez, his direct report, that Benco advertise at the TDA that it would match the prices of TDA Perks Supplies, and said that Fernandez should instead "encourage more vendor partners to join the big three dealers and boycott future conventions. [The TDA convention] dying a slow death will have more impact than matching prices."

On April 9, 2014, Schein announced that it would not attend the 2014 TDA. Later that day, Benco's Fernandez informed Steck (his counterpart at Schein) that Benco had officially decided to **[**9]** pull out of the 2014 TDA — before Fernandez had informed the sales representatives he managed. Fernandez also called Kevin Upchurch, a Schein manager in Arizona, that same day.

II. Arizona Dental Association's 2015 Meeting

Patterson's decisions not to attend the 2014 TDA and 2015 AZDA conventions[1] were made at the local level by different managers (Clint Edens for the TDA convention and Chad Bushman, Patterson's Arizona branch manager, for the AZDA convention), but both defendants' Arizona decision-makers knew about the Texas boycott and discussed it with their Texas counterparts.

On July 21, 2014, Dan Reinhardt, Patterson's Mountain West Region Manager (which included Arizona) contacted Clint Edens, the Patterson's South-Central Regional Manager, saying that Patterson's Arizona team had heard that the AZDA was collaborating with SourceOne and asking Edens about the status of Patterson's relationship with the TDA and SourceOne. Dave Misiak replied to both Reinhardt and Edens less than an hour later, instructing them to "[p]lease discuss live and no more emails on this topic."

On April 17, 2014, Chuck Cohen, Benco's managing director in Texas, emailed Brian Evans, Benco's Director for the **[**10]** Western District (including Arizona), informing Evans **[*355]** about "a new program called #TDAPerks, an effort by the Texas Dental Association to compete with traditional dental distributors" and about Schein, Patterson, and Benco's decision "independently to withdraw as an exhibitor [*sic*] at the TDA meeting this year." The email noted that Benco's Texas team was "monitoring this development closely," but that they were "not overly concerned about it growing quickly." The email asked Evans to let members of Benco's Texas team "know if you hear anything more on this issue." On July 10, 2014, Evans responded to Cohen, informing him that the AZDA had confirmed that SourceOne was an "endorsed vendor."

The Arizona decision-makers at Patterson and Benco also discussed with each other their companies' respective plans to withdraw support from the 2015 AZDA. As early as June 18, 2014, Mike Wade, Benco's regional manager in Arizona and the decision-maker on the AZDA convention, responded to an email from his salesperson asking if Benco was planning to sit out the 2015 AZDA convention. Wade said that he would "pull some local pressure" and that he was "[p]laying phone tag with Upchurch at Schein and **[**11]** will get PDCO Manager involved."

A month later, on July 21, 2014, Benco's Wade emailed Patterson's Bushman, asking for "his take on our friends at the AZDA becoming our competitors." Wade told Bushman that Benco was "looking at pulling all our [AZDA] sponsorship including the AZDA meeting." He continued, "I know that Patterson, Schein and Benco all boycotted the Texas Dental Association meeting this year after the TDA did the same thing and wanted to see if we could create the same message here in AZ." Patterson's Bushman replied an hour or so later, stating that, "[i]f the AZDA has in fact signed on with SourceOne (which it looks like they have), we will be pulling our sponsorship and attendance of the state meeting." Benco's Wade replied the next day: "We are of the same mindset. It would be gratifying to see every distributor with a local presence make a unified statement on the AZDA's ill-conceived idea to become a distribution competitor."

A week or so later, on July 30, 2014, Benco's Wade sent an email to a representative of Dentsply, a dental supplies manufacturer, asking if SourceOne was an authorized dealer of Dentsply's products and informing the representative that "I have **[**12]** communicated with our competition at Schein and Patterson and we are all of the same mind that we will not be supporting a competitor's meeting next year."

On September 2, 2014, Benco announced that it would not attend the AZDA; Patterson announced a few weeks later, on September 19, 2014. Neither defendants nor Schein attended the 2015 AZDA meeting.

III. Pressuring Manufacturers and at Least One Individual Dentist

Upon first learning about SourceOne, Patterson's Clint Edens contacted at least six manufacturers and asked about their involvement in the platform, stating that Patterson is "strongly opposed and . . . would appreciate your support."[2]

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[1] The "AZDA convention" is officially called the Western Regional Dental Convention.

Months later, on April 8, 2014, Ron Fernandez of Benco sent an email to his supervisor, Mark Rowe, informing him that Fernandez was "going to have discussions with all of the manufacturer's [*sic*] that support the TDA Perks program" and that "Schein and Patterson have already told most of them that if they support the program, they will no longer be invited to attend their regional meetings." A few **[*356]** days later, Fernandez expressed the same sentiment in a text message to a manufacturer's representative who lauded Benco for backing out of the convention. **[**13]** Fernandez appeared to ask that representative to contact other manufacturers on his behalf: "I wish all of the manufacturers would. We need to show solidarity in our approach to dismissing them. I will have my admin send you a roster."

Around the same time, Rick Dunn, Benco's Dallas regional manager, announced in an email sent to other regional managers that because Kuraray (a manufacturer) "has chosen to support the TDA Perks program here in Texas, and I personally don't want them attending the [Benco's upcoming regional] meeting. Unless my director instructs me otherwise, I will not be contacting them." Rowe, Benco's Director of Sales, and Fernandez also replied to the chain, agreeing that Benco "will not b [*sic*] supporting Kurary [*sic*] in the great state of TX." And in Arizona, Benco's decision-maker, Mike Wade, in conveying his commitment to withdrawing Benco's AZDA sponsorship unless the dental association ended its relationship with SourceOne, told a member of his team that "[i]f all the distribution companies stand firm and *if we can pull some of the manufacturers our way maybe they* [the AZDA] *will reconsider*." (emphasis added).

In mid-April 2014, Chuck Cohen, managing director **[**14]** at Benco, emailed Frank Nowtash of Arnold Dental (a smaller distributor), informing him that Benco would no longer be able to serve as Arnold's "larger inventory" because Arnold supplied products to SourceOne. Nowtash confirmed that he received a phone call from Cohen to that effect, and that, along with significant pressure from manufacturers and his employees, Benco's displeasure with Arnold for selling to SourceOne was part of Nowtash's decision to end Arnold's relationship with SourceOne. Nowtash testified that the risk of losing Benco as a major supplier was "a factor," but not a "major factor" in this decision. In an internal email between Cohen and Mike McElaney, Benco's Vice President of Sales, McElaney told Cohen to "cut him off" if Nowtash did not agree to stop supplying to SourceOne because McElaney "would not want any of our Texas team to find out about our relationship with Frank [Nowtash] and his support of the Perks program." Once Nowtash decided that Arnold would no longer supply to SourceOne, he called Cohen to inform him.

In response to a July 11, 2014 email from Mark Rowe, Benco's Texas decision-maker, asking for updates on the TDA Perks Supplies program, Benco's **[**15]** Ron Fernandez responded that there was extremely low turnout at the TDA's 2014 convention and that "the doctors know they need us and aren't willing to risk our support by gambling on a poorly planned and run program," but that there are "a few like Josh Austin . . . that is [*sic*] openly bashing dental distributors." (Josh Austin is a prominent individual dentist in Texas.). Fernandez continued that, "[a]s of now, Schein, Patterson and Benco have all told him [Josh Austin] he can have the Perks program handle his service needs as well. Really interested to see how that turns out to him."

DISCUSSION

I. Sherman Act Claim

To prevail on a claim under *§ 1* of the Sherman Act, a plaintiff must prove the existence of a contract, combination or conspiracy that unreasonably restrains trade and causes antitrust injury to the plaintiff. *In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 61 (2d Cir. 2012)*. There are certain well-established situations which courts consider *per se* violations of *§ 1*, such as price-fixing, and, as relevant **[*357]** here, group boycotts involving concerted refusals to deal with a competitor. See *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 542-43 (2d Cir. 1993)*. Outside of those cases, a plaintiff can show that a conspiracy was an

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[2] Two of the manufacturers Edens contacted, Sybron Axis and Ivoclar Vivadent, would later pressure Arnold, another distributor, to stop supplying products to SourceOne.

unreasonable restraint of trade by showing an actual adverse effect on competition as **[**16]** a whole in the relevant market — a so-called "rule of reason" violation. Id.

A plaintiff can withstand a motion for summary judgment on a *§ 1* conspiracy claim by presenting direct or circumstantial evidence "that reasonably tends to prove that the [defendants] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775, (1984)*. "No formal agreement is necessary to constitute an unlawful conspiracy." *Am. Tobacco Co. v. United States, 328 U.S. 781, 809, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)*; see *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 183 (2d Cir. 2012)*; *Apex Oil Co. v. DiMauro, 822 F.2d 246, 253 (2d Cir. 1987)*.

But a plaintiff relying on circumstantial evidence to demonstrate an illegal conspiracy must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Ambiguous evidence — evidence that is equally consistent with independent conduct as with illegal conspiracy — is not enough. *United States v. Apple, Inc., 791 F.3d 290, 315 (2d Cir. 2015)*. "Parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of 'coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" *Apple, 791 F.3d at 315* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 n.4, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Even when parties engage in parallel conduct knowing that their competitors are acting similarly, that is not enough to overcome the "more than ambiguous" **[**17]** standard. See *Apex Oil, 822 F.2d at 253*; see also *Apple, 791 F.3d at 315*.

Therefore, to prevail on summary judgment using circumstantial evidence such as parallel conduct, an antitrust plaintiff must "show the existence of additional circumstances, often referred to as 'plus' factors, which . . . allow the fact-finder to infer a conspiracy." *Apex Oil, 822 F.2d at 253*. These plus factors include, but are not limited to: evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators;[3] evidence of a high level of inter-firm communications; and a common motive to conspire. *Mayor & City Council v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013)* (citations omitted).

The Court's task is to decide whether a jury could reasonably conclude from the totality of the evidence that the defendants' actions were taken as the result of a conspiracy, rather than through independent, parallel action. See *Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *In re Publ'n Paper, 690 F.3d at 64*; see also *Apex Oil, 822 F.2d at 253*. Such an inference may be more easily drawn where the "challenged activities could not reasonably be perceived as procompetitive." **[*358]** *In re Publ'n Paper, 690 F.3d at 63* (citation omitted).

In assessing the totality of the evidence, the Court bears in mind the Second Circuit's admonition that "[a] court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly **[**18]** innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place." *Apex Oil, 822 F.2d at 254-55*. Conduct that would be lawful when undertaken unilaterally may still be actionable under *§ 1* when competitors agree to that conduct together. *Anderson News, 680 F.3d at 183*.

Based on the evidence presented, a jury could reasonably find that at some point between October 2013 and January 2014, defendants agreed with each other or with Schein to exclude SourceOne from the market, including by agreeing to boycott the conventions hosted by the Texas Dental Association and the Arizona Dental Association if those associations did not discontinue their relationship with SourceOne, and by pressuring individual manufacturers and at least one prominent dentist to also discontinue their relationship with SourceOne in

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[3] As explained further below, acts taken "against apparent individual economic self-interest" are those that would have contravened a defendant's individual self-interest in the absence of collusion.

furtherance of this conspiracy. SourceOne has shown both parallel conduct and evidence to support at least three "plus factors." Based on this evidence, a jury could reasonably infer collusion over ambiguous conduct.

Defendants make two primary arguments in support of their motions: first, that their conduct was not really parallel, because Patterson announced that **[**19]** it would not attend the 2014 TDA convention nearly five months before Benco (and Schein) announced the same. Second, defendants argue that even if their conduct was parallel, it was at worst ambiguous as to any conspiracy because both companies had plausible independent reasons for the actions they took.

A. Parallel Conduct

SourceOne's circumstantial evidence of a *per se* illegal agreement to exclude is founded on defendants' parallel action in declining to attend the 2014 TDA and 2015 AZDA conventions and subsequent conventions,[4] which Patterson, Benco, and Schein had attended for many years.

As defendants point out, there was a significant delay between Patterson's December 18, 2013 announcement that it would not attend the 2014 TDA convention and Schein and Benco's announcements of the same on April 9, 2014. But the communications between Patterson, Benco, and Schein leading up to Patterson's announcement that it would not attend the 2014 TDA convention and all three companies' communications immediately afterward raise an inference that Patterson made its decision not to attend based on the explicit or implied agreement of its competitors to do the same if the TDA refused to drop its **[**20]** partnership with SourceOne.

Well before Patterson officially announced that it would not attend the 2014 TDA meeting, all three companies were communicating with each other or, at least, were aware of and monitoring each other's decision-making on the issue. A jury could find that the inter-firm communications leading up to Patterson's announcement on December 13, 2013 that it would not attend the 2014 TDA meeting demonstrate that defendants and Schein had reached some kind of agreement by then.

[*359] Communications between representatives of all three companies leading up to the announcements by Benco and Schein that they too would not attend the 2014 TDA convention could also support an inference that defendants colluded with each other or with Schein. A Benco manager contacted people with Schein's Texas and Arizona teams immediately after Benco decided internally not to attend the 2014 TDA convention, before the manager had informed his sales representatives. A jury could reasonably conclude that the Benco manager made the calls to assure Schein that Benco would follow through on the agreement to take coordinated action against dental associations unless they ended their partnerships with **[**21]** SourceOne.

Based on certain aspects of the above evidence — "plus factors" — a jury could find that the parallel conduct outlined above was the result of illegal collusion to exclude SourceOne, rather than purely independent parallel conduct. Those plus factors include: the high level of inter-firm communications and their timing, the actions taken by defendants that were contrary to their unilateral self-interest, and the market structure that gave defendants a common motive to conspire.

B. Plus Factor: High Level of Inter-Firm Communications

In examining inter-firm communications, the Court is cognizant that "evidence of the mere exchange of information by competitors cannot establish a [*per se*] conspiracy." *Apex Oil, 822 F.2d at 257-58*. Cf. *Todd v. Exxon Corp., 275 F.3d 191, 198-99 (2d Cir. 2001)* (information exchange alone is not a *per se* Sherman Act violation but may violate the rule of reason). But a high volume of communications, or communications that represent a departure from the ordinary pattern of communications among defendants, can be probative of an agreement. See *Apple, 952 F. Supp. 2d at 655 n.14*.

[4] Neither Benco nor Patterson have attended a TDA or AZDA convention since, at least through the 2017 conventions.

Inter-firm communications involving Patterson, Benco, and Schein were pervasive. There were emails, text messages, phone calls, and one in-person meeting. Patterson and Schein employees at various **[**22]** levels testified at their depositions that these inter-firm communications were unusual. The communications involved people at many levels of the companies, from salespeople to managers and decision-makers and vice presidents. And the intra-firm communications show that higher-ups at all three companies knew, at least to some extent, about the inter-firm communications between lower-level employees.

Defendants do not dispute that these communications were unusual; they argue that their irregularity does not necessarily indicate collusion in light of the unprecedented stimulus of two dental associations teaming up with another distributor to compete against them. Defendants are missing the point. What is suspicious about these inter-firm communications, in addition to their quantity, is that competitors communicated information with each other when, absent assurances of mutual support, doing so would have put each company individually at a competitive disadvantage.

C. Plus Factor: Actions Contrary to Apparent Individual Economic Self-Interest

Defendants' argument that their inter-firm communications were innocuous is closely related to their argument that not attending the TDA and AZDA **[**23]** conventions was in each company's individual economic self-interest once the TDA and the AZDA announced their partnerships with SourceOne. Defendants argue that after the dental associations became their competitors through the associations' partnerships with SourceOne, it was no longer in defendants' **[*360]** individual self-interest to attend the conventions because the money they spent on booth fees would benefit their new competitor. From there, defendants argue that their parallel acts of withdrawing from these conventions were, at best, ambiguous, because there is an equally plausible, non-collusive business explanation for their parallel conduct.

The problem with defendants' argument is that it assumes a definition of "apparent individual economic self-interest" in which defendants each know about each other's plans (and those of Schein). An action that is contrary to a firm's apparent economic self-interest is one that is implausible if undertaken alone, without the guarantee of cooperation by competitors. A unilateral economic incentive makes the inference of concerted action less plausible precisely because a jury confronted with such an incentive could just as easily infer that a **[**24]** defendant's actions were taken in response to that incentive, rather than as the product of collusion. From the correct perspective, defendants' actions in deciding not to attend the TDA and AZDA annual meetings were not clearly in their own individual economic self-interest.

As alluded to above, Patterson, Benco, and Schein hesitated to drop out of the TDA and AZDA annual conventions after they learned about the dental associations' partnerships with SourceOne. This is unsurprising, because all three distributors had, at least in the years leading up to SourceOne's endorsements by the TDA and AZDA, perceived the annual conventions to be an important marketing opportunity, competing with each other for prime booth location and overall presence. Before the TDA Perks Supplies website was announced, Rick Dunn, Benco's Dallas regional manager, encouraged the company to prioritize major dental-association events over smaller ones, stating that "Benco not attending the Dallas midwinter or TDA would be detrimental to our markets." And Benco's position as a relatively small participant in the dental-supplies-distribution market meant that it had an additional incentive to conspire with its **[**25]** larger competitors to ensure that its "stance" against the dental associations partnering with SourceOne did not disadvantage it competitively — something Benco employees acknowledged in their deposition testimony.

Benco implicitly recognizes this conclusion in its brief when it points out that the potential for commercial harm that Benco might have suffered by not attending the TDA annual convention was "substantially reduced" once Benco learned that neither Patterson nor Schein were attending. This implies that Benco *did* risk commercial harm if it chose not to attend the TDA or AZDA conventions while its primary competitors did. Although Benco makes this point to argue that, as a smaller firm in a concentrated industry, its decision not to attend the convention after its larger competitors had already announced that they would not is evidence against a conspiracy, it also suggests that each defendant individually would not have been willing to boycott the TDA or AZDA conventions without assurances from the other major players that they too would not participate unless the associations ended their partnerships with SourceOne.

These incentives could also explain the high volume of inter-firm **[**26]** communications before each company's announcement that it would not attend the conventions. Benco's Fernandez testified at his deposition that he reached out to his counterpart at Patterson to find out if Patterson was planning to attend the TDA annual meeting because it would be "favorable" to Benco to attend if Patterson did not and **[*361]** unfavorable for Benco to opt out if Patterson attended.

Patterson's Bob Ingersoll, a branch manager, testified similarly at his deposition. He said that when Schein's Randall McLemore paid him a visit (sometime in November 2013) to ask whether Patterson was attending the 2014 TDA convention, Ingersoll returned the question because Patterson would be disadvantaged if Schein attended while Patterson did not. Christopher Cobb, a Patterson salesperson, echoed McLemore's concerns about Patterson not attending the TDA in his deposition testimony. Clint Edens, Patterson's decision-maker on the TDA convention, acknowledged that Schein could have exploited Patterson's decision not to attend the convention for its own economic benefit by attending. All three distributors shared this concern: Randall McLemore of Schein testified that he asked Bob Ingersoll whether **[**27]** Patterson was planning to attend the 2014 TDA because he "thought it would be advantageous for my organization if they weren't there and we were."

Tellingly, defendants have not advanced a legitimate business reason for these inter-firm communications, such as the in-person conversation between Schein's McLemore and Patterson's Ingersoll and the phone call between Patterson's Dave Misiak and Schein's Dave Steck, in which Steck told Misiak that Schein had not yet decided whether it would attend the 2014 TDA, but that Steck would tell Misiak when Schein did make the decision.

Not only have defendants failed to advance a legitimate business reason for these communications, but, in addition, their employees acknowledged that there was no such legitimate business reason in their deposition testimony: Joe Cavaretta, a member of Schein's Texas decision-making team, admitted at his deposition that Schein did not have a legitimate business reason to share with Patterson the information Ingersoll provided during his in-person meeting with McLemore. Patterson salesperson Christopher Cobb agreed that there was no legitimate business reason for the text messages that he exchanged with Schein salesperson **[**28]** Tony Starnes about whether their respective companies were attending the 2014 TDA meeting. Schein's Dave Steck testified at his deposition that he believed making a call like the one David Misiak had made to him in late December 2013 or early January 2014 would have violated Schein's antitrust policy.

A jury could reasonably conclude that not attending the TDA or AZDA annual conventions would be contrary to each defendant's individual interests, absent assurances from the other defendant or from Schein that they too would not be attending. This "plus factor" could support the inference that defendants' conduct was the product of collusion, rather than innocuous, independent motivations.

D. Plus Factor: Motive to Conspire

All of the above evidence is further bolstered by the structure of the dental-supplies market, which gave defendants a common motive to conspire against SourceOne. According to the uncontested market evidence presented by SourceOne's expert, more than three-quarters of dental supplies are purchased through distributors (the other quarter are purchased directly from manufacturers). And the distribution market is concentrated: when SourceOne launched, Patterson and Schein **[**29]** each controlled approximately 35% of the national market, while Benco controlled approximately 10% (thus, about 80% total). Defendants enjoyed the same relative control of the market in Texas and Arizona. Defendants' market positions are protected by significant barriers to entry and expansion, including the substantial economies of scale necessary for distribution to **[*362]** the 80% of dentists who practice alone or with one other dentist, high fixed costs, and access to the most popular brands of dental supplies (the top ten manufacturers produce about 40% of dental supplies). Defendants and Schein perceived themselves to hold significant sway over the commercial viability of state dental association annual conferences because of their control of the market. Defendants' secure positions in the market and the relative ease of excluding others make the allegations of collusive behavior all the more plausible.

These plus factors also make more plausible the allegation that defendants conspired to pressure manufacturers and individual dentists to boycott SourceOne as part of their conspiracy to exclude. SourceOne has presented evidence that managers at both Patterson and Benco contacted manufacturers **[**30]** individually to pressure them not to deal with SourceOne. The email evidence recited in Part III of the Background shows that Benco at least thought that Schein and Patterson were also pressuring manufacturers not to support SourceOne and believed that their competitors were committed to excluding those manufacturers who continued to support SourceOne from the companies' regional meetings. Benco was similarly committed to excluding manufacturers, such as Kuraray, who supported SourceOne. Furthermore, despite Nowtash's testimony that pressure from Benco was not a "major factor" in his decision that distributor Arnold would cease doing business with SourceOne, a jury, given his admission that it was a factor, could reasonably discount his conclusion and instead find that pressure from Benco, both directly and indirectly, was the primary cause. A reasonable jury could conclude that defendants pressured manufacturers and distributor Arnold not to deal with SourceOne in furtherance of their conspiracy to exclude SourceOne.

As for the allegations that defendants pressured individual dentists as an overt act in furtherance of their conspiracy to boycott SourceOne, SourceOne has produced sufficient **[**31]** evidence to create a genuine dispute of material fact that defendants did so for at least one prominent dentist. The plus factors described above make the inference of collusion more plausible. As of July 2014, Benco's Texas decision-maker knew that the company was withholding service from Josh Austin as retaliation for promoting SourceOne and thought that its competitors were doing the same. Benco's Fernandez reported that he knew how other distributors were responding to pressure from this customer (confidently enough to report it to his boss, decision-maker Rowe) which suggests, at a minimum, that the distributors were taking consciously parallel action with respect to individual dentists they perceived to be siding with SourceOne, and also suggests that they were communicating with each other about it or agreed to act the same way.

Defendants argue that this evidence as to a single dentist is not enough to show that they conspired to pressure dentists generally. There is some evidence that Mike Wade, a member of Benco's Arizona division leadership and Benco's decision-maker on the AZDA, instructed his team to pressure dentists in their jurisdiction who supported SourceOne: Wade **[**32]** informed his team via email on August 1, 2014, that Benco would "reevaluate" its partnerships with AZDA if the dental association continued to partner with SourceOne, and instructed his team that "[t]he most important thing you can do is to communicate to your dentists the implications in entering the highly competitive distribution arena." But even if the evidence as to Josh Austin were the only evidence SourceOne presented at trial, the issue would go to damages, not to whether SourceOne has demonstrated **[*363]** a genuine dispute of material fact that defendants violated the Sherman Act by conspiring to boycott SourceOne and to pressure at least one individual dentist to do the same.

The above evidence (although certainly not exhaustive) demonstrates how SourceOne has marshalled sufficient evidence for a jury to reasonably conclude from the totality of the evidence that defendants' actions were taken as the result of a conspiracy, rather than through independent, parallel action. There remains a genuine dispute of material fact as to whether defendants entered into a conspiracy to exclude SourceOne.[5]

II. Information-Sharing Claim Under the Rule of Reason

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[5] In a cursory paragraph in its opposition brief, SourceOne alleges that "[a] jury could also reasonably find that Defendants' agreement was part of a pre-existing conspiracy to boycott dentists forming group purchasing arrangements." But as defendants correctly point out, the four pieces of evidence SourceOne cites to support this argument (three email chains and a text message thread) are all inter-firm communications by Schein employees. None of them involve defendants. If SourceOne's Sherman Act claim were based solely on this theory of a pre-existing conspiracy about group-purchasing arrangements, it would fail as a matter of law.

In its opposition to defendants' motions **[**33]** for summary judgment, SourceOne argues a second theory: that defendants violated *§ 1* of the Sherman Act by agreeing to exchange information. SourceOne alleges that this concerted action of sharing material information by horizontal competitors violates the Sherman Act's prohibition on unreasonable restraints of trade.

Information-sharing is not a *per* se violation of the Sherman Act, but courts have recognized the claim under the rule of reason. See *United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)*; *Todd, 275 F.3d at 198-99*. Courts apply the rule of reason using a three-step burden-shifting framework.

First, the plaintiff bears the initial burden of demonstrating that the defendant's challenged behavior "had an *actual* adverse effect on competition as a whole in the relevant market." *Capital Imaging, 996 F.2d at 543*. A plaintiff can establish this actual adverse effect either "directly by showing an actual adverse effect on competition as a whole within the relevant market" or "indirectly by showing that the defendant has 'sufficient market power to cause an adverse effect on competition.'" *United States v. Am. Express Co., 838 F.3d 179, 194 (2d Cir. 2016)* (quoting *Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 96 (2d Cir. 1998))*.[6] However, because market power is merely a "surrogate for detrimental effects," a plaintiff seeking to prove anticompetitive effects through market power "must show market power, plus some other **[**34]** ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market." *Am. Express, 838 F.3d at 195-96* (quoting *Tops Mkts., 142 F.3d at 96-97*).

Once the plaintiff satisfies its initial burden to demonstrate anticompetitive effects, the burden shifts to the defendant to offer evidence of any procompetitive benefits of the agreement or concerted action. **[*364]** *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 507 (2d Cir. 2004)*. If the defendant can show such proof of procompetitive benefits, then the burden shifts back to plaintiff to demonstrate that whatever procompetitive benefits defendant has shown could have been achieved through less restrictive means. Id.

In its opposition, SourceOne argues that its experts offered testimony about the definition of the relevant market and defendants' market power, and because defendants neither moved for summary judgment on those issues nor moved to exclude SourceOne's expert testimony on those issues, a jury could reasonably find that defendants had "sufficient market power to cause an adverse effect on competition." For the "other ground" to support its argument that defendants' conduct could harm competition in the market, SourceOne argues that **[**35]** the information defendants exchanged — whether they would continue to do business with dental associations, manufacturers, and at least one individual who supported SourceOne — was of the type most likely to be anticompetitive.

Defendants argue that SourceOne's rule-of-reason argument is facially insufficient because the information that defendants allegedly shared is not significant enough for an agreement to share it to be an unreasonable restraint of trade under the Sherman Act. Defendants argue that exchanging information about their attendance at dental conventions is fundamentally different from the price, cost, or wage information sharing that courts have determined violate the Sherman Act.

The Supreme Court has distinguished "current price information" as "having the greatest potential for generating anticompetitive effects" within the category of "the exchange of price data and other information." *Gypsum, 438 U.S. at 441 n.16*. But Gypsum does not say that only price information (current or otherwise) could possibly support a rule-of-reason violation. In the Gypsum footnote defendants cite, the Supreme Court emphasized how courts should consider the "structure of the industry involved" and the "nature of **[**36]** the information exchanged" when determining whether information sharing is pro- or anticompetitive. Id. The two considerations the Supreme Court provided would be unnecessary if only price information could support an information-exchange claim.

Here, SourceOne has put forth evidence from which a jury could conclude that defendants entered into an agreement to exchange information and that the information that defendants shared — their willingness and plans

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[6] For this reason, defendants' argument that SourceOne has not produced any evidence that the challenged conduct had an actual adverse effect on competition as a whole is misplaced.

to deal with (or boycott) third parties who transacted with SourceOne — was significant based on the highly concentrated industry and the importance that the defendants placed on the annual dental conventions (based on their own internal communications).

SourceOne has evidence from which a jury could conclude that defendants agreed (with each other or with Schein) to exchange information. Several employees of both Benco and Patterson testified that they shared information with each other and or with Schein to induce the other party to share similar information. As discussed above, Benco's Ron Fernandez testified that he contacted John Hyden at Patterson to discuss the 2014 TDA and offered him information about whether Benco was planning **[**37]** to attend to induce Hyden to share similar information about Patterson. A few months later, after Patterson had announced it would not be attending the 2014 TDA, Dave Misiak, a Patterson vice president, contacted Dave Steck, a Schein vice president to tell him personally and to ask Steck if Schein was going to attend. Steck testified that although **[*365]** he told Misiak that Schein hadn't decided yet, he felt some obligation to tell Misiak once Schein decided because Misiak had told him of Patterson's plans. A few months later, when Benco announced that it too would not attend the 2014 TDA, Benco's Fernandez called Schein's Steck that day to tell him personally — before Fernandez had even informed the sales representatives he managed. Fernandez also called Kevin Upchurch, a Schein manager in Arizona, that same day. In addition to these specific communications, SouceOne has cited several emails in which defendants' employees reference communicating with their competitors about the dental conventions during the weeks leading up to the companies' respective decisions not to attend the TDA convention.

SourceOne has also presented evidence that the information defendants were sharing with each other **[**38]** and with Schein was material and competitively sensitive based on the structure of the industry and the nature of the information. As described in Part I.C above, defendants and Schein were initially very hesitant to drop out of the dental association conventions for fear of losing business to competitors who did attend. SourceOne has produced evidence from which a jury could conclude that defendants' communications facilitated their anticompetitive conduct in boycotting dental associations who partnered with SourceOne and pressuring manufacturers and at least one individual dentist not to deal with SourceOne, all to exclude SourceOne from the market, therefore harming competition.

Because SourceOne has produced sufficient evidence that a jury could conclude that it has satisfied its initial burden in the rule-of-reason burden-shifting scheme, defendants are not entitled to judgment as a matter of law on a claim based on SourceOne's information-exchange theory.[7]

III. Damages on Sherman Act Claim

Defendants moved for summary judgment on SourceOne's damages claim, arguing that the damages model created by Dr. Jeffrey Leitzinger, one of SourceOne's experts, fails to separate out the damages **[**39]** attributable to the different alleged actions (*e.g.*, the alleged boycott of state dental-association conventions, the alleged pressure on manufacturers, *etc.*). Defendants argue that if they prevail on summary judgment as to one or more of the alleged actions, SourceOne's damages model will be entirely inadmissible and SourceOne will have no way to prove its damages claim. This concern does not support summary judgment on defendants' damages claim, because, as described in Parts I and II of the Discussion, the Court concludes that SourceOne has produced enough evidence to create a genuine dispute of material fact as to each of the alleged actions by defendants.

Defendants have already moved *in limine* to exclude Dr. Leitzinger's expert testimony; the Court will not address that motion here. But even if the Court were to exclude the testimony defendants are seeking to exclude, that would not prevent SourceOne from establishing damages through fact-witness testimony by its own corporate officers or through the testimony of dental-association officials. See *Fed. R. Evid. 701*, advisory committee's note to 2000

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[7] In their reply briefs, defendants argue only that SourceOne's rule-of-reason claim fails as a matter of law and that SourceOne has not produced enough evidence to satisfy its initial burden. Defendants did not argue that they could satisfy their burden at the second step, nor did they point to any evidence that their information-sharing had procompetitive effects.

amendments ("[M]ost courts have permitted the owner or officer of a business **[*366]** to testify to the value **[**40]** or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert."). Defendants' motions for summary judgment on the damages claim are therefore denied.

IV. State Statutory Antitrust Claims

SourceOne also brought state-law antitrust claims under New York's Donnelly Act (*New York General Business Law §§ 340-347*), and Arizona's Uniform State Antitrust Act (*Arizona Revised Statutes Annotated §§ 44-140*). Defendants moved for summary judgment on both of these claims. Both statutes are interpreted in accordance with federal antitrust laws. None of the parties identify any reason to analyze the state claims differently than the federal claims. See, e.g., *Williams v. Citigroup, Inc., 659 F.3d 208, 211 n.2 (2d Cir. 2011)*; *Mothershed v. Justices of the Supreme Court, 410 F.3d 602, 609 (9th Cir. 2005)*. Therefore, summary judgment is denied for the same reasons given in Parts I-III of the Discussion.

V. State Common-Law Claims

Defendants also move for summary judgment on SourceOne's state common-law claims for tortious interference with prospective business relations, civil conspiracy, and aiding and abetting tortious and anticompetitive conduct.

A. Choice of Law

A federal court exercising diversity jurisdiction applies the choice-of-law rules of the state in which the court sits. See *Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. New York courts faced with a decision about which law to apply first **[**41]** determine if there is a conflict between the laws of the jurisdictions involved. *In re Allstate Ins. Co. (Stolarz), 81 N.Y.2d 219, 223, 613 N.E.2d 936, 597 N.Y.S.2d 904, 905 (1993)*. There is a conflict if "'the applicable law from each jurisdiction provides different substantive rules' and those differences are 'relevant to the issue at hand[ ] and . . . have a significant *possible* effect on the outcome of the trial.'" *First Hill Partners, LLC v. BlueCrest Capital Mgmt. Ltd., 52 F. Supp. 3d 625, 632 (S.D.N.Y. 2014)* (alteration in original) (quoting *Fin. One Pub. Co. v. Lehman Bros. Special Fin., 414 F.3d 325, 331 (2d Cir. 2005))*. If there is no actual conflict, New York courts apply New York law. See *Wall v. CSX Transp., Inc., 471 F.3d 410, 422 (2d Cir. 2006)*.

Here, the potentially relevant jurisdictions are New York, Texas, and Arizona, and those states' laws conflict only as to the aiding-and-abetting claim. First, for a tortious-inference claim in which the defendant's interference is intended, at least in part, to advance its own competing interest, New York law requires the plaintiff to prove that the defendant interfered with the prospective relationship using criminal or fraudulent means. See *S.O. Textiles Co. v. A & E Prod. Grp., 18 F. Supp. 2d 232, 240 (E.D.N.Y. 1998)*. The laws of Arizona and Texas do not impose such a requirement. See *BP Automotive LP v. RML Waxahachie Dodge, LLC, 517 S.W.3d 186, 208 (Tex. App. 2017)*; *Dube v. Likins, 216 Ariz. 406, 412-13, 167 P.3d 93, 99-100 (Ariz. Ct. App. 2007)*.

Although the complaint does not use the words "criminal" or "fraudulent," it alleges that defendants violated federal and state antitrust acts, which, if proven, would be sufficiently criminal to constitute the predicate required for the tort of **[**42]** tortious interference. See *Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 CIV. 2120, 1995 U.S. Dist. LEXIS 8822, 1995 WL 380300, at *7 (S.D.N.Y. June 27, 1995)*. The difference in the elements is therefore immaterial; there is no actual conflict as to the laws of the three relevant jurisdictions, **[*367]** so the Court applies New York law to SourceOne's tortious-interference claim.

For a civil-conspiracy claim, Texas and Arizona both recognize the claim and require essentially the same elements. See *First United Pentecostal Church of Beaumont v. Parker, 60 Tex. Sup. Ct. J. 608, 514 S.W.3d 214, 222 (2017)*; *Wells Fargo Bank v. Ariz. Laborers, Teamsters, & Cement Mason Local No. 395 Pension Tr. Fund, 201 Ariz. 474, 498, 38 P.3d 12, 36 (2002)* (en banc). New York only recognizes civil conspiracy when it is connected to a separately pleaded underlying tort. See *ACR Sys., Inc. v. Woori Bank, 232 F. Supp. 3d 471, 479 (S.D.N.Y. 2017)*. Tortious interference with prospective business relations qualifies as an underlying tort, if adequately pleaded. See *Alexander & Alexander of N.Y., Inc. v. Fritzen, 68 N.Y.2d 968, 969, 503 N.E.2d 102, 510 N.Y.S.2d 546, 547 (1986)*. Because SourceOne has adequately pleaded a separate claim for tortious interference with prospective business relations, it can satisfy this additional requirement. And because the remaining elements are the same in all three jurisdictions, there is no conflict and, as with the tortious-interference claim, the Court will apply New York law.

Finally, as to the aiding-and-abetting claim, New York and Arizona both recognize the claim as to tortious conduct generally. Although Texas recognizes a claim for aiding and abetting a breach of fiduciary duty, *Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 574, 160 S.W.2d 509, 514 (1942)*, Texas law is unclear as to aiding and **[**43]** abetting other torts, such as tortious interference with business relations. In the past, the Texas Supreme Court has discussed but declined to adopt *Restatement (Second) Torts § 876(b)*, which imposes aiding-and-abetting liability. The Court stated that even if *§ 876(b)* applied, its purpose is to "deter antisocial or dangerous behavior," which suggests that it would not apply aiding and abetting to a claim for tortious interference with business expectancy. See *Juhl v. Airington, 39 Tex. Sup. Ct. J. 830, 936 S.W.2d 640, 644 (1996)*. At least one Texas court of appeals and a federal district court in Texas have reached a similar conclusion as to the competition-related torts of misappropriation of trade secrets, civil theft, unfair competition by misappropriation, and tortious interference with contract. See *N.Y. Pizzeria, Inc. v. Syal, 56 F. Supp. 3d 875, 884 (S.D. Tex. 2014)*; *W. Fork Advisors, LLC v. SunGard Consulting Servs., LLC, 437 S.W.3d 917, 922 (Tex. App. 2014)* (same as to misappropriation of trade secrets). But see *Clayton v. Richards, 47 S.W. 3d 149, 154 (Tex. App. 2001)* (applying aiding and abetting to a claim for invasion of privacy). The Court is unwilling to conclude that Texas would recognize a claim for aiding and abetting tortious and anticompetitive conduct, as SourceOne alleges here. Because the Court concludes that one jurisdiction would not recognize a claim for aiding and abetting at all, there is an actual conflict as to the laws of the three potential jurisdictions on that claim.

As noted **[**44]** above, the Court applies New York law to the tortious-interference and civil-conspiracy claims, because there is no conflict of laws on those claims. As for the aiding-and-abetting claim, for which the laws of the relevant jurisdictions do conflict, New York courts conduct an "interest analysis" and apply the law of the jurisdiction with the greatest interest in the litigation. *Schultz v. Boy Scouts of Am., Inc., 65 N.Y.2d 189, 197, 480 N.E.2d 679, 491 N.Y.S.2d 90, 95 (1985)* (quoting *Miller v. Miller, 22 N.Y.2d 12, 15, 237 N.E.2d 877, 290 N.Y.S.2d 734, 737 (1968))*.

Defendants argue that because the majority of the alleged conduct occurred in or involved Texas, that state has the greatest **[*368]** interest in the litigation and its law should apply. SourceOne argues that because SourceOne is incorporated and headquartered in Arizona, it suffered the damages from defendants' allegedly tortious conduct there, and therefore Arizona's law should apply. SourceOne also points out that at least some of the tortious conduct occurred in Arizona too, when defendants allegedly interfered with SourceOne's relationship with the Arizona Dental Association, and, through it, with potential customers.

Under New York law, "the interest analysis is applied differently depending on whether the rules in question are conduct-regulating rules that people use as a guide to governing their primary **[**45]** conduct, or loss-allocating rules that prohibit, assign, or limit liability after the tort occurs." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL, 739 F.3d 45, 49 (2d Cir. 2013)* (Licci II) (internal quotation works and citation omitted).

Where, as here, conflicting conduct-regulating laws are at issue, the Second Circuit has concluded that the law of the jurisdiction where the allegedly tortious acts occurred (as opposed to the jurisdiction where the injury was inflicted) should generally apply because "that jurisdiction has the greatest interest in regulating behavior within its borders." *Id. at 49*. In reaching this conclusion, the Second Circuit, applying the New York Court of Appeals' decision in Schultz, explicitly considered whether the law of the place of injury or the law of the place of wrongful conduct governed; for conduct-regulating rules, it adopted the latter. See *id. at 50-51*.

The Court agrees with defendants that the majority of the tortious conduct occurred in Texas, which has the greatest interest in this case under New York's choice-of-law rules, as interpreted by Licci II. The Court will therefore apply Texas law to the aiding-and-abetting claim, and, because the Court concludes that Texas would not recognize an aiding-and-abetting claim under these circumstances, **[**46]** grants summary judgment in favor of defendants on that claim.

B. Tortious Interference with Prospective Economic Advantage

To prevail on a claim for tortious interference with prospective economic advantage under New York law, a plaintiff must show that: "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the relationship." See *Carvel Corp. v. Noonan, 350 F.3d 6, 17 (2d Cir. 2003)*. Improper or wrongful means generally must amount to a crime or an independent tort, and include an excessive degree of economic pressure, physical violence, or fraud, but exclude mere acts of persuasion. *Smith v. Meridian Techs., Inc., 86 A.D.3d 557, 560, 927 N.Y.S.2d 141, 144 (2011)*.

As to the first element — a business relationship with a third-party — SourceOne has also demonstrated a reasonable probability of a future contractual relationship. Defendants argue that SourceOne cannot demonstrate that it was reasonably probable that it would have entered into a business relationship with state dental associations and dentists absent defendants' allegedly tortious **[**47]** interference. I disagree. SourceOne has produced evidence that it had a reasonable assurance that at least the Louisiana and Colorado Dental Associations would have endorsed SourceOne but for defendants' interference. SourceOne has also produced evidence that defendants' allegedly tortious conduct interfered with its future business relations **[*369]** with the Texas and Arizona Dental Associations and their members by pointing to evidence that the TDA eventually dropped its endorsement of SourceOne because of pressure from defendants and related pressure from TDA members. SourceOne cites testimony by leaders of those organizations that their endorsements of SourceOne caused problems with dentists who were upset about defendants withdrawing from the dental associations' annual conventions.

As to the second element — that defendant knew of the business relationship and intentionally interfered with it — SourceOne has produced considerable evidence, described in the Background and discussed in the Discussion Parts I-III, from which a jury could conclude that defendants intentionally tried to disrupt SourceOne's current and prospective business relationships with state dental associations, dentists, **[**48]** and manufacturers. Defendants do not deny (and could not, based on the evidence presented at summary judgment) that they knew of SourceOne's business expectancy with the Texas and Arizona Dental Associations, and knew of SourceOne's plan to seek endorsement by at least the Louisiana Dental Association.

As to the third element — that defendants used dishonest, unfair, or improper means to interfere — SourceOne has presented sufficient evidence that defendants interfered with its prospective business relationships by means that were unlawful or improper. Where "unlawful restraint of trade is effected," a competitor can be held liable for interference with prospective contractual relations. *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 191, 406 N.E.2d 445, 428 N.Y.S.2d 628, 632 (1980)*. "[E]ven absent a finding of antitrust violations, certain degrees of economic pressure may be sufficiently wrongful to compel a finding of liability based on this cause of action." Id.; see also *Tech. Consortium, Inc. v. Digital Commc'ns Assocs., Inc., 757 F. Supp. 197, 200 (E.D.N.Y. 1991)*.

Furthermore, the competitor justification, through which an interference intended at least in part to advance the competing interest of the interferer may be justified, simply does not apply here because it is only available where "no unlawful restraint of trade is effected, and the means employed are not **[**49]** wrongful." *Guard-Life Corp., 50 N.Y.2d at 191, 428 N.Y.S.2d at 632*. Because SourceOne has created a genuine dispute of material fact as to whether defendants violated state and federal ***antitrust law*** through an illegal boycott, defendants are not entitled to summary judgment on this claim based on the competitor justification.

As to the fourth element — causation and injury — SourceOne must show "that the wrongful acts were the proximate cause of the rejection of the plaintiff's proposed contractual relations," *Pacheco v. United Med. Assocs.,* *P.C., 305 A.D.2d 711, 712, 759 N.Y.S.2d 556, 559 (3d Dep't 2003)*, and that it suffered some actual damages, such as lost opportunities for profits on business diverted from it. *Mandelblatt v. Devon Stores, Inc., 132 A.D.2d 162, 521 N.Y.S.2d 672 (1st Dep't 1987)*. The parties did not address proximate cause in their briefing. Nevertheless, the Court is satisfied that SourceOne has produced sufficient evidence for the proximate-cause element to survive summary judgment.

> An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

[*370] *Jund v. Town of Hempstead, 941 F.2d 1271, 1286 (2d Cir. 1991)*; see also *Walley v. Bivins, 81 A.D.3d 1286, 1287, 917 N.Y.S.2d 461, 463 (4th Dep't 2011)*.

Defendants argue that there is no evidence that state **[**50]** dental associations or dentists refused to do business with SourceOne because of their actions. SourceOne, however, has produced significant evidence — in the form of testimony from leadership in the TDA and AZDA and communications from two prospective dental associations, Louisiana and Colorado — that those organizations' concerns that defendants would boycott their annual meetings was a substantial factor in their decision to not to endorse SourceOne or to cease endorsing SourceOne. SourceOne has also produced intra-company and inter-company emails in which defendants' employees discuss not attending dental association meetings to discourage the TDA, the AZDA, or other dental associations from endorsing SourceOne. From this evidence, a reasonable jury could conclude that defendants' actions were both a cause-in-fact of SourceOne's lost business (and therefore profits), and that the lost business was a foreseeable consequence of defendants' actions.

And, as described in Part III of the Discussion, SourceOne has created a genuine dispute of material fact as to damages in the form of lost profits from a continuing business relationship with the Texas Dental Association and other dental **[**51]** associations (at least the Louisiana and Colorado Dental Associations, for whom plaintiff has demonstrated a reasonable assurance of future business).

Because SourceOne has demonstrated a genuine dispute of material fact as to each contested element of its tortious-interference claim, defendants are not entitled to summary judgment on that claim.

C. Civil-Conspiracy Claims

As mentioned above, New York only recognizes a civil-conspiracy claim if it is connected to a separate underlying tort. *ACR Sys., 232 F. Supp. 3d at 479*. Once that showing has been made, a plaintiff must establish: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in furtherance of the agreement; and (4) resulting damage or injury. Id.

Defendants argue that SourceOne cannot show an underlying tort, such as that they violated ***antitrust law*** by agreeing to exclude SourceOne from the market. As explained above, the Court concludes that SourceOne can survive summary judgment as to both the antitrust claims and its tortious-interference claim, so SourceOne has clearly satisfied the underlying tort requirement. See *Alexander & Alexander, 68 N.Y.2d at 969, 510 N.Y.S.2d at 547*. As for the four elements, they essentially replicate **[**52]** the elements of federal and state ***antitrust law***. SourceOne's civil-conspiracy claim therefore survives summary judgment for the same reasons given in Parts I-III of the Discussion.

D. Claims for Aiding and Abetting Tortious and Anticompetitive Conduct

Because, as described above, the Court concludes that Texas would not recognize a claim for aiding and abetting tortious and anticompetitive conduct, defendants are entitled to summary judgment on their aiding-and-abetting claims.

CONCLUSION

Defendants' motions for summary judgment [158], [161] are therefore GRANTED IN PART AND DENIED IN PART. Defendants' motions for summary judgment on the Sherman Act claim, state statutory **[*371]** antitrust claims, damages claim are denied. Applying New York law to the common-law tortious-interference and civil-conspiracy claims, defendants' motions for summary judgment as to those claims are denied. Applying Texas law to the common-law claim for aiding and abetting, defendants' motions for summary judgment as to that claim are granted.

SO ORDERED.

/s/ Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York

April 10, 2018

Dieffenbach v. Barnes & Noble, Inc.

United States Court of Appeals for the Seventh Circuit

December 6, 2017, Argued; April 11, 2018, Decided

No. 17-2408

Reporter

887 F.3d 826 *; 2018 U.S. App. LEXIS 9051 **; 2018 WL 1737128

HEATHER DIEFFENBACH and SUSAN WINSTEAD, Plaintiffs-Appellants, v. BARNES & NOBLE, INC., Defendant-Appellee.

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Dieffenbach V.barnes & Noble, 2018 U.S. App. LEXIS 12331 (7th Cir. Ill., May 10, 2018)*

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 12 C 8617. Andrea R. Wood, Judge.

In re Barnes & Noble Pin Pad Litig., 2017 U.S. Dist. LEXIS 97161 (N.D. Ill., June 13, 2017)

Core Terms

damages, district court, actual damage, state law

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Complaints, Requirements for Complaint**

Pleading is governed by *Fed. R. Civ. P. 8* and *9*. *Fed. R. Civ. P. 8(a)(3)* requires the plaintiff to identify the remedy sought, but it does not require detail about the nature of the plaintiff's injury.

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Special Damages

HN2[] **Judgments, Entry of Judgments**

Fed. R. Civ. P. 54(c) provides that the prevailing party receives the relief to which it is entitled, whether or not the pleadings have mentioned that relief. *Fed. R. Civ. P. 9(g)*, by contrast, does require details, but only with respect to special damages.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN3[] **Federal & State Interrelationships, Erie Doctrine**

In federal court it is the Federal Rules of Civil Procedure that determine what must be in a complaint.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN4[] **Deceptive & Unfair Trade Practices, State Regulation**

California's Customer Records Act provides that a customer injured by a violation of the Act may recover damages. *Cal. Civ. Code § 1798.84*. The statute does not define injury.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN5[] **Deceptive & Unfair Trade Practices, State Regulation**

California's judiciary understands lost money or property to mean an economic injury and states that there are innumerable ways in which economic injury may be shown. An identifiable trifle of economic injury suffices. The time value of money meets the statutory definition. Although the loss of use in case law was longer (six months), the principle that the time value of money is money or property controls.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] **Deceptive & Unfair Trade Practices, State Regulation**

State courts say that significant time and paperwork costs incurred to rectify violations can qualify as economic losses.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN7[] **Deceptive & Unfair Trade Practices, State Regulation**

A person who suffers actual damage as a result of a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, *815 ILCS 505/2*, may recover. *815 ILCS 505/10a(a)*. A monthly $17 out of pocket is a form of actual damage. It is real and measurable; Illinois does not require more. And, if the plaintiff has suffered an economic loss, noneconomic injuries are compensable.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN8[] **Deceptive & Unfair Trade Practices, State Regulation**

An Illinois appellate court has held that a person who purchases credit-monitoring services after a merchant discloses personal information has not suffered actual damages. The United States Court of Appeals for the

Seventh Circuit thinks it unlikely that the Supreme Court of Illinois would agree with the actual damages portion of this decision, given the breadth of the statutory language of *815 ILCS 505/10a(a)*. Money out of pocket is a standard understanding of actual damages in contract law, ***antitrust law***, the law of fraud, and elsewhere. To get damages plaintiffs must show that a culpable data breach caused the monthly payments, but the complaint cannot be dismissed before giving the class an opportunity to do so.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN9[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(c)(1)(A) requires the certification decision to be made at an early practicable time after a person sues as a class representative.

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Judges: Before WOOD, Chief Judge, and EASTERBROOK and HAMILTON, Circuit Judges.

Opinion by: EASTERBROOK

Opinion

[*827] EASTERBROOK, *Circuit Judge*. In 2012 Barnes & Noble discovered that scoundrels had compromised some of the machines, called PIN pads, that it used to verify payment information. They acquired details such as customers' names, card numbers and expiration dates, and PINs. Some customers temporarily lost the use of their funds while waiting for banks to reverse unauthorized charges to their accounts. Some spent money on credit-monitoring services to protect their financial interests. Some lost the value of their time devoted to acquiring new account numbers **[**2]** and notifying businesses of these changes. Many people use credit or debit cards to pay bills automatically; every time the account number changes, these people must devote some of their time and mental energy to notifying merchants that the old numbers are invalid and new ones must be used. In this suit under state law, plaintiffs seek to collect damages not from the data thieves but from Barnes & Noble. Jurisdiction rests on the *Class Action Fairness Act*, *28 U.S.C. §1332(d)*, because the proposed class contains at least 100 members, the amount in controversy exceeds $5 million, **[*828]** and minimal diversity of citizenship exists.

The district court initially held that the representative plaintiffs had suffered no loss at all—that they did not even have standing to sue. *2013 U.S. Dist. LEXIS 125730 (N.D. Ill. Sept. 3, 2013)*. After this court held in *Remijas v. Neiman Marcus Group, LLC, 794 F.3d 688 (7th Cir. 2015)*, and *Lewert v. P.F. Chang's China Bistro, Inc., 819 F.3d 963 (7th Cir. 2016)*, that consumers who experience a theft of their data indeed have standing, the district court (acting through a different judge) concluded that the complaint alleges injury. *2016 U.S. Dist. LEXIS 137078 at *8-11 (N.D. Ill. Oct. 3, 2016)*. But the judge nonetheless dismissed the complaint, ruling that it does not adequately plead damages. *Id. at *13-25*. See also *2017 U.S. Dist. LEXIS 97161 (N.D. Ill. June 13, 2017)* (dismissing an amended complaint).

This seems to us a new label for an old error. To say that the plaintiffs have standing is **[**3]** to say that they have alleged injury in fact, and if they have suffered an injury then damages are available (if Barnes & Noble violated the statutes on which the claims rest). The plaintiffs have standing because the data theft may have led them to pay money for credit-monitoring services, because unauthorized withdrawals from their accounts cause a loss (the time value of money) even when banks later restore the principal, and because the value of one's own time needed to set things straight is a loss from an opportunity-cost perspective. These injuries can justify money damages, just as they support standing.

HN1[] Pleading is governed by *Fed. R. Civ. P. 8* and *9*. *Rule 8(a)(3)* requires the plaintiff to identify the remedy sought, but it does not require detail about the nature of the plaintiff's injury. See *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. What's more, ***HN2***[] *Rule 54(c)* provides that the prevailing party receives the relief to which it is entitled, whether or not the pleadings have mentioned that relief. *Rule 9(g)*, by contrast, does require details, but only with respect to "special damages." Barnes & Noble does not contend, and the district judge did not find, that any loss plaintiffs have identified is treated as "special damages." As far as the federal rules are concerned, **[**4]** then, all this complaint needed to do was allege generally that plaintiffs have been injured.

The district court did not apply these rules, instead demanding that the complaint contain all specifics that would have been required had this suit been in state court. *2016 U.S. Dist. LEXIS 137078 at *13-19, 22-25*. But ***HN3***[] in federal court it is the federal rules that determine what must be in a complaint. See, e.g., *Walker v. Armco Steel Corp., 446 U.S. 740, 100 S. Ct. 1978, 64 L. Ed. 2d 659 (1980)*; *Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S. Ct. 2211, 135 L. Ed. 2d 659 (1996)*; *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co., 559 U.S. 393, 130 S. Ct. 1431, 176 L. Ed. 2d 311 (2010)*. The fact that the federal rules do not require plaintiffs to identify items of loss (except for special damages) means that this complaint cannot be faulted as insufficient.

Still, a district court could grant judgment on the pleadings, see *Fed. R. Civ. P. 12(c)*, if none of the plaintiffs' injuries is compensable, as a matter of law, under the statutes on which they rely. We therefore turn to state law.

Heather Dieffenbach dealt with Barnes & Noble in California and contends on appeal that she suffered four kinds of injury: (1) her bank took three days to restore funds someone else had used to make a fraudulent purchase; (2) she had to **[*829]** spend time sorting things out with the police and her bank; (3) she could not make purchases using her compromised account for three days; and (4) she did not receive the benefit of her bargain with Barnes & Noble. **[**5]** The fourth of these is not a loss; it is the failure to obtain a gain from the transaction. (Dieffenbach does not contend that any of the items she purchased was defective or that Barnes & Noble promised any particular level of security, for which she paid. See *Remijas, 794 F.3d at 694-95*.) But the first three are losses, at least in economic terms.

Dieffenbach invokes two statutes: *California's Customer Records Act* and its Unfair Competition Law. ***HN4***[] The Records Act provides that a "customer injured by a violation of [this Act] may — recover damages." *Cal. Civ. Code §1798.84*. The statute does not define injury, nor does any state decision we could find. The district judge took this absence of a definition as equivalent to conditioning recovery on satisfaction of the Unfair Competition Law, which provides that "lost money or property" supports recovery. *Cal. Bus. & Prof. Code §17204*. That's a problematic move; the statutes are distinct, after all, as is their language. But this does not matter, because the first three losses that Dieffenbach identifies fit within the phrase "lost money or property".

HN5[] California's judiciary understands "lost money or property" to mean an economic injury and tells us that "[t]here are innumerable ways in which economic injury — may be **[**6]** shown." *Kwikset Corp. v. Superior Court, 51 Cal. 4th 310, 323, 120 Cal. Rptr. 3d 741, 246 P.3d 877 (2011)*. An "identifiable trifle of economic injury" suffices. *Id. at 330 n.15* (internal quotation marks and citation omitted). We know from *Marentes v. Impac Funding Corp., 2014 Cal. App. Unpub. LEXIS 3650, 2014 WL 2157539 (Cal. App. May 23, 2014)*, that the time value of money meets the statutory definition. Although the loss of use in *Marentes* was longer (six months there, three days for Dieffenbach) the principle that the time value of money is "money or property" controls. Cf. *Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 126 S. Ct. 2405, 165 L. Ed. 2d 345 (2006)*, which holds that a worker suffers a compensable injury even though the employer awards back pay to make up for salary lost during a 37-day suspension. Losing the use of money for three days may be a trifle to some people (though to others it may be a calamity), but a trifling loss suffices under California law. And ***HN6***[] state courts have said that significant time and paperwork costs incurred to rectify violations also can qualify as economic losses. Compare *Sarun v. Dignity*

Health, 232 Cal. App. 4th 1159, 1169, 181 Cal. Rptr. 3d 545 (2014) ("The tangible burden of [providing tax return information and other personal financial data]" satisfies the Law), with *Lueras v. BAC Home Loans Servicing, LP, 221 Cal. App. 4th 49, 82, 163 Cal. Rptr. 3d 804 (2013)* (finding time spent "preparing and assembling materials" for a loan modification application de minimis and insufficient).

Now for Illinois. Susan Winstead, the second representative plaintiff, alleges that (1) her bank contacted her about a potentially fraudulent **[**7]** charge on her credit card statement and deactivated her card for several days; and (2) the security breach at Barnes & Noble "was a decisive factor" when she renewed a credit-monitoring service for $16.99 per month. Her claim rests on the *Illinois Consumer Fraud and Deceptive Business Practices Act*, *815 ILCS 505/2*, and the proposed class relies on materially identical laws in other states. ***HN7***[] A person "who suffers actual damage as a result of a violation of this Act" may recover. *815 ILCS 505/10a(a)*. A monthly $17 out of pocket is a form of "actual damage". **[*830]** It is real and measurable; Illinois does not require more. See *Avery v. State Farm Mutual Automobile Insurance Co., 216 Ill. 2d 100, 195-99, 835 N.E.2d 801, 296 Ill. Dec. 448 (2005)*. And, if the plaintiff has suffered an economic loss, noneconomic injuries are compensable. See, e.g., *Morris v. Harvey Cycle & Camper, Inc., 392 Ill. App. 3d 399, 402-03, 911 N.E.2d 1049, 331 Ill. Dec. 819 (2009)*.

HN8[] An Illinois appellate court has held that a person who purchases credit-monitoring services after a merchant discloses personal information has not suffered actual damages. *Cooney v. Chicago Public Schools, 407 Ill. App. 3d 358, 365-66, 943 N.E.2d 23, 347 Ill. Dec. 733 (2010)*. We think it unlikely that the Supreme Court of Illinois would agree with the "actual damages" portion of this decision, given the breadth of the statutory language. Money out of pocket is a standard understanding of actual damages in contract law, ***antitrust law*** (*Reiter v. Sonotone Corp., 442 U.S. 330, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)*), the law of fraud, and elsewhere. To get damages plaintiffs must **[**8]** show that a culpable data breach caused the monthly payments, but the complaint cannot be dismissed before giving the class an opportunity to do so.

Everything we have said about California and Illinois law concerns injury. We have not considered whether Barnes & Noble violated any of these three state laws by failing to prevent villains from stealing plaintiffs' names and account data. Barnes & Noble was itself a victim. Its reputation took a hit, it had to replace the compromised equipment plus other terminals that had been shown to be vulnerable, and it lost business. None of the state laws expressly makes merchants liable for failure to crime-proof their point-of-sale systems. Plaintiffs may have a difficult task showing an entitlement to collect damages from a fellow victim of the data thieves. It is also far from clear that this suit should be certified as a class action; both the state laws and the potential damages are disparate. These and other questions need consideration on remand. That the case has been pending for 5 1/2 years without a decision by the district court whether the proposed class can be certified is problematic under ***HN9***[] *Fed. R. Civ. P. 23(c)(1)(A)*, which requires the decision to be made **[**9]** "[a]t an early practicable time after a person sues — as a class representative". All we hold today is that the complaint cannot be dismissed on the ground that the plaintiffs do not adequately allege compensable damages.

The judgment is vacated, and the case is remanded for proceedings consistent with this opinion.

End of Document

State v. AstraZeneca AB

Court of Appeal of Louisiana, First Circuit

April 11, 2018, Judgment Rendered

2016 CA 1073

Reporter

249 So. 3d 38 *; 2018 La. App. LEXIS 693 **; 2018-1 Trade Cas. (CCH) P80,350; 2016 1073 (La.App. 1 Cir. 04/11/18);; 2018 WL 1755535

STATE OF LOUISIANA, BY AND THROUGH ITS ATTORNEY GENERAL JAMES CALDWELL VERSUS ASTRA ZENECA AB, ASTRAZENECA LP, ASTRAZENECA PHARMACEUTICALS LP, AND AKTIBOLAGET HASSLE

Subsequent History: Writ denied by *State v. Astra Zeneca AB, 252 So. 3d 899, 2018 La. LEXIS 2237 (La., Sept. 21, 2018)*

Writ denied by *State v. Astra Zeneca AB, 252 So. 3d 904, 2018 La. LEXIS 2262 (La., Sept. 21, 2018)*

Decision reached on appeal by, Remanded by *State v. AstraZeneca AB, 2020 La. App. LEXIS 1043 (La.App. 1 Cir., July 2, 2020)*

Prior History: [1]** On Appeal from the Nineteenth Judicial District Court. In and for the Parish of East Baton Rouge State of Louisiana. No. 637960. Honorable Timothy E. Kelley, Judge Presiding.

Disposition: REVERSED; EXCEPTIONS OVERRULED.

Core Terms

no right, no cause of action, purchaser, indirect, right of action, attorney general, cause of action, Monopolies, unjust enrichment, trial court, sustaining, partial, antitrust, asserts, manufacturers, commerce, raising, belong, peremptory, violations, damages, funds, operative fact, partial judgment, bring an action, civil penalty, bring suit, pharmaceutical, alleges, unfair

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN1[] **Involuntary Dismissals, Failure to State Claims**

The peremptory exceptions of no right of action and no cause of action are separate and distinct. *La. Code Civ. Proc. Ann. art. 927(A)(5)*, *(6)*. One of the primary differences between the exceptions of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether a particular plaintiff has a right to bring a suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against a particular defendant.

Civil Procedure > Dismissal > Involuntary Dismissals > Appellate Review

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Involuntary Dismissals, Appellate Review**

An exception of no cause of action questions whether the law extends a remedy against a defendant to anyone under the factual allegations of the petition and is triable on the face of the petition. To determine the issues raised by the exception of no cause of action, each well-pled fact in the petition must be accepted as true. In reviewing a district court's ruling sustaining an exception of no cause of action, appellate courts conduct a de novo review because the exception raises a question of law, and the district court's decision is based only on the sufficiency of the petition. An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him or her to relief. Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at trial. If the petition states a cause of action on any ground or portion of the demand, the exception should generally be overruled.

Civil Procedure > Dismissal > Involuntary Dismissals > Appellate Review

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

HN3[] **Involuntary Dismissals, Appellate Review**

The exception of no cause of action should not be maintained in part, so as to prevent a multiplicity of appeals thereby forcing an appellate court to consider the merits of the action in a piecemeal fashion. If there are two or more items of damages or theories of recovery that arise out of the operative facts of a single transaction or occurrence, a partial judgment on an exception of no cause of action should not be rendered to dismiss an item of damages or theory of recovery.

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN4[] **Standards of Review, Questions of Fact & Law**

The function of the exception of no right of action is a determination of whether a plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. *La. Code Civ. Proc. Ann. art. 927(A)(6)*. In examining an exception of no right of action, a court should focus on whether the particular plaintiff has a right to bring the suit, but assume that the petition states a valid cause of action for some person. Evidence supporting or controverting an exception of no right of action is admissible; however, in the absence of evidence to the contrary, the averments of fact in the pleadings are taken as true. Determination of whether a plaintiff has a right of action is a question of law.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN5[] **Entry of Judgments, Multiple Claims & Parties**

Courts treat a partial exception of no right of action no differently than a partial exception of no cause of action. The Code of Civil Procedure does not provide for a partial peremptory exception raising the objection of no right of action, and, thus, if a plaintiff has a right of action as to any one of the theories or demands for relief set out in his or her petition, the objection of no right of action should be overruled. Where the plaintiff pleads multiple theories of recovery based on a single occurrence or set of operative facts, a partial grant of an exception of no right of action, which attacks only one theory of recovery and which does not dismiss a party, is invalid as an impermissible partial judgment.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Employees & Officials

HN6[] **Deceptive & Unfair Trade Practices, State Regulation**

Extensive powers have been granted the Attorney General on behalf of the State to institute and prosecute any and all suits he or she may deem necessary for the protection of the interests and rights of the State. *La. Rev. Stat. Ann. § 13:5036*. The Attorney General has also been granted specific powers in the area of consumer protection under the Louisiana Unfair Trade Practices Act. *La. Rev. Stat. Ann. § 51:1404*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Employees & Officials

HN7[] **Deceptive & Unfair Trade Practices, State Regulation**

The Attorney General has a right of action to maintain a Louisiana Unfair Trade Practices Act claim on behalf of the State for specific purposes.

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN8[] **Justiciability, Standing**

To the extent that *State v. Abbott Laboratories, Inc., (La. App. 1 Cir. 10/21/16), 208 So.3d 384*, recognizes a partial grant of no right of action when claims arise from the same set of operative facts, it is overruled.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Civil Procedure > Preliminary Considerations > Justiciability > Standing

Governments > State & Territorial Governments > Claims By & Against

HN9[] **Deceptive & Unfair Trade Practices, State Regulation**

The State, by virtue of its statutory authority expressly granted it under the Louisiana Unfair Trade Practices Act (LUTPA), has a right to bring claims under LUTPA and to seek limited specified relief, regardless of any right that the Louisiana Department of Health may possess. The State has a right of action to proceed under the express provisions of LUTPA.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN10[] **Deceptive & Unfair Trade Practices, State Regulation**

Indirect purchasers are individuals who do not deal directly with those engaging in an unfair trade practice or activity. Rather, indirect purchasers are injured when the costs of illegal activities are passed down the distribution chain.

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Judges: BEFORE: WHIPPLE, C.J., GUIDRY, PETTIGREW, McDONALD, McCLENDON, WELCH, HIGGINBOTHAM, CRAIN, THERIOT, HOLDRIDGE, CHUTZ, AND PENZATO, JJ. Welch, J., concurring in part and dissenting in part. With reason **[**2]** assigns. McDonald, J. concurs for the reason assigns by Judge Pettigrew. Guidry, concur in the Result. Judge Pettigrew, J. concurs with the results and assigns reasons. Holdridge, J., concurs with results and assigns reasons. J - Chutz, J, concur for reasons singed by J. Pettigrew.

Opinion by: McCLENDON

Opinion

[*41] [Pg 3] **McCLENDON, J.**

The State of Louisiana appeals a judgment that sustained peremptory exceptions raising the objections of no cause of action and no right of action in favor of a drug manufacturer, dismissing the State's claims against the manufacturer with prejudice. For the reasons that follow, we reverse.

FACTS AND PROCEDURAL HISTORY

The State of Louisiana, by and through its Attorney General, filed the instant suit against AstraZeneca AB, AstraZeneca LP, AstraZeneca Pharmaceuticals LP, and Aktiebolaget Hassle (collectively "AstraZeneca") on March 18, 2015. The State alleges that AstraZeneca intentionally delayed approval of a generic equivalent to their brand pharmaceutical product Toprol-XL ® in an effort to limit competition from generic pharmaceutical manufacturers and in violation of state law.[1] As a result of a generic being delayed, the State alleges that it, through the Louisiana Medicaid **[**3]** program, paid more in reimbursement for Toprol-XL than it otherwise would have paid for the generic equivalent. The State also claims that it lost substantial amounts in reimbursements paid outside of the Medicaid program. In its lawsuit, the State asserts that its claims arise from antitrust violations under the *Louisiana Monopolies Act ("Monopolies Act"), LSA-R.S. 51:121, et seq.*, and from violations of the *Louisiana Unfair Trade Practices Act ("LUTPA"), LSA-R.S. 51:1401, et seq.* Alternatively, the State asserts that it has a claim for unjust enrichment. It seeks restitution, treble damages, attorney fees, and costs.

In response, AstraZeneca filed multiple exceptions, including the ones at issue herein — the peremptory exceptions raising the objections of no right of action and no cause of action. Following argument on AstraZeneca's exceptions, the trial court found that all claims were vested with the Department of Health and Hospitals (now Louisiana Department of Health or "LDH") rather than the State. No evidence was introduced at the hearing. Because the trial court found that all claims were vested with LDH, it sustained the exceptions of no right of action and no cause of action and dismissed the State's claims with prejudice. **[**4]**

[Pg 4] The State has appealed, assigning the following as error:

1. The trial court erred in sustaining Defendants' Exceptions of No Right of Action and No Cause of Action in this suit, based upon its finding that the State of Louisiana is not the proper party in interest to bring the suit and/or that the Louisiana Department of Health has the sole right to assert these claims.
2. The Trial Court erred in sustaining Defendants' Exceptions of No Right of Action and No Cause of Action in this suit, based upon its finding that the State of Louisiana's role as an indirect purchaser of Toprol-XL bars the State from pursuing antitrust claims and LUTPA claims.

[*42] 3. The Trial Court erred in sustaining Defendants' Exceptions of No Right of Action and No Cause of Action in this suit by dismissing the State's claims that are not derived from Medicaid expenditures.
4. The Trial Court erred in sustaining Defendants' Exceptions of No Right of Action and No Cause of Action in this suit by dismissing the State's unjust enrichment claim.

DISCUSSION

At issue in this case are the exceptions of no right of action and no cause of action. Although these two exceptions are often confused, ***HN1***[] the peremptory exceptions **[**5]** of no right of action and no cause of action are separate and distinct. *LSA-C.C.P. art. 927(A)(5)* and *(6)*; ***Badeaux v. Southwest Computer Bureau, Inc.****, 05-0612 (La. 3/17/06), 929 So.2d 1211, 1216*. The Louisiana Supreme Court has recognized that one of the primary differences between the exception of no right of action and no cause of action lies in the fact that the focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, while the focus in an exception of no cause of action is on whether the law provides a remedy against the particular defendant. ***Badeaux****, 929 So.2d at 1216-17*.

HN2[] An exception of no cause of action questions whether the law extends a remedy against the defendant to anyone under the factual allegations of the petition and is triable on the face of the petition. ***Badeaux****, 929 So.2d at 1217*. To determine the issues raised by the exception of no cause of action, each well-pleaded fact in the petition must be accepted as true. **Id.** In reviewing a district court's ruling sustaining an exception of no cause of action, appellate courts conduct a *de novo* review because the exception raises a question of law, and the district court's decision is based only on the sufficiency of the petition. **Id.** An exception of no cause of action should be [Pg 5] granted only when it appears beyond doubt that **[**6]** the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. **Id.** Every reasonable interpretation must be accorded the language used in the petition in favor of maintaining its sufficiency and affording the plaintiff the opportunity of presenting evidence at

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[1] Toprol-XL is a drug used to treat angina, hypertension, and congestive heart failure. The generic equivalent of Toprol-XL is metoprolol succinate.

trial. **Id.** If the petition states a cause of action on any ground or portion of the demand, the exception should generally be overruled. **Id.**

Further, the Louisiana Supreme Court has held that ***HN3***[] the exception of no cause of action should not be maintained in part, so as to prevent a multiplicity of appeals thereby forcing an appellate court to consider the merits of the action in a piecemeal fashion. ***Everything on Wheels Subaru, Inc. v. Subaru South, Inc.****, 616 So.2d 1234, 1236 (La. 1993)*. If there are two or more items of damages or theories of recovery that arise out of the operative facts of a single transaction or occurrence, a partial judgment on an exception of no cause of action should not be rendered to dismiss an item of damages or theory of recovery. ***Id.*** *at 1239*.

HN4[] As to the exception of no right of action, the function of the exception is a determination of whether plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the petition. *LSA-C.C.P. art. 927(A)(6)*; ***Badeaux****, 929 So.2d at 1217*. In examining **[**7]** an exception of no right of action, a court should focus on whether the particular plaintiff has a right to bring the suit, but assume that the petition states a valid cause of action for some person. ***Turner v. Busby****, 03-3444 (La. 9/9/04), 883 So.2d 412, 415*. Evidence supporting or controverting **[*43]** an exception of no right of action is admissible; however, in the absence of evidence to the contrary, the averments of fact in the pleadings will be taken as true. See ***Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.****, 10-2267, 10-2272, 10-2275, 10 2279, 10-2289 (La. 10/25/11), 79 So.3d 246, 252-53 & 255*. Determination of whether a plaintiff has a right of action is a question of law. ***1900 Highway 190, L.L.C. v. City of Slidell****, 15-1755 (La.App. 1 Cir. 6/3/16), 196 So.3d 693, 698* (citing ***Horrell v. Horrell****, 99-1093 (La.App. 1 Cir. 10/6/00), 808 So.2d 363, 368*, writ denied, *01-2546 (La. 12/7/01), 803 So.2d 971*).

[Pg 6] Additionally, ***HN5***[] courts have treated a partial exception of no right of action no differently than a partial exception of no cause of action. This court has previously held that the Code of Civil Procedure does not provide for a partial peremptory exception raising the objection of no right of action, and, thus, if a plaintiff has a right of action as to any one of the theories or demands for relief set out in his petition, the objection of no right of action should be overruled. ***Talbot v. C&C Millworks, Inc.****, 97-1489 (La.App. 1 Cir. 6/29/98), 715 So.2d 153, 156* (citing ***Clement v. McNabb****, 580 So.2d 981, 983 (La.App. 1 Cir. 1991)* and ***Cenac Towing Co. v. Cenac****, 413 So.2d 1351, 1352 (La.App. 1 Cir. 1982))*. Where the plaintiff pleads multiple theories of recovery based on **[**8]** a single occurrence or set of operative facts, the partial grant of an exception of no right of action, which attacks only one theory of recovery and which does not dismiss a party, would be invalid as an impermissible partial judgment. ***Talbot****, 715 So.2d at 156* (citing ***Shinew v. Luciano Refrigerated Transport, Inc.****, 96-2454 (La.App. 1 Cir. 11/19/97), 706 So.2d 140, 142* and ***Poy v. Twin Oaks Nursing Home, Inc.****, 95-889 (La.App. 5th Cir. 2/14/96), 671 So.2d 15, 18-19*.

In light of these axioms, we first consider whether the Attorney General has a right of action to bring the proceeding at issue. In connection with its exception raising the objection of no right of action, AstraZeneca maintains that LDH, as opposed to the State, is the only party that has a right of action. AstraZeneca avers that the Louisiana Supreme Court has recognized: (1) state agencies with the power to "sue and be sued" as "the sole parties capable of bringing suit to enforce their rights" and (2) that lawsuits concerning the duties of such agencies should be instituted by the agency and not by the state. See ***State ex rel. Dep't of Highways v. City of Pineville****, 403 So.2d 49, 52 (La. 1981)*. AstraZeneca notes that LDH is "a body corporate with the power to sue and be sued," and contends that LDH is statutorily vested with responsibility for Medicaid. *LSA-R.S. 36:251A* and *36:254D(1)(a)(i)*. Further, AstraZeneca asserts that LDH is the owner of the funds used to reimburse pharmacies for the purchase of Toprol-XL. See *LSA-R.S. 46:153.3*. Nevertheless, AstraZeneca **[**9]** maintains that even if the funds could be classified as belonging to the State, any action against it would belong to LDH under the rationale of **City of Pineville**.

[Pg 7] On the other hand, while the State recognizes that LDH is a body corporate with the power to sue and be sued, the State maintains that it is not asserting any right that was ever solely possessed by LDH. The State avers that under the rationale of **Pineville**, the political subdivision becomes the sole party capable of asserting a claim only when the claim asserted derives from property owned (or a contract entered into) exclusively by that political subdivision or agency. The State argues that while LDH administers the Medicaid program, all Medicaid funds belong to the State. The State claims that all of the funds paid through the Medicaid **[*44]** program come from the

State's general fund and from federal funds granted the State on which the State remains obligated—funds which were never a part of LDH's budget and never the distinct property of LDH. The State additionally alleges that there were non-Medicaid funds that were also paid out by the State. As such, the State maintains that it has a right to bring this action in **[**10]** its own name stemming from its ownership of those funds.

Recently, this court addressed a similar issue in ***State v. Abbott Labs., Inc.**, 15-1854, 15-1626 (La.App. 1 Cir. 10/21/16), 208 So.3d 384*, writs denied, *17-0125, 17-0149 (La. 3/13/17), 216 So.3d 802, 216 So.3d 808*, wherein the State sued pharmaceutical manufacturers alleging that the manufacturers "engaged in an unlawful and deceptive scheme to receive Medicaid payments for drugs that were not eligible for Medicaid payments." The State raised claims under LUTPA and the Louisiana Medical Assistance Programs Integrity Law (MAPIL), *LSA-R.S. 46:437.1, et seq.*, along with claims for fraud, negligent misrepresentation, redhibition, and unjust enrichment. ***Id.** at 386-87*. In response, the manufacturers filed an exception of no right of action, asserting that the right of action belonged to the Louisiana Department of Health and Hospitals (now LDH). The trial court sustained the manufacturers' exception of no right of action and dismissed the suit. The State then appealed. ***Id.** at 387*.

On appeal, this court noted that LDH was a political subdivision that had the right to sue and be sued, and that the LDH was statutorily authorized to file suit on behalf of Medicaid. *LSA-R.S. 36:254D(2)(d)*. ***Abbott**, 208 So.3d at 388*. Nonetheless, ***HN6***[] this court recognized the extensive powers granted the Attorney General on behalf of the State **[**11]** to "institute and prosecute any and all suits he may deem necessary for the [Pg 8] protection of the interests and rights of the state." See *LSA-R.S. 13:5036*. We also recognized the specific powers granted the Attorney General in the area of consumer protection under LUTPA. See *LSA-R.S. 51:1404*.[2] ***Abbott**, **[*45]** 208 So.3d at 388-89*. With regard to the LUTPA claim, this court cited the following provisions of the act: *Louisiana Revised Statutes 51:1405* provides, in part:

> A. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

Louisiana Revised Statutes 51:1407 provides, in part:

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[2] *Louisiana Revised Statutes 51:1404* provides, in pertinent part:

> A. The Louisiana Attorney General's Office, Public Protection Division, Consumer Protection Section shall have the following powers and duties:
>
> (1)(a) To investigate, conduct studies and research, to conduct public or private hearings into commercial and trade practices in the distribution, financing and furnishing of goods and services to or for the use of consumers.
>
> (b) In the furtherance of the above, the attorney general shall notify said seller, distributor, packer, or manufacturer who shall have the right to put on the record any and all pertinent information that may substantiate the commercial or trade practice and shall have the right of cross examination. **[**14]**
>
> (c) Public disclosure shall not be made of any trade secret and commercial or financial information obtained from a person which is of a privileged or confidential nature.
>
> (2) To suggest means of securing adequate consumer representation on public boards and commissions;
>
> (3) To advise the governor and the legislature on matters affecting consumer interests, and to assist in developing executive policies, and to develop, draft and prepare legislative programs to protect the consumer;
>
> (4) To promote consumer education;
>
> ....
>
> (6) To do such other acts as are necessary and incidental to the exercise of the powers and functions of the section.
>
> B. The attorney general may receive information and documentary material and may receive and otherwise investigate complaints with respect to acts or practices declared to be unlawful by this Chapter or other laws of this state and inform the public with respect thereto. The attorney general may institute legal proceedings and take such other actions provided for herein or which are necessary or incidental to the exercise of his powers and functions.

A. Whenever the attorney general has reason to believe that any person is using, has used, or is about to use any method, act, or practice declared by *R.S. 51:1405* to be unlawful, he may bring an action for injunctive relief in the name of the state against such person to restrain and enjoin the use of such method, act, or practice. ...

B. In addition to the remedies provided herein, the attorney general may request and the court may impose a civil penalty against any person found by the court to have engaged in any method, act, or practice in Louisiana declared to be unlawful under this Chapter. In the event the court finds the method, act, or practice to have been **[**12]** entered into with the intent to defraud, the court has the authority to impose a penalty not to exceed five thousand dollars for each violation.

[Pg 9] *Louisiana Revised Statutes 51:1408* provides, in part:

A. The court may issue such additional orders or render judgments against any party, as may be necessary to compensate any aggrieved person for any property, movable or immovable, corporeal or incorporeal, which may have been acquired from such person by means of any method, act, or practice declared unlawful by *R.S. 51:1405*, whichever may be applicable to that party under *R.S. 51:1418*. Such orders shall include but not be limited to the following:

(1)Revocation, forfeiture, or suspension of any license, charter, franchise, certificate, or other evidence of authority of any person to do business in the state.

(2) Appointment of a receiver.

(3) Dissolution of domestic corporations or associations.

(4) Suspension or termination of the right of foreign corporations or associations to do business in this state.

(5) Restitution.

B. Unless otherwise expressly provided, the remedies or penalties provided by this Chapter are cumulative to each other and to the remedies or penalties available under all other laws of this state.

Louisiana Revised Statutes 51:1416 provides:

In addition **[**13]** to remedies for contempt of court otherwise provided by law, any person who violates the terms of an injunction issued under *R.S. 51:1407* or *1408*, or an assurance of voluntary compliance as authorized under *R.S. 51:1410*, may be required to pay to the state treasurer a civil penalty of not more than five thousand dollars per violation. For the purposes of this Section, the district court issuing an injunction shall retain jurisdiction and the attorney general acting in the name of the state may petition for recovery of civil penalties provided in this Section.

Considering the foregoing statutory authority, this court concluded that "LUTPA **[*46]** expressly gives the Attorney **[**15]** General the right to bring an action for injunctive relief (*La. R.S. 51:1407A*) and request civil penalties (*La. R.S. 51:1407B*) and restitution (*La. R.S. 51:1408(A)(5)*)." ***Id.** at 389*. Accordingly, this court reversed the trial court ruling sustaining the objection of no right of action under LUTPA.

Here, AstraZeneca asserts that the **Abbott** decision is not controlling because the State, through the Attorney General, has not asserted a claim under MAPIL. However, in **Abbott**, this court held that ***HN7***[] the Attorney General has a right of action to maintain a LUTPA claim on behalf of the State for specific purposes, which it has done [Pg 10] here. Therefore, the non-existence of a MAPIL claim in this matter does not control our decision.[3] Accordingly, we conclude that the State has a right of action under LUTPA.

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[3] Moreover, at oral argument, AstraZeneca posited that the remedies available to the State under *LSA R.S. 51:1407B* cannot be sought unless the State pursues injunctive relief in accordance with *LSA-R.S. 51:1407A*. Having not been briefed, we do not address this issue at this time. See Uniform Rules — Courts of Appeal, Rule 1-3 ("The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise.").

Having concluded that the State has a right of action under LUTPA, and given that the claims under LUPTA and the Monopolies Act arise from the same set of operative facts, the exception of no right of action should be overruled. ***HN8***[] To the extent that ***Abbott*** recognizes a partial grant of no right of action when the claims arise from the same set of operative facts, it is overruled. Moreover, given that the State has a specific right under LUTPA, we need not **[**16]** delineate between Medicaid and non-Medicaid expenditures at this time.

Nevertheless, AstraZeneca urges that if the cause of action is vested with LDH, then the Attorney General has no right to pursue the agency's cause of action even if the Attorney General otherwise has a general grant of authority permitting it to do so. We note that substantially similar arguments were asserted by the defendant manufacturers in **Abbott**, wherein the defendants urged that "the district court correctly recognized that the State cannot pursue claims that, by law, belong to a state agency. ... The defendants assert that the State, represented by the Attorney General, purported to bring the action in its own name in order to circumvent the prescriptive periods that would apply if DHH were the plaintiff." ***Id.*** *at 387*. Even so, the **Abbott** court recognized that ***HN9***[] the State, by virtue of its statutory authority expressly granted it under LUTPA, has a right to bring claims under LUTPA and to seek limited specified relief, regardless of any right that LDH may possess.

In light of our holding in ***Abbott***, we recognize that the State has a right of action to proceed under the express provisions of LUTPA. In so holding, however, **[**17]** we do not address whether the Medicaid funds belong to LDH or to the State, whether [Pg 11] some of the claims belong solely to LDH, what specific relief is available to the State, or whether any claims are prescribed.[4]

[*47] AstraZeneca further contends that even if the State has a right of action, it cannot maintain a cause of action as an indirect purchaser[5] of the prescription drug at issue. Although AstraZeneca couches this argument in terms of "no cause," the argument in essence is one of no right. In other words, AstraZeneca asserts that because **[**18]** the State is an indirect purchaser, it has no right to assert claims under LUTPA or the Monopolies Act.

In ***Illinois Brick Co. v. Illinois****, 431 U.S. 720, 728-29, 97 S.Ct. 2061, 2066, 52 L.Ed.2d 707 (1977)*, the United States Supreme Court held that only a direct purchaser may bring an action under *§ 4 of the Clayton Act*, or the federal antitrust provision (akin to the Louisiana Monopolies Act). Citing a number of policy concerns, the Supreme

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[4] Although the facts are distinguishable, we note that a similar argument was addressed in ***State v. Classic Soft Trim, Inc.****, 95-804 (La.App. 5 Cir. 10/20/95), 663 So.2d 835*, writ denied, *95-2604 (La. 1/26/96) 666 So.2d 669*, wherein an action was commenced by the State, through the Attorney General, on behalf of several private parties for violations of LUTPA and the Monopolies Act. The Fifth Circuit noted that under both acts, the Legislature has determined that actions for violations of these laws may be brought by the Attorney General. **Id.** at 835. The defendants in **Classic Soft Trim** had filed an exception in the trial court urging a lack of procedural capacity on the part of the State to be a party to the action. The trial court maintained the exception, but the Fifth Circuit reversed, noting that LUTPA and the Monopolies Act (the two acts at issue here) give the Attorney General, on behalf of the State, procedural capacity to bring suits alleging violations of those Acts. **Id.** at 836. Although the defendants argued that the State's action was a "disguised private action" and that the real parties in interest were the intervenors, the Fifth Circuit held that the State had procedural capacity to proceed, noting:

> Here, the legislature has enacted certain regulations concerning commerce in this state and has empowered the Attorney General to enforce those laws both criminally and civilly, and to seek redress against violators on behalf of both the state and private parties. It is not alleged that these enactments are beyond the sovereign power of the state to control commerce within its borders, or that they violate any rights of the defendants which are protected by either the state or the federal constitutions. Absent such allegations, the statutes must be presumed valid and must be given effect by the courts of the state.

Id. at 837. Accordingly, the Fifth Circuit reinstated the State as a proper party to the action, allowing it to proceed with its claims under LUTPA and the Monopolies Act.

[5] ***HN10***[] Indirect purchasers are individuals who do not deal directly with those engaging in the unfair trade practice or activity. Rather, indirect purchasers are injured when the "costs of illegal activities are passed down the distribution chain." **Robert F. Roach, Revitalizing Indirect Purchaser Claims: Antitrust Enforcement Under New York Law, *13 PACE L. REV. 9, 11 (1993)***.

Court held that indirect purchasers were not entitled to recover. *431 U.S. at 730-35, 97 S.Ct. at 2067-69*. In support of its holding, the Supreme Court cited the unique nature of antitrust litigation, issues of multiple recovery, and the problem of allocating damages if indirect purchasers were allowed to bring suit. ***Id.*** *at 737-38, 97 S.Ct. at 2070-71*. Later, the court held that federal antitrust laws do not, however, [Pg 12] preempt states from enacting statutes that allow indirect purchasers to recover damages for their injuries. See ***California v. ARC America Corp.***, *490 U.S. 93, 101-02, 109 S.Ct. 1661, 1665-66, 104 L.Ed.2d 86 (1989)* (rejecting the argument that California's ***antitrust law***, which specifically allows indirect purchaser actions, was preempted by federal law).

Louisiana has no statute that specifically provides a right of action to an indirect purchaser; nor has a Louisiana state court addressed this specific **[**19]** issue.[6] Nonetheless, **[*48]** we need not make a determination of whether we would follow **Illinois Brick**. Regardless of whether the State is an indirect purchaser or if Louisiana courts would follow the **Illinois Brick** rationale, the State itself has a right of action under LUTPA, including a specific right of action to seek civil penalties and restitution. On this limited record based solely on the exceptions, we make no determination of whether Louisiana would follow **Illinois Brick** with regard to the indirect purchaser rule, as we need not decide this issue to determine whether the State has any right of action.

AstraZeneca also maintains that the State has no cause of action as to antitrust claims under the Louisiana Monopolies Act, because the petition alleges activity occurring in interstate commerce. Additionally, AstraZeneca asserts that reading the Monopolies Act claims and LUTPA claims *in pan materia*, the LUTPA claims sounding in antitrust should likewise be barred where the conduct at issue lacks a specific **[**20]** nexus to Louisiana.[7] However, having found that LUTPA, by its terms, gives the State a cause of [Pg 13] action, as well as a right of action, and based on decisions of both the Louisiana Supreme Court and this court that do not recognize partial exceptions of no cause of action, the exception of no cause of action must be overruled.

CONCLUSION

For the foregoing reasons, the trial court's judgment sustaining the exceptions of no right of action and no cause of action, and dismissing the State's claims with prejudice, is reversed. We overrule AstraZeneca's exceptions raising

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[6] The Federal Fifth Circuit in ***Free v. Abbott Laboratories, Inc.***, *176 F.3d 298, 301 (5th Cir. 1999)*, aff'd, *529 U.S. 333, 120 S.Ct. 1578, 146 L.Ed.2d 306 (2000)*, believes Louisiana courts would follow the **Illinois Brick** rationale such that indirect purchasers do not have standing under Louisiana state law. The Louisiana Supreme Court, however, denied certification of the state law question of whether Louisiana ***antitrust law*** grants standing to indirect purchasers of consumer products.

Twenty-six states and the District of Columbia have judicially or legislatively "repealed" **Illinois Brick** and provided standing (or a right of action) to indirect purchasers under antitrust or consumer protection statutes. **Newberg on Class Actions, § 20:12 Indirect purchaser standing under state antitrust laws** (5th Edition). To guard against the concern first raised in **Illinois Brick**, many of these states require courts to ensure the defendants are not subject to multiple liability. Six other states have passed partial **Illinois Brick** repealer statutes. While these states do not permit indirect purchaser suits, they authorize the state attorney general to recover if the state itself is injured as an indirect purchaser or to recover on behalf of an indirect purchaser as *parens patriae*. **Id.** In contrast, thirteen states follow **Illinois Brick** by either completely barring indirect purchaser suits or by providing standing under limited circumstances. Many do so because their antitrust laws are interpreted to be harmonious with federal ***antitrust law***. **Id.** Five states have not addressed the issue. **Id.**

[7] AstraZeneca notes that the Monopolies Act generally prohibits "restraint[s] on trade or commerce" in Louisiana. *LSA-R.S. 51:122*. AstraZeneca avers that by its very terms, the Louisiana Monopolies Act applies only to intrastate commerce and does not reach the conduct alleged in the Petition — the filing of patent applications and the infringement lawsuits, which were instituted in Delaware and Missouri. But see ***Southern Tool & Supply, Inc. v. Beerman Precision, Inc.***, *01-1749 (La.App. 4 Cir. 5/1/02), 818 So.2d 256, 261*, writs denied, ***02-1509, 02-1515, 02-1531 (La. 9/20/02) 825 So.2d 1177***, ***825 So.2d 1178***, and ***825 So.2d 1179***. ("Although neither the Louisiana Supreme Court nor this Court have explicitly held that Louisiana's antitrust statutes may apply to matters involving both intrastate and interstate commerce, they have upheld application of Louisiana's antitrust laws in cases where the anti-competitive effects occurred in Louisiana.")

the objections of no right of action and no cause of action. Costs of this appeal are assessed to appellees, AstraZeneca AB, AstraZeneca LP, AstraZeneca Pharmaceuticals LP, and Aktiebolaget Hassle.

REVERSED; EXCEPTIONS OVERRULED.

Concur by: PETTIGREW; WELCH (In Part); HOLDRIDGE

Concur

[*49] PETTIGREW, J., CONCURS WITH THE RESULTS, AND ASSIGNS REASONS.

I concur with the results reached by the majority, however, I am of the opinion it was not necessary, nor is there any reason, to overrule ***State v. Abbott Labs., Inc.****, 15-1854, 15-1626 (La.App. 1 Cir. 10/21/16), 208 So.3d 384*, writs denied, *17-0125, 17-0149 (La. 3/13/17), 216 So.3d 802*, *216 So.3d 808*. Under the unique facts of **Abbott**, I am of the opinion it was legally **[**21]** correct.

[*50contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

HOLDRIDGE, J., CONCURS WITH THE RESULT, AND ASSIGNS REASONS.

I concur with the result. I think the majority is in error in finding that "this court [does] not recognize [a] partial exception of no cause of action[.]" I agree that prior to 1997, the cases did not allow a judgment granting only a partial exception of no cause of action. *See* *Everything on Wheels Subaru, Inc. v. Subaru S., Inc., 616 So.2d 1234, 1235 (La. 1993)*. However, in 1997, the legislature authorized a partial judgment which "sustains an exception in part." *La. C.C.P. art. 1915(B)(1)*. "This amendment ... authorizes a judgment granting a partial exception of no cause of action; importantly, this amendment provides certainty as to the immediate appealability of such judgment." Frank L. Maraist, *Louisiana Civil Law Treatise: Civil Procedure*, Vol. I, § 6.7, pp. 172-173 (2d ed. 2008). As stated in *Castille v. Louisiana Medical Mut. Ins. Co., 2014-519 (La. App. 3 Cir. 11/5/14), 150 So.3d 614, 618*, "[a] partial judgment on an exception of no cause of action should not be rendered to dismiss only one theory of recovery out of several within a single cause of action. However, a partial judgment on an exception of no cause of action may be rendered **[*51]** to dismiss one of several separate causes of action." In this case, from the face of the petition and without reference to any additional facts, I agree with the majority that **[**22]** the peremptory exceptions raising the objection of no cause of action should have been denied.

Dissent by: WELCH (In Part)

Dissent

[*49contd]

[EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published document.]

[Pg 1] **WELCH, J., concurring in part and dissenting in part**.

I agree with the majority opinion insofar as it determines that the State of Louisiana has a right of action against AstraZeneca under LUTPA; that AstraZeneca's peremptory exception raising the objection of no right of action should have been overruled; that *State v. Abbott Labs., Inc., 2015-1854, 2015-1626 (La. App. Pt Cir. 10/21/16), 208 So.3d 384*, writs denied, *2017-0125, 2017-0149 (La. 3/13/17), 216 So.3d 802*, *216 So.3d 808*, should be overruled to the extent that it recognized a partial objection of no right of action when the claims arise from the same set of operative facts; and that the portion of the judgment sustaining AstraZeneca's objection of no right of action should be reversed. However, I disagree with the majority opinion insofar as it reverses that portion of the judgment of the trial court sustaining AstraZeneca's objection of no cause of action and I disagree with the majority's reasoning that AstraZeneca's objection of no cause of action was essentially one of no right of action. Based on my review of the State's petition, and accepting the well-pleaded facts set forth therein as true, **[**23]** I find that the State has failed to state a cause of action against AstraZeneca for alleged violations of the Monopolies Act, LUTPA, and unjust enrichment.

Pursuant to the Monopolies Act, "no person shall monopolize, or attempt to monopolize, or combine or conspire with any person to monopolize any part of the trade or commerce within this state." *La. R.S. 51:123*. LUTPA outlaws unfair [Pg 2] methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. See *La. R.S. 51:1405*. As to unjust enrichment, *La. C.C. art. 2298* provides that a person who has been enriched without cause at the expense of another person is bound to compensate that person, with the term "without cause" excluding cases in which the enrichment results from a valid juridical act or the law. Furthermore, the remedy of unjust enrichment is subsidiary and is not available if the law provides another remedy for the impoverishment or declares a contrary rule. *Id.*

As set forth in the State's petition, its claims against AstraZeneca are based on its "indirect purchases" of Toprol-XL. However, the State, as an indirect purchaser, cannot state a cause of action against AstraZeneca for alleged violations of either the Monopolies **[**24]** Act or LUTPA. See ***Illinois Brick Co. v. Illinois**, 431 U.S. 720, 728-729, 97 S.Ct. 2061, 2066, 52 L.Ed.2d 707 (1997)* (holding that only a direct purchaser may bring an action under the federal anti-trust statute and that indirect purchasers are not entitled to recover); ***Free v. Abbot Laboratories, Inc.**, **[*50]** 176 F.3d 298, 301 n.9 (5th Ci. 1999)* and ***Southern Tool & Supply, Inc. v. Beerman Precision, Inc.**, 2001-1749 (La. App. 4th Cir. 5/1/02), 818 So.2d 256, 261*, writs denied, *2002-1509, 2002-1515, and 2002-1531 (La. 9/20/02), 825 So.2d 1177*, *825 So.2d 1178*, and *825 So.2d 1179* (indicating that Louisiana courts would follow the federal indirect purchaser rule); ***Federal Trade Com'n v. Mylan Laboratories, Inc.**, 99 F.Supp.2d 1, 7* (affirming the dismissal of the State's claims for damages, on behalf of indirect purchasers, based on violations of the Monopolies Act and LUTPA in accordance with the holdings of **Illinois Brick Co.** and **Free v. Abbot Laboratories)**.

In addition, the State cannot state a cause of action for violations of either the Monopolies Act or LUTPA based on operative facts (or the activities of AstraZeneca) that occurred outside of the geographic boundaries of Louisiana, *i.e.*, [Pg 3] the filing of patent applications and the infringement lawsuits that were instituted in Missouri and Delaware. See *La. R.S. 51:121* and *51:122* (prohibiting the restraint of trade or commerce in this state, with commerce defined as trade or commerce within the geographic boundaries of this state) and *La. R.S. 51:1405* (prohibiting unfair or deceptive acts or practices in the conduct of any trade or commerce).

Lastly, with respect to the State's **[**25]** claims based on unjust enrichment, the plaintiff's sought unjust enrichment damages because AstraZeneca financially "benefit[ted] from the monopoly profits on their sales of Toprol-XL" and their "unlawful scheme and anti-competitive conduct" to the economic detriment of the State. Since the State, as an indirect purchaser, cannot state a cause of action against AstraZeneca under either the Monopolies Act or LUTPA, the State cannot employ a subsidiary unjust enrichment claim to circumvent this rule. See ***Coastal Environmental Specialists, Inc. v. Chem-Lig Intern., Inc**. 2000-1936 (La. App. 1st Cir. 11/9/01), 818 So.2d 12, 19* and ***Aikens v. Microsoft Corp.**, 159 F. App'x 471, 477 (4th Cir. 2005)*. As such, the State has failed to state a cause of action for unjust enrichment.

Accordingly, the trial court correctly sustained AstraZeneca's peremptory exception raising the objection of no cause of action and I would affirm that portion of the judgment of the trial court.

Thus, I respectfully concur in part and dissent in part.

Branta, LLC v. Newfield Prod. Co.

United States District Court for the District of Colorado

April 12, 2018, Decided; April 12, 2018, Filed

Civil Action No. 1:15-cv-00416-WYD-KLM

Reporter

310 F. Supp. 3d 1166 *; 2018 U.S. Dist. LEXIS 62174 **; 2018-1 Trade Cas. (CCH) P80,353; 2018 WL 1762612

BRANTA, LLC, a Delaware limited liability company; BRANTA EXPLORATION & PRODUCTION COMPANY, LLC, a Delaware limited liability company; HARVEST (US) HOLDINGS, INC., a Delaware corporation; and HARVEST NATURAL RESOURCES, INC., a Delaware corporation, Plaintiffs, v. NEWFIELD PRODUCTION COMPANY, a Texas corporation, Defendant.

Prior History: *Branta, LLC v. Newfield Prod. Co., 2017 U.S. Dist. LEXIS 61832 (D. Colo., Apr. 24, 2017)*

Core Terms

bid, auction, Basin, bidders, Entities, damages, confidentiality agreement, competitor, no evidence, communications, participating, exploration, carbonate, basal, antitrust, contacted, partial, parties, acquisition, conspiracy, valuation, prospective business relationship, bid-rigging, confirmed, submit a bid, negotiate, entirety, drilled, Non-Circumvention, costs

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Breach > Breach of Contract Actions > Elements of Contract Claims

HN1[] **Breach of Contract Actions, Elements of Contract Claims**

The four elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach. Plaintiffs bear the burden of proving a breach by a preponderance of the evidence.

Business & Corporate Compliance > ... > Contracts Law > Breach > Material Breach

HN2[] **Breach, Material Breach**

When one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform. Reciprocal promises are presumed to be mutually dependent and the breach by one party excuses the performance of the other.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN3[] Intentional Interference, Elements

With respect to an interference claim, a mere hope for a contract is insufficient to establish a reasonable likelihood or reasonable probability that a contract could have resulted to support the existence of a prospective business relationship.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN4[] Sherman Act, Claims

Section 1 of the Sherman Act prohibits every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce. *15 U.S.C.S. § 1*. The Colorado Antitrust Act provides that it is illegal for any person to contract, combine, or conspire with any person to rig any bid, or any aspect of the bidding process, in any way related to the provision of any commodity or service. *Colo. Rev. Stat. § 6-4-106(1)*. Courts look to federal antitrust cases to guide interpretation of the Colorado Antitrust Act. *Colo. Rev. Stat. § 6-4-119*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN5[] Regulated Practices, Price Fixing & Restraints of Trade

Despite the *Sherman Act's* broad language, almost from its inception the Act has been read to prohibit only those restraints of trade that are unreasonable. Courts analyze claims of unreasonable restraints on trade under the rule of reason doctrine. In addition to this rule of reason, the courts have also developed a doctrine of per se violations to cover those business relationships that because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN6[] Per Se Rule & Rule of Reason, Per Se Violations

Section 1 of the Sherman Antitrust Act, *15 U.S.C.S. 1*, prohibits contracts and conspiracies that restrain trade. Certain violations have been identified as per se illegal, requiring no additional proof of an unreasonable restraint of trade. Other *§ 1* violations require proof that a defendant's actions resulted in an unreasonable restraint of trade. If proven, bid rigging is one such per se violation. Any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN7[] Per Se Rule & Rule of Reason, Per Se Violations

A conspiracy to rig bids in violation of *15 U.S.C.S. § 1* is essentially an agreement among actual or potential competitors which restrains competition in or effecting interstate trade or commerce. Conspiracy may be proved through direct or circumstantial evidence. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN8[] **Cartels & Horizontal Restraints, Price Fixing**

Where the disputed issue is the existence or scope of the alleged horizontal agreement that is to be inferred from circumstantial evidence, the first inquiry must be whether or not each firm alleged to have been a party to it was an actual or potential competitor in that market. The determination of a per se antitrust violation depends on whether there was an agreement to subvert the competition, not on whether each party to the scam could perform.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Inferences & Presumptions > Inferences

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN9[] **Sherman Act, Claims**

When analyzing a claim under *15 U.S.C.S. § 1*, the Supreme Court has held that ***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a *Section 1* case. Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. A plaintiff seeking damages for violation of *Section 1* must present evidence that tends to exclude the possibility that the alleged conspirators acted independently. Therefore, the plaintiff must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN10[] **Sherman Act, Claims**

With respect to a conspiracy claim under *15 U.S.C.S. § 1*, the Tenth Circuit in Matsushita has restated a two-part evidentiary test: (1) is the plaintiff's evidence of conspiracy ambiguous, i.e., is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN11[] **Per Se Rule & Rule of Reason, Sherman Act**

The essence of a claim of violation of *Section 1 of the Sherman Act*, *15 U.S.C.S. § 1*, is the agreement itself. Without proof of an agreement to rig bids, the antitrust claims fail. Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN12[] **Per Se Rule & Rule of Reason, Per Se Violations**

Direct evidence of a conspiracy in violation of *Section 1 of the Sherman Act*, *15 U.S.C.S. § 1*, is evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Evidence > Burdens of Proof > Allocation

HN13[] **Per Se Rule & Rule of Reason, Per Se Violations**

With respect to a claim of a conspiracy in violation of *Section 1 of the Sherman Act*, *15 U.S.C.S. § 1*, the burden remains on the antitrust plaintiff to introduce evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy which tends to exclude the possibility that defendants were acting independently.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN14[] **Per Se Rule & Rule of Reason, Per Se Violations**

To prevail on a *Sherman Act* claim alleging bid rigging, plaintiffs must prove, by a preponderance of the evidence, that they were injured in their business or property by the alleged bid-rigging. That is, a plaintiff must show that it was injured because of the anticompetitive effects of the alleged bid-rigging. A relaxed measure of proof is afforded to the amount, but not the causation of loss — the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN15[] **Intentional Interference, Elements**

Colorado recognizes the tort of intentional interference with prospective business relations. One who intentionally and improperly interferes with another's prospective contractual relation is subject to liability to the other for the pecuniary harm resulting from the loss of benefits of the relation. While the existence of an underlying contract is not required for this tort, there must be a showing of improper and intentional interference by the defendant that prevents the formation of a contract between the plaintiff and a third party. However, in order to prove that there is a protected prospective business relationship, the plaintiff must show that there is a reasonable likelihood or probability that a contract would have resulted; there must be something beyond a mere hope.

Torts > ... > Concerted Action > Civil Conspiracy > Elements

HN16[] Civil Conspiracy, Elements

To support a civil conspiracy claim, a plaintiff must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5) damages as to the proximate result. A plaintiff must present evidence of an agreement; the court may not infer its existence. Additionally, the purpose of the conspiracy must involve an unlawful act or unlawful means. A party may not be held liable for doing in a proper manner that which it had a lawful right to do.

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Judges: WILEY Y. DANIEL, SENIOR UNITED STATES DISTRICT JUDGE.

Opinion by: WILEY Y. DANIEL

Opinion

[*1171] FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

I. STIPULATED JOINT FACTS[1]

A. PROCEDURAL BACKGROUND

1. On February 27, 2015, Plaintiffs Branta, LLC ("Branta"), Branta Exploration & Production Company, LLC ("Branta E&P"), Harvest (US) Holdings, Inc. ("Harvest"), and Harvest Natural Resources, Inc. ("HNR") filed a Complaint against Defendant Newfield Production **[**2]** Company ("Newfield"). (ECF No. 1.)

2. Newfield answered Plaintiffs' complaint on May 18, 2015. (ECF No. 13.)

3. On September 9, 2015, Plaintiffs filed their First Amended Complaint and Jury Demand, adding new defendants Crescent Point Energy Corporation and Ute Energy, LLC ("Ute Energy"). (ECF No. 35.)

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[1] Section I contains the parties Joint Submission of Stipulated Proposed Findings of Fact ("Joint Facts") (ECF No. 496), filed on January 16, 2018.

4. On August 19, 2016, Plaintiffs filed a Motion for Partial Summary Judgment on Liability. (ECF No. 142.)

5. On December 12, 2016, Newfield filed a Motion for Summary Judgment. (ECF No. 235.)

6. Plaintiffs moved to amend their Complaint a second time and their Second Amended Complaint and Jury Demand was entered on the docket on February 1, 2017. (ECF No. 258.)

7. The Court denied both summary judgment motions on June 21, 2017. (ECF No. 415.)

8. A 10-day trial to the Court commenced on September 11, 2017.

B. PARTIES AND BACKGROUND FACTS

9. Branta is a privately held company that develops oil and natural gas resources. (ECF No. 258 ¶ 1.)

10. Branta is the parent company of Branta E&P, a privately held oil and natural gas exploration and production company. (ECF No. 258 ¶¶ 1-2.) Branta E&P is a wholly-owned subsidiary of Branta. (*Id.* at ¶ 2.)

11. HNR was a publicly traded company and the parent **[**3]** of Harvest, which invested in, acquired, and developed oil and gas assets. (ECF No. 258 ¶¶ 3-4; Nesselrode Trial Test., Vol. IV, 724:10-11.) Harvest is a wholly-owned subsidiary of HNR. (ECF No. 258 ¶ 4.)

12. In 2009, Branta E&P and Harvest owned oil and gas assets in the Uintah Basin in the State of Utah; Branta E&P own 40% of the Uinta Basin assets and Harvest owned the remaining 60%. (Edmiston Trial Test., Vol. IV, 804:24-805:3.)

13. Newfield is an oil and gas exploration and production company with operations throughout the United States and internationally, including in the Uintah Basin. (2015 Newfield Form 10-K at 3, available at http://phx.corporate-ir.net/phoenix.zhtml?c=63798&p=irol-reportsannual .)

14. In January 2011, Plaintiffs decided to conduct an auction for the sale of their Uinta Basin assets. (ECF No. 258 ¶ 15.)

15. In advance of the auction, Bank of America Merrill Lynch ("BAML"), which had been engaged to provide financial advice and assistance to Plaintiffs in connection with the auction, prepared a contact list that tracked entities Plaintiffs and/or BAML thought might be interested in the **[*1172]** Uintah Basin assets and recorded contacts with those entities. (Trial Ex. 18.) **[**4]**

16. Newfield was on BAML's contact list. (Trial Ex. 18 at BofA_000023.)

17. Throughout 2010 and 2011, Ute Energy was an oil and gas exploration and production company operating in the Uinta Basin. (Jaggers Trial Test., Vol. I, 78:1-2, 78:17-24.)

18. In early 2011, Ute Energy was interested in acquiring assets in the Uintah Basin. (Jaggers Trial Test., Vol. I, 116:9-11.)

19. The Bridgeland Exploration and Development Agreement ("Bridgeland EDA") created an Area of Mutual Interest ("AMI"). (Trial Ex. 25 at Art. XX.)

C. NEWFIELD'S CONFIDENTIALITY AGREEMENT WITH BRANTA

20. In February 2010, Branta notified Newfield of its plan to sell some of Branta E&P's share of the Uinta Basin assets. (Trial Ex. 33.)

21. To facilitate discussions of a potential sale of the Branta E&P assets to Newfield, on February 22, 2010, Branta and Newfield executed a confidentiality agreement (the "Branta Confidentiality Agreement") with respect to a potential acquisition by Newfield of Branta E&P's assets. (Trial Ex. 27.) The original term of the Branta CA was eighteen (18) months. (*Id.* at ¶ 8.)

22. Under the Branta Confidentiality Agreement, Branta agreed to share confidential and proprietary information with Newfield **[**5]** related to their Uintah Basin assets. (Trial Ex. 27.)

23. The Branta Confidentiality Agreement states that Newfield agreed "[t]o keep the [proprietary and confidential information ("PCI")] confidential and not to disclose the PCI to any entity or person except to [Newfield]'s and its affiliates' respective employees, officers, directors, counsel, accountants or consultants . . . on a need to know basis as is necessary to evaluate [Branta] or [various oil and gas exploration prospects]." (*Id.* at ¶ 3(a).)

24. The Branta Confidentiality Agreement also contains a "Non-Circumvention" clause:

> Each party hereby agrees that neither it nor its representatives will contact (whether by telephone, email, in-person meeting or otherwise) any of the other party's or its subsidiary's [sic] of affiliate's lenders, equity owners, co-working interest owners, joint exploration and development partners or other persons having existing or prospective business relations with the other party or its subsidiaries without the other party's prior express written consent obtained at least 48 hours in advance of such proposed contact, which consent may be withheld in the applicable party's sole discretion, and no such contacts may **[**6]** be conducted unless a representative of the other party is present throughout any such contacts.

(*Id.* at ¶ 4.)

25. The Branta Confidentiality Agreement states that it is governed by Texas law. (*Id.* at ¶ 12(a).)

26. The Branta Confidentiality Agreement applied to Branta and its affiliates, including Branta E&P. (Trial Ex. 27.)

27. On September 29, 2010, Newfield proposed to purchase Branta E&P's 30% interest in the Uinta Basin assets for $77 million. Newfield's proposal was rejected. (Trial Exs. 47, A35.)

28. On February 18, 2011, Newfield and Branta executed a letter that amended the Branta Confidentiality Agreement (the "Amendment Letter"). (Trial Ex. 31.)

[*1173] 29. The Amendment Letter applied to Branta and its affiliates, including Branta E&P. (*Id.* at 1.)

30. The Amendment Letter amended the Branta Confidentiality Agreement's Non-Circumvention provision to allow the parties to: (i) have contact with Harvest and its investment banker Merrill Lynch Securities in regards to Harvest's assets in the Uintah Basin; (ii) waive any prior breaches of the Branta CA arising out of any prior contacts with Harvest or Merrill Lynch Securities; and (iii) agree that the Branta CA was never intended to preclude either party "from contacting Harvest in respect **[**7]** of their respective relationships with Harvest that existed on the date of the [Branta] CA, including relationships as co-working interest owners or exploration and development partners in Uintah and Duchesne Counties, Utah." (*Id.* at 1.)

D. NEWFIELD'S CONFIDENTIALITY AGREEMENT WITH HNR

31. On February 17, 2011, HNR entered into a confidentiality agreement (the "Harvest Confidentiality Agreement") with Newfield. (Trial Ex. 32.)

32. The Harvest Confidentiality Agreement applied to HNR's subsidiaries, including Harvest. (*Id.* at 1 & ¶ 1.)

33. Under the Harvest Confidentiality Agreement, HNR and Harvest agreed to share "Evaluation Material" with Newfield. (*Id.* at 1 & ¶ 3.)

34. The Harvest Confidentiality Agreement stated that, without Harvest's prior written consent, Newfield "shall not disclose to or discuss with any third person," other than "the parent companies, subsidiaries and affiliates of the Parties . . . and each of their directors, officers, employees, agents, financial advisors or lenders, contractors, and consultants," "either the fact that discussions or negotiations are taking place concerning ['a strategic transaction involving Harvest's assets in the United States located in the Uintah Basin, State **[**8]** of Utah (a "Transaction")'] or any of the terms, conditions, or other facts with respect to any such Transaction, including the status thereof." (*Id.* at 1 & ¶ 6.)

35. The Harvest Confidentiality Agreement states that it is governed by Texas law. (*Id.* at ¶ 16.)

36. Harvest shared Evaluation Material with Newfield as provided for by the Harvest Confidentiality Agreement. (Trial Exs. 91, 92; Nesselrode Trial Test., Vol. IV, 751:19-23.)

E. COMMUNICATIONS BETWEEN NEWFIELD AND UTE ENERGY

37. Newfield did not have Plaintiffs' consent to contact Ute Energy about the auction. (Trial Exs. 57, 91.)

38. On May 18, 2011, Howard and Jaggers had a lunch meeting, and afterwards, Jaggers was disappointed. (Jaggers Trial Test., Vol. I, 156:25-157:4; Howard Trial Test., Vol. II, 332:1-3, 438:24-439:1.)

39. On May 20, 2011, Jaggers sent a letter to Howard. (Trial Ex. 1.)

F. BIDS FOR PLAINTIFFS' ASSETS

40. Before Newfield's initial March 7, 2011 bid, its technical team performed detailed economic analyses of Plaintiffs' assets. (Trial Exs. 110, 116-119, 122, 124.)

41. On March 7, 2011, Newfield submitted a bid of $196,988,000 for Harvest's assets and a bid of $90,587,000 for Branta E&P's assets, for a total bid of $287,575,000. **[**9]** (Trial Exs. 127, 128.)

42. On March 10, 2011, Bill Barrett Corporation ("BBC") submitted a bid that totaled $180,000,000 for just a portion of Plaintiffs' assets. (Trial Exs. 135, 136.)

[*1174] 43. Ute Energy did not bid on Plaintiffs' assets during the auction. (Tresca Trial Test., Vol. III, 599:10-12.)

G. NEWFIELD'S PURCHASE OF PLAINTIFFS' ASSETS

44. Newfield submitted the highest bid in the auction and was awarded the opportunity to buy the Uintah Basin assets. (Trial Ex. 142.)

45. HNR publicly announced Newfield's acquisition of Harvest's Uinta Basin assets on March 22, 2011, including the amount to be paid for the assets. (Trial Ex. B69.)

46. The sale of the Uintah Basin assets to Newfield closed on May 17, 2011. (Trial Ex. C46.)

47. After the close of the transaction, Newfield offered Ute Energy an option pursuant to the Bridgeland AMI to purchase the portion of the acquired assets located within the Bridgeland EDA, and Ute Energy exercised the option and paid approximately $12.1 million to acquire the offered assets. (Trial Exs. C11, C13.)

II. ASSET OWNERSHIP INTERESTS

1. Throughout 2010 and until March 21, 2011, Harvest (US) Holdings, Inc. ("Harvest (US)") and Brant Exploration & Production **[**10]** Company, LLC ("Branta E&P") owned a combined 100% working interest in approximately 69,399 net acres of mineral assets in the Uinta Basin (the "Uinta Basin Assets"). [Trial Ex. C49 at C49_0002, C49_0009, C49_0014, ¶¶ 2, 4, 30, 50; Nesselrode Testimony (Vol. IV — 738:16-18)]

2. Harvest Natural Resources, Inc. ("HNR") and Branta, LLC ("Branta") did not own any of the Uinta Basin Assets, except through their subsidiaries Harvest (US) and Branta E&P. [Trial Ex. C49 at C49_0002, C49_0009, C49_0014, ¶¶ 1, 3, 30, 50]

III. UTE ENERGY AND ITS AGREEMENTS WITH NEWFIELD

3. The Ute Indian Tribe owned 51% of Ute Energy, LLC ("Ute Energy"), and Quantum Energy Partners ("Quantum") owned 49%, though employees owned a part of the company, so it was not exactly 51/49. [Jaggers Testimony (Vol. I — 71:5-18; Vol. XI — 2045:19-2047:3)] Nevertheless, at all relevant times, the Ute Indian Tribe was the majority owner of Ute Energy, LLC ("Ute Energy"). [Jaggers Testimony (Vol. I — 71:5-15)]

4. Newfield had existing business relations with Ute Energy throughout 2010 and 2011, including as co-working interest owners and exploration and development partners in the Uinta Basin. [Trial Exs. 25, 28, 29, C38 at C38_0021-22 **[**11]** (Request for Admission # 20)]

5. Ute Energy and the Ute Indian Tribe were partners with Newfield under several exploration and development agreements ("EDAs") in the Uinta Basin. The relevant agreements were the Monument Butte Exploration and Development Agreement between the Ute Indian Tribe and Newfield executed on December 22, 2006, which the Ute Indian Tribe assigned to Ute Energy in 2007 (the "Monument Butte EDA"), the Bridgeland Exploration and Development Agreement between Ute Energy and Newfield executed on May 19, 2008 (the "Bridgeland EDA"), and the Rocky Point Exploration and Development Agreement and Area of Mutual Interest Agreement (the "Rocky Point EDA") executed on September 27, 2010 between Ute Energy and Newfield. [Trial Exs. 25, 28, 29]

6. EDAs are commonly used in the industry and by the Ute Indian Tribe to facilitate the exploration and development of hydrocarbons. Based on the testimony of Newfield's expert, Bruce Kramer, EDAs, like those entered into by Ute Energy **[*1175]** and Newfield, provide procompetitive benefits to the mineral owners, operators, and other working interest owners through risk- and cost-sharing, and through the ability to obtain substantial efficiencies **[**12]** and prevention of waste by allowing the development of large sections of land as a single lease. [Kramer Testimony (Vol. VII — 1346:14-1351:4, 1365:15-1367:15, 1367:23-1370:10, 1371:1-1372:10)]

7. EDAs and their associated joint operating agreements ("JOAs") often contain or are accompanied by an area of mutual interest agreement or "AMI." An area of mutual interest agreement is "an agreement between or among parties to an oil and gas farmout agreement, joint operating agreement or other agreement by which the parties describe a geographical area within which they agree to share certain additional leases or other interests acquired by any of them in the future." 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* 56 (2015). [Kramer Testimony (Vol. VII — 1350:10-1353:16, 1372:11-1374:14, 1375:6-10, 1375:13-1376:13)]

8. The purpose of a JOA is to share risks and costs, as well as information. JOAs allow for the exploration and development of oil and gas that otherwise might not get explored and developed, leading to greater production. [Tresca Testimony (Vol. III — 616:5-6, 616:12-617:23); Kramer Testimony (Vol. VII — 1343:12-1344:7)]

9. EDAs and AMIs promote risk-sharing. [Tresca Testimony (Vol. III **[**13]** — 616:12-617:23); Schulman Testimony (Vol. VI — 1130:11-22); Burtis Testimony (Vol. X — 1938:3-24)]

10. Without the EDAs at issue in this case, the minerals would likely have remained in the ground. [Kramer Testimony (Vol. VII — 1348:22-1349:12)]. Due to the Ute Tribe's lack of money and experience, and Newfield's lack of access to the tribal lands, the EDAs provided a mutually beneficial arrangement between the Ute Tribe and Newfield to develop the assets. It is unlikely that either party could have developed the assets solo. [Schulman

Testimony (Vol. VI — 1173:19-1174:2); Howard Testimony (Vol. II — 282:12-16); Packer Testimony (Vol. VII — 1422:22-1423:9)]

11. Harvest (US) and Branta E&P were parties to an AMI agreement that covered the Uinta Basin Assets. [Trial Ex. A76 at A76_0022; Tresca Testimony (Vol. III — 617:25-618:8); Edmiston Testimony (Vol. IV — 866:23-24)]

12. The Bridgeland EDA that Newfield entered into with Ute Energy contained an AMI. There was no AMI included in the Monument Butte EDA because, at the time it was executed, the Ute Tribe did not have an operating company or operating capabilities. [Packer Testimony (Vol. VII — 1421:9-13)] There was also a Rocky Point **[**14]** AMI between Newfield and Ute Energy. [Trial Ex. 29]

13. Pursuant to the AMI contained in the Bridgeland EDA, Ute Energy and Newfield agreed that they would offer to each the option to purchase additional leases acquired within the area of mutual interest pursuant to agreed-upon terms. [Trial Ex. 25 at §§ 1.10, 20.1]

14. Pursuant to the AMI associated with the Rocky Point area, which was in the form of a December 20, 2010 amendment to a preexisting AMI covering the Rocky Point area, Ute Energy and Newfield agreed to offer to each other the option to purchase assets acquired within the area of mutual interest pursuant to agreed-upon terms. In particular, Ute Energy and Newfield agreed that they would offer to each other leases acquired "through their own leasing activity [but this was] not intended to apply to acquisitions of interests by any means other than new leasing." [Trial Ex. 29 at 129-004 ¶ 1, **[*1176]** 029-002 ¶ 5; Jaggers Testimony (Vol. I — 108:9-17)]

15. The Ute Tribe was unwilling to enter into the Bridgeland EDA without the included AMI [Packer Testimony (Vol. VII — 1424:11-25)], thus the AMI was necessary to allow the Tribe to share in additional acreage opportunities that would be developed **[**15]** within the Uintah Basin.

16. It is the EDAs with its leasing and joint operating agreement aspects that create the precompetitive benefits, not the existence or nonexistence of the AMIs. [Kramer Testimony (Vol. VII — 1385:14-1386:11)] EDAs and, when included, AMIs, are negotiated provisions between the parties under the particular circumstances of each agreement, but are part of the joint collaboration to increase output of oil and gas at lower costs. [Kramer Testimony (Vol. VII — 1354:8-1356:1)]

IV. THE BRANTA CONFIDENTIALITY AGREEMENT

17. In 2010, the Branta Entities explored raising additional capital for Branta E&P, or alternatively selling Branta E&P's share of the Uinta Basin Assets. [Tresca Testimony (Vol. III — 552:22-553:4, 553:14-20, 554:10-15, 554:24-555:11)]

18. Energy Capital Solutions ("ECS") was an investment banking firm engaged by Branta in 2010 and 2011. Scott Trulock was the ECS principal with whom Branta worked. Mr. Trulock was retained to assist in identifying a financial partner to invest in Branta. [Tresca Testimony (Vol. III — 554:16-555:3, 601:15-602:3, 646:20-647:7)]

19. As part of the effort to sell its assets or finance its operations, Branta established a data **[**16]** room for prospective buyers or investors, and required any data room visitor to execute a confidentiality agreement ("CA"). [Tresca Testimony (Vol. III — 558:18-559:2, 560:22-561:4, 600:24-601:14)]

20. The Branta CA was drafted by the Branta Entities. [Tresca Testimony (Vol. III — 621:18-25)]

21. Paragraph 4 of the Branta CA, the non-circumvention provision, was a reciprocal provision intended to prevent each party from communicating with the other party's partners. [Tresca Testimony (Vol. III — 560:12-21, 623:22-624:6); Donohoue Testimony (Vol. V — 1068:24-1069:4, 1080:14-1081:20); Howard Testimony (Vol. II — 396:1-3); Trial Ex. 27 at 27-001, ¶ 4] For example, Branta could not communicate with Newfield's partners to transact business that cut out Newfield. But Branta could communicate with its own partners. Similarly, Newfield could not communicate with Branta's partners to transact business that cut out Branta. But Newfield was free to communicate

with its own partners. [Howard Testimony (Vol. II — 397:12-21); Tresca Testimony (Vol. III — 623:22-625:1, 626:4-20)]

22. Because, at the time the Branta CA was executed, Newfield and Ute Energy were partners under the three EDAs, the Branta **[**17]** CA did not prohibit Newfield from communicating with its partner, Ute Energy. [Howard Testimony (Vol. II — 396:4-20)]

23. The Branta Entities had no existing or prospective business relations with Ute Energy at the time the Branta CA was executed. [Tresca Testimony (Vol. III — 627:2-4, 627:11-18); Howard Testimony (Vol. II — 397:24-398:4)] There was no evidence presented that Harvest had an existing or prospective business relationship with Ute Energy at that time either.

24. Thus, the Branta CA prohibited Branta from communicating with Ute Energy without Newfield's prior written consent.

25. On September 29, 2010, the same day Newfield made its $77 million offer for Branta's interests, Branta E&P's manager, Fred Tresca, instructed Scott Trulock **[*1177]** of ECS to set up a meeting with Ute Energy. [Trial Ex. A31; Trial Ex. A33; Tresca Testimony (Vol. III — 628:25-630:4)] At the time, Ute Energy was Newfield's working interest partner and exploration and development partner in the Bridgeland, Monument Butte and Rocky Point EDAs. [FF # 4-5, 12-14]

26. On September 30, 2010, Mr. Trulock emailed the CEO of Ute Energy, Joseph Jaggers, asking for a meeting with Branta and Ute Energy to "see if there **[**18]** are any opportunities to work together." [Trial Exs. A31, A32, A33; Tresca Testimony (Vol. III — 630:5-19); Jaggers Testimony (Vol. I — 218:24-219:24)]

27. Mr. Jaggers agreed to a call, and, on October 4, 2010, Mr. Tresca and other representatives of the Branta Entities spoke with Ute Energy. [Trial Ex. A34; Jaggers Testimony (Vol. I — 219:25-220:7)]

28. Branta did not seek or obtain Newfield's consent prior to its September 30, 2010 outreach and October 4, 2010 conversation with Ute Energy. [Howard Testimony (Vol. II — 398:5-18)]

V. <u>THE AUCTION</u>

29. HNR was motivated to sell Harvest (US)'s share of the Uinta Basin Assets in part because it needed to raise funds to cover debts coming due in the second quarter of 2011 after unsuccessful attempts to market certain other assets in Venezuela in 2010, and intended to sell only 100% — not a part — of its interest. [Head Testimony (Vol. VIII — 1728:18-22); Edmiston Testimony (Vol. IV — 797:25-800:6, 813:10-20, 816:21-817:14, 847:12-848:5, 849:16-23, 849:11-850:24); Trial Ex. A73; Trial Ex. B15]

30. In the auction, the selling parties, here Harvest (US) and Branta E&P, controlled the auction's rules for bidding and the identities and number of competitors **[**19]** allowed to participate in the auction. The sellers and their banker (Bank of America Merrill Lynch ("BAML")) controlled the market of participating competitors by choosing whom to invite into the process, including sending the initial "teaser" and making follow-up calls to generate interest in the auction, offering confidentiality agreements and allowing access to the sellers' "data room," and sending bid guidelines describing the terms of bids. A party not invited to participate or barred from participation by the sellers was not a competitor in the auction. [Nesselrode Testimony (Vol. IV — 737:17-19, 743:1-5, 789:9-21, 780:12-15); Edmiston Testimony (Vol. IV — 817:15-819:15, 825:18-827:10, 839:25-840:9, 849:16-23, 851:9-22, 862:19-24); Sooby Testimony (Video Depo. — 118:6-119:4); Tresca Testimony (Vol. III — 583:7-11, 583:16-19, 667:10-20); Trial Ex. 5; Trial Ex. 7; Trial Ex. B15 at B15_0003, 0005]

31. Branta agreed in early January 2011 to participate as a seller with the Harvest Entities, agreed that HNR could act as a representative for both Branta Entities in the auction, and agreed to BAML's participation on behalf of the Branta Entities in the auction process. [Tresca Testimony **[**20]** (Vol. III — 575:9-576:5, 583:2-19, 644:21-645:7); Trial Ex. 30; Trial Ex. 52]

32. Plaintiffs expected that Newfield, Shell or El Paso would be the primary competitors in the auction. [Tresca Testimony (Vol. III — 601:1-4, 604:17-605:1, 676:24-677:6); Head Testimony (Vol. VIII — 1732:14-1733:5); Trial Ex. 77] They expected El Paso to be the most logical company to make a strong bid. [Trial Ex. K] Branta was aware, however, that Ute Energy could not afford to purchase the Uinta Basin Assets in their entirety. [Trial Exs. Q, T]

a. Plaintiffs Barred Newfield and Ute Energy From The Auction

33. On January 6, 2011, HNR's CEO, James Edmiston, informed Branta's Fred **[*1178]** Tresca that Ute Energy and Newfield would be excluded from the auction process, at least until a later point in the process. [Trial Ex. A43 at A43_003]

34. On January 7, 2011, Edmiston instructed BAML that Ute Energy and Newfield would not be permitted to participate in the auction unless and until he instructed BAML otherwise. [Trial Ex. 18 at 18-024; Sooby Testimony (Video Depo. — 60:24-62:18, 70:22-71:8, 72:7-15); Edmiston Testimony (Vol. IV — 853:14-855:18)] Mr. Edmiston instructed BAML to move Newfield and Ute Energy to the "B-List." **[**21]** [Trial Ex. 18 at 18-024] BAML understood Mr. Edmiston's instructions to bar Ute Energy and Newfield from participating in the auction unless and until Plaintiffs affirmatively lifted their respective bars. [Sooby Testimony (Video Depo. — 67:12-69:12, 70:22-71:8, 74:2-11, 77:01-12, 92:14-94:22, 97:19-98:4)]

35. On January 10, 2011, BAML began a calling program contacting potential buyers about the auction. [Trial Ex. 18] Potential buyers were also sent "teasers" that described the assets to be sold as well as the next steps in the sale process, which involved the execution of a confidentiality agreement, access to an online data room, and management presentations in Houston covering Land, Geology, Geophysics, Reservoir Engineering and Economics, Operations, and Facilities and Marketing. [*Id.*; Trial Ex. A76]

36. BAML's Contact List records that BAML contacted 47 different companies in its calling program and sent Teasers to 45 companies. [Trial Ex. 18] The Contact List shows that BAML never sent a Teaser to Newfield or Ute Energy, and never contacted Ute Energy in its calling program. [*Id.*]

37. On January 13, 2011, Mr. Jaggers called HNR's vice president, Karl Nesselrode, to express interest **[**22]** in the Uinta Basin Assets. [Jaggers Testimony (Vol. I — 99:21-100:14, 132:2-5)] Mr. Nesselrode testified that Mr. Jaggers expressed interest in participating in the process and that he told Mr. Jaggers that if Ute Energy were interested it needed to contact BAML. [Nesselrode Testimony (Vol. IV — 752:10-16, 754:7-22, 755:14-756:9, 793:3-11)]

38. However, in an email sent at 11:15 p.m. on the same day that Mr. Nesselrode spoke to Mr. Jaggers and reported his conversation with Mr. Jaggers to Mr. Edmiston, Mr. Edmiston reiterated his instruction to Mr. Nesselrode and BAML that "Ute Energy and Newfield are barred from the early rounds of our process due to competitive reasons." Mr. Edmiston stated "[i]f I think we need to, we will bring them in at the end . . . ." [Trial Ex. 57; Nesselrode Testimony (Vol. IV — 746:5-748:5)]

39. Mr. Nesselrode testified that, later in January 2011, he received two other calls from Mr. Jaggers expressing Ute Energy's interest in being part of the process relating to the Uinta Basin Assets and seeking information regarding the status of the data room. [Nesselrode Testimony (Vol. III — 696:17-697:1, 697:18-25; Vol. IV — 753:20-23, 758:14-759:8)]

40. Mr. Nesselrode **[**23]** indicated that he and Mr. Jaggers did not discuss bidding on any of the January phone calls regarding Ute Energy's interest in participating in the process relating to the Uinta Basin Assets because it was too early in the process to talk about bidding. [Nesselrode Testimony (Vol. IV — 758:1-13)]

b. <u>Plaintiffs Lifted The Bar On Newfield's Participation In the Auction On</u> February 15, 2011 <u>But Never Lifted The Bar On Ute Energy's Participation</u>

41. On February 15, 2011, just three weeks before the auction, Mr. Edmiston **[*1179]** decided to allow Newfield to participate in the auction and instructed BAML to invite Newfield to participate. However, Mr. Edmiston never lifted the bar on Ute Energy's participation in the auction and never instructed BAML to contact Ute Energy about participating in the auction. [Sooby Testimony (Video Depo. — 74:2-76:1, 77:1-18, 78:6-10, 79:22-80:10, 80:20-81:1, 94:17-22); Trial Ex. 90; Tresca Testimony (Vol. III — 668:13-669:21, 670:9-15); Edmiston Testimony (Vol. IV — 857:6-19, 857:24-858:4, 858:25-859:8); Head Testimony (Vol. VIII — 1738:10-19)]

42. Harvest also barred Morgan Stanley from the auction process. [Trial Ex. B12]

43. BAML invited Newfield into the process **[**24]** on February 15, 2011 by contacting Newfield's CFO, Terry Rathert, and sending a confidentiality agreement for Newfield to execute, and by inviting Newfield to schedule a visit to the data room. [Trial Exs. A95, A98, 91-92; Edmiston Testimony (Vol. IV — 856:11-14, 856:22-24)]

44. Plaintiffs did not expect companies to bid without first executing a confidentiality agreement, accessing the data room, and receiving bid procedures. Ute Energy would not have bid in the auction without first accessing the data room. [Jaggers Testimony (Vol. I — 199:1-13, 201:11-14); Jaggers Testimony (Vol. II — 257:19-258:1, 261:10-13); Nesselrode Testimony (Vol. IV — 709:13-21, 711:7-14, 758:3-10, 780:8-15); Edmiston Testimony (Vol. IV — 851:9-852:5); Sooby Testimony (Video Depo. — 21:12-19, 22:08-19, 68:9-20); Tresca Testimony (Vol. III — 667:25-668:12); Head Testimony (Vol. VIII — 1732:24-1733:6)]

45. BAML's Contact List reflects that BAML sent confidentiality agreements to 21 companies, and hosted 10 data room presentations. [Trial Ex. 18] The Contact List identifies the companies visiting the data room as El Paso, Devon, Shell, Endeavour, Bill Barrett Corporation ("BBC"), Newfield, ExxonMobil, Enduring **[**25]** Resources, ConocoPhillips, and Berry Petroleum. [*Id.*]

46. Plaintiffs never sent Ute Energy a confidentiality agreement and never invited Ute Energy to the data room, which contained proprietary information from which potential bidders could evaluate the Uinta Basin Assets. [Edmiston Testimony (Vol. IV — 851:9-853:6, 855:3-856:4, 857:8-11, 857:24-858:5, 858:25-859:3); Head Testimony (Vol. VIII — 1730:13-1731:2, 1731:16-1732:5); Nesselrode Testimony (Vol. IV — 751:24-752:9, 752:20-753:18); Trial Ex. C38 at C38_0021-22, at Request for Admission # 5; Trial Ex. 18; Sooby Testimony (Video Depo. — 77:1-18, 77:23-78:10, 78:15-17, 78:19)]

47. Neither Plaintiffs nor BAML ever contacted Ute Energy after Mr. Edmiston sent his January 13, 2011 email reiterating that Ute Energy was barred from participating in the auction. [Trial Ex. 18; Nesselrode Testimony (Vol. IV — 751:24-752:9, 752:20-753:18); Sooby Testimony (Video Depo. — 79:5-8, 79:10-80:10, 82:4-10, 83:6-23, 92:14-93:14, 93:17-94:4, 94:12-22)]

48. There is no evidence that anyone from HNR, Branta, or BAML expressed surprise that Ute Energy was not in the process or asked why Ute Energy was not involved. Instead, they reported that the data **[**26]** room attendees included "everyone you would expect." [Trial Ex. A96] There is no evidence Plaintiffs or their bankers expected Ute Energy to participate in the auction process.

c. <u>Newfield Executed A Confidentiality Agreement With HNR And Entered Into An Amendment To The Branta CA</u>

49. On February 17, 2011, Newfield and HNR entered into a confidentiality agreement (the "Harvest Confidentiality Agreement" or "Harvest CA"), so that **[*1180]** Newfield could access the data room and gather information to prepare a bid for Harvest (US)'s share of the Uinta Basin Assets. [Trial Ex. 32]

VI. <u>NEWFIELD DEVELOPS ITS BID PRESUMING ROBUST COMPETITION</u>

50. The auction for the Uinta Basin Assets was a sealed bid process, in which bidders did not know the identities or bid amounts of other bidders, or the number of other bidders. [Schulman Testimony (Vol. VI — 1142:22-1143:12); Burtis Testimony (Vol. X — 1921:1-21)]

51. Newfield did not know the number or identities of the potential bidders contacted by BAML. Newfield believed, however, that there would be robust competition in the auction from numerous bidders. [Trial Ex. 9 at 9-065; Packer Testimony (Vol. VII — 1416:7-21, 1467:13-1469:12, 1495:24-1496:22, 1534:17-20, 1543:24-1544:9); Massaro Testimony (Vol. VIII — 1567:5-14, 1574:9-18, 1604:1-6, **[**27]** 1629:20-24); Jergensen Testimony (Vol. V — 1020:20-24, 1027:13-24, 1029:24-1030:20); Rathert Testimony (Vol. IX — 1774:3-1775:7); Boothby Testimony (Vol. VIII — 1688:5-1690:5); Howard Testimony (Vol. II — 384:12-385:5]

52. For example, Newfield's Decision Review document that was presented internally to Newfield's senior management identified El Paso, Shell, Oxy, Noble and Samson as "well- capitalized—could move the needle" potential bidders. Ute Energy, along with BBC, Berry, and QEP, was identified in this document in the list of potential bidders that were "also active in the basin" but from which Newfield "expected lower level activity," along with Crescent Point Energy, a Canadian company that ultimately purchased Ute Energy's upstream business. [Trial Ex. 9 at 9-065; Jaggers Testimony (Vol. I — 191:14-16); Howard Testimony (Vol. II — 425:17-20); Massaro Testimony (Vol. VIII — 1567:5-14, 1574:9-18, 1581:20-1582:15)]

53. Bigger players such as El Paso were considered the primary competitors Newfield thought it would need to beat to win the auction. [Trial Exs. 112, 117, 118, 120, 124; Howard Testimony (Vol. II — 368:11-15, 384:15-385:5, 421:7-19); Packer Testimony (Vol. VII — 1468:3-8, **[**28]** 1468:25-1469:12); Massaro Testimony (Vol. VIII — 1567:10-14, 1574:9-16, 1577:18-23, 1582:12-15, 1604:1-6); Boothby Testimony (Vol. VIII — 1689:5-13, 1732:14-19); Rathert Testimony (Vol. IX — 1774:25-1775:7)]

54. Though Newfield identified Ute Energy as a potential competitor, Newfield never thought Ute Energy was the primary competitor it would have to beat to win the auction. [Howard Testimony (Vol. II — 421:7-19)] This is because it was widely known that Ute Energy had limitations on its ability to fund a transaction, as evidenced by discussions Ute Energy had had with Newfield as to whether it could keep up with Newfield's drilling capital campaigns. [Packer Testimony (Vol. VII — 1469:22-24); Jergensen Testimony (Vol. V — 1027:13-1028:12); Jaggers Testimony (Vol. I — 136:9-13)]

55. According to Ute Energy's CEO, Mr. Jaggers, Ute Energy was not a natural buyer for the Uinta Basin Assets because the only way Ute Energy could participate was if Newfield acquired the assets and then shared them with Ute Energy. [Jaggers Testimony (Vol. I — 203:5-14); Tresca Testimony (Vol. III — 608:8-15)]

56. The Decision Review document presented to Newfield's senior management recommended a bid of $220 **[**29]** million. [Trial Ex. 9 at 9-064; Howard Testimony (Vol. II — 374:4-13)] Newfield's initial bid was approximately $67.5 million higher than the recommended bid because Newfield anticipated robust competition. [Massaro **[*1181]** Testimony (Vol. VIII — 1593:20-1596:12); Packer Testimony (Vol. VII — 1473:21-1475:16, 1525:7-1526:11, 1543:24-1544:9)]

VII. <u>NEWFIELD IS THE SUCCESSFUL BIDDER</u>

57. On March 1, 2011, BAML sent bid procedures to Newfield and eight other potential bidders for the purchase of Harvest (US)'s share of the Uinta Basin Assets and for the purchase of Branta E&P's share of the Uinta Basin Assets. [Trial Ex. 18; Trial Ex. B15] No bid procedures were sent to Ute Energy. [*See id.*]

58. The bid procedures instructed the bidders to submit their proposals "in conformity with the guidelines" set forth in the procedures. The guidelines required that any bid be for all of Harvest (US)'s and Branta E&P's Uinta Basin Assets, respectively. [Trial Ex. B15 at B15_0004, B15_0008]

59. Plaintiffs always intended to sell 100% of the Uinta Basin Assets, not portions thereof, if possible. [Tresca Testimony (Vol. III — 644:7-20); Edmiston Testimony (Vol. IV — 816:21-817:14, 847:12-848:5, 848:16-24, 849:11-20, **[**30]** 850:10-24); Sooby Testimony (Video Depo.-- 47:19-48:1; Trial Exs. A73, 104] In fact, Harvest (US), through Mr. Edmiston, was contacted by several smaller companies regarding partial bids, but Mr. Edmiston rejected their overtures, wanting 100% of the assets to be available in the auction. [Edmiston Testimony (Vol. IV — 848:16-24); Trial Ex. A73] And, in the end, Plaintiffs rejected BBC's partial bid at $180 million. [Trial Ex. 13] Harvest never told its bankers, BAML, that they would entertain partial bids, and never invited partial bids. [Nesselrode Testimony (Vol. IV — 735:2-12, 735:23-736:7)]

60. Ute Energy understood that Plaintiffs were interested only in selling the entirety of their Uinta Basin Assets, but Ute lacked the financial ability to compete for those assets. [Jaggers Testimony (Vol. I — 189:2-7)]

61. Plaintiffs' position was that selling the whole portion of the assets would maximize the value or price they could receive—the whole being greater than the sum of the parts—and therefore that they wanted to sell the entirety of the Uinta Basin Assets together at the auction. [Tresca Testimony (Vol. III — 644:17-20)]

62. At trial, Mr. Jaggers testified that he might have approached **[**31]** Harvest (US) outside the auction process regarding a partial bid since Ute Energy could not compete for the entirety of the assets in the auction. [Jaggers Testimony (Vol. I — 114:18-20, 189:2-13)] But there was no evidence of what portion Ute Energy would have bid on, nor the price it would have paid, nor any other details. Therefore, Mr. Jaggers' testimony was speculative. Moreover, based on the evidence that Mr. Edmiston rejected all expressions of interest in partial offers made outside the auction process, I find no reason to believe that an overture from Ute Energy expressing interest in making a partial offer prior to the auction would have been more positively received. And because the nature of such a partial offer was never considered by Ute Energy, it would also be speculative to predict even what that offer would have been.

63. The Decision Review document recommending a $220 million bid was prepared by Newfield's Rocky Mountain business unit, for presentation to Newfield's senior management, which was responsible for discussing bids for significant acquisitions and the amounts of such bids, with final decisions made by Newfield's CEO, Lee K. Boothby. [Boothby Testimony **[**32]** (Vol. VIII — 1672:23-1673:11, 1675:8-1676:8, 1684:2-1685:22); Howard Testimony (Vol. II — 277:10-278:3, 342:16-343:6, 374:4-13, **[*1182]** 383:25-384:9); Massaro Testimony (Vol. VIII — 1592:19-1596:12)]

64. The Newfield bid of approximately $287.5 million was decided by Mr. Boothby, based on his determination that the maximum amount he was willing to pay for the Uinta Basin Assets was $300 million, and he wanted to submit a bid somewhat below the maximum to leave room for possible further negotiations. [Boothby Testimony (Vol. VIII — 1684:21-1686:13); Massaro Testimony (Vol. VIII — 1593:20-1596:12)]

65. On March 7, 2011, the bid deadline, Newfield submitted a bid for more than $196 million for Harvest (US)'s share of the Uinta Basin Assets and a bid for more than $90 million for Branta E&P's share of the Uinta Basin Assets, for a total bid of $287,575,000. [Trial Ex. 127; Trial Ex. 128].

66. BBC initially submitted a bid for $120 million for a portion of Harvest (US)'s share of the Uinta Basin Assets. [Nesselrode Testimony (Vol. IV — 728:18-20); Trial Ex. 13 at 13-003]

67. On March 10, 2011, BBC submitted a bid for $50 million for a portion of Branta E&P's share of the Uinta Basin Assets and an amended **[**33]** bid for $130 million for a portion of Harvest (US)'s share of the Uinta Basin Assets. [Trial Ex. 135; Trial Ex. 136]

68. Following Newfield's March 7, 2011 bid, BAML comments to Newfield caused Newfield to believe there were competitive bids for the entirety of the Uinta Basin Assets and a partial bid for an unspecified part of the Uinta Basin Assets in "the North." [Trial Ex. B41; Massaro Testimony (Vol. VIII — 1598:7-1599:7, 1603:1-19, 1604:1-6)]

69. However, Newfield did not know how many other bidders there were, their identities, their bid amounts, or the scope of the partial bid that was reported to them. [Massaro Testimony (Vol. VIII — 1603:1-19, 1604:1-6)]

70. The Branta Entities did know the identities of the other bidders as well as the bid amounts. Before Newfield's bid was accepted, Branta and/or Branta E&P used their knowledge of Newfield's bid to propose to Morgan Stanley that it finance Branta in making a bid for Harvest (US)'s 70% share of the Uinta Basin Assets. Branta told Morgan Stanley that, based on the bids, it looked like it would take $310 million to win the auction. [Trial Ex. B44 at B44_0004; Tresca Testimony (Vol. III — 583:20-584:2, 663:2-22, 664:6-665:2)] **[**34]** Morgan Stanley declined to finance Branta, stating that the $310 million price tag was "too pricey." [Trial Ex. B44 at B44_0002]

71. Between March 7 and March 11, 2011, Plaintiffs requested, through BAML, and by communications between Mr. Edmiston and Newfield's COO Gary Packer, that Newfield increase its combined bid slightly, suggesting that, if Newfield did so, it would be the high bidder. [Trial Ex. 13 at 013-003; Sooby Testimony (Video Depo. — 133:9-19, 144:6-22); Edmiston Testimony (Vol. IV — 839:14-21, 877:18-878:9, 881:3-23); Massaro Testimony (Vol. VIII — 1603:1-19, 1604:1-6)]

72. Newfield agreed to raise its bid to $295 million, to which Plaintiffs agreed. [Massaro Testimony (Vol. VIII — 1600:23-1601:2)] Newfield then requested "exclusivity," meaning that the Harvest Entities and Branta Entities would negotiate exclusively with Newfield for a period of 9 days to reach a definitive purchase and sale agreement. Plaintiffs demanded $15 million in exchange for exclusivity, and Newfield agreed, thereby making the total bid $310 million, comprised of $295 million for the Uinta Basin Assets and $15 million for exclusivity. [Trial Exs. B41, B46, B47, B48, 13 at 13-003; Edmiston Testimony **[**35]** (Vol. IV — 877:14-882:16); Massaro Testimony **[*1183]** (Vol. VIII — 1599:24-1602:17, 1603:16-19, 1604:7-9, 1604:15-1605:3)]

73. No other companies besides Newfield and BBC bid in the auction. [Edmiston Testimony (Vol. IV — 836:23-837:16, 872:18-873:7, 877:5-13); Sooby Testimony (Video Depo. — 114:5-11); Nesselrode Testimony (Vol. IV — 725:21-726:2, 728:2-6, 729:13-20)]

74. Harvest (US) and Branta E&P accepted Newfield's March 11, 2011 bids for a combined $310 million, with an agreement for exclusive negotiations for 9 days. [Trial Ex. B46 at B46_0003 ¶ F; Trial Ex. B45 at B45_0003 ¶ F]

75. On March 21, 2011, Newfield entered into two separate Purchase and Sale Agreements ("PSAs"), one with Harvest (US) and one with Branta E&P. Pursuant to those two agreements, Newfield agreed to pay Harvest (US) and Branta E&P a combined total of $308 million for the Uinta Basin Assets -- $215 million for Harvest's interests and $93 million for Branta E&P's interests. [Trial Ex. B67; Trial Ex. B68; Tresca Testimony (Vol. III — 597:14-598:1); Nesselrode Testimony (Vol. IV — 782:18-785:2)]

76. On March 22, 2011, HNR issued a press release publicly announcing the sale of Harvest's 70% interest in the Uinta Basin Assets **[**36]** to Newfield for $215 million and the expectation that the deal would close in May 2011. [Trial Ex. B69]

77. HNR also attached a copy of the executed PSA, including the PSA's appendix, to its March 25, 2011 Form 8-K filing with the Securities and Exchange Commission. [Edmiston Testimony (Vol. IV — 894:8-895:1)]

78. Pursuant to Section 10.12(a) of the PSAs between Newfield and Harvest (US) and Branta E&P, respectively, the Branta CA and Harvest CA terminated on May 17, 2011. [Trial Ex. B67 at B67_0043; Trial Ex. B68 at B68_0042-43; Howard Testimony (Vol. II — 456:10-14)]

79. Newfield did not offer Ute Energy an option to acquire any of the interests acquired in the Rocky Point EDA. [Howard Testimony (Vol. II — 436:16-437:15); Jaggers Testimony (Vol. I — 153:5-10; 154:14-19)]

VIII. <u>THERE WAS NO AGREEMENT BETWEEN NEWFIELD AND UTE ENERGY THAT UTE ENERGY NOT PARTICIPATE IN THE AUCTION</u>

80. There was no credible evidence presented at trial of an agreement between Newfield and Ute Energy that Ute Energy would not participate in the Auction in return for compensation from Newfield, as alleged by Plaintiffs in their complaint.

81. I also find that there is no credible evidence, as alleged by Plaintiffs, that an agreement **[**37]** was entered into by Daryll Howard and Mr. Jaggers during a telephone call that took place on January 13, 2011 that Ute Energy would not participate in the bidding for the Uinta Basin Assets in return for remuneration from Newfield.

a. It Was Premature For Newfield And Ute Energy To Be Talking About Bidding On January 13, 2011

82. Though Plaintiffs claim that, on January 13, 2011, Newfield and Ute Energy agreed that Ute Energy would not bid on the Uinta Basin Assets, Plaintiffs had not yet announced at that time that they would be auctioning the Uinta Basin Assets. [Jaggers Testimony (Vol. II — 267:14-268:21)]

83. And even if Newfield and Ute Energy had been informed by then of the upcoming auction, it still would have been premature to discuss bidding. Bidding was **[*1184]** the last step in a lengthy, multi-step process to obtain access to and evaluate information regarding the Uinta Basin Assets and then to formulate a bid. As Plaintiffs acknowledged, the process included BAML sending a "teaser" to potentially interested parties, interested parties negotiating and executing a confidentiality agreement, interested parties being invited to and attending the data room to review information regarding **[**38]** the Uinta Basin Assets, and interested parties being send bid procedures and invited to bid on the assets. [Trial Ex. 18; Edmiston Testimony (Vol. IV — 818:9-819:15); Nesselrode Testimony (Vol. IV — 714:4-19); Sooby Testimony (Video Depo. — 21:12-19, 22:8-19, 74:2-75:3); Howard Testimony (Vol. II — 410:8-411:5)]

84. On January 13, 2011, neither Ute Energy nor Newfield had been contacted about the forthcoming auction or sent a teaser.

85. Instead, Ute Energy had just been informed that Harvest was contemplating a sale of its assets and, in Mr. Jaggers' call with Mr. Nesselrode, learned that a data room was not even open yet for interested parties to begin evaluating the assets. [Jaggers Testimony (Vol. I — 169:16-25)]

b. The January 13, 2011 Phone Call

86. The evidence shows Mr. Jaggers called Mr. Howard on January 13, 2011 to inquire whether Newfield might be interested in acquiring the Uinta Basin Assets, which it was. [Jaggers Testimony (Vol. I — 137:3-8, 169:21-22)]

i. Mr. Jaggers' Recollection Of The January 13, 2011 Call

87. Mr. Jaggers and Mr. Howard then discussed Mr. Jaggers' belief that there were AMIs in place such that it would not make sense for Ute Energy to participate because **[**39]** of the AMIs and Ute Energy's lack of technical staff. [Jaggers Testimony (Vol. I — 138:8-13, 139:25-140:10)]

88. Mr. Jaggers testified that Mr. Howard did not ask Ute Energy not to participate during that phone call. [Jaggers Testimony (Vol. I — 140:14-15)] And Ute Energy did not agree with Newfield that Ute Energy would not participate in any other aspect of the process. [Jaggers Testimony (Vol. I — 166:3-5)]

89. Mr. Jaggers testified that he and Mr. Howard did not even discuss bidding. [Jaggers Testimony (Vol. I — 183:3-17); Jaggers Testimony (Vol. II — 261:24-262:10)]

90. Mr. Jaggers further testified that there was no agreement not to bid, outside of the parties' AMIs [Jaggers Testimony (Vol. I — 165:23-166:2, 169:7-15, 174:6-175:2, 183:3-17, 208:25-209:22); Jaggers Testimony (Vol. II — 261:24-262:19)], and no agreement that Ute Energy would receive any compensation in return for not bidding. [Jaggers Testimony (Vol. I — 183:3-17)]

91. Rather, Mr. Jaggers testified that he and Mr. Howard both misunderstood the scope of the Rocky Point AMI, and so discussed on the January 13, 2011 call that the AMIs would apply to the Uinta Basin Asset acquisition such

that Ute Energy would be able **[**40]** to participate in the acquisition if Newfield was successful in acquiring the assets. [Jaggers Testimony (Vol. I — 168:15-169:2)]

92. While Plaintiffs have pointed to testimony from Mr. Jaggers that he and Mr. Howard had discussions "regarding the AMI and agreed not to bid" [Jaggers Testimony (Vol. I — 165:17-22)], and concluded that Newfield would be the bidder [Jaggers Testimony (Vol. I — 223:14-21)], Mr. Jaggers clarified, upon further examination, that there was no agreement beyond the AMIs, and that there was no discussion of bidding specifically on the January 13, 2011 call. Any understanding regarding who would bid was derived from the normal **[*1185]** way an AMI would operate. [Jaggers Testimony (Vol. I — 223:18-19); Jaggers Testimony (Vol. II— 261:24-262:19)] As discussed in detail below, I find credible Mr. Jaggers' testimony that he did not enter into any agreement with Newfield on the January 13, 2011 call, and that any understanding as to the Uinta Basin Asset process arose solely from the parties' understanding of their AMIs.

93. There is no evidence that Mr. Jaggers ever told anyone on his team at Ute Energy or its investors that Ute Energy had an agreement with Newfield that it **[**41]** would not bid or otherwise participate in the auction for the Uinta Basin Assets on the January 13, 2011 call.

ii. Mr. Howard's Recollection Of The January 13, 2011 Call

94. Mr. Howard's testimony confirmed Mr. Jaggers' recollection of the January 13, 2011 phone call.

95. Mr. Howard testified that he learned for the first time on the January 13, 2011 call that the Uinta Basin Assets might be for sale. [Howard Testimony (Vol. II — 409:18-20)] He confirmed that he believed it was too early in the process to be talking about bidding; rather, this was a very quick call right after learning that the Uinta Basin Assets might be sold. [Howard Testimony (Vol. II — 417:8-14)]

96. Like Mr. Jaggers, Mr. Howard testified that there was no discussion about bidding on the assets during the January 13, 2011 telephone call. [Howard Testimony (Vol. II — 316:12-18, 317:9-13, 409:21-23, 410:3-7)]

97. Mr. Howard confirmed that because it was too early in the process to be talking about bidding, they were merely discussing that Harvest would be selling its Utah assets and that there were AMIs between Newfield and Ute Energy that covered the area. [Howard Testimony (Vol. II — 409:21-410:2, 411:6-14)]

98. Mr. **[**42]** Howard thus confirmed that he never asked Mr. Jaggers and Ute Energy not to make a bid on the Uinta Basin Assets [Howard Testimony (Vol. II — 415:13-18, 417:4-7)], and that they reached no agreement that Ute Energy would not bid on the Uinta Basin Assets [Howard Testimony (Vol. II — 316:12-18, 404:7-405:4, 415:4-18, 417:4-7, 417:15-23, 442:3-8)], or that Newfield would provide any compensation to Ute Energy in return for Ute Energy not bidding. [Howard Testimony (Vol. II — 417:15-19)]

99. Mr. Howard never informed his boss, Mr. Packer, that he had reached an agreement with Mr. Jaggers. [Packer Testimony (Vol. VII — 1441:14-20)] Indeed, Mr. Howard understood that he would not have been authorized to enter into any such agreement. [Howard Testimony (Vol. II — 419:8-13)]

100. And there is no evidence that Mr. Howard informed anyone else at Newfield that he and Mr. Jaggers had agreed on the January 13, 2011 telephone call that Ute Energy would not bid or otherwise participate in the auction.

iii. Later Communications Confirm No Agreement Was Reached By Newfield and Ute Energy On January 13, 2011

101. I find that evidence regarding later communications and conduct supports the testimony of **[**43]** Mr. Howard and Mr. Jaggers that there was no agreement reached on January 13, 2011 regarding Ute Energy's participation in the auction.

102. As already described above, there was no evidence presented at trial that either Mr. Howard or Mr. Jaggers informed anyone else about any supposed agreement regarding bidding. [FF # 93, 99-100]

103. Instead, on January 30, 2011, two weeks after the supposed agreement that Ute Energy would not bid and would be **[*1186]** remunerated by receipt of a share of the assets beyond its entitlement under the AMIs, Mr. Howard proposed to Newfield's management just that — that if Newfield were successful in acquiring the Uinta Basin Assets, it would share with Ute Energy even when not required to do so under the AMIs. Mr. Howard's boss, Mr. Packer, responded "first things first. . ." and directed Mr. Howard to focus first on obtaining access to the Harvest data room. [Trial Ex. 80] This confirms both that Mr. Howard had not communicated to Newfield's management that he had reached an agreement with Ute Energy and that Newfield did not perceive that it already had an agreement to share the Uinta Basin Assets with Ute Energy other than pursuant to the terms of the AMIs. **[**44]**

104. Similarly inconsistent with the existence of a bid-rigging agreement is Newfield's continued treatment internally of Ute Energy as a potential competitor in the auction. For example, Mr. Howard and his team consistently communicated internally, including to management, that Ute Energy was a competitor of Newfield's. [Packer Testimony (Vol. VII — 1451:8-23); Trial Ex. 9 at 9-065]

105. Ute Energy similarly did not behave as if it already had agreed that it would not participate in the auction process or bid as of January 13, 2011.

106. For example, Mr. Jagger placed two calls to Mr. Nesselrode in the second half of January 2011, after the supposed agreement was reached. Mr. Nesselrode confirmed that, during those conversations, Mr. Jaggers continued to express Ute Energy's interest in participating in the process. [Nesselrode Testimony (Vol. III — 696:17-697:1, 697:18-25; Vol. IV — 753:20-23, 758:14-759:8)] I find such continued expressions of interest by Ute Energy in participating in the sale process incompatible with Ute Energy having agreed not to participate in the process.

107. Another example is an email from Ute Energy's Todd Kalstrom to Kelly Donohoue of Newfield on January **[**45]** 19, 2011, a mere six days after the call. In that email, Mr. Kalstrom stated that Mr. Howard and Mr. Jaggers "have talked about reviewing the Harvest divestiture package." [Trial Ex. 67] Far from relaying that his boss had informed him that Ute Energy had reached an agreement with Newfield that Ute Energy would not participate in the auction, Mr. Kalstrom relayed only that he had been informed that Mr. Jaggers and Mr. Howard had spoken about the diligence process.

108. And on March 4, 2011, Mr. Jaggers sent an email to Newfield noting that the "7th is almost here" and asking if Newfield "was planning to submit a bid on Monday," an inquiry that is inconsistent with a preexisting agreement that Newfield would bid and not Ute Energy, as Plaintiffs allege. [Trial Ex. 115]

iv. <u>Any Understanding That Came Out Of The</u> January 13, 2011 <u>Call Related To The Application Of The Parties' AMIs</u>

109. I find that, to the extent Newfield and Ute Energy had any understanding between them coming out of the January 13, 2011 call, it was not an agreement regarding bidding or participation in the process. Rather, it was that the AMIs applied and that each would act pursuant to the parties' AMIs, or their understandings **[**46]** thereof. [Packer Testimony (Vol. VII — 1492:8-13); Jaggers Testimony (Vol. I — 175:1-9); Jaggers Testimony (Vol. II — 262:11-19); Howard Testimony (Vol. II — 320:22-321:6, 442:5-8)]

110. Mr. Jaggers testified that he expected that if anyone would make a bid it would be Newfield, and not Ute Energy, and that this expectation was based on the AMIs, not on any discussion regarding **[*1187]** who would bid. [Jaggers Testimony (Vol. II — 262:11-19)]

111. Plaintiffs attempted to discredit the testimony regarding a mutual misunderstanding of the AMIs being the focus of the January 13, 2011 call by arguing that the Rocky Point AMI's language was clear and that Newfield misled Ute Energy regarding its scope in the January 13, 2011 conversation. I find no credible evidence to support Plaintiffs' theory, nor do I find it material when evaluating whether a bid-rigging agreement was made.

112. Rather, Mr. Jaggers testified that he was unaware on January 13, 2011 that the Rocky Point AMI would not cover the assets acquired in the auction. [Jaggers Testimony (Vol. I— 138:11-13, 224:22-225:2)]

113. As detailed above, the Rocky Point AMI had been amended by the December 20, 2010 Letter Agreement [Trial Ex. 29], but **[**47]** Mr. Jaggers testified that he was not "aware that it had been amended until some point between January and May" 2011. [Jaggers Testimony (Vol. I — 224:22-225:1)] Mr. Jaggers testified further that he only discovered the Rocky Point AMI had been amended to exclude assets like the Uinta Basin Assets sometime in February or March 2011, when the Ute Energy employee who had actually executed it informed him of the change. [Jaggers Testimony (Vol. I — 225:7-10)] I find Mr. Jaggers' testimony regarding the timing of his knowledge regarding the scope of the Rocky Point AMI credible.

114. Dr. Schulman, Plaintiffs' expert, testified that he had no reason to disbelieve Mr. Jaggers' testimony that, at the time of the alleged agreement, he believed that the AMIs would give Ute Energy the opportunity to participate. [Schulman Testimony (Vol. VI — 1156:22-1157:4)]

115. Mr. Howard expressed on the call his belief that the AMIs applied, and was unaware of the limitations in the coverage of the Rocky Point AMI, at the time of the January 13, 2011 call. [Howard Testimony (Vol. II — 309:20-25, 312:8-13, 411:10-14, 414:8-10, 430:11-14) Trial Ex. 61; Trial Ex. 76]

116. Mr. Howard continued to believe thereafter **[**48]** that the Rocky Point AMI covered this transaction, as evidenced by a January 15, 2011 email from Mr. Howard stating that Newfield had "an AMI on RP and Bridgeland but not MD [*sic*] EDA." [Trial Exs. 61, 76; Howard Testimony (Vol. II — 430:11-14); Donohoue Testimony (Vol. V — 1064:10-1065:8)]

117. Indeed, though Mr. Howard had signed the Rocky Point AMI on December 20, 2011, he was not aware that it excluded the acquisition of the Uinta Basin Assets until late January, when Ms. Donohoue, Newfield's former land manager for the Rocky Mountain region, discovered Mr. Howard's misunderstanding of the Rocky Point AMI. At that time, as Ms. Donohoue testified, Mr. Howard asked her to help clear up his misunderstanding by preparing a memo summarizing each of the AMIs and Newfield's obligations thereunder. [Donohoue Testimony (Vol. V — 1043:13-15, 1064:10-1065:8); Trial Ex. 76]

118. I find that it is not unreasonable that Mr. Howard was not aware of the limited scope of the sharing obligations under the Rocky Point AMI, despite having executed it, because, as a senior executive, Mr. Howard did not read every detail of every document he signed. [Howard Testimony (Vol. II — 413:8-16)]

119. I find that **[**49]** Mr. Howard's belief at the time of the January 13, 2011 phone call that the Rocky Point AMI would cover the Uinta Basin Asset transaction was genuine. [Howard Testimony (Vol. II — 413:8-16, 414:8-10)]

120. I also do not find that Newfield misled Ute Energy by failing to affirmatively **[*1188]** disclose the plain language of the Rocky Point AMI once Mr. Howard became aware that it would not cover the Uinta Basin Asset acquisition. It is undisputed that the language is clear and unambiguous and so equally accessible and understandable to Ute Energy as to Newfield. Moreover, Mr. Howard had no reason to call Mr. Jaggers to highlight the plain language of the Rocky Point AMI because Newfield remained undecided until May 2011 as to whether it would share acquired assets irrespective of the limitations in the Rocky Point AMI. [Howard Testimony (Vol. II — 435:15-437:5); Packer Testimony (Vol. VII — 1483:16-1484:2)] Furthermore, the Harvest CA precluded such a conversation starting on February 17, 2011. [Trial Ex. 32]

c. The May 20, 2011 Letter From Mr. Jaggers To Mr. Howard

121. Plaintiffs also have pointed to a May 20, 2011 letter, Trial Exhibit 1, as evidence of an agreement between Newfield and Ute **[**50]** Energy regarding bidding in the auction.

122. The May 20, 2011 letter states that Mr. Howard asked Ute Energy "not to be involved because the existing AMIs would cover the division of interest." [Trial Ex. 1] Mr. Jaggers, however, does not recall that Mr. Howard ever made this request. [Jaggers Testimony (Vol. I — 184:8-18)]

123. The May 20, 2011 letter does not state that Newfield and Ute Energy *agreed* that Ute Energy would not bid in the auction. [Trial Ex. C08]

124. A statement that Newfield and Ute Energy "agreed" appeared in an earlier draft of the May 20, 2011 letter, but was removed from the final version of the letter because Mr. Jaggers did not think that statement accurately summarized the situation. [Trial Ex. C08; Jaggers Testimony (Vol. I — 208:25-209:22)]

125. Mr. Jaggers testified that his letter was designed to pressure Newfield to offer Ute Energy a participation option for the Rocky Point assets acquired in the auction, even though Mr. Jaggers recognized that the Rocky Point AMI did not obligate Newfield to offer such an option. [Jaggers Testimony (Vol. I — 209:23-210:2, 211:19-23, 214:14-20)]

126. And Newfield promptly pointed out the inaccuracies in Mr. Jaggers' letter, **[**51]** responding that there were "lots of allegations in this letter that are not accurate." [Trial Ex. C09]

127. I therefore find that the May 20, 2011 letter is not direct evidence that Newfield and Ute Energy had an agreement that Ute Energy would not bid in the auction.

IX. <u>UTE ENERGY DECIDED INDEPENDENTLY NOT TO PARTICIPATE IN THE AUCTION FOR THE UINTA BASIN ASSETS</u>

128. Contrary to Plaintiffs' assertion that Ute Energy's failure to submit a bid in the auction for the Uinta Basin Assets was the product of an illicit agreement, the evidence showed that Ute Energy made a unilateral decision that it would not participate in the auction or submit a bid for the Uinta Basin Assets outside the context of the auction.

129. Mr. Jaggers testified that, as the CEO of Ute Energy, he made a unilateral and independent decision that it was not in Ute Energy's economic interest to participate in the auction because he believed (mistakenly, as he later discovered) that Ute Energy would have the right to purchase a portion of the Uinta Basin Assets from Newfield under the Rocky Point AMI if Newfield was the successful bidder. [Jaggers Testimony (VolI — 138:11-13, 166:6-167:19, 168:15-169:6, 171:15-18, 224:25-225:1)] **[**52]**

[*1189] 130. Ute Energy's decision not to participate in the auction and to allow Newfield, as the larger, better-capitalized AMI partner, to try to acquire the assets conforms to the decision-making one would expect from a party that believed it would have the opportunity to share assets pursuant to the terms of an AMI.

131. Expert witness, Professor Bruce Kramer, testified that it is the custom and practice in the oil and gas industry for parties to an AMI not to bid against each other for assets covered by an AMI because doing so would be economically irrational, something the United States Department of Justice has recognized in its analysis of AMIs. [Kramer Testimony (Vol. VII — 1358:2-1360:21, 1361:2-19, 1376:14-1377:6, 1378:9-14); Jaggers Testimony (Vol. I — 188:2-16); Howard Testimony (Vol. II — 416:14-22, 417:1-3); Tresca Testimony (Vol. III — 618:17-619:5)]

132. Indeed, although the Harvest Entities and Branta Entities were parties to AMIs, neither could identify any circumstance in which they had bid against their AMI partners, and did not know of any situation in which parties to an AMI bid against each other for interests that fell within the area covered by the AMI. [Tresca Testimony **[**53]** (Vol. III — 618:24-619:5); Edmiston Testimony (Vol. IV — 866:23-24, 867:10-868:4)]

133. With his belief that Newfield would be required to share a portion of the Uinta Basin Assets with Ute Energy under the Rocky Point AMI if Newfield were successful in the auction, Mr. Jaggers' independent and unilateral decision that Ute Energy would not participate in the auction was consistent with the standard custom and practice in the industry and aligned with Ute Energy's economic self-interest. [Kramer Testimony (Vol. VII — 1358:2-1360:21, 1361:2-19, 1376:14-1377:6, 1378:9-14); Jaggers Testimony (Vol. I — 166:6-11, 167:2-23, 188:2-16)]

134. Plaintiffs' own expert, Dr. Schulman, confirmed that, if Ute Energy believed it would be able to share assets under an AMI, it is a reasonable economic inference that Ute Energy would make no bid on the assets on its own,

but, rather, would rely on the AMIs to provide Ute Energy's participation in the assets, particularly if Mr. Jaggers believed that the Rocky Point AMI applied, which he did. [Schulman Testimony (Vol. VI — 1157:10-18); Burtis Testimony (Vol. X — 1937:18-1938:2); Kramer Testimony (Vol. VII — 1376:14-25); Jaggers Testimony (Vol. I — 138:11-13, **[**54]** 171:15-18, 224:25-225: 2); Howard Testimony (Vol. II — 411:10-14)]

135. The evidence further confirmed that Ute Energy to decide not to bid since it knew that it was barred from the auction process. [Jaggers Testimony (Vol. I — 196:25-197:3, 198:2-11, 198:17-25); Trial Exs. A44, 81, 93]

136. Moreover, I find credible Mr. Jaggers' testimony that Ute Energy decided not to bid based on its own financial situation and its expectation of what it would take to win the auction.

137. First, the Bid Procedures expressly stated that bids were to be for the entirety of Plaintiffs' Uinta Basin Assets, rather than for a portion. [Trial Ex. B15 at B15_0004, 0008] Therefore, it would have been reasonable for Ute Energy to believe that it would have to bid on the entirety of the Uinta Basin Assets in order to succeed at the auction.

138. Mr. Jaggers expected the price of the Uinta Basin Assets to be around $300 million, but testified that under no circumstance could Ute Energy have bid on an asset with a value in that range, or even in the $200 million range. [Jaggers Testimony (Vol. I — 189:23-190:5, 226:14-23)]

139. Mr. Jaggers testified that Ute Energy had the ability to raise no more than **[*1190]** $100 million **[**55]** for all of the acquisitions that it was contemplating at the time. Thus, Ute Energy could not even have been certain that it could actually bid $100 million in the auction. Moreover, Ute Energy did not have such funds available when the bids were due, it did not know if the Ute Tribe would be able or willing to contribute a sufficient matching amount to even total $100 million with Quantum's hypothetical contribution, and because the $100 million was the maximum amount Ute Energy had available for all acquisitions that Ute Energy was contemplating. [Trial Ex. B92; Jaggers Testimony (Vol. I — 133:22-25, 193:1-194:17, 194:22-196:3); Jaggers Testimony (Vol. XI — 2046:3-20); Trial Ex. B96 at B96_0002]

140. Based on its financial situation, Mr. Jaggers knew Ute Energy could not compete at the $300 million level and testified that, as a result, he made the business decision not to compete at all. [Jaggers Testimony (Vol. I — 166:6-15, 166:22-167:1, 188:20-189:10, 189:23-190:10, 192:16-193:3)]

141. Mr. Jaggers' testimony about the limitations on Ute Energy's financial capacity is not discredited by Plaintiffs' suggestion that its minority owner, Quantum, was sufficiently capitalized to finance **[**56]** the acquisition of the entirety of the Uinta Basin Assets.

142. Rather, I find that the fact that Quantum, the holder of a 49% interest in Ute Energy, may have had the resources to consummate an acquisition in excess of $100 million, was immaterial because the Ute Tribe, which owned 51% of Ute Energy, was unwilling to dilute its 51% majority interest and could not afford more than its 51% of $100 million. [Jaggers Testimony (Vol. I — 193:7-194:2, 226:14-23); Jaggers Testimony (Vol. XI — 2045:19-2047:3)]

143. Because of Mr. Jaggers' belief in the validity of the AMI in the Rocky Point EDA, along with Ute Energy's financial constraints, and its understanding that Plaintiffs intended to sell the Uinta Basin Assets altogether as a single package, Ute Energy gave no consideration to participating in the auction. [Jaggers Testimony (Vol. I — 201:7-21)]

144. There was also no evidence presented that Ute Energy would have attempted to purchase part of the Uinta Basin Assets outside of the auction.

145. Mr. Jaggers testified that he had no idea what Ute Energy would have done had it known it did not have rights under the Rocky Point AMI. It would be speculative. He did not know what he would have **[**57]** offered or if he would have been successful. [Jaggers Testimony (Vol. I — 189:2-13, 201:15-21)] Regardless, Mr. Jaggers would

not have considered making an offer even on a piece of the assets if Harvest had not let Ute Energy into the data room. [Jaggers Testimony (Vol. I — 199:1-11, 201:11-14)]

146. Based on the evidence, I find that Ute Energy made the decision not to bid on the Uinta Basin Assets independently. As a result, I find that it is impossible to find with reasonable certainty that Ute Energy would have bid in the auction but for the alleged agreement.

X. UTE ENERGY'S PARTICIPATION IN THE AUCTION WOULD NOT HAVE CHANGED THE FINAL AUCTION PRICE

147. Even if Ute Energy would have participated in the auction but for the January 13, 2011 telephone call between Mr. Jaggers and Mr. Howard, Plaintiffs failed to present convincing evidence that Ute Energy's participation would have impacted the outcome of the auction in any fashion, let alone resulted in a greater price to Plaintiffs.

[*1191] a. Newfield Bid Its Maximum Amount At The Auction And Would Have Bid No More

148. Plaintiffs argued that Newfield could have and would have paid more for the Uinta Basin Assets. The evidence, however, demonstrated **[**58]** that Newfield was constrained in what it was willing to pay for the Uinta Basin Assets, with $300 million being the approximate maximum outlay it would make.

149. As announced in a publicly-filed Form 8-K, in 2010, Newfield had agreed to pay $405 million for assets in another transaction referred to as the EOG transaction. The EOG transaction fell through in December of 2010. The $405 million approved by the board for the EOG transaction was the maximum amount Newfield's CEO, Lee Boothby, was willing to ask the Newfield board to approve for acquisitions in 2011. Newfield then decided to invest approximately $100 million of that amount in the Anadarko Basin, leaving approximately $300 million for the potential purchase of the Uinta Basin Assets in March of 2011. [Boothby Testimony (Vol. VIII —1687:3-25, 1714:21-1723:22); Trial Ex. 177 at 177-002]

150. Mr. Boothby initially capped Newfield's bid at $300 million. [Boothby Testimony (Vol. VIII — 1685:16-25, 1686:14-1687:25)] Newfield's first offer of approximately $287.5 million was made so that Newfield would have room to "sharpen its pencil" in an anticipated second round of bidding and still be within Newfield's $300 million limit. [Boothby **[**59]** Testimony (Vol. VIII — 1686:1-13); Massaro Testimony (Vol. VIII — 1593:20-1596:12)]

151. After Newfield was told that there were other bids for the whole asset package, and BAML/Harvest asked Newfield to increase its bid "a little," the parties agreed to a price of $295 million. [Boothby Testimony (Vol. VIII — 1690:6-17); Massaro Testimony (Vol. VIII — 1598:7-21, 1600:19-1601:2, 1603:1-19)] However, Newfield was not prepared to go above $300 million, and agreed to pay $310 million only because it gave Newfield an additional right to negotiate exclusively to the final purchase and sale agreements on the presumption that there were other competitively-priced conforming bids. [Boothby Testimony (Vol. VIII — 1690:18-1691:13, 1691:19-1692:17, 1692:18-21); Massaro Testimony (Vol. VIII — 1600:8-1602:17, 1604:7-9, 1604:15-1605:5); Trial Ex. B41]

152. Newfield purchased exclusivity because of the expectation of competition. Not only had it had been told there were competing bids (*i.e.*, that there was competition), but Newfield also wanted to avoid Plaintiffs shopping the Newfield bid before a binding agreement could be negotiated. [Trial Ex. B47; Massaro Testimony (Vol. VIII — 1661:10-17)] In **[**60]** the end, Branta did in fact shop Newfield's bid to Morgan Stanley, though Morgan Stanley declined to compete because the assets were now "too pricey." [Trial Ex. B44]

153. The evidence at trial was unequivocal that Newfield was not willing to increase its bid beyond the $310 million it eventually bid. [Boothby Testimony (Vol. VIII —1687:12-18, 1688:1-4, 1693:4-11)]

154. Not only was the acquisition budget constrained, as detailed above, but also Newfield had to ensure a corporate rate of return of approximately 20%, and so could not increase its bid beyond the point where it could

obtain such a return. [Trial Ex. B26; Boothby Testimony (Vol. VIII — 1676:17-20, 1686:14-1687:2); Massaro Testimony (Vol. VIII — 1568:19-21, 1569:7-15)]

155. The evidence showed not only that Newfield bid its maximum amount with the $295 million plus $15 million for exclusivity, but also showed that Plaintiffs knew that Newfield was unwilling to go any higher. Harvest's CEO, Mr. Edmiston, **[*1192]** asked Newfield's COO, Mr. Packer, to pay an additional $5 million, but Mr. Packer responded that Newfield was unable to obtain authority to pay additional amounts. [Edmiston Testimony (Vol. IV — 881:9-882:16)] This testimony **[**61]** from Mr. Edmiston confirms Newfield's testimony that Newfield was unwilling to pay any more than $295 million for the Uinta Basin Assets, which became $310 million when exclusivity was added.

156. Because Newfield paid its absolute maximum for the Uinta Basin Assets, the presence of Ute Energy in the auction would not have impacted the amount Newfield offered for these assets. This is reflected by the fact that Newfield did not adjust the amount of its bid in response to notice of a partial bid, but rather based on the belief that there were other competing bids for the entirety of the Uinta Basin Assets. [Boothby Testimony (Vol. VIII — 1686:14-1687:18, 1688:5-1690:17); Massaro Testimony (Vol. VIII — 1598:9-1599:7, 1604:1-6, 1636:2-25, 1661:23-1662:2)] Moreover, a bid for $100 million from Ute Energy (its absolute maximum capability) would have been far inferior to the $180 million partial bid submitted by BBC, and thus would have been expected to have no impact on Newfield's maximum bid amount. [Burtis Testimony (Vol. X — 1988:21-1990:2)]

b. Ute Energy's Participation Would Not Have Changed Newfield's Bidding In The Auction

157. Newfield's undisputed willingness to spend no more aside, **[**62]** Plaintiffs argue that Newfield would have bid and paid more for the Uinta Basin Assets had Ute Energy participated in the auction, because the addition of a single competitor in the process would necessarily have led to a higher price for the assets.

i. Newfield Already Considered Ute Energy In Formulating Its Bids

158. Preliminarily, the evidence showed that Newfield already considered the possibility that Ute Energy would be a competitor in formulating its bids. Newfield did not know whether Ute Energy would bid in the auction, however, because of Ute Energy's small size and its majority ownership by the Ute Indian Tribe, Newfield did not believe that Ute Energy would be a meaningful competitor in the auction and did not formulate its bid based on whether Ute Energy would participate. [FF # 54] Nonetheless, Newfield included Ute Energy in its analysis of potential competitors when formulating its bid. [Trial Ex. 9 at 9_065]

ii. The Participation In The Auction Of A Single Additional Competitor Would Not Have Impacted Newfield's Bidding

159. I turn now to the parties' competing theories of the impact of a single additional competitor like Ute Energy on the outcome of the auction.

160. **[**63]** Plaintiffs' expert, Dr. Schulman, testified that the number of bidders participating in an auction is decisive with respect to how competitive the bidding will be and how high the price received. Dr. Schulman opined that, had a single additional bidder (Ute Energy) participated in the auction process, the mere presence of that additional bidder would have caused Newfield to pay a higher price for the Uinta Basin Assets. [Schulman Testimony (Vol. VI — 1124:14-16)] Indeed, Dr. Schulman opined that a bidder like Newfield would have been focused only on how many competitors were participating in the auction. [Schulman Testimony (Vol. VI— 1145:12-22)]

161. In support of his theoretical approach, Dr. Schulman relied upon a single article that he claimed demonstrated that **[*1193]** economic theory supports the conclusion that the addition of a single bidder would have an impact in a sealed bid auction of the sort used by Plaintiffs here. [Schulman Testimony (Vol. VI — 1144:25-1145:11); Burtis Testimony (Vol. X — 1926:9-1933:8)]

162. By contrast, Newfield's expert, Dr. Burtis, testified that economic theory shows that a company participating in an auction will focus on who it believes the second highest **[**64]** bidder would be. [Burtis Testimony (Vol. X — 1922:6-1925:7)] She highlighted that the article relied upon by Dr. Schulman does not conclude that the presence of

a single additional bidder in an auction necessarily results in a higher price achieved in the auction. [Burtis Testimony (Vol. X — 1929:13-1930:10)]

163. I find Dr. Burtis' explanation of the economic theory relevant to bid determination in a sealed-bid auction more persuasive in this case; but, in any event, for Dr. Schulman's thesis to have merit, the bidding party would have to know how many other bidders there were, the underlying assets would have to be valued subjectively, or the other bidders would not have considered profit maximization.

164. It is undisputed, however, that in a sealed bid auction, a participant like Newfield does not know how many other participants or bidders there are. [Schulman Testimony (Vol. VI—1143:9-12)] Thus, there is no reason to believe that Newfield would have known had Ute Energy submitted a bid or that its submission would have impacted Newfield's bid.

165. Under Dr. Burtis' theory — that a rational economic actor would consider only the second highest bidder in formulating its bid —Ute **[**65]** Energy's submission of a bid likewise would have had no impact on Newfield's bid amount because Ute Energy was not expected to be the second highest bidder, El Paso was.

166. And, consistent with Dr. Burtis' testimony regarding the applicable economic theory, Newfield based its bid on El Paso in evaluating its competition, and analyzed in detail the amount it expected El Paso, as the second highest bidder and strongest competitor, to bid. Newfield's analysis and decision review documents show it was concerned with the potential bid to come from El Paso. [Trial Ex. 9 and 9-065; Trial Ex. B25; Trial Ex. 125]

167. Newfield's analyses of competitor valuations focused on a company positioned like El Paso, making decisions about development that Newfield expected El Paso to make. [Trial Exs. B25, 125] There is no evidence that Newfield's bid analysis included any consideration of the number of potential bidders. Its analysis was focused on who it expected to submit competitive bids and at what price levels, just as Dr. Burtis testified a bidder in Newfield's position is expected to do under the economic theory of auctions.

168. The evidence demonstrated that Newfield did not believe its internal **[**66]** valuation of $220 million would be sufficient to overcome a bid from El Paso, thus leading Newfield to raise its initial bid to approximately $287 million in the hopes of being competitive with El Paso in the first stage of the auction. [Howard Testimony (Vol. II — 370:19-25)]

169. And Newfield increased its bids when informed that there were "other bidders" in the auction. [Massaro Testimony (Vol. VIII — 1598:7-1599:7, 1636:12-25, 1639:25-1640:4)] It was not informed of how many other bidders there were, so the number of bidders was irrelevant to determining whether to raise Newfield's bids. [Massaro Testimony (Vol. VIII — 1598:7-1599:7, 1636:12-25, 1639:25-1640:4); Howard Testimony (Vol. II — 328:3-329:4); Nesselrode Testimony (Vol. IV — 786:12-17)]

170. There is no evidence that the participation of an additional bidder — undisclosed to Newfield, and which was not **[*1194]** expected to be the second-highest bidder — would have impacted Newfield's decision-making or caused it to raise its bid further. [Burtis Testimony (Vol. X — 1961:10-1962:13)]

171. Based on the evidence at trial, I find that Ute Energy's participation in the auction would not have caused Newfield to submit a bid in excess **[**67]** of the $310 million winning bid. Plaintiffs' claim to the contrary is based on speculation and contradicted by the evidence.

c. <u>There Is No Evidence That Ute Energy Would Have Submitted A Bid That Would Have Impacted The Final Auction Price</u>

172. Even presuming Newfield could or would have bid more had there been additional competition, there is no credible evidence from which to conclude that Ute Energy would have submitted a bid that would have impacted the final price received by Plaintiffs for the Uinta Basin Assets, whether in the auction or outside.

173. Plaintiffs' expert, Dr. Schulman assumed that absent the alleged agreement with Newfield, Ute Energy would have bid on the Uinta Basin Assets, and, based on those assumptions, testified that such participation would have caused the price received to increase. Dr. Schulman acknowledged that if there was no such agreement, then his opinion is rendered moot. [Schulman Testimony (Vol. VI — 1137:21-1138:2)] He did not perform any of the kinds of economic analysis typically performed by economists to quantify the amount of that increase, but relied on the analysis prepared by Plaintiffs' other expert, Mr. McBeath (discussed below) to establish **[**68]** the range of values and damages. [Schulman Testimony (Vol. VI — 1126:21-1127:10, 1137:18-20)]

174. Dr. Schulman's assumption that Ute Energy would have bid on at least part of the assets ignores the weight of the evidence to the contrary, namely, that Ute Energy decided independently not to participate based on its own financial limitations, its knowledge that it was barred from the auction, and its belief that the AMIs with Newfield would have provided it the ability to participate if Newfield won the assets. [FF# 128-143]

175. Moreover, as Newfield's expert, Quentin Mimms, testified, it is improper to assume that Ute Energy would have bid (and thus could have impacted the outcome) without even addressing the record evidence that negates the validity of the assumption. [Mimms Testimony (Vol. X — 1983:9-1984:8)] Indeed, in the face of contrary evidence, it was not reasonably certain that Ute Energy would have participated in the auction but for the alleged agreement. [Mimms Testimony (Vol. X — 1984:10-22)]

176. Even if it were reasonable to assume that Ute Energy would have attempted in some manner to acquire the Uinta Basin Assets, the evidence contradicts any argument that Ute Energy **[**69]** could have submitted a competitive bid in the auction. As a result, Plaintiffs presented argument to the effect that Ute Energy would have attempted to submit a partial bid outside the auction process, and that such a bid would have led to a greater price for the entirety of the assets.

177. In support of this argument, Dr. Schulman hypothesized that it was possible Ute Energy and other companies could have bid, and the various pieces of the Uinta Basin Assets could have been sold piecemeal for more than was received when sold together. [Schulman Testimony (Vol. VI — 1139:15-19)]

178. Mr. Mimms highlighted that Dr. Schulman's suggested "but for" scenario ignores the evidence that Plaintiffs strove to sell the assets altogether and rejected expressions of interest in partial bidding. [Mimms Testimony (Vol. X — 1984:23-1985:14)] **[*1195]** Again, the failure to consider this evidence rendered Dr. Schulman's testimony unreliable and insufficient to satisfy the standard of reasonable certainty. [Mimms Testimony (Vol. X — 1986:11-19)]

179. The Branta Entities and Harvest Entities were not interested in selling only a portion of the Uinta Basin Assets in the auction, and therefore issued bid instructions **[**70]** requiring that all bids be for 100% of each Plaintiff's portion of the assets. [Trial Ex. B15 at B15_0004, 0008; Nesselrode Testimony (Vol. IV — 727:2-7, 731:10-15, 733:3-7, 735:9-16, 739:16-740:1, 740:9-20, 742:15-24); Sooby Testimony (Video Depo. — 47:19-48:1); Tresca Testimony (Vol. III—644:4-20)] There is no reason to suspect that Plaintiffs would have accepted a $100 million bid over the Newfield or BBC bids, or that a partial bid outside the auction process or within would have changed Plaintiffs' decision to accept the Newfield offer for the whole.

180. Furthermore, even if there were evidence from which I could find it reasonable to extrapolate that Plaintiffs might have been willing and able to sell the Uinta Basin Assets piecemeal, there is no evidence from which I can determine what the outcome of such a piecemeal process would have been.

181. Plaintiffs presented no evidence of what Ute Energy could have or would have bid had it decided to make an offer for part of the Uinta Basin Assets or what part of their assets Ute Energy would have bid for had it submitted a partial bid, and have not shown that Newfield's bid would have been on the remainder, or even if Newfield would **[**71]** have been willing to accept only a portion of the assets being offered. There was no evidence presented as to how the various bidders — Newfield, BBC, and, hypothetically, Ute Energy — might have bid on different pieces of the assets and how the entirety of the assets could have been sold through the auction process or outside it through a negotiated division of the assets amongst the three entities. I therefore find that it would be entirely speculative to find that Plaintiffs would have received more for the Uinta Basin Assets had Ute Energy

submitted a partial bid. This is particularly true since there is no evidence or reason to believe that Newfield would have known if Ute Energy had submitted a bid or anything about the details of such a bid.

XI. PLAINTIFFS DID NOT PROVE ANY NON-SPECULATIVE DAMAGES FROM UTE ENERGY'S ABSENCE FROM THE AUCTION WITH REASONABLE ECONOMIC CERTAINTY

182. Plaintiffs claim that they were damaged in an amount equal to the difference between the price they received from Newfield and the price Newfield would have paid had Ute Energy participated.

183. In support of this claim, Plaintiffs presented the analysis of its expert, Mr. McBeath, who purported to calculate **[**72]** a range of values that a company with the information Newfield possessed would have placed on the Uinta Basin Assets. But Newfield is the only company possessing that information so, in effect, Mr. McBeath was purporting to impute to Newfield a value for the Uinta Basin Assets.

184. Mr. McBeath admits that he did not perform or even attempt to perform a market value analysis of the Uinta Basin Assets. [McBeath Testimony (Vol. VI — 1254:9-1255:8)]

185. Mr. McBeath also did not perform an independent evaluation of the range of values of the Uinta Basin Assets because he did not perform a rigorous engineering evaluation of the production decline profiles, nor did he independently evaluate the producing formations that are included in **[*1196]** his discounted cash flow. [Gonzenbach Testimony (Vol. IX — 1787:23-1789:3)]

186. Instead, Mr. McBeath utilized the data on which he believed Newfield relied — with some modifications — to determine a range of value for the Uinta Basin Assets. [McBeath Testimony (Vol. VI — 1205:7-18, 1205:24-1206:8); Gonzenbach Testimony (Vol. IX — 1789:4-12)]

187. Mr. McBeath's analysis was unreliable and cannot be utilized to prove damages with reasonable certainty, even assuming, **[**73]** as he did, both an illegal bid-rigging agreement and causation.

188. Most importantly, Mr. McBeath presumed in his analysis that the basal carbonate formation was a "probable reserve." [McBeath Testimony (Vol. VI — 1220:21-25)]

189. To be probable reserves, an oil or gas play must be "commercial." [McBeath Testimony (Vol. VI — 1286:17-1287:4); Gonzenbach Testimony (Vol. IX — 1808:13-1809:10)] The Petroleum Reserve Management System ("PRMS"), which is regularly used in the industry to classify reserves (now, even if it was not in 2011, as Mr. McBeath testified), requires actual production or formation tests to prove commerciality. [McBeath Testimony (Vol. VI — 1286:17-22)] A well must have been drilled and competed in the horizon and been commercially produced in order to demonstrate commerciality. [Tresca Testimony (Vol. III — 638:5-10)]

190. The basal carbonate in the Uinta Basin was "virtually untested," and had not yet been proven to be commercial, at the time of the auction. [Howard Testimony (Vol. II — 380:2-21, 381:6-17); Nesselrode Testimony (Vol. IV — 766:17-20); Head Testimony (Vol. VIII — 1730:9-12); Jergensen Testimony (Vol. V — 1040:24-1041:1); Kerchner Testimony (Vol. V — **[**74]** 951:21-952:4); Packer Testimony (Vol. VII — 1415:10-23); Gonzenbach Testimony (Vol. IX — 1797:17-1798:11)]

191. No horizontal wells had yet been drilled into the basal carbonate and the only horizontal wells drilled in the Greater Monument Butte Unit below the central part of the basin had been viewed as uneconomic. [Kerchner Testimony (Vol. V — 951:21-952:4); Howard Testimony (Vol. II — 380:2-21, 381:6-17); Tresca Testimony (Vol. III — 637:10-14, 642:19-23, 643:12-15)]

192. Mr. McBeath's analysis was predicated on the expectation that the basal carbonate would be developed through horizontal drilling. As such, Mr. McBeath should not have categorized the basal carbonate as probable reserves. He claims to have done so, however, based on his belief that Newfield categorized the basal carbonate

as probable reserves and because he believed it was not a huge leap to say economic vertical production would lead to economic horizontal production. [McBeath Testimony (Vol. VI — 1234:23-1235:5)]

193. As an independent evaluator of the value of these assets, Mr. McBeath should have categorized the basal carbonate as a "contingent resource" [McBeath Testimony (Vol. VI — 1289:18-22); Gonzenbach testimony **[**75]** (Vol. IX — 1795:20-25)], based on the undisputed fact that the commerciality of the basal carbonate had not yet been proved.

194. By treating the basal carbonate as probable reserves instead of as a contingent resource, Mr. McBeath placed significant and excessive value on the basal carbonate. [Gonzenbach Testimony (Vol. IX — 1801:16-1802:11, 1804:17-1805:14, 1806:17-1807:4)] Mr. McBeath agreed that he would not usually assign any value to contingent resources when evaluating a play because of the risk factors that are associated with modeling the value of such resources. [McBeath Testimony (Vol. VI — 1289:11-17)] Moreover, he agreed that if the basal carbonate had not yet been **[*1197]** proved to be commercial, he should have assigned no value to it. [McBeath Testimony (Vol. VI — 1289:18-22)] Newfield's expert, Mr. Gonzenbach, confirmed that contingent resources are so risky that one would not typically assign any value to them. [Gonzenbach Testimony (Vol. IX — 1809:23-1810:15, 1812:12-16)]

195. The evidence is undisputed that the basal carbonate had not yet been proved commercial at the time of the auction. Mr. McBeath therefore should have given no value to the basal carbonate in his analysis; **[**76]** instead, he valued the basal carbonate at $96 million to $326 million. [McBeath Testimony (Vol. VI — 1282:18-1283:16)]

196. By contrast, Newfield in fact placed a $50 million value on the basal carbonate. [Kerchner Testimony (Vol. V — 936:9-23)] This reflected the speculative nature of the basal carbonate portion of the assets. [Kerchner Testimony (Vol. V — 936:5-23); Jergensen Testimony (Vol. V — 1032:5-20)] Mr. McBeath's analysis of what value he thinks Newfield (the only party possessing the information Mr. McBeath considered) might have placed on the assets is far less reliable than the value Newfield <u>actually</u> placed on the assets.

197. Mr. McBeath also failed to consider the costs associated with failed wells. Instead, he accounted only for the costs of successful wells, even though it is improper to presume that all wells drilled within a resource play will be successfully drilled and produced. [Kerchner Testimony (Vol. V — 954:2-14); McBeath Testimony (Vol. VI — 1272:24-1273:7)]

198. The Uinta Basin Assets were considered, by all parties, including Plaintiffs, a "resource play." [Trial Ex. 5 at 005-003; Trial Ex. 7 at 007-001; Trial Ex. 8 at 008-001]

199. Even though it is improper **[**77]** to assume that all wells drilled within a resource play will be successfully drilled and produced [Kerchner Testimony (Vol. V — 954:2-14); McBeath Testimony (Vol. VI — 1272:24-1273:7); Gonzenbach Testimony (Vol. IX — 1817:17-1818:7, 1870:14-1871:1)], Mr. McBeath accounted only for the costs of successful wells, ignoring the costs for wells that are expected to be unsuccessful.

200. Expert testimony established that when evaluating a resource play (irrespective of whether the particular formations are characterized as a contingent resource or as a reserve), one has to account for the costs of all the wells expected to be drilled, not just the successful ones, because one has to bear the cost of the unsuccessful drilling efforts as well. [Kerchner Testimony (Vol. V — 954:2-14); Gonzenbach Testimony (Vol. IX —1808:2-3, 1817:14-1818:7)]

201. The costs associated with the unsuccessful wells that Mr. McBeath did not consider were over $700 million. [McBeath Testimony (Vol. VI — 1276:14-1277:24); Gonzenbach Testimony (Vol. IX — 1813:17-1814:3, 1817:8-16, 1820:8-1821:5, 1822:1-11)]

202. By failing to account for these significant costs, Mr. McBeath vastly overstated the value of the Uinta Basin **[**78]** Assets. [Gonzenbach Testimony (Vol. IX — 1872:19-21, 1874:5-16); Trial Ex. C50 at C50_0036)]

203. Mr. McBeath's use of a risk adjustment factor did not negate the need to account for the costs of the failed wells. [Gonzenbach Testimony (Vol. IX — 1822:13-1823:2)]

204. Mr. McBeath also purported to rely on what he called "valuations" from Newfield's internal records to show that Newfield valued the Uinta Basin Assets higher than its bids. [McBeath Testimony (Vol. VI — 1210:13-24, 1220:21-25, 1295:20-1296:7)]

[*1198] 205. The "internal valuations" to which Mr. McBeath pointed (in particular, Trial Exhibit 118), however, were merely economic runs testing the impact of numerous variables and assumptions, not valuations, and should not have been viewed as valuations by Mr. McBeath, and were merely some of the runs performed by Ms. Kerchner, not all. [Kerchner Testimony (Vol. V— 926:7-17, 946:9-947:11, 946:20-25, 948:15-949:6); Howard Testimony (Vol. II — 373:12-17)] Ms. Kerchner testified unequivocally that it would be a "distortion of the work" she and her team were doing to take any of the individual runs reflected in the documents highlighted at trial by Plaintiffs and "say that's what Newfield's **[**79]** view of the value of these assets was." [Kerchner Testimony (Vol. V — 948:24-949:6)]

206. Furthermore, the "playing fields" to which Plaintiffs gave much weight did not evidence a higher internal valuation from Newfield than the bids actually made. Rather, they focused on what valuations would look like under assumptions determined to be unrealistic, and on how Newfield believed its primary competitor (El Paso) would value the assets. [Howard Testimony (Vol. II — 368:11-15, 369:2-370:10)] Plaintiffs assume this was a bid range for Newfield, but Newfield's witnesses confirmed that it was in fact an estimate of the expected competitor valuation. [Jergensen Testimony (Vol. V — 1005:11-24, 1027:2-11, 1028:16-24, 1029:24-1030:10); Kerchner Testimony (Vol. V — 956:18-957:15)]

207. And the portfolio analysis that Plaintiffs claim shows Newfield valued the Uinta Basin Assets higher than their bids also were not bid recommendations or valuations, but just an unbiased look at how the company should choose investment opportunities from amongst many options. [Packer Testimony (Vol. VII — 1463:13-15); Howard Testimony (Vol. II — 346:15-25, 359:24-360:2, 361:4-10)]

208. Rather, the uncontested evidence **[**80]** is that Newfield's Rocky Mountain Business Unit valued the Uinta Basin Assets at $220 million and recommended a bid at that level. [Howard Testimony (Vol. II — 374:4-13); Kerchner Testimony (Vol. V — 985:13-17)]

209. Based on the expectation of robust competition and reflecting its desire to win in the auction, Newfield ultimately bid approximately $310 million—$90 million above its internal valuation. [FF# 51-56, 151-152, 156] Newfield's personnel believed the $310 million bid was very aggressive. [Kerchner Testimony (Vol. V — 961:12-15)]

XII. <u>THE HARVEST ENTITIES AND BRANTA ENTITIES COULD HAVE REJECTED NEWFIELD'S BID BUT CHOSE NOT TO DO SO, AND THE FINAL AUCTION PRICE WAS WELL ABOVE THE MINIMUM EXPECTED PRICE AND WAY ABOVE PRIOR VALUATIONS OF THE UINTA BASIN ASSETS</u>

210. Whatever complaints Plaintiffs may have now about the $308 million they received from Newfield for the Uinta Basin Assets, Plaintiffs received a price that appears to have been the result of a competitive process and which was within the range expected by Plaintiffs, and which Plaintiffs agreed at the time was a great result for their companies.

211. As stated in Plaintiffs' bid procedures, the Harvest Entities and Branta **[**81]** Entities reserved the right not to sell the Uinta Basin Assets to any bidder. [Trial Ex. B15 at B15_0005, 0009] Thus, either the Harvest Entities or the Branta Entities could have decided not to sell their interests had they thought they could get **[*1199]** more for the Uinta Basin Assets than what Newfield had bid, whether from Newfield, some other party, or some combination of parties. [Tresca Testimony (Vol. III — 576:19-21, 678:13-20); Nesselrode Testimony (Vol. IV — 737:17-19, 790:12-15); Edmiston Testimony (Vol. IV — 825:24-827:10)]

212. Newfield's bid was within the range that the Branta Entities and Harvest Entities expected to receive, and well above the minimum that was expected. Prior to the auction, Mr. Edmiston told Mr. Tresca that he expected the Uinta Basin Assets would sell for between $200 to $400 million and Mr. Tresca wrote in an email that the floor was

$200 million. [Trial Ex. A43 at A43_0003; Trial Ex. A49 at A49_0002; Tresca Testimony (Vol. III — 658:19-659:12, 659:18-660:8)]

213. Newfield's bid for the Branta E&P assets was also significantly higher than the amounts offered to Branta E&P when it was exploring the sale of its assets in 2010. In 2010, BBC offered Branta E&P **[**82]** $12.7 million for its share of the Uinta Basin Assets. [Tresca Testimony (Vol. III — 607:5-15, 608:3-7)]

214. In addition, on July 1, 2010, Branta E&P sold a 10% interest in the Uinta Basin Assets to Harvest (US) for $20 million (which would equate to a value of approximately $200 million for 100% of the Uinta Basin Assets, of which approximately $60 million would be attributed to Branta E&P's remaining 30% share). [Trial Ex. A14; Edmiston Testimony (Vol. IV— 808:25-810:18); Tresca Testimony (Vol. III — 563:25-564:8, 566:10-17, 567:8-13)]

215. On September 29, 2010, Newfield offered to purchase Branta E&P's share of the Uinta Basin Assets for $77 million (which would impute a value of $210 million to the entirety of Plaintiffs' interest in the Uinta Basin Assets). [Trial Ex. 47]

216. No bid, other than those from Newfield and BBC, was received in the auction for all of the Uinta Basin Assets, despite the fact that BAML contacted 47 companies in its calling program. [Trial Ex. 18]

217. BAML, Plaintiffs' investment bank, was not surprised that Newfield was the only bidder for the entire package of Uinta Basin Assets offered by Plaintiffs, nor did BAML consider Newfield's bid too low. [Sooby **[**83]** Testimony (Video Depo. — 105:21-106:15)]

218. Mr. Edmiston, in an email to his employees, described the sale to Newfield as "an outstanding transaction for the company." [Trial Ex. B76]

219. Mr. Edmiston also wrote an email to Mr. Packer stating that: "It's not often that an asset transaction is recognized as a clear win-win for both parties. In this case, I think the market response speaks for itself in that regard." [Edmiston Testimony (Vol. IV — 887:2-12); Trial Ex. B79]

220. Harvest expressed its satisfaction with the result by awarding Mr. Edmiston and Mr. Nesselrode significant cash bonuses, $200,000 to Mr. Edmiston and $100,000 to Mr. Nesselrode. [Head Testimony (Vol. VIII — 1733:20-1734:5)]

XIII. NEWFIELD DID NOT BREACH THE CONFIDENTIALITY AGREEMENTS

221. In addition to its claim that Newfield entered into a bid-rigging agreement with Ute Energy, Plaintiffs claim that Newfield breached the Branta CA and the Harvest CA through communications it had with Ute Energy.

222. Branta does not claim any breach by Newfield of the Branta CA based on the disclosure of proprietary or confidential information. [Tresca Testimony (Vol. III — 621:13-17)]

223. Instead, Branta claims that Newfield breached **[**84]** the Branta CA by virtue of its communications with Ute Energy regarding **[*1200]** the auction, which Branta argues breached the CA's non-circumvention provision. [Tresca Testimony (Vol. III — 560:12-21, 563:6-16, 621:18-22, 685:3-6)] Branta argues that it had a prospective business relationship with Ute Energy, thus triggering the non-circumvention provision.

224. The Branta CA's non-circumvention provision, however, was never intended to bar a party from talking to its own partners. [Trial Ex. 27 at 027-002 ¶ 4] Even Branta admits that Newfield was not barred from talking to its own partners in the ordinary course of business. [Tresca Testimony (Vol. III — 590:13-19, 624:23-626:3)] And Mr. Howard testified that Newfield would never have expected the non-circumvention provision to "basically shut down any business communications that [Newfield] would have had prior to this agreement," as Branta suggests the Branta CA required. [Howard Testimony (Vol. II — 396:4-20)]

225. Moreover, Ute Energy did not have an existing or prospective business relationship with either of the Branta Entities between January 7, 2011 and the close of the transaction on May 17, 2011. Ute Energy was barred by Mr. Edmiston **[**85]** from participating in the auction process by no later than January 7, 2011, and that bar was reiterated to Mr. Nesselrode after Mr. Nesselrode spoke with Mr. Jaggers on January 13, 2011. [FF # 33-34, 38] Ute Energy had no further contact with the Harvest Entities, the Branta Entities, or BAML after the January 2011 calls between Mr. Jaggers and Mr. Nesselrode. [FF # 47] Moreover, the Branta Entities were precluded from communicating the Ute Energy under the Branta CA based on Newfield's preexisting business relationship with Ute Energy. [FF # 4-5, 12-14, 21-24]

226. Branta's sole basis for claiming that it had a prospective business relationship with Ute Energy at any relevant time is that Branta hoped Ute Energy would bid, be the high bidder, and then buy all of the assets. [Tresca Testimony (Vol. III — 680:13-17)]

227. The evidence shows that Newfield was mindful of its obligations under the Branta CA, with senior executives directing their teams to "make sure we take care to honor the CA" and to "make sure all the I's are dotted and T's are crossed." [Trial Exs. 56, 59]

228. None of the documents highlighted at trial evidenced Newfield providing any confidential information or information **[**86]** regarding the status of the auction to Ute Energy between the time Newfield gained access to the auction by executing the Harvest CA on February 17, 2011 and the transaction's closing on May 17, 2011. [Trial Exs. 95, 106, 115, 130, 132, 153, 159-161, 164]

229. And both Mr. Howard and Mr. Jaggers confirmed that no confidential information or information regarding the status of the auction was disclosed by Newfield to Ute Energy. [Howard Testimony (Vol. II — 450:16-451:22, 456:5-457:8, 464:12-470:8, 470:22-471:4); Jaggers Testimony (Vol. I — 215:2-217:14, 218:15-23)]

230. Plaintiffs presented no evidence that Newfield initiated contact with Ute Energy concerning the auction at any time between when Newfield gained access to the process (*i.e.*, the date Newfield executed the Harvest CA) and the transaction's closing on May 17, 2011. [Jaggers Testimony (Vol. I — 215:2-14); Howard Testimony (Vol. II — 470:1-8, 470:22-471:1)]

231. Moreover, there was no evidence that Newfield disclosed to Ute Energy any confidential, non-public information regarding the transaction or Plaintiffs' assets between the time Newfield gained access to the auction and the transaction's closing. **[*1201]** [Howard Testimony (Vol. **[**87]** II — 450:16-451:22, 456:5-457:8, 464:12-470:8, 470:22-471:4); Jaggers Testimony (Vol. I — 215:2-217:14, 217:18-218:4, 218:15-23); Jaggers Testimony (Vol. II — 254:11-13); Trial Ex. 95, 106, 115, 130, 132, 153, 159, 160, 161, 164]

232. Plaintiffs pointed to a slide prepared by Ute Energy and supposedly approved by Newfield in late March 2011 after Harvest had made its public disclosure of the sale as evidence that Newfield disclosed information. The slide itself, however, makes clear the source of its information was Harvest's public disclosures. [Trial Ex. 153 at 153-002; Trial Ex. 154; Howard Testimony (Vol. II — 443:17-444:8)] But no new parties could have entered the process after the date on which Plaintiffs agreed to negotiate exclusively with Newfield, March 11, 2011. [Edmiston Testimony (Vol. IV — 895:16-896:2)] Regardless, the question of how to share an asset under an existing AMI should the asset be acquired is not divulging information learned in the data room or from Harvest or Branta, nor is it divulging the status of the transaction. It is simply a discussion regarding the existing business relationship between the parties.

CONCLUSIONS OF LAW

Based on the foregoing factual **[**88]** findings, the Court hereby enters the following conclusions of law and judgment in favor of Newfield and against Plaintiffs on each of the claims for relief:

I. NO BREACH OF THE CONFIDENTIALITY AGREEMENTS

1. Both the Branta CA and the Harvest CA are governed by Texas law. [Trial Ex. 27 at 027-004; Trial Ex. 32 at 032-005; Trial Ex. 98]

2. *HN1*[] The four elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from the breach. *Velvet Snout, LLC v. Sharp, 441 S.W. 3d 448, 451 (Tex. App. 2014)*. Plaintiffs bear the burden of proving a breach by a preponderance of the evidence. *Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 642 (W.D. Tex. 1999)*.

HN2[] 3. "[W]hen one party to a contract commits a material breach of that contract, the other party is discharged or excused from any obligation to perform." *X Techs., Inc. v. Marvin Test Sys., Inc., 719 F.3d 406, 413 (5th Cir. 2013)* (quoting *Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 692 (Tex. 1994))*.

4. Reciprocal promises are presumed to be mutually dependent and the breach by one party excuses the performance of the other. *DEW, Inc. v. Depco Forms, Inc., 827 S.W.2d 379, 382 (Tex. App. 1992)* (collecting cases).

a. The Branta CA

5. Branta does not allege that Newfield breached the Branta CA by virtue of disclosure of confidential or proprietary information. [FF# 222] Branta's claim relates exclusively to an alleged breach of paragraph 4 of the **[**89]** Branta CA — the Non-Circumvention provision. [FF # 223]

6. The Non-Circumvention provision in the Branta CA barred either party to the agreement from having contact with "any of the other party's or its subsidiary's of affiliate's lenders, equity owners, **[*1202]** co-working interest owners, joint exploration and development partners or other persons having existing or prospective business relations with the other party or its subsidiaries." [Joint Facts # 24]

7. This language is, unequivocally, mutual, and precluded Plaintiffs from having unapproved contact with Newfield's "affiliate's lenders, equity owners, co-working interest owners, joint exploration and development partners or other persons having existing or prospective business relations with the other party or its subsidiaries." [FF #21; Joint Facts # 24]

8. Ute Energy was Newfield's co-working interest owner and joint exploration and development partner. [FF # 4-5, 12-14]

9. Because Ute Energy was Newfield's co-working interest owner, the Branta Entities were precluded from having affirmative contact with Ute Energy without the prior written consent of Newfield. [FF # 22-24]

10. The Branta Entities, through their various representatives, **[**90]** contacted Ute Energy to market the Branta Entities' assets on September 30, 2010, and met with Ute Energy on October 4, 2010 to explore opportunities to work together in breach of the Non-Circumvention provision. [FF # 25-27]

11. The Branta Entities did not first seek or obtain Newfield's written consent to the communications with Newfield's partner, as required by Paragraph 4 of the Branta CA. [FF# 28]

12. I find that the Branta Entities' unapproved contacts with Ute Energy constituted a prior material breach of the Branta CA, predating and excusing any later communications between Newfield and Ute Energy.

13. Even had these unapproved contacts not constituted a prior material breach, there is no basis for finding that Newfield breached the Branta CA.

14. Plaintiffs argued that Newfield breached the Branta CA's Non-Circumvention provision by having contact with Ute Energy's Mr. Jaggers concerning the acquisition of Branta E&P's share of the Uinta Basin Assets during the term of the Branta CA.

15. The Branta CA did not prohibit Newfield from having contact with Ute Energy. The Non-Circumvention provision only prohibited Newfield from contacting "persons having existing or prospective business **[**91]** relations with [Branta, LLC] or its subsidiaries." [Joint Facts # 24] It was never intended to bar either Branta or Newfield from communicating with its own partner. [FF #21] The language of Paragraph 4 itself only bars communications with the other party's partners or those with prospective business relationships, not one's own partners. [Trial Ex. 27 at 027-002 ¶ 4]

16. Under Texas law, Branta had no prospective business relationship with Ute if it did not appear reasonably certain that a "prospective contract would have been made were it not for the [alleged] interference." *Suprise v. Dekock, 84 S.W.3d 378, 382 (Tex. App. Ct. 2002)*.

17. The Branta Entities did not have an existing or prospective business relationship with Ute Energy at the time the Branta CA was entered into. [FF # 23]

18. The Branta Entities also did not have an existing or prospective business relationship with Ute Energy between January 7, 2011 and the termination of the Branta CA because during this time Ute Energy was barred from participating in the auction process, and that bar was never lifted. [FF # 33-38, 41] Moreover, the mere hope that Ute Energy would participate in the auction is insufficient to create a prospective business relationship between Ute Energy and **[**92]** Branta. *Klein v. Grynberg, 44 F.3d 1497, 1506 (10th Cir. 1995)* (**HN3**[] mere hope for a contract is insufficient to establish a "reasonable likelihood or reasonable probability that a contract could have resulted" to support the existence of a prospective business relationship). Accordingly, I find that the Non-Circumvention provision in the CA did not **[*1203]** preclude Newfield's contacts with Ute Energy.

19. Finally, I find that Newfield engaged in no affirmative contacts with Ute Energy regarding the information obtained from the Branta Entities pursuant to the Branta CA or the acquisition of Branta E&P's share of the Uinta Basin Assets contemplated by the Branta CA, and therefore had no communications with Ute Energy that would have been barred by the Branta CA had Ute Energy been a party with whom such communications were prohibited.

b. The Harvest CA

20. The Harvest CA precluded Newfield from disclosing to Ute Energy any confidential Evaluation Materials or from discussing or disclosing the fact that discussions or negotiations were taking place concerning Harvest (US)'s assets in the Uinta Basin. [Joint Facts # 34]

21. Harvest has suggested that the harm it suffered from the alleged breach is that Ute Energy agreed not to — and did not — bid in the **[**93]** auction, causing Harvest to receive a lower price for the Uinta Basin Assets than it otherwise would have. The communication that could give rise to these damages, if such an agreement had been reached, is the January 13, 2011 telephone call between representatives of Newfield and Harvest. No harm arising out of that call could give rise to a claim for breach of the Harvest CA, however, since the Harvest CA was not executed until February 17, 2011. [Trial Ex. 32]

22. More generally, I find that no communications pre-dating the execution of the Harvest CA could be considered to breach the Harvest CA.

23. Plaintiffs also suggest that Newfield breached the Harvest CA by engaging in discussions with Ute Energy regarding the auction.

24. Plaintiffs presented no evidence that Newfield made any affirmative contact with Ute Energy regarding the auction, or that Newfield disclosed any confidential Evaluation Materials, between the time Newfield gained access to the auction on February 17, 2011 and the transaction closing on May 17, 2011. Indeed, the communications as

to which evidence was presented constituted exclusively communications from Ute Energy to Newfield, to which there is no evidence **[**94]** that Newfield substantively responded. [FF # 227-232]

25. Newfield did not provide information subject to the Harvest CA to Ute Energy prior to the termination of the CA. [FF # 227-232]

26. The March 25, 2011 email with a PowerPoint presentation that Ute Energy's Joseph Jaggers sent to Newfield's Darryl Howard, and which Mr. Howard supposedly approved, contained only publicly-available information that had already been disclosed by the Harvest Entities. [FF # 232]

27. Mr. Jaggers testified that Newfield never provided Ute Energy with any information in response to his requests. [FF # 229] Mr. Howard's general response of "looks good" to the slide sent by Mr. Jaggers on March 25, 2011 [Trial Ex. 154] did not confirm any part of the transaction that HNR had not already publicly disclosed. [FF # 230-232] I find that Mr. Howard did not disclose any information regarding the auction by indicating his approval of that slide, and thus that this communication did not violate the Harvest CA.

28. Mr. Howard likewise testified that he never shared any information about the Uinta Basin Assets auction with Ute Energy prior to the termination of the CA. [FF # 229]

[*1204] 29. In the absence of any evidence that **[**95]** Newfield affirmatively disclosed any information regarding the fact of negotiations or the status of the auction, I find that Newfield did not breach the Harvest CA.

c. <u>There Are No Damages Associated With The Alleged Breach Of Confidentiality Agreements</u>

30. Even if Newfield had violated the terms of either the Branta CA or the Harvest CA, Plaintiffs have presented no evidence of any damages arising from such breaches.

31. Harvest claims damages from breach of the Harvest CA as a result of Ute Energy's failure to participate in the auction. This outcome, if it arose from any communication whatsoever between Newfield and Ute Energy, could only have resulted from the alleged agreement reached on the January 13, 2011 call, which predated the Harvest CA by more than one month, not from any of the later correspondence cited by Plaintiffs at trial. As such, Harvest can state no claim for damages since the alleged harm occurred before the contract was even executed.

32. Branta, too, claims the damages-causing breach of the Branta CA was the January 13, 2011 call between Mr. Jaggers and Mr. Howard.

33. Plaintiffs presented no evidence that any later communication between Newfield and Ute Energy **[**96]** caused Ute Energy not to submit a bid in the action, or otherwise caused Plaintiffs any harm.

34. Moreover, Plaintiffs could not have suffered any damages after March 11, 2011, when they agreed to negotiate PSAs exclusively with Newfield as no other bidders could have participated as of that date. [Edmiston Testimony (Vol. IV — 895:16-896:2)]

35. Furthermore, Plaintiffs presented no expert testimony regarding the causation of damages or the quantum of damages arising from the alleged breaches of the Harvest CA and Branta CA.

36. Instead, Plaintiffs rely exclusively on the damages analysis presented in support of their antitrust claims, where Dr. Schulman simply presumed causation and relied on Mr. McBeath's "valuation" range. For the same reasons that the antitrust causation and damages analysis was deficient, as described in detail below, the damages calculation here cannot support an award in favor of Plaintiffs even if a breach of either confidentiality agreement had been proven.

37. Moreover, it is self-evident that there is no logical connection between any of the later communications relied upon by Plaintiffs in support of their claims and the claimed result of Ute Energy deciding **[**97]** not to participate in the auction. Those communications largely were unanswered emails from Ute Energy to Newfield. [Trial Exs. 115,

130, 132, 135] I find no reason to conclude that any later communication caused Ute Energy not to bid or caused Plaintiffs any damages.

38. Having failed to provide proof of all of the essential elements of a breach of contract claim, Plaintiffs are entitled to no relief with respect to the allege breach of the Branta CA or Harvest CA.

II. BID-RIGGING CLAIMS UNDER THE SHERMAN ANTITRUST ACT AND COLORADO ANTITRUST ACT

39. Plaintiffs allege that Newfield and Ute Energy had an agreement that Ute Energy would refrain from participating in the auction for the Uinta Basin Assets, and that such agreement was an illegal contract to rig the bidding process.

40. ***HN4***[] *Section 1 of the Sherman Act* prohibits "every contract, combination in the form of a trust or otherwise, or conspiracy **[*1205]** in restraint of trade or commerce." *15 U.S.C. § 1*.

41. Plaintiffs also claim that Newfield violated the Colorado Antitrust Act, which provides that "it is illegal for any person to contract, combine, or conspire with any person to rig any bid, or any aspect of the bidding process, in any way related to the provision **[**98]** of any commodity or service." *Colo. Rev. Stat. § 6-4-106(1)*.

42. Courts look to federal antitrust cases to guide interpretation of the Colorado Antitrust Act. *See* *C.R.S. § 6-4-119* ("[i]t is the intent of the general assembly that, in construing this article, the courts shall use as a guide interpretations given the federal courts to comparable federal antitrust laws."). Claims of bid-rigging under the Colorado Antitrust Act typically rely on federal courts' definitions of "bid-rigging." *See* *Amos v. Aspen Alps 123, LLC, 280 P.3d 1256, 1262, 2012 CO 46 (Colo. 2012)*. Therefore, I will analyze the two claims together.

43. ***HN5***[] Despite the *Sherman Act's* broad language, almost from its inception the Act has been read to prohibit only those restraints of trade that are unreasonable. *Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918)*. Courts analyze claims of unreasonable restraints on trade under the rule of reason doctrine. In addition to this rule of reason, the courts have also developed a doctrine of per se violations to cover those business relationships that "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958)*.

44. ***HN6***[] "*Section 1 of the Sherman Antitrust Act* prohibits **[**99]** contracts and conspiracies that restrain trade. Certain violations have been identified as per se illegal, requiring no additional proof of an unreasonable restraint of trade. Other *§ 1* violations require proof that a defendant's actions resulted in an unreasonable restraint of trade." *Smalley & Co. v. Emerson & Cuming, Inc., 13 F.3d 366, 367 (10th Cir. 1993)* (citation omitted).

45. If proven, bid rigging is one such per se violation. *United States v. Mobile Materials, Inc., 881 F.2d 866, 869 (10th Cir.1989)*, *cert. denied*, *493 U.S. 1043, 110 S. Ct. 837, 107 L. Ed. 2d 833 (1990)*. "Any agreement between competitors pursuant to which contract offers are to be submitted [to] or withheld from a third party constitutes bid rigging per se violative of *15 U.S.C. section 1*." *Id.* (quoting *United States v. Portsmouth Paving Corp., 694 F.2d 312, 325 (4th Cir.1982))*; *see* *Tal v. Hogan, 453 F.3d 1244, 1261 (10th Cir. 2006)*.

46. In this case, the disputed issue is whether Newfield and Ute Energy made an agreement that Ute Energy would refrain from participating in the auction for the Uinta Basis Assets during the January 13, 2011 phone call between Mr. Jaggers and Mr. Howard. It is important to note that Plaintiffs do not challenge the effective AMIs in place between Ute Energy and Newfield. Thus, I analyze Plaintiffs' claims to determine whether the alleged conduct was per se violative of ***antitrust law***.

47. ***HN7***[] A conspiracy to rig bids in violation of *15 U.S.C. § 1* is essentially an agreement among actual or potential competitors which restrains competition in **[**100]** or effecting interstate trade or commerce. *United States*

v. Beachner Constr. Co., 555 F. Supp. 1273, 1276 (D. Kan. 1983), *aff'd*, 729 F.2d 1278 (10th Cir. 1984). Conspiracy may be proved through direct or circumstantial evidence. "Indeed, often if not generally, **[*1206]** direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances." *Id.*

48. The Third Circuit provides that **HN8**[] "where the disputed issue is the existence or scope of the alleged horizontal agreement that is to be inferred from circumstantial evidence, the first inquiry must be whether or not each firm alleged to have been a party to it was an actual or potential competitor in that market." United States v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir. 1986).

49. The Tenth Circuit provides that "the determination of a per se antitrust violation depends on whether there was an agreement to subvert the competition, not on whether each party to the scam could perform." United States v. Reicher, 983 F.2d 168, 172 (10th Cir. 1992).

50. The evidence at trial showed that Ute Energy operated in the Uintah Basin, and it was interested in acquiring assets in the Uintah Basin in early 2011. [Joint Facts #17, 18]. Additionally, Newfield's decision review document listed Ute Energy among a list of potential bidders that was "also active in the basin," despite being a list of competitors from which Newfield **[**101]** "expected lower level activity." [FF # 52]. At trial, Mr. Jaggers testified that even though Ute Energy could not compete for the entirety of the assets, he might have approached Harvest (US) outside the auction process regarding a partial bid; even though there was no evidence of what portion Ute Energy would have bid on, or the price it would have paid. [FF #62].

51. I find that based on the evidence presented at trial, Ute Energy was a potential competitor in the auction for the Uintah Basin Assets, for antitrust purposes.

52. **HN9**[] When analyzing a Section 1 claim, the Supreme Court has held that "***antitrust law*** limits the range of permissible inferences from ambiguous evidence in a [Section] 1 case." Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1508 (D. Colo. 1992), *aff'd*, 13 F.3d 366 (10th Cir. 1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (analyzing a Section 1 claim on a motion for summary judgment)). "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* "[A] plaintiff seeking damages for violation of [S]ection 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (citation omitted). Therefore, plaintiff "must show that the inference of conspiracy is reasonable in light **[**102]** of the competing inferences of independent action." *Id.*

53. **HN10**[] The Tenth Circuit in Matsushita has restated a two-part evidentiary test: "(1) is the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests." Id. at 1509 (citing Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987)).

A. There Is No Evidence That Ute Energy and Newfield Agreed To Bid-Rig

54.**HN11**[] "The essence of a claim of violation of Section 1 of the Sherman Act is the agreement itself." Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1082 (10th Cir. 2006) (citing Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330, **[*1207]** 111 S. Ct. 1842, 114 L. Ed. 2d 366 (1991)). Without proof of an agreement to rig bids, Plaintiffs' antitrust claims fail. *Id.* "Solely unilateral conduct, regardless of its anticompetitive effects, is not prohibited." McKenzie v. Mercy Hosp., 854 F.2d 365, 367 (10th Cir. 1988). Because Plaintiffs have not met their burden of proving the existence of an agreement to rig bids, their antitrust claims must fail.

i. There Is No Direct Evidence Of Any Bid-Rigging Agreement

55. Here, there is no direct evidence of any bid-rigging agreement between Newfield and Ute Energy. *Champagne Metals, 458 F.3d at 1083* (***HN12***[] "Direct evidence [of] a *Section 1* conspiracy . . . [is] evidence that is explicit and requires no inferences to establish **[**103]** the proposition or conclusion being asserted."). Newfield disavowed the existence of any agreement that Ute Energy would not bid in the Auction, and Ute Energy's CEO repeatedly confirmed that Ute Energy decided not to participate in the auction unilaterally, independent of Newfield. [FF # 86-100, 129-143]

56. Mr. Jaggers' May 20, 2011 letter to Mr. Howard is not direct evidence of an agreement. In that letter, Mr. Jaggers stated that Mr. Howard "asked Ute Energy not to be involved because the existing AMIs would cover the division of interest," not that Newfield and Ute Energy "agreed." [FF # 122-124] At trial, however, Mr. Jaggers was unable to recall Mr. Howard making this request [FF # 122], and such a request is ***not*** an agreement not to bid and does not necessarily give rise to the inference that this supposed request led to an actual agreement not to bid.

57. I therefore find that no direct evidence of a bid rigging agreement between Newfield and Ute Energy was presented at trial.

ii. There Is No Circumstantial Evidence Of Bid Rigging That Can Exclude The Possibility of Unilateral Decision-making By Newfield and Ute Energy

58. The circumstantial evidence also does not "exclude the **[**104]** possibility that [Ute Energy and Newfield] acted independently." *Champagne Metals, 458 F.3d at 1085* (quoting *Mitchael v. Intraco, Inc., 179 F.3d 847, 856-57 (10th Cir. 1999))*; *see also* *World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1475 (10th Cir. 1985)* (holding ***HN13***[] a jury is not permitted to infer an agreement from certain evidence, "the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy [which] tends to exclude the possibility that [defendants] were acting independently.") (citation omitted); *see also* *St. Louis Convention & Visitors Comm'n v. National Football League, 154 F.3d 851, 862 (8th Cir. 1998)* (noting that ***antitrust law*** "limits the range of permissible inferences from ambiguous evidence" in a *Sherman Act § 1* case and affirming judgment as matter of law where "the trial evidence did not support an inference that [defendants] were acting pursuant to the alleged conspiracy when they declined to bid").

59. Both Mr. Jaggers and Mr. Howard testified that any understanding they had emanating from the January 13, 2011 call related exclusively to their AMIs, and the partnership the companies had under those agreements. Each denied the existence of any agreement outside the AMIs to control participation in the auction process. Instead, their testimony expressed that each acted as one would expect AMI partners to behave when they believed a potential **[**105]** acquisition fell within the scope of their AMIs. [FF# 87-100, 109-120]

60. The evidence is undisputed that it is the custom and practice in the industry **[*1208]** that parties to an AMI agreement do not bid against each other for assets covered by an AMI because doing so would be economically irrational. [FF # 131] It is also undisputed that Mr. Jaggers believed at the time of the auction that Ute Energy would have the option to purchase a portion of the Uinta Basin Assets under the Rocky Point AMI if Newfield's bid was successful. [FF # 129] With that belief, it would have been economically irrational for Ute Energy to have bid in the auction [FF# 131-134], and this evidence strongly supports Mr. Jaggers' testimony that he made a unilateral and independent decision that Ute Energy would not participate in the auction.

61. It is also undisputed that Newfield was the far larger and the better capitalized of the two AMI partners, and thus the more logical company to take the lead in the effort to acquire the Uinta Basin Assets. The correspondence referring to partnering in pursuing or taking the lead arises from this logical positioning of Newfield as the lead AMI partner. [FF# 87-100, 109-120]

[106]** 62. I find that the evidence presented at trial cannot exclude the possibility of independent action in conformity with the well-accepted practices of AMI partners, and thus cannot support the existence of a bid-rigging agreement.

63. Moreover, I find that other communications and behaviors are inconsistent with the notion of a January 13, 2011 agreement between Newfield and Ute Energy regarding bidding or participation in the auction, and thus also cannot exclude the possibility of independent action.

64. First, Newfield's internal deal analyses show that Newfield believed that Ute Energy was a potential bidder in the auction, even if its inability to submit a large bid had no impact on Newfield's bid. [FF # 52, 54]

65. Second, it would have been illogical for Mr. Jaggers to express interest in the process to Mr. Nesselrode in late January 2011 had Mr. Jaggers already agreed with Mr. Howard that Ute Energy would not bid on the Uinta Basin Assets or otherwise participate in the auction process. [FF# 39, 106]

66. Third, it also would have been illogical for Ute Energy's Mr. Kalstrom to reach out to Newfield about coordinating review of the Harvest divestiture package had an agreement already **[**107]** been reached that Ute Energy would not be involved. [FF# 107]

67. Fourth, it also appears anomalous to me that, had there been an agreement between Mr. Howard and Mr. Jaggers, Mr. Howard would not have informed his boss or others within Newfield of such an important agreement. [FF# 99-100] I also would have expected evidence of other communications referencing the alleged agreement, but there was not a shred of evidence of any reference to such an agreement anywhere. Similarly, there was no evidence of any communications between Mr. Jaggers and anyone at Ute Energy or otherwise mentioning the alleged agreement.

68. Lastly, had Ute Energy agreed not to bid on the Uinta Basin Assets because Newfield was going to bid on behalf of both of them, it would have been inexplicable for Ute Energy to inquire if Newfield intended to bid just days before bids were due, and yet Ute Energy did just that. [FF # 108]

69. I find that Plaintiffs have not presented sufficient circumstantial evidence of an agreement between Newfield and Ute Energy, and certainly none that excludes the possibility of independent action.

70. I therefore find that there is no direct or circumstantial evidence supporting **[*1209]** the existence **[**108]** of an agreement between Ute Energy and Newfield pursuant to which Ute Energy agreed not to participate in the auction for the Uinta Basin Assets.

B. Plaintiffs Have Failed to Show Antitrust Injury

71. ***HN14***[] To prevail on their *Sherman Act* claim, Plaintiffs must prove, by a preponderance of the evidence, that Plaintiffs were injured in their business or property by the alleged bid-rigging. That is, Plaintiffs must show that they were injured because of the anticompetitive effects of the alleged bid-rigging. *See* *Suture Express, Inc. v. Owens & Minor Distrib., Inc., 851 F.3d 1029, 1044 (10th Cir. 2017)* ("As part of any claim under *Section 1 of the Sherman Act*, the plaintiff must establish 'an injury of the type the antitrust laws were intended to prevent.' This means that the plaintiff must show the challenged restraint actually injured competition, not merely a competitor.") (citations omitted).

72. Plaintiffs must show that they were injured in their business or property by the alleged bid-rigging, that is, that they were injured because of the anticompetitive effects of the alleged bid-rigging. *Suture Express, 851 F.3d at 1044*.

73. "The relaxed measure of proof is afforded to the amount, but not the causation of loss — the nexus between the defendant's illegal activity and the injuries suffered must be reasonably proven." **[**109]** *Wills Trucking, Inc. v. Baltimore & Ohio R.R. Co. (In re Lower Lake Erie Iron Ore Antitrust Litig.), 998 F.2d 1144, 1176 (3d Cir. 1993)* (citation omitted).

74. Here, Plaintiffs have failed to meet their burden to show that they were injured because of anticompetitive effects of the alleged bid-rigging. There is no basis to conclude that the auction price would have been higher but

for the alleged agreement or Ute Energy's absence from the bidding. The evidence shows that Newfield formulated its bid with the expectation that there would be robust competition from well-funded competitors, including El Paso, Shell, Oxy, Noble and Samson who could "move the needle" at the auction. [FF # 51-53] Ute Energy, although active in the Uinta Basin, was not a competitor that Newfield believed could "move the needle" on activity. [FF # 52]

75. During the auction process, ten companies visited the data room and attended the management presentations: El Paso, Devon, Shell, Endeavour, BBC, Newfield, ExxonMobil, Enduring Resources, ConocoPhillips, and Berry Petroleum. [FF #45]

76. Because Plaintiffs do not allege that there was any agreement between Newfield and the numerous other competitors who Newfield believed could "move the needle" on the activity and the nine other companies that visited the data room, even if I had found that **[**110]** Newfield had an agreement with Ute Energy not to bid, there is no basis on which I can conclude that Newfield's initial bid or subsequent bid would have been higher but for such an agreement.

77. After the initial bids were received, in discussions with BAML, Newfield understood that there were other bidders for the entirety of the Uinta Basin Assets and another bid for a portion of the Uinta Basin Assets. [FF # 68, 151] Thus, even assuming there was an agreement that Ute Energy would not bid, Newfield believed it still had to compete with other bidders whose identities were not known to Newfield, and whose bid amounts also were unknown, and there is no evidence from which it can be concluded that Newfield's subsequent bids would have been higher but for Ute Energy's absence as a **[*1210]** bidder. [FF # 50-51, 68-69] In fact, the internal Decision Review document that was presented to senior management recommended a bid of $220 million. [FF # 56] Newfield's initial bid was $67.5 million higher than the initial recommended bid because it anticipated robust competition. [FF# 56] Had Newfield believed it had taken Ute Energy (whom the Amended Complaint alleges was the only other "serious business **[**111]** competitor[]" that was likely to bid in the competition [ECF No. 258, ¶¶ 16-17]) out of the competition, one would predict that Newfield's initial bid would have been lower than its recommended bid, not $67 million higher, and that Newfield would not have increased its bid in the second round, nor would it have paid an additional $15 million for exclusivity. Paying for exclusivity only makes economic sense if Newfield believed there were other strong competitors still vying for the Uinta Basin Assets in the auction.

78. In addition, the evidence is undisputed that Ute Energy could not have made a bid that came close to Newfield's bid or the bid that was received from BBC [FF # 66-67, 138-140], thus suggesting that Ute Energy's participation in the auction would not have impacted the final auction price. And there is no evidence from which I can conclude that Ute Energy would have even participated in the auction but for the alleged bidding agreement.

79. Indeed, the testimony from Mr. Jaggers was that, if, hypothetically, Ute Energy were to have attempted to submit a bid for the Uinta Basin Assets, it would not have done so through the auction process because Plaintiffs' bid procedures **[**112]** directed submission of bids for the entirety of the Uinta Basin Assets and Mr. Jaggers did not believe Ute Energy was financially capable of submitting a competitive bid given the expected value of the assets. [FF # 138-140, 143] Instead, Mr. Jaggers testified that Ute Energy might have attempted to negotiate with Plaintiffs for part of the Uinta Basin Assets outside the context of the auction. [FF # 62] However, it is undisputed that Harvest and Branta intended to sell the Uinta Basin Assets a single package in the auction. [FF # 58-59]

80. At closing, Plaintiffs adopted the theory that they would have been able to obtain a higher price through the piecemeal sale of the Uinta Basin Assets outside of the auction. [Plaintiffs' Closing (Vol. XI — 2164:19-2166:4)] Plaintiffs presented no evidence, however, reflecting what part of the Uinta Basin Assets they might have sold to Ute Energy in that scenario, or the price that Ute Energy might have offered. They likewise presented no evidence that, once the Uinta Basin Assets were subdivided, Newfield would have been willing to participate in the acquisition of a part of the assets, or at what price. There was no evidence whatsoever as to the **[**113]** aggregate price that Plaintiffs would have received for the Uinta Basin Assets once broken up and sold piecemeal. For me to conclude that Plaintiffs would have obtained a higher price outside of the auction process through such a piecemeal sale would be speculative.

81. Similarly, Plaintiffs have not shown that but for the alleged agreement Newfield would have increased its bid. Rather, the evidence showed that Newfield crafted its bid with the expectation of robust competition. [Trial Ex. 9 at 9-065] The relevant Newfield business unit recommended a valuation of $220 million for the Uinta Basin Assets, but, because of the expected competition, Newfield's senior executive team increased the amount if would bid from $220 million to $287 million, and then to $295 million, with an additional $15 million to purchase the right to negotiate **[*1211]** exclusively for one week. [Trial Exs. 127, 128, 137]

82. There was no credible evidence presented at trial that Newfield would have submitted a higher bid had Ute Energy participated. Indeed, Newfield's Mr. Boothby testified categorically that he would not have agreed to pay any additional amount for the Uinta Basin Assets. [Boothby Testimony (Vol. VIII **[**114]** — 1692:18-21, 1693:4-11, 1697:10-15)]

83. Though Plaintiffs' expert, Dr. Schulman, testified that the participation of additional bidders in an auction, without more, tends to lead to a higher price paid in auctions, I did not find his testimony credible or well-founded in the economics literature on which he relied. Rather, I give credence to Dr. Burtis' testimony that, in sealed-bid auctions like the one that took place here, what matters is a bidder's expectations of competition, namely from the expected next highest bidder and its expected bid amount.

84. Dr. Burtis testified how auctions of this sort function and the paramount importance of a bidder's estimation of the valuation that other bidders are likely to attach to the asset that is the subject of the auction. [Burtis Testimony (Vol. X — 1920:4-1929:1)] According to Dr. Burtis, it is only in very specific circumstances where the number of bidders is the primary determinant of the high bid — *i.e.*, where the bidders are purchasing the asset with the intent of keeping it indefinitely for their own private benefit rather than with the intent to resell the asset in a commercial venture. [Burtis Testimony (Vol. X — 1927:3-1927:15)] **[**115]** In the context of commercial ventures, the mere presence of additional bidders is unlikely to increase a given bidder's perception of what it should bid for the asset, at least absent evidence that the existing bidders are aware of the additional bidders and if they are perceived by the existing bidders to have more resources and to value the asset higher. [Burtis Testimony (Vol. X — 1929:2-1930:10, 1932:8-22, 1958:17-1959:1)]

85. Here, there was no evidence presented that Newfield was told in the auction how many other bids had been made. Rather, Mr. Massaro and Mr. Howard were told only that there were "other bidders." [FF# 169]

86. I cannot find that Plaintiffs have shown, by a preponderance of the evidence, that the addition of a single bidder would have impacted the final outcome of the auction because Newfield was never told how many bidders — or which bidders — had participated in the auction and thus I have no reason to believe that Newfield would have raised its maximum bid value based on the participation of another bidder.

87. I also find there is no non-speculative evidence that suggests Plaintiffs would have received a price for the Uinta Basin Assets in excess of that received **[**116]** in the auction had they elected to sell the assets piecemeal.

88. I therefore find that Plaintiffs have not proven by a preponderance of the evidence that the final auction price would have been different, and therefore Plaintiffs have failed to prove antitrust injury.

C. Plaintiffs Have Failed To Show Any Non-Speculative Damages

89. Plaintiffs' theory of damages is that, but for the alleged agreement, Ute Energy would have participated in the auction and the final sale price would have been higher, with the appropriate measure of damages being the difference between the sale price ($308 million) and the final sale price in the "but for" world." [Schulman Testimony (Vol. VI — 1126:21-1127:5, 1133:8-11)]

[*1212] 90. Plaintiffs, however, have failed to establish with reasonable certainty the price they would have received in the "but for" world.

91. Furthermore, Plaintiffs speculated in closing that Ute Energy might have made an offer on part of the Uinta Basin Assets outside the auction process, that BBC would have made its bid, and that Newfield would have made a bid, and, somehow, Plaintiffs would have been able to divvy up the assets between the three parties and obtain a more favorable aggregate **[**117]** price. [Plaintiffs' Closing (Vol. XI — 2165:9-2166:4)] Plaintiffs' experts, however, did not evaluate what this scenario would look like or what the expected outcome would have been. [Mimms Testimony (Vol. X — 1984:23-1985:14, 1986:11-19, 1989:11-1990:16)] Any attempt to assign damages based on a "but for" world that was not even considered by the experts and was not supported by any evidence at trial would be speculative.

92. Even if I found an award of damages appropriate under these circumstances, I cannot rely on the damages analysis proffered at trial. Plaintiffs' expert, Mr. McBeath, provided a range of values for the Uinta Basin Assets, untethered from any analysis of what the expected bids for some or part of the assets would have been in the "but for" world. [FF # 185] He did not offer up an opinion as to what the bid or range of bids would have been had Ute Energy participated.

93. Even if Mr. McBeath's analysis were relevant to establishing what the winning bid would have been in the "but for" world, or what the aggregate amount received from the piecemeal sale Plaintiffs' hypothesized at closing would have been, it fails to provide a damages estimate with reasonable certainty. **[**118]**

94. First, Mr. McBeath's damages are predicated on the insupportable assumption that the basal carbonate was a probable reserve. To be categorized as a probable reserve, the basal carbonate had to have been proved commercial. The undisputed evidence at trial was that the basal carbonate had not been proved to be commercial at the time of the auction because no horizontal drilling had been tested, and no horizontal wells had been drilled economically. [FF# 190-191] Because Mr. McBeath improperly characterized the basal carbonate as a probable reserve, he performed a discounted cash flow analysis on it, and assigned greater value to it than appropriate.

95. As Mr. McBeath acknowledged, if the basal carbonate was not commercial, it should have been characterized as a contingent resource, with no positive value assigned to it in his valuation. [FF# 193-195] Because Mr. McBeath instead assigned a value of $96 to $326 million to the basal carbonate, his analysis cannot credibly be relied on.

96. Second, Mr. McBeath failed to account for the high costs associated with developing the Uinta Basin Assets. Harvest's own materials identify the Uinta Basin Assets as a "resource play." Even Mr. McBeath **[**119]** acknowledged that it is improper to account for the costs of successful wells only because, in resource plays, you are not assured a 100% drilling and production success rate. [FF# 197-200] And yet that is exactly what Mr. McBeath did in his damages analysis. The ignored costs were over $700 million. [FF# 201]

97. Because of these primary (not exclusive) deficiencies in Mr. McBeath's damages analysis, I find that he did not offer a damages estimate with the requisite reasonable certainty to support an award of damages in this case.

98. Even if the deficiencies identified above were not fatal, Mr. McBeath has provided an inordinately broad range for the valuation of the assets — from $328 million **[*1213]** to $653.8 million. [McBeath Testimony (Vol. VI — 1192:11-14, 1250:5-9)] This makes the top end of the valuation roughly twice that of the low end and, if the $308 million purchase price is deducted (per Plaintiffs' damages theory), gives a range of damages from $20 million to $345.8 million, making the top end of the damages range more than 17 times the bottom end. While antitrust plaintiffs are not required to prove their damages with absolute certainty, such an extreme range of potential damages **[**120]** suggests that any award would be based on no more than mere speculation. *See* *World of Sleep, v. La-Z-Boy Chair Co., 756 F.2d 1467, 1478 (10th Cir. 1985)*.

99. In recognition of the huge range offered by Mr. McBeath, Plaintiffs' counsel offered at closing that a damages award number of not more than $400 million would be non-speculative. Plaintiffs offered, and I find, no basis in the record to pick this number above any other.

100. I therefore find that, even if Plaintiffs had been able to prove at trial that there existed an agreement between Newfield and Ute Energy that Ute Energy would not participate in the auction for the Uinta Basin Assets, and that

Newfield and Ute Energy were actual or potential competitors in the auction, Plaintiffs have not proven that the final auction price would have been different, and therefore Plaintiffs have failed to prove either an antitrust injury or any damages.

III. TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONSHIP WITH UTE ENERGY

101. Plaintiffs allege that Newfield interfered with their prospective business relationship with Ute Energy.

102. ***HN15***[] Colorado recognizes the tort of intentional interference with prospective business relations. *Hertz v. Luzenac Grp., 576 F.3d 1103, 1119 (10th Cir. 2009)*. "One who intentionally and improperly interferes with another's prospective **[**121]** contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from the loss of benefits of the relation . . . ." *MDM Grp. Assocs., Inc. v. CX Reinsurance Co., 165 P.3d 882, 886 (Colo. App. 2007)* (quoting *Restatement (Second) of Torts § 766B* (1979)). "While the existence of an underlying contract is not required for this tort, there must be a showing of improper and intentional interference by the defendant that prevents the formation of a contract between the plaintiff and a third party." *Id.*; *cf. Puls v. Landmark Cmty. Newspapers, Inc., 335 Fed. Appx. 805, 2009 WL 1927442, at *10 (10th Cir. July 7, 2009)* (citing *MDM Grp. Assocs., Inc.*). However, in order to prove that there is a protected prospective business relationship, the plaintiff must show that there is "a reasonable likelihood or probability that a contract would have resulted; there must be something beyond a mere hope." *Hertz, 576 F.3d at 1119* (quoting *Klein v. Grynberg, 44 F.3d 1497, 1506 (10th Cir. 2008))*.

103. I found above that Ute Energy had no prospective business relationship with Branta during the relevant time period. [FF # 23, 225-226]

104. Similarly, I find that Harvest had no prospective business relationship with Ute Energy. [FF# 23]

105. Ute Energy's CEO, Mr. Jaggers, testified that Ute Energy never considered participating in the auction for the Uinta Basin Assets, and made the decision not to participate unilaterally, without any interference from or involvement of Newfield. **[**122]** [FF # 128-146]

106. Ute Energy's lack of consideration of submitting a bid in the auction, when combined with the undisputed evidence that Ute Energy lacked the resources to submit a competitive bid regardless, confirms **[*1214]** that there was not a reasonable likelihood that Ute Energy would have entered into a contract for the sale of all or part of the Uinta Basin Assets with Plaintiffs.

107. Having had no reasonable likelihood or probability that a contract would have resulted but for the alleged interference by Newfield, Plaintiffs cannot prove the tort of tortious interference with prospective business relations.

108. Even if Plaintiffs had shown a prospective business relationship between all or one of them and Ute Energy, Plaintiffs have not presented evidence of any improper conduct that would give rise to a tortious interference claim. As I have found in connection with Plaintiffs' antitrust claims, I find no evidence of an improper agreement between Ute Energy and Newfield. Moreover, I do not find that Newfield improperly deceived Ute Energy regarding the scope of the Rocky Point AMI. Mr. Howard was unaware of the limitations in the coverage of the Rocky Point AMI at the time of the **[**123]** January 13, 2011 phone call with Mr. Jaggers, as was Mr. Jaggers, himself. [FF# 112, 115-120] I do not find that Mr. Howard had an affirmative obligation to inform Mr. Jaggers or others at Ute Energy of the plain language of their contract.

IV. CIVIL CONSPIRACY

109. Plaintiffs claim that Newfield's conduct constituted a civil conspiracy.

110. ***HN16***[] To support this claim, Plaintiffs must show: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) an unlawful overt act; and (5)

damages as to the proximate result. *Wagner v. Universal Fin'l Grp., Inc., No. 14-cv-01297, 2015 U.S. Dist. LEXIS 189637, 2015 WL 12967850, at *10 (D. Colo. Aug. 21, 2015)* (citing *Nelson v. Elway, 908 P.2d 102, 106 (Colo. 1995))*. Plaintiff must present evidence of an agreement; the court may not infer its existence. *Id.* "Additionally, the purpose of the conspiracy must involve an unlawful act or unlawful means. A party may not be held liable for doing in a proper manner that which it had a lawful right to do." *Id.* (citations omitted).

111. For the same reasons for which I find no *Sherman Act* or Colorado Antitrust Act violations, I find Plaintiffs have failed to prove that Newfield has committed a civil conspiracy.

V. CONCLUSION

112. Based on the foregoing Findings of Fact and Conclusion **[**124]** of Law, I make the following rulings. First, I find that Plaintiffs have failed to prove that Defendant Newfield breached either the Harvest CA or Branta CA by a preponderance of the evidence. Second, I find that Plaintiffs have failed to prove that Newfield and Ute Energy entered into an agreement to rig bids in violation of either the *Sherman Act* or the Colorado Antitrust Act. Third, I find that Plaintiffs have failed to prove that Newfield tortuously interfered with any prospective contract or business relationship between Plaintiffs and Ute Energy. Finally, I find that Plaintiffs have failed to prove that Newfield participated in any civil conspiracy.

113. Accordingly, Final Judgment shall enter in favor of Defendant Newfield Production Company on each of Plaintiffs' claims of relief, and each claim is hereby **Dismissed With Prejudice**.

Dated: April 12, 2018.

BY THE COURT:

/s/ ***Wiley Y. Daniel***

WILEY Y. DANIEL,

SENIOR UNITED STATES DISTRICT JUDGE

Sc Licensing v. 5 Horizons Group

United States District Court for the Central District of California

April 12, 2018, Decided; April 12, 2018, Filed

Case No.: CV 17-7542 DSF (SKx)

Reporter

2018 U.S. Dist. LEXIS 237189 *

SC LICENSING, LLC, et al., Plaintiffs, v. 5 HORIZONS GROUP, LLC, Defendant.5 HORIZONS GROUP, LLC, Counterclaimant/Third-Party Plaintiff, v. RACHEL ASHWELL, et al., Counterclaim Defendants/Third-Party Defendants.

Core Terms

License, cause of action, alleges, Trademarks, registrations, restitution, breached, products, unfair, exclusive license, Counterclaim, disgorgement, estoppel, promise, fails, terms

Counsel: **[*1]** For SC Licensing, LLC, a California limited liability company, RA Licensing, LLC, a California limited liability company, Plaintiffs: Benjamin O Aigboboh, Michael David Wilburn, LEAD ATTORNEYS, Paul A Bost, Jill M Pietrini, Sheppard Mullin Richter and Hampton LLP, Los Angeles, CA.

For 5 Horizons Group, LLC, a Missouri limited liability company, Defendant, ThirdParty Plaintiff, Counter Claimant: Alison P Buchanan, LEAD ATTORNEY, Hoge Fenton Jones and Appel Inc, San Jose, CA; Daniel D Williams, PRO HAC VICE, Hutchinson Black and Cook LLC, Boulder, CO; Wendy Wen Yun Chang, Hinshaw and Culberton LLP, Los Angeles, CA.

For Liliput & Co., LLC, Rachel Ashwell, ThirdParty Defendants: Benjamin O Aigboboh, Paul A Bost, Sheppard Mullin Richter and Hampton LLP, Los Angeles, CA.

For RA Licensing, LLC, a California limited liability company, SC Licensing, LLC, a California limited liability company, Counter Defendants: Benjamin O Aigboboh, Michael David Wilburn, LEAD ATTORNEYS, Paul A Bost, Jill M Pietrini, Sheppard Mullin Richter and Hampton LLP, Los Angeles, CA.

Judges: Dale S. Fischer, United States District Judge.

Opinion by: Dale S. Fischer

Opinion

(In Chambers) Order GRANTING in PART and DENYING in PART Motion to Dismiss Counterclaims **[*2]** (Dkt. 39)

I. FACTS

5 Horizons Group, LLC is a global products firm. Dkt. 34 (Am. Countercl.) ¶ 1. Rachel Ashwell is a designer and owner of a portfolio of brands under which furniture, décor, and other home goods are designed and marketed. Id. ¶ 9. Ashwell is the trustee of the Rachel Ashwell Revocable Trust of 2001. Id. ¶ 3. The Trust wholly owns RA Licensing and SC Licensing (RA/SC), which hold Ashwell's various trademark and product names, and Liliput, which operates brick-and-mortar and online retail stores. Id. ¶¶ 4-6.

In 2015, after several months of negotiations, 5 Horizons and RA/SC entered into the License Agreement, which granted 5 Horizons an exclusive license to RA/SC's names and trademarks for the purposes of "designing, developing, selling and distributing furniture, lighting, wall furniture products, and other home goods and décor." Id. ¶¶ 15-17.

By 2017, the parties' relationship soured. 5 Horizons alleges the Ashwell Defendants acted in concert to frustrate and circumvent the License Agreement. Id. ¶ 18-22. For example, the Ashwell Defendants continued to authorize one of 5 Horizons' competitors, Miles Talbot, to manufacture, market, and sell products covered by the License **[*3]** Agreement. Id. ¶ 22.

The parties attempted to negotiate an amended License Agreement, but were unsuccessful. Id. ¶¶ 30-31. 5 Horizons alleges that when confronted with their failures to perform as promised, RA/SC developed pretextual reasons to justify terminating the License Agreement. Id. ¶¶ 43-44. In light of RA/SC's refusal to comply with the License Agreement, 5 Horizons terminated it by letter dated October 27, 2017. Id. ¶ 47.

II. LEGAL STANDARD

Rule 12(b)(6) allows an attack on the pleadings for failure to state a claim upon which relief can be granted. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)*. However, allegations contradicted by matters properly subject to judicial notice or by exhibit need not be accepted as true, *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001)*; and a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (citation omitted). "Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Id. (alteration in original; citation and internal quotation marks omitted). A complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. This means **[*4]** that the complaint must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Ruling on a motion to dismiss will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not show[n] — that the pleader is entitled to relief." *Id. at 679* (alteration in original; citation omitted).

III. DISCUSSION

Plaintiffs and Counter-Defendants RA Licensing, LLC and SC Licensing, LLC, and Third-Party Defendants Rachel Ashwell and Liliput & Co., LLC (together, the Ashwell Defendants) move for dismissal of 5 Horizons' Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Causes of Action.[1]

A. Breach of License Agreement — Failure to Secure Registration (Against RA/SC, Second Cause of Action)

In order to state a claim for breach of contract, a plaintiff must plead the **[*5]** existence of a contract, his or her performance or excuse for nonperformance; the defendant's breach; and resulting damages. See *Otworth v. S. Pac. Transp. Co., 166 Cal. App. 3d 452, 458, 212 Cal. Rptr. 743 (1985)*. A contract may be written, oral, or implied

[1] 5 Horizons has voluntarily withdrawn its Ninth Cause of Action for Conspiracy. See Dkt. 42 (Opp'n) at 17.

by conduct. *Id. at 458-59*. The complaint must identify the specific provision of the contract allegedly breached by the defendant. See *Progressive West Ins. Co. v. Superior Court, 135 Cal. App. 4th 263, 281, 37 Cal. Rptr. 3d 434 (2005)*.

5 Horizons alleges RA/SC breached ¶ 4.2 of the License Agreement by failing to maintain trademark registrations and exclusive ownership of those trademarks. Am. Countercl. ¶¶ 54-60. Paragraph 4.2 provides: "Licensor shall maintain, all registrations for the Trademarks in the jurisdictions set forth in Schedule 4.2 hereto in the Classes of Use designated therein." Dkt. 12-1 (License Agreement) ¶ 4.2. Schedule 4.2 identifies three marks ("SHABBY CHIC"; "RACHEL ASHWELL"; and "SIMPLY SHABBY CHIC"), but does not identify anything under the columns entitled, "Jurisdiction," "Class of Goods," or "Registration No." Id. at Schedule 4.2.

5 Horizons has not sufficiently alleged that RA/SC breached ¶ 4.2. Specifically, RA/SC cannot be found to have failed to maintain "all registrations for Trademarks in the jurisdiction set forth in Schedule 4.2" when Schedule 4.2 is blank. 5 Horizons' other argument—that **[*6]** RA/SC were contractually obligated to maintain the registrations for Trademarks in force at the execution of the License Agreement—is not supported by the terms of the Agreement. In fact, the Agreement expressly entitles 5 Horizons to ask RA/SC to obtain registrations, and, if they decline, to do so at its own expense. Id. As the Agreement contemplates that RA/SC might not comply, and provides its own remedy, 5 Horizons has not stated a claim for breach. 5 Horizons' reference at oral argument to ¶ 6.1 is of no assistance, as the First Amended Counterclaim alleges a failure to maintain, not a breach of representations and warranties.

With respect to the enforcement claim, 5 Horizons does not identify any provisions of the Agreement that required RA/SC to affirmatively enforce its exclusive ownership of the Trademarks. Instead, ¶ 4.5 gives RA/SC the discretion to enforce its Trademarks, and if it failed to do so, 5 Horizons was authorized to commence an enforcement action. Id. ¶ 4.5.

5 Horizons' implied covenant of good faith and fair dealing argument fails because it is not alleged in the First Amended Counterclaim. It also fails because, as discussed, RA/SC has complied with the express **[*7]** terms of the License Agreement. See *Pasadena Live, LLC v. City of Pasadena, 114 Cal. App. 4th 1089, 1094, 8 Cal. Rptr. 3d 233 (2004)* ("The implied covenant of good faith and fair dealing is limited to assuring compliance with the *express terms* of the contract, and cannot be extended to create obligations not contemplated by the contract.") (citing 1 Witkin, Summary of Cal. Law § 743, at 449 (2003 Supp.)).

The Second Cause of Action is DISMISSED.

B. Breach of License Agreement — Violation of Exclusive License (Against RA/SC, Fourth Cause of Action)

5 Horizons alleges RA/SC breached the License Agreement's exclusivity provision and has received royalties or license fees for products for which 5 Horizons held the exclusive license. Am. Countercl. ¶¶ 66-69. 5 Horizons contends it is entitled to its "lost profits" from the breach, as well as "disgorgement of [RA/SC's] ill-gotten gains." Id. ¶ 69.

RA/SC argues that disgorgement is not a proper remedy for a breach of contract action. 5 Horizons agrees that it may not receive a "double recovery" of lost profits and disgorgement, but contends it is premature to dismiss the disgorgement theory. The Court agrees. See Ajaxo Inc. v. E**Trade Group, Inc., 135 Cal. App. 4th 21, 55-57 (2005)* (finding plaintiff should be compensated for breach of an NDA by disgorging its unjust enrichment).

The Motion to **[*8]** Dismiss the Fourth Cause of Action is DENIED.

C. Promissory Estoppel (Against Liliput and Ashwell, Fifth Cause of Action)

5 Horizons alleges a claim for promissory estoppel against Liliput and Ashwell as an alternative to its breach of contract claim.[2] Am. Countercl. ¶¶ 70-76. "The elements of a promissory estoppel claim are (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." *US Ecology, Inc. v. State, 129 Cal. App. 4th 887, 901, 28 Cal. Rptr. 3d 894 (2005)* (citation omitted).

Ashwell and Liliput dispute the first element—whether 5 Horizons has adequately pleaded that Ashwell or Liliput made a promise clear and unambiguous on its terms. The Court concludes the element is not satisfied. 5 Horizons relies on the terms of the License Agreement to allege that Ashwell and Liliput failed to live up to their promises. Am. Countercl. ¶¶ 71-72. But the License Agreement is between 5 Horizons and RA/SC, not Ashwell or Liliput. The Court is not convinced (and 5 Horizons provides no authority to support) that non-parties can be liable under a promissory estoppel theory based on the terms of **[*9]** a contract they were not party to.

The Fifth Cause of Action is DISMISSED.

D. Restitution (Against Liliput, Sixth Cause of Action)

Restitution (and unjust enrichment) "describe the theory underlying a claim that a defendant has been unjustly conferred a benefit 'through mistake, fraud, coercion, or request.'" *Astiana v. Hain Celestial Group, Inc., 783 F.3d 753, 762 (9th Cir. 2015)* (quoting 55 Cal. Jur. 3d Restitution § 2). "The return of that benefit is the remedy typically sought in a quasi-contract cause of action." Id. (citation omitted).

However, when a plaintiff fails to sufficiently plead an actionable wrong, the restitution claim must be dismissed. See *Hill v. Roll Int'l Corp., 195 Cal. App. 4th 1295, 1308 (2011)* (consumer could not maintain unjust enrichment claim absent an underlying actionable wrong). In Astiana, for example, the Ninth Circuit held the plaintiff stated a restitution claim based on allegations that defendant enticed plaintiff to purchase its products through a false and misleading label, and defendant was unjustly enriched as a result. See *Astiana, 783 F.3d at 762*.

5 Horizons' restitution claim fails because it has not sufficiently pleaded an underlying actionable wrong. 5 Horizons alleges only that Liliput acted "deceptively" when it "implied to 5 Horizons prior to execution of the License Agreement that goods sold in **[*10]** Liliput stores would be manufactured by 5 Horizons . . . ." Am. Countercl. ¶ 80. This allegation is vague and conclusory, and to the extent it sounds in fraud, is not pleaded with the requisite particularity. See *Donohue v. Apple, Inc., 871 F. Supp. 2d 913, 933 (N.D. Cal. 2012)* (dismissing restitution claim based on fraud because plaintiff "failed to sufficiently plead an actionable misrepresentation or omission").

The Sixth Cause of Action is DISMISSED.

E. Breach of Contract (Against Liliput, Seventh Cause of Action)

5 Horizons alleges that Liliput breached the License Agreement by "selling products manufactured by companies other than 5 Horizons that are subject to 5 Horizons' exclusive license." Am. Countercl. ¶¶ 84-89.

5 Horizons has not sufficiently alleged the existence of a contract between it and Liliput. The License Agreement is exclusively between RA/SC and 5 Horizons. See License Agreement at 1, 31. There are no allegations that RA/SC was empowered to commit Liliput to any of the terms. 5 Horizons' argument—that Liliput's mention in the Agreement establishes that the two companies are in "contractual privity"—is not supported by any authority at all. Without more details, a breach of contract claim does not lie against Liliput. See *Donovan v. RRL Corp., 26 Cal. 4th*

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[2] Even though 5 Horizons' breach of contract and promissory estoppel claims are mutually exclusive, the federal rules allow plaintiffs to plead inconsistent claims and theories. See *Molsbergen v. United States, 757 F.2d 1016, 1018 (9th Cir. 1985)*.

261, 271, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (2001) (contract **[*11]** formation requires an "offer communicated to the offeree and an acceptance communicated to the offeror").

The Seventh Cause of Action is DISMISSED.

F. Unfair Competition (Against Liliput, Eighth Cause of Action)

The UCL prohibits any "unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. In its Opposition, 5 Horizons clarified that it asserts its UCL claim under the "unfair" prong. Am. Countercl. ¶¶ 90-95; Opp'n at 16.

An "unfair" act is one which "threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns v. L.A. Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Because the "antitrust laws . . . were enacted for the protection of *competition*, not *competitors*," *Cargill, Inc. v. Monofort of Colorado, Inc., 479 U.S. 104, 110 (1986)* (citations omitted), "[i]njury to a competitor is not equivalent to injury to competition," and thus, standing alone, cannot suffice to establish an "unfair" act under the UCL, *Cel-Tech Commc'ns, 20 Cal. 4th at 186*.

5 Horizons alleges "Liliput has sourced license products from vendors other than 5 Horizons based on its profit motive even though it knew RA/SC had provided an exclusive license for such products to 5 Horizons." Am. Countercl. **[*12]** ¶ 94.[3] Although 5 Horizons alleges a sharp and deceptive practice that caused it harm, it fails to assert harm to competition and therefore fails to allege the requisite violation of the "policy or spirit" of an ***antitrust law***. 5 Horizons, then, has not sufficiently alleged an "unfair" act in violation of the UCL. See *Prudential Ins. Co. of Am. v. Herman, Case No. SACV 09-00432-JVS (ANx), 2009 U.S. Dist. LEXIS 135351, 2009 WL 10674431, at *3 (C.D. Cal. Aug. 31, 2009)* ("The prevention of contract breaches is not tethered to any legislatively declared policy of the UCL. The legislature enacted the UCL not to protect competitors and consumers from mere contract breaches, but to protect them from 'unfair competition.'").

The Eighth Cause of Action is DISMISSED.

G. Request for Attorneys' Fees

The Court declines to impose the extreme sanction of attorneys' fees on 5 Horizons. Going forward, the Court expects the parties to conduct themselves appropriately and act in good faith.

IV. CONCLUSION

The Second, Fifth, Sixth, Seventh, and Eighth Causes of Action are DISMISSED with leave to amend. The Ninth Cause of Action is voluntarily dismissed. The Motion to Dismiss is DENIED as to the Fourth Cause of Action. An amended counterclaim may be filed and served no later than May 14, 2018. The **[*13]** Court does not grant leave to add new defendants or new claims. Leave to add defendants or claims must be sought by a separate, properly noticed motion. 5 Horizons is ordered to provide a "red-lined" copy of any amended counterclaim to chambers email in addition to a paper chambers copy.

IT IS SO ORDERED.

Date: April 12, 2018

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[3] 5 Horizons appears to concede that it cannot allege a UCL claim based on Liliput's alleged use of 5 Horizons' intellectual property.

/s/ Dale S. Fischer

Dale S. Fischer

United States District Judge

LexisNexis®

Ass'n for Accessible Meds. v. Frosh

United States Court of Appeals for the Fourth Circuit

January 24, 2018, Argued; April 13, 2018, Decided

No. 17-2166

Reporter

887 F.3d 664 *; 2018 U.S. App. LEXIS 9265 **; 2018-1 Trade Cas. (CCH) P80,356; 2018 WL 1770978

ASSOCIATION FOR ACCESSIBLE MEDICINES, Plaintiff - Appellant, v. BRIAN E. FROSH, in his official capacity as Attorney General for the State of Maryland; DENNIS R. SCHRADER, in his official capacity as Secretary of the Maryland Department of Health, Defendants - Appellees, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, Amicus Supporting Appellant, AARP; AARP FOUNDATION; KNOWLEDGE ECOLOGY INTERNATIONAL; MARYLAND CITIZENS' HEALTH INITIATIVE EDUCATION FUND, INCORPORATED; PUBLIC CITIZEN; PUBLIC JUSTICE CENTER; MARYLAND CITIZENS' HEALTH INITIATIVE EDUCATION FUND, INCORPORATED; DISABILITY RIGHTS MARYLAND, Amici Supporting Appellee.

Subsequent History: Rehearing, en banc, denied by *Ass'n for Accessible Meds. v. Frosh, 742 Fed. Appx. 720, 2018 U.S. App. LEXIS 20683 (4th Cir., July 24, 2018)*

US Supreme Court certiorari denied by *Frosh v. Ass'n for Accessible Meds., 139 S. Ct. 1168, 203 L. Ed. 2d 197, 2019 U.S. LEXIS 826 (U.S., Feb. 19, 2019)*

Prior History: [1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. (1:17-cv-01860-MJG). Marvin J. Garbis, Senior District Judge.

Ass'n for Accessible Meds. v. Frosh, 2017 U.S. Dist. LEXIS 161168 (D. Md., Sept. 29, 2017)

Disposition: REVERSED AND REMANDED WITH INSTRUCTIONS.

Core Terms

manufacturers, prices, extraterritoriality, dormant, drugs, out-of-state, commerce, regulation, generic, increased price, consumers, prescription drug, transactions, generic drug, borders, sales, majority opinion, distributors, violates, milk, wholesale, interstate commerce, in-state, stream, unconscionable, district court, strike down, affirmation, gouging, products

LexisNexis® Headnotes

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN1[] **Healthcare Litigation, Antitrust Actions**

Maryland's Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" prohibits a manufacturer or wholesale distributor from engaging in price gouging in the sale of an essential off-patent or generic drug. *Md. Code Ann., Health-Gen. § 2-802(a)*. The Act defines "price gouging" as an unconscionable increase in the price of a prescription drug. *Md. Code Ann., Health-Gen. § 2-801(c)*. "Unconscionable increase" is further defined as an increase that is excessive and not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health and results in consumers having no meaningful choice about whether to purchase the drug at an excessive price due to the drug's importance to their health and insufficient competition in the market. *§ 2-801(f)*. The "essential" medications subject to the law are those made available for sale in Maryland that either appear on the Model List of Essential Medicines most recently adopted by the World Health Organization or are designated as an essential medicine due to their efficacy in treating a life-threatening health condition or a chronic health condition that substantially impairs an individual's ability to engage in activities of daily living. *§ 2-801(b)(1)*.

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN2[] **Healthcare Litigation, Antitrust Actions**

A manufacturer or wholesale distributor determined to be in violation of Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" may face a number of legal consequences, including a civil penalty of $10,000 per violation or an action to enjoin the sale of the medication at the increased price. *Md. Code Ann., Health-Gen. § 2-803(d)*. To assist the Maryland Attorney General in identifying violations, the Act provides that the Maryland Medical Assistance Program may notify the Attorney General in the event of a particular price increase, including when an increase would result in an increase of 50% or more in the wholesale acquisition cost of the drug within the preceding one-year period or when a 30-day supply of the drug would cost more than $ 80 at the drug's wholesale acquisition cost. *§ 2-803(a)*.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

HN3[] **Standards of Review, De Novo Review**

The appellate court reviews the dismissal de novo, accepting the plaintiff's well-pleaded allegations as true and drawing all reasonable inferences in the plaintiff's favor.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN4[] **Commerce Clause, Dormant Commerce Clause**

Implicit in the constitutional allocation of the power yo regulate commerce among the several states, *U.S. Const. art. I, § 8, cl. 3*, to the federal government is a corollary constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce. This doctrine, known as the "dormant" commerce clause, is driven by concern about economic protectionism and seeks to prevent state regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN5[] **Commerce Clause, Dormant Commerce Clause**

The principle against extraterritoriality as it relates to the Dormant Commerce Clause is derived from the notion that a State may not regulate commerce occurring wholly outside of its borders. The principle reflects the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the individual States within their respective spheres. A state law violates the extraterritoriality principle if it either expressly applies to out-of-state commerce, or has that practical effect, regardless of the legislature's intent.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN6[] **Commerce Clause, Dormant Commerce Clause**

A state statute may not regulate commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State. Specifically, a state law may not have the practical effect of establishing 'a scale of prices for use in other states.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN7[] **Commerce Clause, Dormant Commerce Clause**

A statute that directly controls commerce occurring wholly outside the legislating state's boundaries is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. The statute's practical effect is the focus of the inquiry.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN8[] **Commerce Clause, Dormant Commerce Clause**

In evaluating a statute's practical effect, the court considers not only the consequences of the statute itself, but also how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if every State adopted similar legislation. This is because the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN9[] **Commerce Clause, Dormant Commerce Clause**

the extraterritoriality principle is violated if the state law at issue regulates the price of any out-of-state transaction, either by its express terms or by its inevitable effect.

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN10[] **Healthcare Litigation, Antitrust Actions**

The plain language of Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" allows Maryland to enforce the Act against parties to a transaction that did not result in a single pill being shipped to Maryland. Specifically, the Act prohibits price gouging in the sale of an essential off-patent or generic drug. *Md. Code Ann., Health-Gen. § 2-802(a)*. Essential off-patent or generic drug is defined, in part, as a drug that is made available for sale in Maryland. *Md. Code Ann., Health-Gen. § 2-801(b)(1)(iv)*. This "made available for sale" language does not limit the Act's application to sales that actually occur within Maryland, nor does it restrict the Act's operation to the context of a resale transaction with a Maryland consumer. Indeed, the Act is intended to reach sales upstream from consumer retail sales. Such "upstream" sales would occur almost exclusively outside Maryland.

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN11[] **Healthcare Litigation, Antitrust Actions**

Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" targets conduct that occurs entirely outside Maryland's borders, a conclusion supported by the Act's prohibition of a manufacturer's use of the defense that it did not directly sell to a consumer in Maryland. *Md. Code Ann., Health-Gen. § 2-803(g)*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN12[] **Commerce Clause, Dormant Commerce Clause**

A statute is invalid where it controls the price of transactions that occur wholly outside the state.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN13[] **Commerce Clause, Dormant Commerce Clause**

Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition," by its own terms, is not fixated on the price the Maryland consumer ultimately pays for the drug. Instead, the lawfulness of a price increase is measured according to the price the manufacturer or wholesaler charges in the initial sale of the drug. An unconscionable price increase is one that is excessive and not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health. *Md. Code Ann., Health-Gen. § 2-801(f)*. Significantly, the retailers that sell the drug directly to the consumer cannot be held liable under the Act; only a manufacturer or wholesale distributor is prohibited from engaging in price gouging. *Md. Code Ann., Health-Gen. §§ 2-802(a)*, *2-803(g)*. This structure makes clear that the conduct the Act targets is the upstream pricing and sale of prescription drugs, and the parties agree that nearly all of these transactions occur outside Maryland.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN14[] **Commerce Clause, Dormant Commerce Clause**

Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" effectively seeks to compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland. This it cannot do.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN15[] Commerce Clause, Dormant Commerce Clause

The Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN16[] Commerce Clause, Dormant Commerce Clause

States may not mandate compliance with their preferred policies in wholly out-of-state transactions.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN17[] Commerce Clause, Dormant Commerce Clause

Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" is effectively a price control statute that instructs manufacturers and wholesale distributors as to the prices they are permitted to charge in transactions that do not take place in Maryland. This is precisely the conduct the rule that was applied in Baldwin and Healy aims to prevent. the Act does not establish a price schedule for prescription drugs, nor does it aim to tie the prices charged for prescription drugs in Maryland to the prices at which those drugs are sold in other states. the Act attempts to dictate the price that may be charged elsewhere for a good. Any legitimate effects the Act may have in Maryland are insufficient to protect the law from invalidation.

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN18[] Healthcare Litigation, Antitrust Actions

Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" aims to override prescription drug manufacturers' reaction to the market and to regulate the prices these manufacturers charge for their products. This is more than an upstream pricing impact -- it is a price control.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN19[] Commerce Clause, Dormant Commerce Clause

The fundamental problem with Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" is that it regulates the price of an out-of-state transaction. The Act instructs prescription drug manufacturers that they are prohibited from charging an unconscionable price in the initial sale of a drug, which occurs outside Maryland's borders. Maryland cannot, even in an effort to protect its consumers from skyrocketing prescription drug costs, impose its preferences in this manner. The practical effect of the Act is to specify the price at which goods may be sold beyond Maryland's borders.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN20[] **Commerce Clause, Dormant Commerce Clause**

The critical inquiry for Dormant Commerce Clause purposes is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN21[] **Commerce Clause, Dormant Commerce Clause**

The practical effect of a statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN22[] **Commerce Clause, Dormant Commerce Clause**

The Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

HN23[] **Commerce Clause, Dormant Commerce Clause**

The Dormant Commerce Clause does not protect the particular structure or methods of operation in a retail market.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN24[] **Commerce Clause, Dormant Commerce Clause**

If Maryland compels manufacturers to sell prescription drugs in the initial transaction at a particular price, but another state imposes a different price, then manufacturers could not comply with both laws in a single transaction. The manufacturers' compliance would require more than modification of their distribution systems; it would force them to enter into a separate transaction for each state in order to tailor their conduct so as not to violate any state's price restrictions. Even then, if a drug from a transaction addressed to another state were later made available for sale in Maryland, Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" would permit Maryland to penalize the manufacturer. The potential for the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude is therefore both real and significant. Thus, the Fourth Circuit is pressed to invalidate the Act.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Dormant Commerce Clause

Healthcare Law > Healthcare Litigation > Antitrust Actions

HN25[] **Commerce Clause, Dormant Commerce Clause**

Maryland's "Act concerning Public Health--Essential Off-Patent or Generic Drugs--Price Gouging--Prohibition" is unconstitutional under the Dormant Commerce Clause because it directly regulates transactions that take place outside Maryland.

Counsel: ARGUED: Jay P. Lefkowitz, KIRKLAND & ELLIS LLP, New York, New York, for Appellant. Joshua Neal Auerbach, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees.

ON BRIEF: Jonathan D. Janow, Matthew D. Rowen, KIRKLAND & ELLIS LLP, Washington, D.C., for Appellant.

Brian E. Frosh, Attorney General, Leah J. Tulin, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees.

Warren Postman, Janet Galeria, UNITED STATES CHAMBER LITIGATION CENTER, Washington, D.C.; William S. Consovoy, Bryan K. Weir, CONSOVOY MCCARTHY PARK PLLC, Arlington, Virginia, for Amicus Chamber of Commerce of the United States of America.

William Alvarado Rivera, Iris Y. González, David Edmon, AARP FOUNDATION LITIGATION, Washington, D.C., for Amici AARP, AARP Foundation, Knowledge Ecology International, The Maryland Citizens' Health Initiative Education Fund, and Public Citizen.

K'Shaani Smith, Murnaghan Appellate Advocacy Fellow, PUBLIC JUSTICE CENTER, Baltimore, **[**2]** Maryland, for Amici Public Justice Center, Maryland Citizens' Health Initiative Education Fund, Incorporated, and Disability Rights Maryland, Incorporated.

Judges: Before AGEE, WYNN, and THACKER, Circuit Judges. Judge Thacker wrote the majority opinion, in which Judge Agee joined. Judge Wynn wrote a dissenting opinion. WYNN, Circuit Judge, dissenting.

Opinion by: THACKER

Opinion

[*666] THACKER, Circuit Judge:

The Association for Accessible Medicines ("AAM") appeals the district court's dismissal of its dormant *commerce clause* challenge to a Maryland statute prohibiting price gouging in the sale of prescription drugs. AAM also appeals the district court's refusal to enjoin enforcement of the statute on the basis that it is unconstitutionally vague. We hold that the statute violates the dormant *commerce clause* because it directly regulates the price of transactions that occur outside Maryland.[1] Accordingly, we reverse the district court's dismissal of that claim and remand with instructions to enter judgment in favor of AAM.

I.

Factual Background and Procedural History

A.

Maryland's Anti-Price Gouging Statute

In response to reports of price gouging by pharmaceutical manufacturers in the sale of certain prescription medications, Maryland's legislature passed **[**3]** HB 631, "An Act concerning Public Health — Essential Off-Patent or Generic Drugs — Price Gouging — Prohibition" (the "Act"), during the 2017 legislative session. J.A. 42-48.[2] Maryland's governor refused to sign the bill, citing constitutional and other concerns, and the bill became law without his signature. The Act went into effect on October 1, 2017.

HN1[] The Act prohibits "[a] manufacturer or wholesale distributor" from "engag[ing] in price gouging in the sale of an essential off-patent or generic drug." *Md. Code Ann., Health—General § 2-802(a)*. The Act defines "price gouging" as "an unconscionable increase in the price of a prescription drug." *Id. § 2-801(c)*. "Unconscionable increase" is further defined as an increase that "[i]s excessive and not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health" and "[r]esults in consumers . . . having no meaningful choice about whether to purchase the drug at an excessive price" due to the drug's "importance . . . to their health" and "[i]nsufficient competition in the market." *Id. § 2-801(f)*. The "essential" medications subject to the law are those "made available for sale in [Maryland]" that either "appear[] on the Model List of **[**4]** Essential Medicines most recently adopted by the World Health Organization" or are "designated . . . as an essential medicine due to [their] efficacy in treating a life-threatening health condition or a chronic health condition that substantially impairs an individual's ability to engage in activities of daily living." *Id. § 2-801(b)(1)*.

HN2[] A manufacturer or wholesale distributor determined to be in violation of the Act may face a number of legal consequences, including a civil penalty of $10,000 per violation or an action to enjoin the sale of the medication at the increased price. *See Md. Code Ann., Health—General § 2-803(d)*. To assist the Maryland Attorney General in identifying violations, the Act provides that the Maryland Medical Assistance Program "may notify the Attorney **[*667]** General" in the event of a particular price increase, including when an increase "[w]ould result in an increase of 50% or more in the wholesale acquisition cost of the drug within the preceding 1-year period" or when a 30-day supply of the drug "would cost more than $80 at the drug's wholesale acquisition cost." *Id. § 2-803(a)*.

B.

AAM's Suit Challenging the Act

AAM is a voluntary organization with a membership that consists of prescription drug manufacturers and wholesale distributors **[**5]** and other entities in the pharmaceutical industry. AAM's member-manufacturers, only one of which is based in Maryland, typically sell their products to wholesale pharmaceutical distributors, *none of which are based in Maryland*. The vast majority of these sales occur outside Maryland's borders.

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[1] Because we hold that the statute is unconstitutional pursuant to the dormant *commerce clause*, we need not address whether it is also void for vagueness.

[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

On July 6, 2017, AAM filed this action against Brian Frosh, Maryland's Attorney General, and Dennis R. Schrader, Secretary of the Maryland Department of Health (collectively, "Maryland"). Among other claims, AAM asserts that the Act violates the dormant *commerce clause* and is unconstitutionally vague. Maryland filed a motion to dismiss AAM's suit, which the district court granted as to the dormant *commerce clause* claim but denied as to the vagueness claim. The district court also denied AAM's motion for a preliminary injunction. AAM timely appealed.

II.

Dormant *Commerce Clause* Challenge

AAM argues that the district court improperly dismissed its claim that the Act violates the dormant *commerce clause* by directly regulating wholly out-of-state commerce. ***HN3***[] We review the dismissal de novo, "accepting [AAM's] well-pleaded allegations as true and drawing all reasonable inferences in [AAM's] favor." *Schilling v. Schmidt Baking Co., 876 F.3d 596, 599 (4th Cir. 2017)*.

A.

The Dormant *Commerce Clause* and the Principle Against Extraterritoriality

HN4[] Implicit **[**6]** in the constitutional allocation of the "Power . . . To regulate Commerce . . . among the several States," *U.S. Const. art. I, § 8, cl. 3*, to the federal government is a corollary "constraint on the power of the States to enact legislation that interferes with or burdens interstate commerce." *Brown v. Hovatter, 561 F.3d 357, 362 (4th Cir. 2009)*. This doctrine, known as the "dormant" *commerce clause*, "is driven by concern about economic protectionism" and seeks to prevent state "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id. at 363* (quoting *Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008))*.

HN5[] The principle against extraterritoriality as it relates to the dormant *commerce clause* is derived from the notion that "a State may not regulate commerce occurring wholly outside of its borders." *Star Sci., Inc. v. Beales, 278 F.3d 339, 355 (4th Cir. 2002)* (citing *Healy v. Beer Inst., 491 U.S. 324, 335-36, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582-83, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*; *Edgar v. MITE Corp., 457 U.S. 624, 642-43, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982)* (plurality opinion)). The principle "reflect[s] the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the autonomy of the **[*668]** individual States within their respective spheres." *Healy, 491 U.S. at 335-36* (footnote omitted). A state law violates the extraterritoriality principle if it either expressly applies to out-of-state commerce, *see Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 491-92 (4th Cir. 2007)*, or has that "practical effect," regardless of the legislature's intent, *Star Sci., 278 F.3d at 355*.

1.

One of **[**7]** the earliest cases to address the extraterritoriality principle as it relates to the dormant *commerce clause* is *Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)*. The New York law at issue in *Baldwin* required milk dealers to pay a minimum amount to milk producers, even when the milk was purchased outside New York. *See id. at 519*. The parties agreed that "New York ha[d] no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." *Id. at 521*. In holding that the law violated the dormant *commerce clause*, the Supreme Court observed that the law essentially operated as a duty on milk produced in other states and therefore unlawfully burdened interstate commerce. *See id. at 521-22*.

A plurality of the Court expounded on this concept nearly half a century later in *Edgar v. MITE Corp., 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982)* (plurality opinion). The Illinois law challenged in *Edgar* required "any takeover offer for the shares of a target company [to] be registered with the Secretary of State" if Illinois shareholders owned at least 10% of the company or if the company was organized under Illinois law or headquartered in the state, among other conditions. *Id. at 626-27* (internal footnote omitted). The Illinois Secretary of State had the authority "to deny registration to a tender offer" under certain circumstances. **[**8]** *Id. at 627*. The plurality held that the Illinois law violated the dormant *commerce clause* by "directly regulat[ing] transactions which take place across state lines, even if wholly outside the State of Illinois" because it permitted the Illinois Secretary of State to reject a tender offer even as to those shares not owned by Illinois shareholders. *Id. at 641-42*. In other words, the law granted the Illinois Secretary of State the ability to intervene in transactions between an out-of-state acquiring company and out-of-state shareholders of the target company when neither the acquiring company nor the target company's shareholders had connections to Illinois.

The Court favorably referenced both *Baldwin* and *Edgar* in *Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*. The New York law struck down in *Brown-Forman* "requir[ed] distillers to affirm that they will make no sales anywhere in the United States at a price lower than the posted price in New York," which prohibited the distillers from lowering their prices in other states. *Id. at 579-80*. The Court noted that the law regulated commerce in other states by controlling liquor prices in those states, which would "effectively force [the distiller] to abandon its promotional allowance program in States in which that program is legal, or force those other States **[**9]** to alter their own regulatory schemes in order to permit [the distiller] to lower its New York prices without violating the affirmation laws of those States." *Id. at 583-84*. As a result, the law was invalid. *See id. at 584*.

[*669] Just three years later, the Supreme Court considered a similar Connecticut law in *Healy v. Beer Institute, 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*. The law, which was aimed at preventing Connecticut residents from crossing state lines to purchase cheaper beer, required beer producers to affirm that their Connecticut prices were, "at the moment of posting, no higher than the prices at which those products are sold in the bordering States." *Id. at 326*. From its "cases concerning the extraterritorial effects of state economic regulation," *id. at 336* (citing *Brown-Forman, 476 U.S. at 579, 581-83*; *Edgar, 457 U.S. at 642-43*; *Baldwin, 294 U.S. at 528*), the Supreme Court outlined the principle against extraterritoriality:

1) ***HN6***[] A state statute may not regulate "commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Id. at 336*. Specifically, a state law may not have "the practical effect of establishing 'a scale of prices for use in other states.'" *Id.* (quoting *Baldwin, 294 U.S. at 528*).

2) ***HN7***[] "A statute that directly controls commerce occurring wholly outside the [legislating state's] boundaries . . . is invalid regardless of whether **[**10]** the statute's extraterritorial reach was intended by the legislature." *Id.* The statute's "practical effect" is the focus of the inquiry. *Id.*

3) ***HN8***[] In evaluating a statute's "practical effect," the Court considers "not only . . . the consequences of the statute itself, but also . . . how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if . . . every[] State adopted similar legislation." *Id. at 336*. This is because "the *Commerce Clause* protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State." *Id. at 336-37*.

Applying these three directives, the Court invalidated the Connecticut law due to its "undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State." *Id. at 337*. The Court also emphasized that "the practical effect of this affirmation law, in conjunction with the many other beer-pricing and affirmation laws that have been or might be enacted throughout the country, is to create just the kind of competing and interlocking local economic regulation that the *Commerce Clause* was meant to preclude." *Id.*

2.

Maryland asserts that in *Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644, 669, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003)*, the Supreme Court limited the **[**11]** principle against extraterritoriality in the dormant *commerce clause* context to price affirmation statutes. The Maine law at issue in *Walsh* established a program through which the state would "attempt to negotiate rebates with drug manufacturers to fund the reduced price for drugs offered to [program] participants." *Id. at 649*. The petitioner challenged the law on the basis "that the rebate requirement constitutes impermissible extraterritorial regulation." *Id. at 669*. The Supreme Court concluded that "[t]he rule that was applied in *Baldwin* and *Healy*" did not apply to the rebate program because "unlike price control or price affirmation statutes, '[the program] does not regulate the **[*670]** price of any out-of-state transaction, either by its express terms or by its inevitable effect.'" *Id.* (quoting *Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81-82 (1st Cir. 2001))*.

Maryland's reading of this language, while adopted by two of our sister circuits, is too narrow. The Supreme Court's statement does not suggest that "[t]he rule that was applied in *Baldwin* and *Healy*" applies *exclusively* to "price control or price affirmation statutes." *See* *Walsh, 538 U.S. at 669*. Instead, the Court's statement emphasizes that ***HN9***[] the extraterritoriality principle is violated if the state law at issue "regulate[s] the price of any out-of-state **[**12]** transaction, either by its express terms or by its inevitable effect." *Id.* The Maine program challenged in *Walsh* directly affected only transactions in Maine and did not impact the prices drug manufacturers could charge elsewhere. Further, the Illinois statute at issue in *Edgar*, which permitted the Secretary of State to block the takeover of a target company with certain connections to Illinois, clearly was not a price control or price affirmation statute, but the Court nonetheless concluded that it ran afoul of the principle against extraterritoriality. *See* *457 U.S. at 627, 641-42*; *see also* *Healy, 491 U.S. at 333 n.9* (stating that *Edgar* "significantly illuminates the contours of the constitutional prohibition on extraterritorial legislation"). We therefore reject Maryland's argument that *Walsh* limited the extraterritoriality principle only to price affirmation statutes.

B.

AAM's Challenge to the Act

We now turn to the merits of AAM's dormant *commerce clause* challenge. AAM asserts that the Act directly regulates the prices charged for prescription drugs in out-of-state transactions, even though its provisions are triggered only when one of those drugs is available for sale in Maryland. Maryland acknowledges that the Act is intended to reach the manufacturers' **[**13]** conduct in the series of wholesale transactions that occur "upstream" from consumer retail sales but argues that these indirect effects do not violate the dormant *commerce clause*'s prohibition on direct regulation.

We agree with AAM that the district court erroneously upheld the Act under the dormant *commerce clause*. First, the Act is not triggered by any conduct that takes place within Maryland. Second, even if it were, the Act controls the prices of transactions that occur outside the state. Finally, the Act, if similarly enacted by other states, would impose a significant burden on interstate commerce involving prescription drugs. All of these factors combine to create a violation of the dormant *commerce clause*.

1.

The Act is Not Limited to Sales Wholly Within Maryland

In reaching its conclusion, the district court emphasized that the Act's provisions "are triggered only when there is a drug . . . made available for sale *within* the state." J.A. 486 (emphasis in original). The district court likened the Act to the Virginia statute at issue in *Star Scientific*, but this comparison is inapposite. *See* *id. at 485-86*. The Virginia statute at issue in *Star Scientific* did not apply to sales to distributors, retail chains, or consumers *outside Virginia* ***[**14]*** . Instead, it specifically required tobacco manufacturers selling cigarettes *in Virginia* to join a nationwide settlement agreement or place into escrow a fee of two cents per cigarette actually sold in the state. *See* *Star Sci., 278 F.3d at* ***[*671]*** *346*. The relevant conduct penalized by that statute was the sale of a cigarette *in Virginia*.

In contrast, here, ***HN10***[] the Act's plain language allows Maryland to enforce the Act against parties to a transaction that did not result in a single pill being shipped to Maryland. Specifically, the Act prohibits "price gouging in the sale of an essential offpatent or generic drug." *Md. Code Ann., Health—General § 2-802(a)*. "Essential offpatent or generic drug" is defined, in part, as a drug "[t]hat is made available for sale in [Maryland]." *Id. § 2-801(b)(1)(iv)*. This "made available for sale" language does not limit the Act's application to sales that actually occur within Maryland, nor does it restrict the Act's operation to the context of a resale transaction with a Maryland consumer. Indeed, Maryland acknowledges that the Act is intended to reach sales upstream from consumer retail sales. *See* Oral Argument at 20:45-55, *Ass'n for Accessible Meds. v. Frosh*, No. 17-2166 (4th Cir. Jan. 24, 2018), http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments **[**15]** ("[T]he conduct that violates the statute could manifest itself in a wholesale transaction that occurs out-of-state.").[3] Such "upstream" sales would occur almost exclusively outside Maryland.

Therefore, ***HN11***[] the Act targets conduct that occurs entirely outside Maryland's borders, a conclusion supported by the Act's prohibition of a manufacturer's use of the defense that it did not directly sell to a consumer in Maryland. *See Md. Code Ann., Health—General § 2-803(g)* ("[A] person who is alleged to have violated a requirement of this subtitle may not assert as a defense that the person did not deal directly with a consumer residing in [Maryland]."). The district court thus erred in relying on the Act's "made available for sale" language to uphold the Act.

2.

The Act Impacts Transactions that Occur Wholly Outside Maryland

Even if the Act did require a nexus to an actual sale in Maryland, ***HN12***[] it is nonetheless invalid because it still controls the price of transactions that occur wholly outside the state. *See Brown-Forman, 476 U.S. at 580* ("The mere fact that the effects of New York's ABC Law are triggered only by sales of liquor within the State of New York . . . does not validate the law if it regulates the out-of-state transactions of distillers who sell in-state."). **[**16]** ***HN13***[] The Act, by its own terms, is not fixated on the price the Maryland consumer ultimately pays for the drug. Instead, the lawfulness of a price increase is measured according to the price the manufacturer or wholesaler charges *in the initial sale of the drug*. An "unconscionable" price increase is one that "[i]s excessive and not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health." *Md. Code Ann., Health—General § 2-801(f)*. Significantly, the retailers that sell the drug directly to the consumer cannot be held liable under the Act; only "[a] manufacturer or wholesale distributor" is prohibited from "engag[ing] in price gouging." *Id. § 2-802(a)*; *see id. § 2-803(g)*. This structure makes clear that the conduct the Act targets is the upstream pricing and sale of prescription drugs, and the parties agree that nearly all of these transactions occur outside Maryland.[4]

[*672] Therefore, ***HN14***[] the Act effectively seeks to compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland. This it cannot do. *See Healy, 491 U.S. at 336* (***HN15***[] "[T]he '*Commerce Clause* . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce **[**17]** has effects within the State' . . . ." (quoting *Edgar, 457 U.S. at 642-43*)); *Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1103 (9th Cir. 2013)* (explaining that ***HN16***[] "[s]tates may not mandate compliance with their preferred policies in wholly out-of-state transactions" (citing *Walsh, 538 U.S. at 669*)).

More importantly, ***HN17***[] the Act is effectively a price control statute that instructs manufacturers and wholesale distributors as to the prices they are permitted to charge in transactions that do not take place in Maryland. This is precisely the conduct "[t]he rule that was applied in *Baldwin* and *Healy*" aims to prevent. *Walsh, 538 U.S. at 669* (concluding that the Maine law at issue was valid in part because "Maine does not insist that manufacturers sell

[3] Thus, even if we applied a limiting construction to require a consumer sale in Maryland prior to enforcement of the Act, Maryland's own interpretation of the Act clarifies that it targets not a consumer retail sale but the manufacturer's initial sale of the drug.

[4] AAM challenges the Act only as it applies to these out-of-state sales.

their drugs to a wholesaler for a certain price"). We acknowledge that the Act does not establish a price schedule for prescription drugs, nor does it aim to tie the prices charged for prescription drugs in Maryland to the prices at which those drugs are sold in other states. *See* Healy, 491 U.S. at 338; Brown-Forman, 476 U.S. at 582. But like the laws struck down in Healy and Brown-Forman, the Act attempts to dictate the price that may be charged elsewhere for a good. Any legitimate effects the Act may have in Maryland are insufficient to protect the law from invalidation. *See* Brown-Forman, 476 U.S. at 580.

3.

The Act Implicates a Price Control as Opposed to **[**18]** an Upstream Pricing Impact

Maryland attempts to justify the Act by arguing that its out-of-state pricing implications are merely "the upstream pricing impact of a state regulation." Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 220 (2d Cir. 2004). But the Act is unlike the statute at issue in *Freedom Holdings*, which banned the importation of cigarettes manufactured by companies that did not comply with an escrow law similar to the one we upheld in *Star Scientific. See* id. at 211-14. The importers in *Freedom Holdings* argued that the New York law regulated out-of-state commerce by requiring manufacturers to sell cigarettes at a higher price "to purchasers in sales transactions that occur wholly outside [New York]." Id. at 220. The Second Circuit rejected the argument, holding that "[t]he extraterritorial effect described by [the importers] amounts to no more than the upstream pricing impact of a state regulation" and observing that "a similar pricing impact might result from any state regulation of a product." *Id.* The price change caused by the New York law at issue in *Freedom Holdings* -- unlike that mandated by the Act here -- was the result of natural market forces and was not artificially imposed by the laws of another state. By contrast, ***HN18***[] the Act aims to override prescription **[**19]** drug manufacturers' reaction to the market and to regulate the prices these manufacturers charge for their products. This is more than an "upstream pricing impact" -- it is a price control.

Therefore, ***HN19***[] the fundamental problem with the Act is that it "regulate[s] the price of [an] out-of-state transaction." Walsh, 538 U.S. at 669. The Act instructs prescription drug manufacturers **[*673]** that they are prohibited from charging an "unconscionable" price in the initial sale of a drug, which occurs outside Maryland's borders. Maryland cannot, even in an effort to protect its consumers from skyrocketing prescription drug costs, impose its preferences in this manner. The "practical effect" of the Act, much like the effect of the statutes struck down in *Brown-Forman* and *Healy*, is to specify the price at which goods may be sold beyond Maryland's borders. *See* Healy, 491 U.S. at 336 (***HN20***[] "The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State." (citing Brown-Forman, 476 U.S. at 579)). The district court erred by failing to account for this impact.

4.

The Act Burdens Interstate Commerce in Prescription Drugs

The Act's significant scope is further illuminated by the burden similar legislation would place on interstate **[**20]** commerce. *See* Healy, 491 U.S. at 336 (***HN21***[] "[T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."). Because the Act targets wholesale rather than retail pricing, an analogous restriction imposed by a state other than Maryland has the potential to subject prescription drug manufacturers to conflicting state requirements. *See* id. at 336-37 ("Generally speaking, ***HN22***[] the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State."); Brown-Forman, 476 U.S. at 583-84. And the Act's relatively subjective definition of what constitutes an unlawful price increase only exacerbates the problem. If multiple states enacted this type of legislation, then a manufacturer may consummate a transaction in a state where the transaction is fully permissible, yet still be subject to an enforcement action in another state (such as Maryland) wholly unrelated to the transaction.

In upholding the Act, the district court referred **[**21]** to this conundrum as a "practical problem" and suggested that prescription drug manufacturers could simply modify their distribution systems to track the shipments of drugs bound for Maryland and isolate those drugs in order to comply with the Act. J.A. 489-90. It is indeed true that ***HN23***[] the dormant *commerce clause* does not "protect[] the particular structure or methods of operation in a retail market." *Exxon Corp. v. Governor of Md., 437 U.S. 117, 127, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978)*. But the Act requires manufacturers and wholesale distributors to do more than alter their distribution channels. It sets prescription drug prices in a way that "interfere[s] with the natural function of the interstate market" by superseding market forces that dictate the price of a good. *McBurney v. Young, 569 U.S. 221, 235, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013)* (quoting *Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 806, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976))*. ***HN24***[] If Maryland compels manufacturers to sell prescription drugs in the initial transaction at a particular price, but another state imposes a different price, then manufacturers could not comply with both laws in a single transaction. The manufacturers' compliance would require more than modification of their distribution systems; it would force them to enter into a separate transaction for each state in order to tailor their conduct so as not to **[*674]** violate any state's price restrictions. Even then, if a drug **[**22]** from a transaction addressed to another state were later made available for sale in Maryland, the Act would permit Maryland to penalize the manufacturer. The potential for "the kind of competing and interlocking local economic regulation that the *Commerce Clause* was meant to preclude" is therefore both real and significant. *Healy, 491 U.S. at 337*. We are thus pressed to invalidate the Act.

5.

In sum, we hold that ***HN25***[] the Act is unconstitutional under the dormant *commerce clause* because it directly regulates transactions that take place *outside Maryland*. We therefore reverse the district court's dismissal of this claim and remand this matter to the district court with instructions to enter judgment in favor of AAM.

To be clear, we in no way mean to suggest that Maryland and other states cannot enact legislation meant to secure lower prescription drug prices for their citizens. Indeed, the Supreme Court upheld a Maine law with that very aim in *Walsh. See 538 U.S. at 653-54, 669-70*.

Although we sympathize with the consumers affected by the prescription drug manufacturers' conduct and with Maryland's efforts to curtail prescription drug price gouging, we are constrained to apply the dormant *commerce clause* to the Act. Our dissenting colleague suggests that by doing so, we imply that prescription **[**23]** drug manufacturers have a constitutional right to engage in price gouging. *See post* at 57-58. This is a sweeping and incorrect conclusion to draw from our holding that Maryland is prohibited from combating prescription drug price gouging *in the manner utilized by the Act*. Prescription drug manufacturers are by no means "constitutionally entitled," *id.* at 57, to engage in abusive prescription drug pricing practices. But Maryland must address this concern via a statute that complies with the dormant *commerce clause of the U.S. Constitution*.

III.

Conclusion

For the foregoing reasons, we reverse the district court's dismissal of AAM's dormant *commerce clause* challenge and remand with instructions to enter judgment in favor of AAM. AAM's request for an injunction pending this appeal is denied as moot.

REVERSED AND REMANDED WITH INSTRUCTIONS

Dissent by: WYNN

Dissent

WYNN, Circuit Judge, dissenting:

After a series of high-profile incidents in which several generic pharmaceutical manufacturers imposed multiple-thousand-fold price increases for single-source generic drugs that treat rare and life-threatening conditions, the Maryland legislature enacted legislation prohibiting "unconscionable" price increases for certain generic drugs "made available for sale" to Maryland consumers. **[**24]** *Md. Code Ann. Health-Gen. §§ 2-801 to - 803* (2017). But a trade association representing generic pharmaceutical manufacturers—which styles itself the "Association for Accessible Medicines" ("AAM" or "Plaintiff")—brought this action to enjoin the Maryland statute on grounds that it violates the dormant *Commerce Clause* and is unconstitutionally vague. The district court upheld Maryland's authority under the dormant *Commerce Clause* to protect its citizens from the abusive pricing practices at issue. I agree with the district court's holding, but my colleagues in the majority hold otherwise.

[*675] In particular, the majority opinion holds that the Maryland statute violates the dormant *Commerce Clause*'s "extraterritoriality doctrine" to the extent that it applies to sales of generic drugs between manufacturers and distributors consummated outside of Maryland, even when the generic drugs involved in such out-of-state transactions are subsequently resold to Maryland consumers. *Ante* at 13-15. Put differently, the majority opinion concludes that the *Commerce Clause* bars Maryland from protecting its citizens against unconscionable pricing practices by out-of-state generic drug manufacturers who distribute their drugs to Maryland's citizens through an out-of-state intermediary. That conclusion **[**25]** conflicts with the approach taken by several of our sister circuits in deciding whether a state statute's extraterritorial reach violates the dormant *Commerce Clause*.

Contrary to the majority opinion's conclusion, Maryland is authorized under its "general police powers to regulate matters of legitimate local concern." *Lewis v. BT Inv. Mgrs., Inc., 447 U.S. 27, 36, 100 S. Ct. 2009, 64 L. Ed. 2d 702 (1980)* (internal quotation marks omitted). Here, Maryland legitimately targeted generic drug pricing practices specifically designed to prey on the special vulnerabilities of a defenseless group of Maryland's citizens. Simply put, the Maryland statute—which applies equally to in-state and out-of-state manufacturers and distributors—does not implicate the concerns that lie at the heart of the Supreme Court's dormant *Commerce Clause* jurisprudence: economic protectionism, discrimination against interstate commerce, and State regulation of streams of transactions that never cross through the State's borders. *See* *Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 337-38, 128 S. Ct. 1801, 170 L. Ed. 2d 685 (2008)*. Accordingly, I respectfully dissent.

I.

Two recent reports by the federal government regarding generic drug pricing gave rise to Maryland taking action to protect its citizens from abusive pricing practices by a subset of generic drug manufacturers. Both reports were prompted by media stories highlighting **[**26]** significant increases in the price of certain generic drugs. *See, e.g.*, Jonathan D. Alpern *et al.*, High-Cost Generic Drugs—Implications for Patients and Policy Makers, 371 N. Engl. J. Med. 1859, 1859-60 (2014); Andrew Pollack, *Once a Neglected Treatment, Now an Expensive Specialty Drug*, N.Y. Times, Sept. 21, 2015, at B1.

The first report, prepared by the Government Accountability Office ("GAO") in response to a request by a bipartisan group of legislators, examined pricing trends for generic drugs covered by the Medicare program's outpatient prescription drug benefit, commonly referred to as "Medicare Part D." *See* U.S. Gov't Accountability Off., GAO-16-706, Generic Drugs Under Medicare: Part D Generic Drug Prices Declined Overall, but Some Had Extraordinary Price Increases (2016) [hereinafter, "GAO Report"]. The GAO Report found that for a basket of 1,441 "established generic drugs"—"drugs that were continuously billed under Medicare Part D . . . during [the] study period"—prices fell, on average, 0.7 percent per quarter from the first quarter of 2010 through the second quarter of 2015. *See id.* at 9. Although prices for established generic drugs generally declined during the 2010 to 2015 period, **[**27]** the GAO Report further found that "315 of the 1,441 established drugs experienced an extraordinary price increase—a price increase of at least 100 percent." *Id.* at 12. Notably, the number of established drugs experiencing a price increase of at least 100 percent *increased* during the five-year study period: **[*676]** 45 drugs experienced such an increase between the first quarter of 2010 and the first quarter of 2011, whereas 103 drugs experienced such an increase between the first quarter of 2014 and the first quarter of 2015. *Id.* at 12, 18.

A smaller subset of established generic drugs experienced even more "extraordinary" price increases—48 such drugs experienced a price increase of 500 percent or greater and 15 such drugs experienced a price increase of 1,000 percent or greater. *Id.* at 14. The vast majority of these extraordinary price increases persisted throughout the term of the study. *Id.* at 18.

Most of the established generic drugs experiencing extraordinary price increases were not among the 100 most heavily prescribed established generic drugs covered under Medicare Part D. To that end, stakeholders interviewed by GAO reported that "[i]f a generic drug serves a small [patient] population, . . . it [is] more susceptible to **[**28]** price increases" because "there may be little financial incentive for a [competing] manufacturer to enter the market" and thus less "downward pressure on price." *Id.* at 24. Stakeholders also reported that supplier and buyer consolidation can drive price increases, as can difficulty manufacturing a particular generic drug. *Id.* The second report, prepared by the United States Senate Special Committee on Aging, investigated and analyzed several "abrupt and dramatic" price increases for certain generic drugs. *See* Senate Special Comm. on Aging, *Sudden Price Spikes in Off- Patent Prescription Drugs: The Monopoly Business Model that Harms Patients, Taxpayers, and the U.S. Health Care System* 3 (2016) [hereinafter, "Senate Report"]. The Senate Report examined the circumstances surrounding large price increases for seven generic drugs, all of which had lacked patent protection for decades, sold by four generic pharmaceutical companies—two of which were formed and managed by sinceconvicted investor Martin Shkreli.[1]*Id.* at 5-6. All seven price increases exceeded 300 percent, with five of the price increases at or exceeding 2,000 percent. *Id.* at 6.

The Senate investigation **[**29]** revealed that the four companies followed a common "business model" in acquiring and marketing the seven generic drugs. *Id.* at 4. In particular, each case involved a (1) single-source generic drug (2) distributed through a "closed distribution system" that (3) was essential to—the "gold standard" for—(4) treating a rare condition. *Id.* at 4, 30-31. Each of these four characteristics allowed the company to "exercise de facto monopoly pricing power, and then impose and protect astronomical price increases," the Senate committee found. *Id.* at 4.

For example, single-source drugs distributed through closed-distribution systems—which make it harder for potential entrants to bring to market a competitive product or attract and retain patients—are unlikely to face competition, thereby allowing sellers to charge monopoly prices, notwithstanding the generic drug's lack of patent protection. *Id.* at 4, 30-31. Likewise, when a generic drug is the "gold standard" for treating a particular condition, physicians continue to prescribe the drug, even in the face of substantial price increases. *Id.* at 30; *see also, e.g.*, *id.* at 56 (chief executive of one generic firm explaining that it had monopoly "pricing **[*677]** power" for a generic drug that is the standard-of-care for **[**30]** treating a rare and deadly disease because, absent the drug, patients would face "liver failure or a liver transplant or even death"). And because the generic drugs treat a "rare" condition "the patient population dependent upon them [is] too small to organize effective opposition to the price increase." *Id.* at 31.

The Senate Report found that the large price increases "devastated patients . . . across the nation," many of whom were "forced to go without vital medicine[s]" or switch to alternative, potentially less effective, therapies. *Id.* at 7-8. The price increases also harmed providers. For example, the Johns Hopkins Health System, which is headquartered in Maryland, reported that it lost nearly $1 million in 2015 alone as a result of several-hundred-fold price increases for two of the drugs. *Id.* at 6-8. The price increases also led to increases in spending by governmental health care programs, including state Medicaid programs. *Id.* at 110. The report further concluded that existing federal competition laws were inadequate to prevent the dramatic price increases and suggested several statutory and regulatory remedies. *Id.* at 116-25.

After reviewing these reports, the Maryland legislature decided to enact legislation to combat what **[**31]** it concluded were abusive pricing practices by certain generic drug suppliers. To that end, on May 27, 2017, the

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[1] On March 9, 2018, the U.S. District Court for the Southern District of New York sentenced Shkreli to seven years' imprisonment for securities fraud and conspiracy to commit securities fraud. Stephanie Clifford, *Citing "Multitude of Lies," Judge Sentences Shkreli to 7 Years in Fraud Case*, N.Y. Times, Mar. 10, 2018, at B2.

Maryland General Assembly passed HB 631. That statute, which went into effect on October 1, 2017, prohibits manufacturers and distributors from engaging in "price gouging" in the sale of an "essential off-patent or generic drug." *Md. Code Ann. Health-Gen. § 2-802(a)*. The statute exempts "wholesale distributors" from liability, however, if they impose a price increase that "is directly attributable to additional costs for the drug imposed on the wholesale distributor by the manufacturer of the drug." *Id. § 2-802(b)*.

HB 631 defines "essential off-patent or generic drug" as a drug: (1) "[f]or which all exclusive marketing rights, if any, granted under the federal *Food, Drug, and Cosmetic Act*, *§ 351 of the federal Public Health Service Act*, and federal patent law have expired"; (2) that is listed on the Model List of Essential Medicines, as adopted by the World Health Organization, or that has been has been designated, according to specified criteria, an "essential medicine" by the Maryland Secretary of Health; (3) "[t]hat is actively manufactured and marketed for sale in the United States by three or fewer manufacturers"; and **[**32]** (4) that is "made available for sale" in the State of Maryland. *Id. § 2-801(b)(1)*. "Essential off-patent or generic drug" also includes any "drug-device combination product used for the delivery of a drug" for which all exclusive marketing rights have expired. *Id. § 2-801(b)(2)*. Although HB 631 regulates only those generic drugs "made available for sale" in Maryland, "a person who is alleged to have violated [the statute] may not assert as a defense that the person did not deal directly with a consumer residing in the State." *Id. §§ 2-801(b)(1)*, *2-803(g)*.

The statute defines "price gouging" as an "unconscionable increase in the price of a prescription drug." *Id. § 2-801(c)*. Tracking many aspects of the "business model" identified in the Senate Report, the statute provides that an "unconscionable increase" means an increase in price that (1) "[i]s excessive and not justified by the cost of producing the drug or the cost of appropriate expansion of access to the drug to promote public health"; and (2) "[r]esults in consumers for whom the drug has been prescribed having no meaningful choice about whether to purchase the drug at an excessive price" due to the "importance of **[*678]** the drug to their health" and insufficient market competition. *Id. § 2-801(f)*.

HB **[**33]** 631 authorizes the Attorney General to petition a Maryland circuit court to restrain or enjoin violations of the statute; restore money to consumers obtained as a result of violations; require manufacturers that have engaged in "price gouging" to provide the drug to participants in any state health plan or state health program at the drug's last permissible price for a period of up to one year; and order civil penalties of up to $10,000. *Id. § 2-803(d)*.

HB 631 also confers monitoring authority on the State's Medicaid program, the Maryland Medical Assistance Program (the "Medicaid Program"). In particular, the Medicaid Program may notify the Attorney General of certain price increases to an "essential off-patent or generic drug." Specifically, the Medicaid Program may notify the Attorney General if (1) a price increase, either by itself or together with other price increases, would cause a fifty percent or more increase, as measured within a one year time period, to the wholesale acquisition cost or price paid by the Medicaid Program; and (2) it would cost $80 at the wholesale acquisition cost to obtain a thirty day supply of the maximum recommended dosage, a full course of treatment, or if the **[**34]** drug is not made available in such quantities, it would exceed $80 at the wholesale acquisition cost to obtain a thirty day supply or full course of treatment. *Id. § 2-803(a)*. After receiving notification of such an increase, the Attorney General may demand that the manufacturer imposing the increase submit documentation that itemizes the cost of production; provides explanation for the price increase, including information related to any expenditures made to "expand access to the drug," as well as the associated benefits to the public health; and any other relevant information. *Id. § 2-803(b)*.

II.

On appeal, AAM argues that HB 631, as applied to any transaction consummated outside of Maryland's borders, violates the *Commerce Clause*, regardless of whether the drugs involved in such transaction later are resold in Maryland. Before addressing the merits of that claim, it is first necessary to determine what the Maryland legislature intended when it limited HB 631's extraterritorial reach to generic drugs "made available for sale" in Maryland. *Id. § 2-801(b)(1)*. The district court held, correctly in my view, that HB 631 is "triggered only when there is a drug . . . made available for sale *within* [Maryland]." *Ass'n for Accessible Meds. v. Frosh, No. 17-cv-1860, 2017 U.S. Dist. LEXIS 161168, 2017 WL 4347818, at *6 (D. Md. Sept. 29, 2017)*. **[**35]** The majority opinion, however, concludes that HB 631 "is not triggered by any conduct that takes place within Maryland." *Ante* at 12; *see also id.* at 12-13

("*[Section 2-801(b)(1)](#)*'s] plain language allows Maryland to enforce [HB 631] against parties to a transaction that did not result in a single pill being shipped to Maryland."); *id.* at 14 (asserting that HB 631 does not "require a nexus to an actual sale in Maryland"). For several reasons, I disagree with the views of my colleagues in the majority.

To begin, the majority opinion's conclusion that HB 631 requires no "nexus to an actual sale in Maryland," *id.* at 14, runs contrary to the State's representation as to its own statute's extraterritorial reach. Before the district court and this Court, the State repeatedly asserted that HB 631 "*in no way prohibits* any of AAM's members from selling drugs at a conscience-shocking price to distributors, to the extent that those drugs are later sold in California or in any other state." J.A. 291 (emphasis added); *see also* Appellee's Br. 7 (representing **[*679]** that HB 631 "applies only when drugs are sold in Maryland"). Put differently, the State represents that HB 631 "does not reach, or purport to reach, any stream of commerce **[**36]** *that does not end in Maryland*." Mem. In Support of Defs.' Mot. to Dismiss, at 23, *Ass'n for Accessible Meds. v. Frosh*, No. 17-cv-1860 (D. Md. Aug. 14, 2017), ECF No. 29-1 (emphasis added). Because pre-enforcement constitutional challenges to state statutes—like AAM's dormant *Commerce Clause* challenge—are disfavored, *see* *Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450-51, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)*, and because the State repeatedly has represented that HB 631's reach does not extend to generic drugs that are not later sold in Maryland, principles of federalism and judicial restraint dictate that we construe the statute's reach as not extending to any stream of commerce that does not end in Maryland.

The majority opinion's conclusion that the statute extends to drugs not ultimately sold in Maryland also conflicts with AAM's understanding of the statute's extraterritorial reach. In particular, AAM asserts that HB 631 "reach[es] 'sale[s]' that take place outside of Maryland, *so long as the objects of those sales are later resold in Maryland*." Appellant's Br. 28 (emphasis added). AAM, therefore, has not challenged the State's representation—and the district court's conclusion—that HB 631 is "triggered only when there is a drug . . . made available for sale *within* [Maryland]." *Frosh, 2017 U.S. Dist. LEXIS 161168, 2017 WL 4347818, at *6*. **[**37]** In such circumstances, the majority opinion errs in reaching out to reject the State's construction of its own statute, and AAM's acquiescence in that construction. *Cf.* *United States v. Al-Hamdi, 356 F.3d 564, 571 n.8 (4th Cir. 2004)* ("It is a well settled rule that contentions not raised in the argument section of the opening brief are abandoned.").

Even if the parties disagreed as to whether the statute's applicability requires an in-state sale, Maryland rules of statutory construction—which this Court must follow—support rejecting the majority opinion's broad interpretation of the statute's extraterritorial reach. *See* *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 489 (4th Cir. 2007)* ("In construing a state law, we look to the rules of construction applied by the enacting state's highest court.").

In *Carolina Trucks*, this Court considered a dormant *Commerce Clause* challenge to a South Carolina statute that prohibited motor vehicle manufacturers from "sell[ing], directly or indirectly, a motor vehicle to a consumer in this State, except through a new motor vehicle dealer." *Id. at 488*. The plaintiff argued that the phrase "in this State" modified only the term "consumer," meaning the statute prohibited "manufacturer-to-consumer sales to South Carolina buyers without regard to the state in which the sales took place"—including sales consummated **[**38]** outside of South Carolina's borders. *Id.* Noting that "[t]he statute is ambiguous as to what 'in this State' modifies," this Court rejected the plaintiff's proposed broad construction of the statute's extraterritorial reach. *Id at 488-89*. In reaching that conclusion, we emphasized that broadly construing the ambiguous statutory language would run contrary to South Carolina rules of statutory construction, which "provide that statutes must not be read to operate outside the state's borders." *Id.*

Like the statute at issue in *Carolina Trucks*, *Section 2-801(b)(1)*'s limitation of HB 631's reach to essential generic drugs "made available for sale" in Maryland is at least ambiguous as to the statute's extraterritorial reach. In particular, this Court reasonably could interpret the statute as **[*680]** applying only to those specific unconscionably priced pills that are sold or resold in Maryland—as the State represents and the district court concluded—or as extending to any unconscionably priced generic drug, some pills of which are "made available for sale" in Maryland, regardless of whether the particular pills subject to an enforcement action actually are sold or resold in Maryland—as the majority concludes. And like South Carolina **[**39]** law, Maryland law dictates that "unless an intent to the contrary is *expressly* stated, acts of the legislature will be presumed not to have any extraterritorial effect." *Chairman of Bd. of Trs. of Emps.' Ret. Sys. v. Waldron, 285 Md. 175, 183-84, 401 A.2d 172 (Md. 1979)* (emphasis added). *Carolina Trucks*, therefore, requires that we reject a "broader interpretation" of *Section 2-801(b)(1)*'s extraterritorial reach, like that adopted by the majority opinion.

Additionally, the majority opinion's broad construction of the statute's extraterritorial reach conflicts with the rule of construction, applied by Maryland courts, requiring a court "whenever reasonably possible, [to] construe and apply a statute to avoid casting serious doubt upon its constitutionality." *R.A. Ponte Architects, Ltd. v. Invs.' Alert, Inc., 382 Md. 689, 857 A.2d 1, 18 (Md. 2004)* (quoting *Becker v. State, 363 Md. 77, 767 A.2d 816, 824 (Md. 2001))*. To be sure, a State statute that regulated sales in streams of commerce not ending in that State would raise significant concerns under the dormant *Commerce Clause*. But that is not a concern here because Maryland law obliges that we interpret the law narrowly—and in accordance with the State's own construction—as applying only to sales in streams of commerce ending in Maryland.

III.

Because HB 631 regulates, at most, sales of essential generic drugs in streams of commerce that end in Maryland, AAM's *Commerce Clause* challenge is without merit.

The *Commerce Clause* entrusts Congress with **[**40]** the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *U.S. Const. art. I, § 8, cl. 3*. The Supreme Court "has long recognized that this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce." *Healy v. Beer Inst., 491 U.S. 324, 326 n.1, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989)*. To that end, the "dormant" *Commerce Clause* "prohibits States from legislating in ways that impede the flow of interstate commerce." *Star Sci., Inc. v. Beales, 278 F.3d 339, 355 (4th Cir. 2002)*. Although some earlier Supreme Court decisions broadly applied the dormant *Commerce Clause* to invalidate state laws, "modern" dormant *Commerce Clause* jurisprudence "is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors," *Davis, 553 U.S. at 337-38* (internal quotation marks omitted).

AAM does not argue that HB 631 implicates either of these concerns underlying the Supreme Court's modern dormant Commerce Cause jurisprudence: discrimination against interstate commerce or favoring in-state economic interests over out-of-state economic interests. Rather, AAM contends—and the majority opinion agrees—that HB 631 violates the "extraterritoriality doctrine."

The extraterritoriality **[**41]** doctrine—a judge-made doctrine which states that a State may not regulate "commerce occurring wholly outside [its] boundaries," *Healy, **[*681]** 491 U.S. at 336*; *see also Star Sci., 278 F.3d at 355*—has been characterized by our sister circuits as the "the most dormant" of the Supreme Court's dormant *Commerce Clause* jurisprudence, *Energy & Envtl. Legal Inst. v. Epel (EELI), 793 F.3d 1169, 1172 (10th Cir. 2015)* (Gorsuch, J.); *IMS Health Inc. v. Mills, 616 F.3d 7, 29 n.27 (1st Cir. 2010)* ("Extraterritoriality has been the dormant branch of the dormant *Commerce Clause*."), *vacated sub nom. on other grounds IMS Health, Inc. v. Schneider, 564 U.S. 1051, 131 S. Ct. 3091, 180 L. Ed. 2d 911 (2011)*. Indeed, several circuits have questioned the continuing vitality of the extraterritoriality doctrine following the Supreme Court's decision in *Pharmaceutical Research & Manufacturers of America v. Walsh*, which "pointedly referred to [the extraterritoriality doctrine] as 'the rule that was applied in *Baldwin* [*v. G.A.F. Seelig, Inc., 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)*,] and *Healy*.'" *IMS Health, 616 F.3d at 29 n.27*; *EELI, 793 F.3d at 1174-75*; *see also Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 381 (6th Cir. 2013)* (Sutton, J., concurring) (noting that there never has been "a single Supreme Court dormant *Commerce Clause* holding that relied exclusively on the extraterritoriality doctrine to invalidate a state law").

Not only have courts questioned the extraterritoriality doctrine's continuing vitality, judges and commentators also have questioned the constitutional rationale underlying the doctrine, in light of new and expanded modes of interstate commerce, changes to the Supreme Court's interpretation **[**42]** of the *Commerce Clause*, and the availability of potentially more appropriate constitutional provisions, like the *Due Process Clause*, to ensure that States do not unduly extend their regulatory authority beyond their borders. *See Am. Beverage, 735 F.3d at 377-80* (describing the extraterritoriality doctrine as "a relic of the old world with no useful role to play in the new"); Brandon P. Denning, *Extraterritoriality and the Dormant* Commerce Clause*: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979, 998 (2013); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant* Commerce Clause, 110 Yale L.J. 785, 788-90, 806 (2001). Nevertheless, unless and until the Supreme Court repudiates the extraterritoriality doctrine as a separate line of dormant Commerce Clause jurisprudence, we are constrained to determine whether HB 631, as applied to out-of-state transactions involving essential generic drugs later sold in Maryland, amounts to a regulation of "commerce occurring wholly outside [Maryland's] borders," as the Supreme Court used that phrase in *Healy*.

The majority opinion concludes that HB 631 regulates "*commerce* occurring wholly outside the boundaries of [Maryland]," Healy, 491 U.S. at 336 (emphasis added)—and therefore violates the dormant Commerce Clause—because it "controls the price of *transactions* that occur wholly outside of the state," *ante* at 14 (emphasis added). I, however, conclude that the **[**43]** Supreme Court's Commerce Clause jurisprudence—including its decisions applying the extraterritoriality doctrine, in particular—and this Court's decisions applying that jurisprudence do not support equating a single "transaction" with "commerce," as the majority opinion does in striking down HB 631.

The Supreme Court first defined "commerce," as that term is used in the Commerce Clause, in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 6 L. Ed. 23 (1824) (Marshall, J.). There, the appellee argued that the meaning of commerce is "limit[ed] to traffic, to buying and selling, or the interchange of commodities." Id. at 189. Writing for the Court, Chief Justice Marshall **[*682]** rejected the appellee's narrow definition—which sought to limit the meaning of commerce to a single exchange of goods—stating that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches . . ." Id. at 189-90.

Notwithstanding Chief Justice Marshall's expansive definition of commerce in *Gibbons*, between the late Nineteenth Century and the New Deal the Supreme Court narrowly interpreted the term, treating each distinct transaction within a single stream of economic activity as a piece of "commerce." For example, in Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936), the **[**44]** Supreme Court struck down a federal law establishing boards responsible for determining the wages, hours, and working conditions of coal mine employees, id. at 280-84. The Court concluded that Congress lacked power under the Commerce Clause to regulate coal mine workers' terms of employment because "the relation of employer and employee . . . in all producing occupations is purely local in character." Id. at 303. In reaching this conclusion, the Court rejected the argument that the subsequent sale of the mined coal rendered the terms of the miners' employment in "commerce," and therefore subject to congressional regulation. *Id.* "Mining brings the subject-matter of commerce into existence. Commerce disposes of it," the Court held. Id. at 304. *Carter* is one example of a series of cases excluding "production" and "manufacturing" from the definition of "commerce." *See also, e.g.,* Champlin Ref. Co. v. Corp. Comm'n of State of Okl., 286 U.S. 210, 235, 52 S. Ct. 559, 76 L. Ed. 1062 (1932) ("[Oil] production is essentially a mining operation, and therefore is not a part of interstate commerce, even though the product obtained is intended to be and in fact is immediately shipped in such commerce."); United States v. E.C. Knight Co., 156 U.S. 1, 12, 15 S. Ct. 249, 39 L. Ed. 325 (1895) ("Commerce succeeds to manufacture, and is not a part of it.").

The Supreme Court abandoned the production-commerce distinction in a series of cases **[**45]** beginning with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 40, 57 S. Ct. 615, 81 L. Ed. 893 (1937) ("[T]he fact that the employees here concerned were engaged in production is not determinative."). As Justice Jackson explained in Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942)—which held that the growing of wheat for personal consumption constituted commercial activity subject to congressional regulation, id. at 128-29—"[w]hether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing,' is . . . not material for purposes of deciding the question of federal power" to regulate commerce under the Commerce Clause, id. at 124. Accordingly, in cases involving the scope of the federal government's power under the Commerce Clause, the Supreme Court now interprets the term "commerce" as encompassing a stream of transactions—including those transactions necessary to produce a good, such as labor contracts, and those by virtue of which the good is distributed and sold to end-users.[2]

[*683] The now-abandoned production-commerce distinction reflected an effort by the Supreme Court to draw a bright line between the regulatory powers of the States and those of the federal government, each of which the Court viewed as "exclusive." *E.C. Knight, 156 U.S. at 11*. The Supreme Court's more expansive interpretation of the meaning of commerce in cases like *Jones & Laughlin* ***[**46]*** and *Wickard*—which returned to Chief Justice Marshall's expansive definition of the term set forth in *Gibbons*—necessarily entailed a narrowing of the restrictions on state regulatory authority imposed by the dormant *Commerce Clause*. To that end, at the same time as the Court authorized the federal government to exercise "power over traditionally 'local' activities," a separate line of Supreme Court decisions empowered the States to "share regulatory authority" in areas previously reserved to the federal government by, in appropriate circumstances, "regulat[ing] commerce that eventually would cross state lines." *Am. Beverage, 735 F.3d at 377-78* (collecting cases). As one commentator explained, "[j]ust as . . . the permissive scope for congressional commerce action has broadened . . . the prohibitive effect of the clause has been progressively narrowed. The trend has been toward sustaining state regulation formerly regarded as inconsistent with Congress' unexercised power over commerce." *Id. at 378* (quoting Wiley Rutledge, A Declaration of Legal Faith 68 (1947)).

Therefore, under the modern definition of "commerce"—which encompasses a stream of transactions—a State regulates "commerce occurring wholly outside of [its borders]," *Healy, 491 U.S. at 336*, if no transactions **[**47]** in that stream take place within the State's borders. Put differently, "State *A* cannot use its [consumer protection] law to make a seller in State *B* charge a lower price to a buyer in *C*." *In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 613 (7th Cir. 1997)* (Posner, J.). When viewed in that light, HB 631 does not regulate "commerce"—as the Supreme Court has used that term in *Commerce Clause* cases—occurring wholly outside of Maryland's borders. In particular, HB 631 applies only to upstream sales in streams of transactions that end in Maryland, *see supra* Part II, and therefore does not regulate any stream of economic activity that does not enter Maryland's borders.

That is precisely the conclusion the Seventh Circuit reached in *Brand Name Prescription Drugs*. There, a group of pharmacies alleged that certain prescription drug manufacturers were engaged in a price-fixing conspiracy. *123 F.3d at 602-03*. Like the consumers protected by HB 631, the pharmacies did not purchase the drugs directly from the manufacturers. *Id. at 603*. Rather, the manufacturers sold the drugs to wholesalers, which in turn sold the drugs to the pharmacies. *Id.* Because the Supreme Court has barred "indirect purchasers," like the pharmacies, from seeking relief under the *Sherman Act*, *see* *Ill. Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the pharmacies sought relief under **[**48]** Alabama's **[*684]** antitrust statute, *Brand Name Prescription Drugs, 123 F.3d at 612*. Notwithstanding that the sales between manufacturers and wholesalers were consummated outside of Alabama, the Seventh Circuit held that Alabama pharmacies—but not pharmacies in other States—could seek relief under the Alabama statute without violating the extraterritoriality doctrine. *Id. at 613*; *see also* *K-S Pharmacies, Inc. v. Am. Home Prods. Corp., 962 F.2d 728, 731 (7th Cir. 1992)* (Easterbrook, J.) (holding that Wisconsin statute did not violate extraterritoriality doctrine because statute did not regulate "sales outside Wisconsin for *resale outside Wisconsin*" (emphasis added)).

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[2] The majority opinion notes that in *Pharmaceutical Research & Manufacturers of America v. Walsh, 538 U.S. 644, 123 S. Ct. 1855, 155 L. Ed. 2d 889 (2003)*, the Supreme Court agreed with the First Circuit's conclusion that a statute did not violate the extraterritoriality doctrine because "unlike price control or price affirmation statutes, '[the program] does not regulate the price of any out-of-state *transaction*, either by its express terms or by its inevitable effect,'" *ante* at 10 (emphasis added) (quoting *Walsh, 538 U.S. at 669* (quoting *Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81-82 (1st Cir. 2001))*). But if a statute does not regulate the price in *any* out-of-state transaction, it certainly does not regulate prices in out-of-state "commerce," a term which the Supreme Court has defined more broadly. Accordingly, *Walsh* did not consider, much less decide, the relevant issue in the instant case—whether a State may regulate an out-of-state "transaction," if that transaction is a component of "commerce," part of which occurs in the State.

In accordance with the meaning of "commerce" adopted in *Jones & Laughlin* and *Wickard* and applied in *Brand Name Prescription Drugs*, none of the three dormant *Commerce Clause* cases upon which the majority opinion relies—*Baldwin, Healy*, and *Brown-Forman Distillers v. N.Y. State Liquor Auth., 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)*, *ante* at 7-10[3]—holds that a nondiscriminatory State law regulating an upstream transaction in a stream of transactions that ends in the State—like HB 631—constitutes an unconstitutional regulation of "wholly" out-of-state "commerce." Rather, each of the three cases turns on the principle concerns animating the Supreme Court's dormant *Commerce Clause* jurisprudence: economic protectionism, discrimination against interstate commerce, and State regulation of a stream of transactions **[**49]** that never crosses through the State's borders.

In *Baldwin*, the Supreme Court considered a New York statute setting minimum prices that New York distributors of milk had to pay to New York dairies. *294 U.S. at 519*. The statute further provided that "there shall be no sale within [New York] of milk bought outside [of New York] unless the price paid to the producers was one that would be lawful upon a like transaction within [New York]." *Id.* The Court concluded that the latter aspect of the statute violated the dormant *Commerce Clause*, explaining "New York has no power to project its legislation into[, for example,] Vermont by regulating the price to be paid in that state for milk acquired there." *Id. at 521*. The Court further held that the statute violated the dormant *Commerce Clause* because it had the purpose of "suppress[ing] or mitigat[ing] the consequences of competition between the states." *Id. at 522*. "If New York, in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation," the Court explained. *Id.; Brown-Forman, 476 U.S. at 580* (explaining **[**50]** that *Baldwin* stood for the proposition that "[w]hile a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess"); *Milk Control Bd. of Pa. v. Eisenberg Farm Prods., 306 U.S. 346, 353, 59 S. Ct. 528,* ***[*685]*** *83 L. Ed. 752 (1939)* (explaining that *Baldwin* struck down the New York law because it "amounted in effect to a tariff barrier set up against milk imported into [New York]."). Accordingly, concerns about economic protectionism—that the New York law was intended to favor in-state interests at the expense of out-of-state producers and consumers—undergirded *Baldwin*.

Likewise, in *Brown-Forman*, the Court struck down a New York "price-affirmation" statute that "requir[ed] every liquor distiller or producer that sells liquor to wholesalers within [New York] to sell at a price that is no higher than the lowest price the distiller charges wholesalers anywhere else in the United States." *476 U.S. at 575*. In the event a distiller desired to lower its posted price in another State, it had to seek approval of a New York regulator. *Id. at 583*. The Court held that the price-affirmation statute violated the *Commerce Clause* because it had the effect of "regulat[ing] out-of-state transactions" by controlling the prices out-of-state distillers **[**51]** could charge to *out-of-state customers*—i.e., for liquor that would *never* be sold in New York. *Id. at 582* ("Once a distiller has posted prices in New York, it is not free to change its prices *elsewhere in the United States* during the relevant month." (emphasis added)). *Brown-Forman*, therefore, struck down the New York statute because it had the effect of regulating the price charged in streams of commerce that *never* entered New York's borders.

Healy also involved a "price-affirmation" statute, pursuant to which Connecticut "require[d] out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers are, as of the moment of the posting, no higher than the prices at which those products are sold in . . . bordering states." *491 U.S. at 326*. The Court concluded that the statute violated the dormant *Commerce Clause* for several reasons. First, the Connecticut statute—like the New York statute at issue in *Brown-Forman*—had the effect of controlling the prices of beer in States other than Connecticut. *Id. at 337-38*. In particular, Connecticut's affirmation and posting requirements, effectively locked in the prices brewers could charge in other States because if they changed their prices in those States **[**52]** as a result of "prevailing market conditions," they would violate the Connecticut statute. *Id. at 338*.

[3] The majority opinion also relies on the Supreme Court's decision in *Edgar v. MITE Corp., 457 U.S. 624, 102 S. Ct. 2629, 73 L. Ed. 2d 269 (1982)*, which addressed whether a state anti-takeover statute violated the Supremacy and *Commerce Clauses of the Constitution*. *Ante* at 7-8. The extraterritoriality analysis in Justice White's opinion in *Edgar*, however, did not receive support from a majority of the Court. *Id. at 626, 641-43* (opinion of White, J.). And the Court subsequently rejected a dormant *Commerce Clause* challenge to a similar, but not identical, state anti-takeover statute. *See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87-88, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987)*.

Furthermore, the posting and affirmation requirements effectively barred brewers from providing retroactive discounts, like promotional and volume discounts, outside of Connecticut, allowing Connecticut to exert further "control" over prices charged in neighboring states. *Id.* The "Connecticut Statute, like the New York law struck down in *Brown-Forman*," the Court explained, "requires out-of-state shippers to forgo the implementation of competitive pricing schemes in *out-of-state markets* because those pricing decisions are imported by statute into the Connecticut market regardless of local competitive conditions." *Id. at 339* (emphasis added); *see also* *Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 221 n.16 (2d Cir. 2004)* ("The [*Healy*] Court held the statute to be unconstitutional because it had the effect of *controlling prices in neighboring states* . . . ." (emphasis added)).

Additionally, the Connecticut statute "discriminate[d] against brewers and shippers of beer engaged in interstate commerce" because such brewers faced greater restraints on their pricing than brewers that operated solely within Connecticut. *Id. at 340-41*. Finally, the Court asserted that the statute impermissibly **[**53]** favored in-state interests at the expense **[*686]** of out-of-state interests by "depriv[ing] businesses and consumers *in other States* of 'whatever competitive advantages they may possess' based on conditions of the local market." *Id. at 339* (emphasis added) (quoting *Brown-Forman, 476 U.S. at 580*). Therefore, like *Baldwin*, concerns about economic protectionism were at the heart of *Healy*.

As then-Judge, now-Justice Gorsuch explained after closely analyzing the Court's opinions in *Baldwin, Brown-Forman*, and *Healy*, "[i]n all three cases, then, the Court . . . faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses." *EELI, 793 F.3d at 1172-73*; *see also* *Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 81 (1st Cir. 2001)* ("The statutes in [*Baldwin, Brown-Forman*, and *Healy*] involved regulating the prices charged in the home state and those charged in other states in order to benefit the buyers and sellers in the home state, resulting in a direct burden on the buyers and sellers in the other states."). In other words, "a careful look at the holdings in [*Baldwin, Brown-Forman*, and *Healy*] suggests a concern with preventing discrimination against out-of-state rivals or consumers"—the concern **[**54]** over economic protectionism underlying the Supreme Court's dormant *Commerce Clause* jurisprudence, generally. *EELI, 793 F.3d at 1173*. The extraterritoriality doctrine, therefore, as explicated in *Baldwin, Brown-Forman*, and *Healy*, applies "*only* [to] price control or price affirmation statutes that link in-state prices with those charged elsewhere and discriminate against out-of-staters." *Id. at 1174* (emphasis added).

Other circuits also have recognized the limited scope of the extraterritoriality doctrine, as the Supreme Court applied that doctrine in *Baldwin, Brown-Forman*, and *Healy. See Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris, 729 F.3d 937, 951 (9th Cir. 2013)* ("*Healy* and *Baldwin* are not applicable to a statute that does not dictate the price of a product and does not 't[ie]' the price of its in-state products to out-of-state prices."); *IMS Health, 616 F.3d at 30* (recognizing that the Supreme Court "has only struck down two related types of statutes on extraterritoriality grounds"—price affirmation statutes and "statutes that force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another" (internal quotation marks omitted)).

Here, HB 631 is not a price affirmation statute, nor does it link in-state prices to out-of-state prices. HB 631 also does **[**55]** not dictate the prices that manufacturers or distributors charge to downstream purchasers in States other than Maryland. Additionally, it is undisputed that HB 631 does not favor in-state interests at the expense of out-of-state interests—it subjects out-of-state and in-state manufacturers and distributors to the same unconscionability limitation. And it is undisputed that HB 631 does not discriminate against interstate commerce—manufacturers and distributors remain free to engage in interstate commerce, they just may not charge unconscionable prices for essential generic drugs later sold to Maryland consumers. HB 631, therefore, does not violate the extraterritoriality doctrine, as that doctrine was applied in *Baldwin, Brown-Forman*, and *Healy*. Indeed, *Brown-Forman* expressly recognized that "a State may seek lower prices for its consumers"—precisely what HB 631 does—without violating the *Commerce Clause*. *476 U.S. at 580*.

[*687] This Court reached a similar conclusion in *Star Scientific*, which involved a Virginia statute that imposed a per-cigarette escrow obligation on manufacturers of cigarettes sold in Virginia. *278 F.3d at 346*. Any manufacturer that failed to put the money in escrow was subject to civil fines and barred from selling cigarettes **[**56]** to Virginia consumers. *Id.* Like AAM, Star Scientific argued that the escrow statute violated the extraterritoriality doctrine as applied to cigarette manufacturers located outside of Virginia such as Star Scientific, because the statute "require[d] [Star Scientific] to make payments on cigarettes sold by it to *independent distributors in other states* if the cigarettes are later sold into Virginia." *Id. at 354* (emphasis added). Also like AAM, Star Scientific asserted that *Healy*'s prohibition on a State's regulation of "commerce occurring wholly outside of its borders" barred States from "attempt[ing] to regulate *aspects of the stream of commerce*"—*i.e.*, transactions—"that occur upstream, outside the State's borders." *Id. at 355* (emphasis added). This Court rejected that argument, holding that the Virginia statute did not violate the dormant *Commerce Clause* because the statute's applicability—like that of HB 631—was limited "to the sale of cigarettes 'within the Commonwealth.'" *Id. at 356* (quoting Va. Code. Ann. § 3.1-336.2.A). This Court further distinguished *Brown-Forman* and *Healy* on grounds that the Virginia statute (1) was not "aiming at or reacting to *commerce outside of Virginia*," (2) "ha[d] no effect on transactions undertaken by out-of-state distributors **[**57]** *in other States*," and (3) "does not insist on price parity with cigarettes sold *outside of the State*." *Id.* (emphasis added).

Like the statute in *Star Scientific*, HB 631 applies only to essential generics drugs sold in Maryland. *See supra* Part II. And like the statute in *Star Scientific*, HB 631 is not "aim[ed]" at "commerce" outside of Maryland, has no effect on transactions undertaken by out-of-state distributors with consumers outside of Maryland, and does not insist on "price parity" with essential generic drugs sold outside of Maryland. *Id.* Accordingly, HB 631 implicates none of the extraterritoriality concerns this Court recognized in *Star Scientific*.

In striking down HB 631, therefore, the majority opinion extends the extraterritoriality doctrine beyond the contexts in which the Supreme Court and this Court previously have applied it. The majority opinion acknowledges that in doing so, it diverges from the approach taken by several of our sister circuits, which interpret the extraterritoriality doctrine far more narrowly. *Ante* at 10. For several reasons, I do not believe such an expansion is warranted.

To begin, the majority opinion's expansive interpretation of the extraterritoriality **[**58]** doctrine substantially intrudes on the States' reserved powers to legislate to protect the health, safety, and welfare of their citizens. *See, e.g., L'Hote v. City of New Orleans, 177 U.S. 587, 596, 20 S. Ct. 788, 44 L. Ed. 899 (1900)*. The Supreme Court long has recognized that the limitation on state regulatory power imposed by the dormant *Commerce Clause* "is by no means absolute." *Lewis, 447 U.S. at 36*. "Rather, [i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected." *Id.* "And because consumer protection is a field traditionally subject to state regulation, '[courts] should be particularly hesitant to interfere with [a] State's efforts [to protect consumers] under the guise of the [dormant] *Commerce Clause*.'" *SPGGC, LLC v. Blumenthal, 505 F.3d 183, 194 (2d Cir. 2007)* (quoting *United* ***[*688]*** *Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344, 127 S. Ct. 1786, 167 L. Ed. 2d 655 (2007))*. Yet that is precisely what the majority opinion does in striking down HB 631, which amounts to an effort by the Maryland legislature to protect some of the State's most vulnerable citizens from the abusive pricing practices detailed in the GAO and Senate Reports.

Additionally, the majority opinion's broad construction of the extraterritoriality doctrine also calls into question the constitutionality of numerous state antitrust and consumer protection **[**59]** statutes. For example, many States allow indirect purchasers to seek relief under their state antitrust laws against manufacturers which engage in an antitrust conspiracy, notwithstanding that such indirect purchasers did not purchase the allegedly price-fixed product directly from the manufacturer. *See California v. ARC Am. Corp., 490 U.S. 93, 99-100, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)* (holding that the Sherman Act, which does not allow indirect purchaser actions, does not preempt state laws that allow indirect purchasers to obtain relief); *see also, e.g., Brand Name Prescription Drugs, 123 F.3d at 613* (applying Alabama ***antitrust law*** in indirect purchaser action by Alabama pharmacies against out-of-state drug manufacturers); *Clayworth v. Pfizer, Inc., 49 Cal. 4th 758, 111 Cal. Rptr. 3d 666, 233 P.3d 1066, 1070 (Cal. 2010)* (applying California ***antitrust law*** in indirect purchaser action by California pharmacies against out-of-state drug manufacturers). Yet under the majority opinion, all such laws would be unconstitutional to the extent they allow an in-state consumer to seek relief against an upstream out-of-state seller which sold the price-fixed product in an out-of-state transaction.

Likewise, numerous States impose safety, quality, and labeling restrictions on goods sold by out-of-state manufacturers through out-of-state distributors to in-state consumers. Courts consistently uphold such statutes in the **[**60]** face of Commerce Clause challenges as legitimate exercises of such States' police powers. *See, e.g.,* Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1103-04 (9th Cir. 2013) (upholding California environmental regulation governing the composition of gasoline, which applied to out-of-state producers that distributed gasoline through out-of-state distributors, and explaining that "California may regulate with reference to local harms, structuring its internal markets to set incentives for firms to produce less harmful products *for sale in California*" (emphasis added)); Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 647-48 (6th Cir. 2010) (rejecting dormant Commerce Clause challenge to state milk labeling law); Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 110-12 (2d Cir. 2001) (rejecting dormant Commerce Clause challenge to state labeling law for lightbulbs). Yet under the broad construction of the extraterritoriality doctrine in the majority opinion, none of these statutes would pass constitutional muster because they regulate wholly out-of-state "transactions." *See* EELI, 793 F.3d at 1175 (rejecting broader construction of extraterritorial doctrine because "if any state regulation that 'control[s] . . . conduct' out of state is *per se* unconstitutional, wouldn't we have to strike down state health and safety regulations that require out-of-state manufacturers to alter their designs or labels"). None of the Supreme Court's extraterritoriality doctrine opinions **[**61]** provides any indication that the Court intended for the doctrine to invalidate such a broad swath of state statutes.

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[*689] In sum, the Supreme Court's Commerce Clause jurisprudence does not support equating a single out-of-state transaction with "commerce" for purposes of the extraterritoriality doctrine. And contrary to the majority opinion's holding, neither the Supreme Court nor this Court ever has relied on the extraterritoriality doctrine as the sole basis to invalidate a state statute regulating products ultimately sold within the state's borders. The majority opinion's application of the extraterritoriality doctrine also conflicts with the approach taken by several of our sister circuits, including in factually indistinguishable cases. And the majority opinion's expansion of the extraterritoriality doctrine significantly incurs on the States' reserved police powers and would render numerous longstanding state laws unconstitutional. In such circumstances, I cannot join the majority opinion's conclusion that HB 631 violates the extraterritoriality doctrine.

IV.

The majority opinion concludes that HB 631 violates the dormant Commerce Clause for two additional reasons: (1) "an analogous restriction imposed by **[**62]** a state other than Maryland has the potential to subject prescription drug manufacturers to conflicting state requirements" and (2) it "interferes with the natural function of the interstate market by superseding market forces that the dictate the price of a good." *Ante* at 17-18. I conclude that neither argument warrants barring Maryland—or any other State—from protecting its citizens from the abusive generic drug pricing practices the legislature sought to address.

Regarding the first reason, *Healy* directed courts confronted with extraterritoriality challenges to consider "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect if not one, but many or every, State adopted similar legislation." 491 U.S. at 336. According to the majority opinion, HB 631 poses a risk of subjecting manufacturers to "'the kind of competing and interlocking local regulation that the Commerce Clause was meant to preclude'" because "[i]f Maryland compels manufacturers to sell prescription drugs in the initial transaction at a particular price, but another state imposes a different price, then manufacturers could not comply with both laws in a single transaction." *Ante* at 18 (quoting **[**63]** Healy, 491 U.S. at 338). This contention is wrong as a matter of both fact and law.

As a matter of fact, HB 631 does not "compel[] manufacturers to sell prescription drugs . . . *at a particular price*." *Id.* (emphasis added). Rather, it forbids manufacturers from imposing an "unconscionable" price increase for essential generic drugs. § 2-801(c). Generic drug manufacturers, therefore, retain broad discretion to set prices for essential generic drugs and to increase the prices of such drugs, even if another state adopted a similar law. Accordingly, the majority opinion's contention that a manufacturer could not comply with two such laws in a single transaction is speculative, at best, and therefore does not offer a basis for striking down a state statute on extraterritoriality grounds, particularly when AAM identifies no State which has adopted, or intends to adopt, a potentially conflicting regulation. *See* Rocky Mountain, 730 F.3d at 1104-05 ("To show the threat of inconsistent regulation, Plaintiffs must either present evidence that conflicting, legitimate legislation is already in place or that the threat of such legislation is both actual and imminent." (internal quotation marks omitted)); Sorrell, 272 F.3d at 112 ("It is not enough to point to a risk of conflicting **[**64]** regulatory **[*690]** regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states.").

As a matter of law, the majority opinion does not cite any authority—nor have I found any—holding that the dormant Commerce Clause entitles manufacturers to consummate all sales to a distributor in "a single transaction." On the contrary, as the majority opinion acknowledges, *ante* at 18, courts have recognized that a State can adopt a consumer protection law that may require a manufacturer to sell different products or versions of products for resale in the State than it sells in other States. For example, in *Sorrell*, the Second Circuit considered an extraterritoriality challenge to a Vermont statute that required special labeling on all mercury-containing light bulbs sold in Vermont. 272 F.3d at 107. A trade group representing light bulb manufacturers challenged the statute on extraterritoriality grounds, asserting that "[g]iven the manufacturing and distribution systems used by its members . . . if its members continue selling in Vermont, they would also be forced as a practical matter to label lamps sold in every other state." Id. at 110. The court rejected that argument, explaining that, **[**65]** by its terms, the statute did "not inescapably require manufacturers to label" lamps sold outside of Vermont and that "[t]o avoid the statute's alleged impact on other states, lamp manufacturers could arrange their production and distribution processes to produce labeled lamps solely for the Vermont market." *Id.*

Likewise, in *International Dairy*, the Sixth Circuit considered an extraterritoriality challenge by milk processors to an Ohio law regulating milk products on grounds that "due to the complex national distribution channels through which milk products are delivered" and the costs associated with altering the nationwide distribution system, milk processors would be "forced" to comply with the Ohio law "nationwide." 622 F.3d at 647. The court rejected that argument, emphasizing that the Ohio law did not require processors to sell milk in other States in conformance with the Ohio regulation, nor did it preclude other States from regulating milk in a different manner. Id. at 647-48; *see also* SPGGC, 505 F.3d at 194 (concluding that state consumer protection law regulating the terms and conditions of gift cards did not violate extraterritoriality doctrine because the law did not "directly regulate sales of gift cards in other states" **[**66]** and did not "prevent other states from regulating gift card sales differently within their own territories").

Like the statutes at issue in *Sorrell* and *International Dairy*, HB 631 does not require generic drug manufacturers to sell drugs destined for resale outside of Maryland at conscionable prices. On the contrary, HB 631 does not purport to regulate the price of essential generic drugs that do not enter Maryland's borders, nor does it bar other States from regulating differently the price of essential generic drugs sold to consumers within their borders. And AAM has not argued—much less proven—that its members could not restructure their distribution processes and contracts to ensure that distributors do not resell unconscionably priced generic drugs into Maryland. Again to the contrary, there would seem to be no obstacle to a generic drug manufacturer entering into a single contract with a distributor for an essential generic drug, under which the manufacturer imposes a conscience-shocking price increase for those pills the distributor resells outside of Maryland and a non-conscience-shocking price increase for the pills the distributor resells in Maryland. The contract could further **[**67]** require the distributor to indemnify the manufacturer against any **[*691]** liability resulting from any unconscionably priced pills that make their way into the Maryland market, unintentionally or otherwise. Accordingly, "[t]o the extent [HB 631] may be said to 'require' [conscionable pricing for drugs] sold outside [Maryland], then, it is only because the manufacturers are unwilling to modify their production and distribution systems to differentiate between [Maryland]-bound and non-[Maryland]-bound [drugs]." Sorrell, 272 F.3d at 110. That is not a basis for relying on the dormant Commerce Clause to invalidate a state consumer protection statute, like HB 631.[4] Id. at 110-11.

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[4] The majority opinion further maintains that complying with HB 631 "would require more than modification of [manufacturers'] distribution systems; it would force them to enter into a separate transaction for each state in order to tailor their conduct so as not to violate any state's price restrictions." *Ante* at 18. But at this preliminary juncture of the litigation, AAM has put forward no evidence that other States intend to impose similar statutes regulating the pricing of generic drugs, let alone evidence that its

The majority opinion's assertion that HB 631 violates the dormant *Commerce Clause* because it "'interferes with the natural function of the interstate market' by superseding market forces that dictate the price of a good" fares no better. *Ante* at 18 (quoting *McBurney v. Young, 569 U.S. 221, 235, 133 S. Ct. 1709, 185 L. Ed. 2d 758 (2013))*. As a matter of fact, the market at issue—like many markets for health care goods and services—is not one that "natural[ly] function[s]." *See generally* Erin C. Fuse Brown, *Resurrecting Health Care Rate Regulation*, *67 Hastings L.J. 85, 92-103 (2015)* (describing a variety of market failures in the health care system). On the contrary, the essential generic drugs at **[**68]** issue in this case present classic examples of market failure. The "business model" detailed in the Senate Report—which HB 631 targets—shows that the generic drug manufacturers that imposed conscience-shocking price increases exploited patients who were at a gross disadvantage in terms of bargaining power. That disadvantage derived from a lack of alternative manufacturers of the drugs—such increases were generally imposed for single-source generic drugs distributed through a "closed distribution system"—and from the fact that the drugs were essential to treating rare and life-threatening conditions. Senate Report at 4, 30-31. Because such patients lack alternatives and face a debilitating illness or even death absent these drugs, they must accept whatever price a manufacturer charges.

The Senate Report reveals that the generic manufacturers recognized and sought to exploit this bargaining inequality by imposing dramatic price increases. For example, Retrophin CEO Shkreli stated in an email explaining a 1,900 percent increase for one generic drug, which was the "only treatment for a rare disease called cystinuria," that "[t]he next generation of pharma guys (or the smart ones) understand **[**69]** the inelasticity of certain products. The insurers really don't care. They just pass [the price increase] through [to patients]." *Id.* at 41, 44-45. Likewise, Valeant CEO J. Michael Pearson explained that Valeant had monopoly "pricing power" for another generic drug that is the standard-of-care for treating a rare and deadly disease—and therefore was able to impose a multiple-thousand-fold price increase—because, absent the drug, patients would face "liver failure or a liver transplant or even death." *Id.* at 6, 56.

By analogy to the issue in this case, the Supreme Court long has recognized that States may "supersede market forces," **[*692]** *ante* at 18, by imposing wage and price restrictions when gross inequality in bargaining power leads to market failure, *see, e.g.,* *W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399, 57 S. Ct. 578, 81 L. Ed. 703 (1937)* (upholding state minimum wage law because, in part, "[t]he exploitation of a class of workers who are in unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support on the community.").

As a matter of law, since the demise of the *Lochner* doctrine, the Supreme Court has held that "[t]he Constitution **[**70]** does not guarantee the unrestricted privilege to engage in a business or conduct it as one pleases," and therefore that "statutes prescribing the terms upon which those conducting certain businesses may contract, or imposing terms if they do enter into agreements, are within the state's competency." *Nebbia v. New York, 291 U.S. 502, 527-28, 54 S. Ct. 505, 78 L. Ed. 940 (1934)*. To that end, the Supreme Court and lower courts have rejected numerous constitutional challenges to nondiscriminatory state statutes that control the price of goods or services, or otherwise interfere with "market forces that dictate the price of a good" or service. *See, e.g.,* *Milk Control Bd., 306 U.S. at 351-53* (rejecting dormant *Commerce Clause* challenge to Pennsylvania law establishing minimum prices for milk); *W. Coast Hotel, 300 U.S. at 398-400* (upholding Washington minimum wage law for female employees); *Nebbia, 291 U.S. at 515, 539* (upholding New York law which established a "Milk Control Board" to fix minimum and maximum retail prices for milk); *All. of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 32-33 (1st Cir. 2005)* (rejecting dormant *Commerce Clause* challenge to Maine law prohibiting motor vehicle manufacturers from "adding state-specific surcharges to wholesale motor vehicle prices in order to recoup the costs of their compliance with [state] retail-reimbursement laws"); *Grant's Dairy—Maine, LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 19-24 (1st Cir. 2000)* (rejecting dormant *Commerce Clause* challenge to Maine law establishing minimum price for milk). Accordingly, **[**71]** even if the markets for essential generic drugs were "natural[ly] function[ing]"—which they are not—Maryland would be entitled to regulate prices charged in those

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members would have to enter into "separate transaction[s]" to comply with multiple such laws, rather than by simply modifying their distribution systems and contracts.

markets for the public interest, so long as the regulation did not favor in-state interests at the expense of out-of-state interests or discriminate against interstate commerce.

V.

In striking down HB 631—legislation enacted to restrain abusive generic drug pricing practices specifically designed to prey on the special vulnerabilities of a defenseless group of Maryland citizens—the majority opinion "empower[s] the judiciary and leave[s] . . . state legislatures and everyone else on the sidelines." *Kolbe v. Hogan, 849 F.3d 114, 150 (4th Cir. 2017)* (Wilkinson, J., concurring). To begin, the majority opinion ignores basic principles of federalism and judicial restraint to reject the State's own interpretation of the statute's extraterritorial reach. Then, relying on its own expansive interpretation of HB 631's reach, the majority opinion extends the extraterritoriality doctrine beyond the contexts in which the Supreme Court and this Court previously have applied it, and in a manner contrary to the approach taken by several other circuits. The majority opinion's expansive conception **[**72]** of the extraterritoriality doctrine renders numerous state consumer protection statutes unconstitutional, and significantly expands federal **[*693]** courts' authority to second-guess States' efforts to protect their citizens. I do not believe that either the Framers or the Supreme Court intended for the *Commerce Clause* to serve such a purpose.

At the end of the day, AAM argues—and the majority opinion concludes—that, absent federal regulation, its members are *constitutionally entitled* to impose conscience-shocking price increases on Maryland consumers, so long as AAM's members sell their essential generic drugs to Maryland consumers through out-of-state intermediaries. But "[t]he Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people." *Nebbia, 291 U.S. at 538-39*. And the dormant *Commerce Clause* is not a "roving license" for federal courts to strike down non-discriminatory state consumer protection laws, like HB 631. *SPGGC, 505 F.3d at 194* (quoting *United Haulers, 550 U.S. at 343*). Accordingly, I respectfully dissent from the majority opinion's conclusion that HB 631 violates the extraterritoriality doctrine.

Huawei Techs. Co v. Samsung Elecs. Co

United States District Court for the Northern District of California

April 13, 2018, Decided; April 13, 2018, Filed

Case No. 3:16-cv-02787-WHO

Reporter

2018 U.S. Dist. LEXIS 63052 *; 2018 WL 1784065

HUAWEI TECHNOLOGIES, CO, LTD, et al., Plaintiffs, v. SAMSUNG ELECTRONICS CO, LTD., et al., Defendants.

Subsequent History: Motion denied by, Reconsideration denied by *Huawei Techs., Co. v. Samsung Elecs. Co., 2018 U.S. Dist. LEXIS 102617 (N.D. Cal., June 19, 2018)*

Appeal dismissed by, in part, Stay granted by, Remanded by, in part *Huawei Techs. Co., Ltd. v. Samsung Elecs. Co., Ltd., 757 Fed. Appx. 1011, 2019 U.S. App. LEXIS 7649 (Fed. Cir., Mar. 15, 2019)*

On remand at, Vacated by *Huawei Techs. Co. v. Samsung Elecs. Co., 2019 U.S. Dist. LEXIS 126133 (N.D. Cal., Mar. 21, 2019)*

Prior History: *Huawei Techs. Co. v. Samsung Elecs. Co, 2016 U.S. Dist. LEXIS 162039 (N.D. Cal., Nov. 21, 2016)*

Core Terms

patents, injunction, license, parties, infringement, injunctive relief, anti-suit, comity, enjoin, terms, seal, obligations, domestic, declarations, negotiations, insists, district court, contractual, terms and conditions, bifurcation, enforcing, factors, global, offers, breach of contract claim, injunction order, cross-license, vexatious, complied, royalty

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For Samsung Research America, Samsung Electronics Co, Ltd., Samsung Electronics America Inc, 3rd party plaintiffs, Counter-claimants: Charles Kramer Verhoeven, LEAD ATTORNEY, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, Ca; Alan Lee Whitehurst, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, DC; Benjamin Laban Singer, Singer Bea LLP, San Francisco, CA; David Andrew Perlson, Iman Lordgooei, Quinn Emanuel Urquhart & Sullivan, LLP, San Francisco, CA; Cole Daniel Malmberg, Quinn Emanuel Urquhart Sullivan LLP, Redwood Shores, CA; Deepa Acharya, Quinn Emmanuel Urquhart & Sullivan LP, **[*6]** Washington, DC; Evan N. Budaj, Singer / Bea LLP, San Francisco, CA; Jared Weston Newton, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan LLP, Washington, DC; Kevin Hardy, Washington, DC; Kevin P.B. Johnson, Ray R. Zado, Quinn Emanuel Urquhart & Sullivan, LLP, Redwood Shores, CA; Mark Thomas Gray, Quinn Emanuel Urquhart and Sullivan, Redwood City, CA; Philip Charles Sternhell, PRO HAC VICE, Quinn Emanuel Urquhart and Sullivan, Washington, DC; Rafik Paul Zeineddin, PRO HAC VICE, ZEINEDDIN PLLC, Washington, DC; Sam Stephen Stake, Quinn Emmanuel Urquhart & Sullivan, LLP, San Francisco, CA; Samuel Bryant Davidoff, Williams and Connolly LLP, Washington, DC; Thomas D. Pease, PRO HAC VICE, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY; Victoria F. Maroulis, Quinn Emanuel Urquhart Oliver & Hedges L, Redwood Shores, CA.

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Judges: William H. Orrick, United States District Judge.

Opinion by: William H. Orrick

Opinion

ORDER GRANTING SAMSUNG'S MOTION FOR ANTISUIT INJUNCTION

Re: Dkt. Nos. 234, 235, 240, 244, 277, 278

INTRODUCTION

Defendants/counterclaim-plaintiffs Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Research America, Inc. (collectively, "Samsung") seek to enjoin plaintiffs Huawei Technologies Co., Ltd., Huawei Device USA, Inc. and Huawei Technologies USA, Inc. (collectively, "Huawei") from enforcing injunction orders issued by the Intermediate People's Court of Shenzhen ("Shenzhen Court"). The Shenzhen Court orders found that Samsung is infringing two of Huawei's Chinese standard essential patents ("SEPs"), and enjoined Samsung's Chinese affiliates from manufacturing and selling its 4G LTE standardized smartphones in China. As a prerequisite to granting this relief, the Shenzhen Court considered whether the parties had complied with their obligations to license their SEPs on fair, reasonable, and nondiscriminatory ("FRAND") **[*8]** terms. Both parties have asserted breach of contract claims in this action based on the other's alleged failure to license their SEPs on FRAND terms.

Under the framework established in *E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984 (9th Cir. 2006)*, Samsung has demonstrated that it is entitled to an antisuit injunction preventing Huawei from enforcing the injunction orders issued by the Shenzhen Court. Those orders could render meaningless the proceedings here, and the risk of harm to Samsung's operations in China in the interim is great. Its motion is GRANTED.

BACKGROUND[1]

I. FACTUAL BACKGROUND

A. The Parties

Huawei and Samsung are major players in the world of wireless telecommunications—a world governed by cellular technology standards, such as the 3G UMTS and 4G LTE standards developed by the Third Generation Partnership Project ("3GPP") and promulgated by standard setting organizations like the European

[1] Portions of the background are redacted in accordance with the administrative motions submitted by both parties. Those motions are addressed at the end of this order.

Telecommunications Standards Institute ("ETSI").[2] Both Huawei and Samsung have agreed to license their declared standard essential patents ("SEPs") on fair, reasonable, and non-discriminatory ("FRAND") terms and conditions under ETSI's Intellectual Property Rights ("IPR") Policy. Compl. ¶ 63 (Dkt. No. 1[redacted], Dkt. No. 3-4[under seal]); *see also* ***[*9]*** Samsung's Answer and Am. Counterclaims ¶ 29 ("Samsung admits that ETSI members who are subject to a commitment to offer licenses on FRAND terms and conditions are obligated not to refuse to enter a license for declared, essential patents that is fair, reasonable, and non-discriminatory.")(Dkt. No. 91[redacted]; Dkt. No. 90-2[under seal]); *id.* ¶ 54 ("Samsung admits that SEC has submitted IPR licensing declaration forms to ETSI expressing SEC's [Samsung Electronics Co., Ltd.] preparedness to grant licenses on FRAND terms and conditions for certain patents as set forth in those declarations in accordance with the ETSI IPR Policy."); Samsung's Licensing Declarations (Samsung's Answer and Am. Counterclaims, Exs. 14, 23-26, 29, 34; Dkt. Nos. 91-14, -18, -23-26, -29, -34); Huawei's Licensing Declaration (Huawei's Compl., Exs. 2.1-2.43, Dkt. Nos. 3-1-13[under seal]).

B. Samsung's Manufacturing Operations in China

Samsung's Chinese manufacturing hubs have a production capacity of [TEXT REDACTED BY THE COURT], the second largest worldwide. T. Wang Decl. ¶ 5 (Dkt. No. 240-48[under seal]). In 2015 and 206, Samsung **[*10]** manufactured [TEXT REDACTED BY THE COURT] in China, of which [TEXT REDACTED BY THE COURT] were imported to the United States. *Id.* ¶¶ 6, 7. In the same years, Samsung sold [TEXT REDACTED BY THE COURT] units of LTE devices in China for a total revenue of [TEXT REDACTED BY THE COURT]. *Id.*

C. Negotiation History

In 2011, the parties began discussing a cross-license for their respective patent portfolios, but they disagreed on the scope of those licenses. *E.g.*, 3/2/15 Letter from Huawei to Samsung re" Patent Licensing Negotiation (Stake Decl. ¶ 19, Ex. 19, Dkt. No. 234-10[under seal]). I will not recount the history of their failure to reach agreement in the ensuing years, since all of the information has been filed under seal, except to wonder aloud how it can be in the interest of these important multi-national corporations to slog through unending litigation around the globe rather than figure out a process to resolve their differences if agreement is impossible.

II. PROCEDURAL HISTORY

Huawei filed this action on May 24, 2016, asserting infringement of 11 of its SEPs, and alleging that Samsung breached "its commitment to enter into a SEP cross-license with [Huawei] on FRAND terms and conditions." **[*11]** Compl. ¶¶ 1, 4. Huawei also asks the court to set the terms and conditions for a global FRAND cross license under the parties' respective worldwide portfolios of essential 3G and 4G patents, and to enjoin Samsung from "seeking injunctive relief against Huawei (including affiliates) in any jurisdiction with respect to any alleged infringement of any patent essential to 3GPP standards."[3] Compl. at Prayer for Relief, E. Samsung answered and filed counterclaims, including patent infringement claims for its own declared essential SEPs, declarations of non-

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[2] Standard Setting Organizations "establish technical specifications to ensure that products from different manufacturers are compatible with each other." *Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 875 (9th Cir. 2012)*("Microsoft II")(citing Mark A. Lemley, *Intellectual Property Rights and Standard—Setting Organizations*, *90 Calif. L.Rev. 1889 (2002)*). Many courts have expounded on the benefits of standards in various industries. *See, e.g., Microsoft Corp. v. Motorola, Inc., 795 F.3d 1024, 1030 (9th Cir. 2015)*("*Microsoft IV*"); *Apple, Inc. v. Motorola Mobility, Inc., 2011 U.S. Dist. LEXIS 72745, 2011 WL 7324582, at *1 (W.D. Wis. June 7, 2011)*.

[3] Huawei points out that it has not sought preliminary injunctive relief attempting to halt any of the seven remaining actions brought by Samsung in China, which seek injunctive relief against Huawei based on its alleged infringement of Samsung's SEPs. Opp'n at 8.

infringement and invalidity of Huawei's patents, and claims for antitrust violation in violation of section 2 of the Sherman Act,[4] and breach of contract. Answer and Am. Counterclaims at 47-114.

The next day,[5] Huawei filed 11 separate actions in China, ten of which it filed in the Intermediate People's Court of Shenzhen ("Shenzhen Court") where Huawei is based. Xie Decl. ¶ 3 (Dkt. No. 235-2). Eight of the actions involve 3G and 4G SEPs, including direct counterparts to patents-in-suit. *Id.* Each action seeks a determination on whether the SEP is infringed, and if so, whether an injunction should issue.[6] *Id.* Samsung countered with fourteen of its own actions **[*12]** in China, alleging Huawei is infringing Samsung's SEPs and seeking injunctive relief. Wang Decl. ¶¶ 2-8; Xie Decl. ¶ 2 n.1. Seven of those SEP actions remain pending.[7] *See* Xie Decl. ¶ 2 n.1.

The Chinese actions have proceeded quicker than this one. *See* Wang Decl. ¶ 9 (describing status of the various actions). In particular, the Shenzhen court has held trials on two of Huawei's SEPs and two of Samsung's SEPs. Wang Decl. ¶¶ 9, 10. The trials addressed both FRAND issues and technical issues specific to each SEP. *Id.* ¶ 9. During these trials, the parties had full opportunities to present their evidence and argument. *Id.* ¶ 11; *see also id.* ¶¶ 12-19 (explaining the proceedings before the Shenzhen court that form the basis for this motion).

On January 11, 2018, the Shenzhen Court issued orders finding that Samsung is infringing two of Huawei's Chinese SEPs and enjoining Samsung's Chinese affiliates from manufacturing and selling its 4G LTE standardized smartphones in China.[8] Xie Decl. ¶ 7; Jan. 11, 2018 Shenzhen Court Civil Judgment, certified translation ("Shenzhen Order")(Stake Decl. ¶ 37, *id.*, Ex. 36, Dkt. No. 277-5[under seal]).[9] The Chinese patents are direct counterparts to **[*13]** two of Huawei's asserted patents, U.S. Patent Nos. 8,369,278 and 8,885,587. Xie Decl. ¶ 4. The Shenzhen Court evaluated the evidence and found that "Huawei's behaviors had complied with FRAND principles while Samsung's behaviors had not complied with FRAND principles." Shenzhen Order at 205. The Shenzhen Court decided that Huawei's six presuit offers to Samsung "were made within the reasonable range according to the strength of SEPs owned by Huawei" and that Huawei's offers "had complied with FRAND principles." *See* Shenzhen Order at 200-203. As to Samsung, the court found that its initial insistence on "binding SEP licensing and non-SEP licensing ... violated FRAND principles for SEP licensing negotiations" and contributed to "serious[] delay[]" in the negotiations. Shenzhen Order at 180. It also found that "Samsung had made significant

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[4] As part of this claim, "Samsung seeks an order enjoining Huawei from pursuing injunctive relief for infringement of patents, including those asserted here and in the parallel Chinese actions, that Huawei contends are essential to ETSI and 3GPP standards." Am. Counterclaims ¶ 322.

[5] Huawei indicates that it filed the Chinese actions "simultaneously," and that those actions reflect a different date due to the time difference between here and China. And it highlights Samsung's acknowledgement that the actions were "simultaneous[ly]" filed. *See* Samsung's Answer and Am. Counterclaims ¶ 340 ("Yet simultaneous with its filing of this action, Huawei filed eight actions against Samsung in China based on Huawei's declared essential patents, seeking only injunctions as relief for Samsung's alleged infringement... ."); *id.* ¶ 543 ("Around the same time as Huawei filed its Complaint here, Huawei initiated several patent infringement actions in China, seeking to enjoin Samsung from making, using, selling, or importing products that practice 3GPP standards.").

[6] Huawei has also initiated a rate-setting and royalty payment suit in China. Wang Decl. ¶ 2; Xie Decl. ¶ 22.

[7] The parties filed a total of 42 infringement actions in China, one corresponding to each patent, both SEP and non-SEP. Wang Decl. ¶ 5. In parallel with those proceeding, all 42 patents underwent invalidation procedures at the Patent Reexamination Board ("PRB"). *Id.* ¶ 6. Once a patent is invalidated by the PRB, it must be withdrawn or dismissed. *Id.* ¶ 7. Twenty-two infringement suits remain between the parties—12 involving Huawei's SEPs and 7 involving Samsung's SEPs. *Id.* ¶ 8.

[8] The Shenzhen court ordered a further continuation of the trial on Samsung's two SEPs, and presumably heard that additional evidence on February 27-28, 2018. Wang Decl. ¶ 9. The parties are awaiting decisions in those two suits. *Id.*

[9] Huawei noted that Samsung submitted only the order in case number 840, but actually seeks to enjoin orders issued in both case numbers 840 and 816. Wang Decl. ¶ 12 n.1. It indicated that "[t]he FRAND issues contemplated, evidence and expert opinion presented, and Court's decision were substantively the same in both the 840 and 816 cases." *Id.* It also represented that it accepts the accuracy of the certified translation "[f]or purposes of this motion only[.]" Opp'n at 6 n.2.

mistakes during technical negotiations," which "seriously delayed the negotiations and clearly violated FRAND principles... directly leading to more than six years of negotiations between both parties without any progress." *Id.* at 185. It concluded that Samsung's sole SEP licensing offer "did not comply with FRAND principles." *Id.* at 204.

Samsung filed a notice of appeal on January 26, 2018. Xie Decl. **[*14]** ¶ 8. It filed this motion on February 1, 2018. Mot. to Enjoin Huawei from Enforcing the Injunction Issued by the Intermediate People's Court of Shezhen ("Mot.")(Dkt. No. 278-2[redacted]; Dkt. No. 278-1[under seal]). It claims that if its appeal is unsuccessful, it will have to close its factories in China, affecting [TEXT REDACTED BY THE COURT], be forced into a negotiation at a disadvantage or be compelled into a global adjudication of all FRAND issues with Huawei, which it stoutly resists.

Since the initial case management conference, Huawei has urged the court to bifurcate the issues and address the breach of contract and related FRAND issues first, which would likely moot the patent infringement claims. *See* Joint Case Management Conference St. at 2-5 (Dkt. No. 67); Minute Entry for Initial CMC held on 9/13/16 (Dkt. No. 75); Huawei's Br. ISO its Request to Bifurcate (Dkt. No. 84). Samsung has insisted that bifurcation was not the most efficient course because the FRAND licensing obligation cannot be determined without "assessing whether and to what extent [the patents-in-suit] are valid, infringed, enforceable, and essential to the relevant ETSI standard." Samsung's Opp'n to Bifurcation at 2 (Dkt. No. 85). I denied Huawei's **[*15]** request to bifurcate, and issued a case management order setting a schedule for the parties to narrow the issues in preparation for a two-week trial. Order Regarding Case Management Proposals (Dkt. No. 143).

LEGAL STANDARD

"A federal district court with jurisdiction over the parties has the power to enjoin them from proceeding with an action in the courts of a foreign country, although the power should be 'used sparingly.'" *Seattle Totems Hockey Club, Inc. v. Nat'l Hockey League, 652 F.2d 852, 855 (9th Cir. 1981)*. "Such injunctions allow the court to restrain a party subject to its jurisdiction from proceeding in a foreign court in circumstances that are unjust." *E. & J. Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 989 (9th Cir. 2006)*("*Gallo")*. The Ninth Circuit employs "a three-part inquiry for assessing the propriety of such an injunction." *Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 881 (9th Cir. 2012)*("*Microsoft II* ")*; see also* *Gallo, 446 F.3d at 990* (establishing framework for determining whether to issue anti-suit injunction).

> First, we determine whether or not the parties and the issues are the same in both the domestic and foreign actions, and whether or not the first action is dispositive of the action to be enjoined. Second, we determine whether at least one of the so-called *Unterweser* factors applies. Finally, we assess whether the injunction's impact on comity is tolerable.

Microsoft II, 696 F.3d at 881 (citations and internal quotation marks omitted); **[*16]** *see* *id. at 882* (referring to three-part inquiry as the "*Gallo* framework").

DISCUSSION

Samsung moves to enjoin Huawei from enforcing the injunctions issued in the Shenzhen Orders.[10] As a preliminary matter, the parties dispute whether Samsung must establish the usual requirements for a preliminary injunction, in addition to satisfying the three-part *Gallo* test for an anti-suit injunction. Huawei's Opp'n to Samsung's Mot. to Enjoin Huawei from Enforcing the Injunction Issued by the Intermediate People's Court of Shenzhen at 4, 13, 23 ("Opp'n")(Dkt. No. 277-4[redacted]; Dkt. No. 277-3[under seal]); Reply ISO Samsung's Mot. for a Preliminary Antisuit Injunction at 2 ("Reply")(Dkt. No. 277-3[under seal]; Dkt. No. 277-4[redacted]). As the district court noted in *Microsoft Corporation v. Motorola, Inc.*, "[u]nder a literal reading of *Gallo*, a showing of irreparable harm, balance of

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[10] As previously mentioned, Samsung references one order from the court, but it actually seeks to enjoin Huawei from enforcing two orders issued by the Shenzhen court on January 11, 2018. *See supra* note 9.

equities, and public interest might still be required to obtain an anti-suit injunction." 871 F. Supp. 2d 1089, 1097 n.10 (W.D. Wash. 2012)("*Microsoft I*"); *see* Gallo, 446 F.3d at 991 ("[Movant] need not meet the usual test of a likelihood of success on the merits of the underlying claim to obtain an anti-suit injunction . . . . Rather, [movant] need only demonstrate that the factors specific to **[*17]** an anti-suit injunction weigh in favor of granting the injunction.").

The court went on to note two things—the absence of an analysis on the traditional *Winter* factors in *Applied Medical Distribution Corp. v. Surgical Co. BV, 587 F.3d 909, 913 (9th Cir. 2009)*, and the fact that the Third Circuit explicitly replaced all four *Winter* factors with the three-part *Gallo* test. *Microsoft I, 871 F. Supp. 2d at 1097 n.10*. It nonetheless analyzed the remaining *Winter* factors "[f]or completeness[.]" *Id.* But the Ninth Circuit, in affirming the district court's grant of the foreign anti-suit injunction, focused only on the three-part *Gallo* test. *Microsoft II, 696 F.3d at 881*. *But see id. at 883-84* ("Ordinarily, we do not assess at all the likelihood of success on the merits in a case like this, because when a preliminary injunction is also a foreign anti-suit injunction, the likelihood-of-success aspect of the traditional preliminary injunction test is replaced by the *Gallo* test."). The Ninth Circuit's analysis convinces me that I need only focus on the three-part inquiry under *Gallo*, and need not analyze the traditional *Winter* factors for obtaining a preliminary injunction.

Because Samsung relies so heavily on that Ninth Circuit decision, *see* Mot. at 11-17, 19-21, I will begin with a background of that case.

I. *MICROSOFT V. MOTOROLA*

The decision in *Microsoft* ***[*18]*** *v Motorola* addressed the parties' obligations with respect to patents they declared essential to the H.264 video coding standard set by the International Telecommunications Union ("ITU"). *Microsoft II, 696 F.3d at 875-876*. The ITU's Common Patent Policy requires each member to "submit a declaration to the ITU stating whether it is willing to 'negotiate licenses with other parties on a non-discriminatory basis on reasonable terms and conditions.'" *Id. at 876*. Motorola submitted numerous declarations to the ITU promising to grant licenses to its SEPs on "reasonable and nondiscriminatory," or "RAND" terms.[11] *Id.*

"In October 2010, Motorola sent Microsoft two letters offering to license certain of its standard-essential patents." *696 F.3d at 876*. Motorola attached to the letter a "non-exhaustive list" of its U.S. and foreign patents that it declared essential to the H.264 standard and included in its license offer. *Id.* On November 9, Microsoft filed a breach of contract action against Motorola based on the theory that it was a third-party beneficiary to Motorola's RAND obligations, which it alleged Motorola breached by proposing unreasonable royalty terms. *Id. at 878*. The next day, Motorola filed a patent infringement suit, and the two cases were consolidated. **[*19]** *Id.* In February 2012, the district court granted partial summary judgment for Microsoft, concluding that (1) Motorola had binding commitments to offer its declared SEPs on RAND terms, and (2) Microsoft was a third-party beneficiary of those commitments. *Id.* The court denied summary judgment on the two remaining issues of whether Motorola's initial offer letter had to include RAND terms, and whether its offers breached RAND obligations. *Id. at 879*. It scheduled those claims for a bench trial in November 2012. *Id.*

Eight months after the domestic actions were filed, Motorola sued Microsoft in Germany for infringement of two of its German patents, and it sought to enjoin Microsoft from selling allegedly infringing products in Germany. *696 F.3d at 879*. On May 2, 2012, the German court issued its ruling,[12] holding that (1) Microsoft did not have a license to use Motorola's patents, (2) any commitment between Motorola and the ITU was not enforceable by Microsoft because German law does not recognize third-party contractual rights, and (3) Microsoft infringed Motorola's

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[11] "RAND" and "FRAND" are "legally equivalent abbreviations." *Microsoft II, 696 F.3d at 877 n.2*.

[12] By this time, Microsoft had already obtained a temporary restraining order ("TRO") enjoining Motorola from enforcing any injunction obtained in the German action. *696 F.3d at 880*.

German patents. *Id.* It enjoined Microsoft from "offering, marketing, using or importing or possessing" the accused products in Germany. *Id.*

The "German injunction **[*20]** [was] not self-enforcing." *696 F.3d at 879*. Motorola had to "post a security bond covering potential damages to Microsoft should the infringement ruling be reversed on appeal[,]" then Microsoft could file a motion to stay the injunction in the German appellate court. *Id.* Alternatively, Microsoft could avoid enforcement of the injunction by employing "the *Orange Book* procedure," under which it would make "an unconditional offer to conclude a license agreement" with Motorola. *Id.*

On May 14, the district court converted the TRO, *see supra* note 12, into a preliminary injunction. *Id. at 880*. The Ninth Circuit affirmed this decision. I will reference its reasoning as I analyze each factor.

II. APPLICATION OF THE *GALLO* TEST

A. The Parties and the Issues are the Same

"The threshold consideration for a foreign anti-suit injunction is 'whether or not the parties and the issues are the same' in both the domestic and foreign actions, 'and whether or not the first action is dispositive of the action to be enjoined.'" *Microsoft II, 696 F.3d at 882* (quoting *Gallo, 446 F.3d at 991*). The consideration should be approached functionally, "not in a technical or formal sense, but in the sense that all the issues in the foreign action ... can be resolved in the local action." *Id. at 882-83* (internal **[*21]** quotation marks omitted). "[W]hen the parties in the two actions are the same, the two questions of whether 'the issues are the same' and whether 'the domestic action is dispositive of the foreign action' collapse into one." *Microsoft I, 871 F. Supp. 2d at 1098*.

1. The Parties Are Functionally the Same

Both sides agree that the parties are functionally the same (although not identical). Mot. at 12; Opp'n at 16. Huawei Technologies Co., Ltd. and Samsung Electronics Co., Ltd. are parties to both actions, and some of their affiliates or subsidiaries are parties in each action. Xie Decl. ¶ 3; Since "[p]erfect identity of parties is not required for an anti-suit injunction[,]" *Microsoft I, 871 F. Supp. 2d at 1098*, this is sufficient to establish that the parties are functionally the same.

2. The Issues Are Functionally the Same

Samsung insists that the primary issue in the Shenzhen cases is at issue here—namely, the availability of injunctive relief for Huawei's SEPs, which are subject to contractual licensing obligations under Huawei's FRAND commitments. *See* Mot. at 12-15. It argues that "[e]ach party acknowledges it has contractual FRAND obligations for its global portfolio of telecommunications SEPs, contends it has complied with those obligations and that the **[*22]** other party has not, and has asked this Court to bar the other party from obtaining injunctive relief anywhere in the world on those SEPs." Mot. at 12; *see* Compl. ¶ 1 ("Huawei and Samsung have made binding commitments to the European Telecommunications Standards Institute ("ETSI")—a 3GPP organizational partner which promulgates standards developed by 3GPP—to license these standard-essential patents ("SEPs") on terms and conditions that are fair, reasonable, and non-discriminatory ("FRAND").)(Dkt. No. 59).

It urges that *Microsoft v. Motorola* is instructive because it "involved highly similar facts[.]" *Id.* at 13. Motorola argued that the U.S. action could not resolve the German action "because patent law is uniquely territorial and patents have no extraterritorial effect." *Microsoft II, 696 F.3d at 883*. The district court rejected this argument, and the Ninth Circuit agreed. According to the district court, Microsoft's contract claim would resolve Motorola's German patent claims "because the European Patents at issue in the German Action were included in Motorola's October 29 Letter offering a worldwide license for Motorola's H.264 Standard-essential patents, and because Motorola contracted with the ITU to license the European **[*23]** Patents on RAND terms to all applicants on a worldwide basis." *Id.* (quoting district court decision). It determined that the district court's decisions on summary judgment (that Motorola's RAND declarations to the ITU created a contract enforceable by Microsoft as a third-party beneficiary and that the contract governed the availability of injunctive relief for declared SEPs) were not "legally erroneous,"[13] and therefore, it was not "an abuse of discretion for the district court to rule that the U.S. contract action might dispose of the German patent action." *Id. at 884*.

The Ninth Circuit cited Motorola's "sweeping promise" in its declarations to the ITU, which included "a guarantee that the patent-holder [would] not take steps to keep would-be users from using the patented material, such as seeking an injunction, but [would] instead proffer licenses consistent with the commitment made." *Id. at 884*. The court summarized, "that there [*was*] a contract, that it [was] enforceable by Microsoft, and that it encompasse[d] not just U.S. patents but also the patents at issue in the German suit." *Id. at 885* (emphasis in original). It concluded that irrespective of the district court's ultimate determination as to whether Motorola **[*24]** actually breached its contract, "injunctive relief against infringement is arguably a remedy inconsistent with the licensing commitment." *Id.*

As in *Microsoft v. Motorola*, Huawei alleges that Samsung breached its contractual obligations under ETSI, Compl. ¶ 1, and seeks relief barring Samsung from obtaining injunctive relief on its declared SEPs anywhere in the world. Samsung insists, therefore, that "this action will necessarily resolve the fundamental issue presented in the Shenzhen injunction action, namely, whether injunctive relief is appropriate for alleged infringement of SEPs that are subject to contractual FRAND licensing obligations." Mot. at 14. It also notes that there is no dispute that the Chinese SEPs fall within the global portfolios of SEPs, Xie Decl. ¶ 3, and Huawei listed those Chinese SEPs in the Letters of Assurance attached to its complaint, Huawei's Licensing Declarations (Compl., Exs. 2.1-2.43). And it emphasizes that the two Chinese SEPs are direct counterparts of patents asserted here. Xie Decl. ¶¶ 4, 7.

But Huawei underscores critical factual distinctions here; namely, differences in the positions of the parties and the decision of the foreign court. *See* Opp'n **[*25]** at 13-15. First, Microsoft initiated the domestic action and asked the court to set the FRAND rate. *Microsoft I, 871 F. Supp. 2d at 1099*. In addition, it did not contest the essentiality or infringement of Motorola's standard-essential patents. *Microsoft Corp. v. Motorola, Inc., 2013 U.S. Dist. LEXIS 60233, 2013 WL 2111217, at *59 (W.D. Wash. Apr. 25, 2013)*("*Microsoft III*"); *2013 U.S. Dist. LEXIS 60233, [WL] at *61*. So, Huawei contends, "Samsung's attempt to cast itself in the role of Microsoft ... is perverse." Opp'n at 13. Samsung did not initiate this action, and it *is* contesting the essentiality and infringement of Huawei's declared SEPs. Second, Huawei distinguishes its own conduct from Motorola's. It notes that it filed this action and the Chinese actions "at the same time," not as "an end run around this action." *Id.* at 14. This is unlike what happened in *Microsoft*, where Motorola filed its German suit several months into the U.S. RAND litigation, in a deliberate effort to force Microsoft to accept non-RAND terms. *See* *Microsoft IV, 795 F.3d at 1046* ("The evidence that the rates Motorola sought were significantly higher than the RAND rate found by the court suggested that Motorola sought to capture more than the value of its patents by inducing holdup, and that it filed infringement actions to facilitate that strategy by preventing Microsoft from using its patents—and therefore from implementing the **[*26]** 802.11 and H.264 standards—until it obtained a license at a rate significantly higher than the RAND rate."); *id.* ("In the absence of a fear of irreparable harm as a motive for seeking an injunction, the jury could have inferred that the real motivation was to induce Microsoft to agree to a license at a higher-than-RAND rate."). Third, it underscores the "critical distinction" that the German court issued its injunction without evaluating whether Motorola had complied with its FRAND commitment. *See* *Microsoft II, 696 F.3d at 879*. It contrasts that decision with the Shenzhen Order, which explicitly considered and decided the underlying FRAND issues as a predicate to determining whether Huawei was entitled to an injunction. In other words, the Shenzhen court issued injunctive relief *because* it found that Samsung had not complied with its FRAND obligations.[14]

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[13] It emphasized that it was not deciding whether the district court's determinations were "proper" because those issues were not before it on this interlocutory appeal. *Microsoft II, 696 F.3d at 884*.

[14] Huawei also argues that the Shenzhen Order should give rise to collateral estoppel effect when final. Opp'n at 15 (citing *Walia v. Aegis Center Point Devs. Private Ltd., 2014 U.S. Dist. LEXIS 10433, 2014 WL 296003 at *2 (N.D. Cal. Jan. 27, 2014)*

But those undeniable and important differences are irrelevant to whether this action is dispositive of the foreign action. Both parties have presented me with a breach of contract claim based on the other's alleged failure to abide by its commitments to ETSI.[15] Neither party disputes the other's right to enforce that contract as a third-party beneficiary. **[*27]** And the availability of injunctive relief for each party's SEPs depends on the breach of contract claims. As in *Microsoft*, "[t]he contractual umbrella over the patent claims" controls, *Microsoft II, 696 F.3d at 883*, and dictates that this action is dispositive of Huawei's Chinese actions. *See id.* ("In other words, the party was 'not seeking to enjoin [a party from litigating in] a foreign court on the basis of a patent validity or infringement finding by a United States court' but on the basis of a contract interpretation by a U.S. court.")(quoting *Medtronic, Inc. v. Catalyst Research Corp., 518 F.Supp. 946 (D. Minn. 1981)*, *aff'd*, *664 F.2d 660 (8th Cir. 1981))*.

Samsung also points to Huawei's prior requests that I address the FRAND issues first, which, in Huawei's estimation, "would moot patent infringement damages if Samsung is, in fact, a willing licensee." Huawei's Br. ISO Bifurcation at 4-5 (Dkt. No. 84). By underscoring Huawei's prior position regarding bifurcation, Samsung seeks to highlight the dispositive nature of the FRAND contract claims. But Samsung previously insisted that bifurcation was inappropriate because I had to first determine whether each asserted patent was valid, enforceable, infringed, and essential before I could decide an appropriate FRAND royalty rate. Since I only **[*28]** have the power to decide those "prerequisite" issues for U.S. SEPs, under Samsung's logic, I would not be able to decide a FRAND rate for the parties' global portfolios; rather, I would only have the ability to determine a FRAND rate for U.S. SEPs. Samsung has also argued that the court lacks the *authority* to set FRAND terms for any cross-license between the parties. *See* 9/6/16 Joint Case Management St. at 2 ("Samsung contends that Huawei, as yet, has not set forth a sufficient basis for its request for Declaratory Judgment of FRAND Terms and Conditions for a Cross-License, and Samsung reserves its rights to seek dismissal or other appropriate relief on any such claim, including on the basis of lack of subject matter jurisdiction."); *id.* at 7 ("[T]he Court has no jurisdiction to 'set' FRAND terms for a general cross license.")(Dkt. No. 67).[16]

Even beyond the question of whether I have the ability to determine a FRAND royalty rate (whether based on global or domestic SEPs), I am at a loss as to how I (or a jury) could decide the breach of contract claims. Unlike in *Microsoft*, the parties' contract claims are based on whether their respective licensing offers were FRAND, not merely **[*29]** whether seeking "injunctive relief against infringement is arguably a remedy inconsistent with the licensing commitment." *696 F.3d at 885*. *See, e.g.*, Compl. ¶ 57 (describing how Samsung's negotiation conduct breached its FRAND obligations); Answer and Am. Counterclaims ¶ 542 ("Huawei did not make an offer to license Huawei's Patents-in-Suit on FRAND terms and conditions to Samsung before filing its Complaint for patent infringement and to date has not done so."). How am I to adjudicate whether those offers were FRAND, if that determination depends on valuation of global portfolios, and can only be made subsequent to finding each patent valid and essential to the standard? *See, e.g.*, Reply at 9 ("As a result, no tribunal, here or elsewhere, will have ever critically examined Huawei's licensing structure and determine what appropriate rates would be—let alone

("Collateral estoppel applies to foreign judgments so long as the parties in the prior action were afforded due process rights."); *see also* *U.S. v. Kashamu, 656 F.3d 679, 683 (7th Cir. 2011)* ("U.S. court[s] [] generally give preclusive effect to [a] foreign court's finding as a matter of comity.")). I need not address that argument at this time.

[15] Huawei notes that Samsung has not "articulate[d] any likelihood of success on those [antitrust and contractual FRAND] claims that could result in final relief enjoining Huawei from obtaining an injunction elsewhere." Opp'n at 17 n.15 (citing Mot. at 12-17). It is true that "a ballpark, tentative assessment of the merits of the contract dispute is intrinsically bound up with the threshold anti-suit injunction inquiry... ." *Microsoft II, 696 F.3d at 884*. But that does not mean that Samsung must establish a likelihood of success on its claims. To the contrary, that inquiry is *replaced*, in part, by the question of whether this contract action will dispose of the Chinese patent actions. *See id.* Assuming I can decide the breach of contract claims, *see* discussion *infra*, this action will dispose of those actions in either one of two scenarios—if Huawei's breach of contract claim is unsuccessful, or if Samsung's breach of contract claim is successful. One way or the other, this action will resolve the propriety of injunctive relief for the parties' declared SEPs.

[16] In an added wrinkle, it was necessary to limit this case to a manageable scope. *See* Civil Pretrial Order (Dkt. No. 208). So I will not even be deciding those "prerequisite" issues for the parties' entire portfolios of U.S. SEPs. Assuming without deciding that I have the *authority* to set FRAND rates, accepting Samsung's reasoning that each patent must first be evaluated would render me unable to decide a FRAND rate based on all of the parties' U.S. SEPs.

adjudicated issues of validity or infringement of the patents at issue, which is a predicate to a true FRAND analysis."). If I take Samsung's reasoning to its logical conclusion, I see no end to this case, and certainly no way for this action to dispose of the parties' foreign patent actions.[17]

Huawei urges me to reject Samsung's seemingly inconsistent **[*30]** positions because it "does not merit exercise of [my] equitable power[,]" Opp'n at 16, and "[c]ourts derive the ability to enter an anti-suit injunction from their equitable powers." *Gallo, 446 F.3d at 989*. It insists that judicial estoppel dictates that "Samsung should be barred from now claiming entitlement to an anti-suit injunction." Opp'n at 16; *see also id.* at 17 (citing *New Hampshire v. Maine, 532 U.S. 742, 751, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001)*, in which the Supreme Court recognized that "judicial estoppel forbids use of 'intentional self-contradiction ... as a means of obtaining unfair advantage'")). This is tempting, given that Samsung insists on its right to have its American patents litigated here but seeks to postpone the impact of having Chinese patents litigated in China.

I conclude that estoppel need not bar Samsung from seeking this antisuit injunction. That said, Samsung will not be able to argue that the breach of contract claims depend on evidence not before me, such as the validity, infringement, and essentiality of foreign patents. Judicial estoppel will apply to preclude such arguments. *See New Hampshire, 532 U.S. at 749* ("[J]udicial estoppel[] 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'"). **[*31]** But I will not require Samsung's "commitment or consent" that I "should decide the FRAND terms of a global patent cross-license." *See* Opp'n at 17. The appropriate remedy for Huawei's breach of contract claim may very well be the injunctive relief issued by the Shenzhen court. But I must have the opportunity to adjudicate that claim without Samsung facing the threat of the Shenzhen court injunctions.

B. The *Unterweser* Factors

Under the *Unterweser* factors, a court may enjoin foreign litigation "when it would (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing courts *in rem* or *quasi in rem* jurisdiction; or (4) where the proceedings prejudice other equitable considerations." *Seattle Totems, 652 F.2d at 855*.

1. Domestic Policy and Other Equitable Considerations

Samsung argues that allowing Huawei to enforce the Shenzhen Court's injunction would frustrate specific domestic policies against injunctive relief on SEPs and general public policies against anticompetitive conduct and breaches of contract. Mot. at 18. The bulk of precedent supports its position. *See, e.g., Microsoft II, 696 F.3d at 884* ("Implicit in such a sweeping promise [made by Motorola to standards-setting organization] is, **[*32]** at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made."); *id. at 885* ("[I]njunctive relief against infringement is arguably a remedy inconsistent with th[at] licensing commitment."); *Realtek Semiconductor Corp. v. LSI Corp., 946 F. Supp. 2d 998, 1006-07 (N.D. Cal. 2013)*("In promising to license on RAND terms, defendants here admit that monetary damages, namely a RAND royalty, would be adequate compensation for any injury it has suffered as a result of Realtek's allegedly infringing conduct."); *Apple, Inc. v. Motorola Mobility, Inc., No. 11-CV-178-BBC, 2012 U.S. Dist. LEXIS 181854, 2012 WL 5416941, at *15 (W.D. Wis. Oct. 29, 2012)*(" I agree with Apple that from a policy and economic standpoint, it makes sense that in most

[17] In fact, Samsung attacks Huawei's characterization that the Shenzhen court truly considered FRAND issues. *See* Reply at 2 ("[The Shenzhen proceedings] focused only on allegations of Samsung's purported 'bad faith' negotiation positions without evaluating the size of or justification for Huawei's proposed rates. [citation] Nowhere does the Shenzhen court address whether Huawei's original 1.5% rate or variations thereon is FRAND or justified in any objective way."); *id.* at 7 ("But the Chinese court did not determine the appropriate terms of a worldwide FRAND license—it only made nebulous findings of conduct in the context of the Chinese patents that it declared 'complied with FRAND principles' and then granted the injunction.").

situations owners of declared-essential patents that have made licensing commitments to standards-setting organizations should be precluded from obtaining an injunction or exclusionary order that would bar a company from practicing the patents.")

But Huawei insists that there is no "per se rule that injunctions are unavailable for SEPs[.]" *Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1331 (Fed. Cir. 2014)*, *overruled on other grounds by* *Williamson v. Citrix Online, LLC, 792 F.3d 1339 (Fed. Cir. 2015)*. It highlights precedent and policy that suggest "an injunction may be justified where an **[*33]** infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect." *Id. at 1332* (citing U.S. Dep't of Justice and U.S. Patent and Trademark Office, *Policy Statement on Remedies for Standard—Essential Patents Subject to Voluntary F/RAND Commitments*, at 7-8 (Jan. 8, 2013)); *see also* Makan Delrahim, Asst. Attorney General, Antitrust Division, U.S. Dept. of Justice, Remarks as Prepared for Delivery at USC Gould School of Law — Application of Competition Policy to Technology and IP Licensing: Taking It to the Limit: Respecting Innovation Incentives in the Application of ***Antitrust Law*** (Nov. 10, 2017), available at https://www.justice.gov/opa/speech/file/1010746/download ("A patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license such a patent.")(Greenblatt Decl. ¶ 5, *id.*, Ex. 4, Dkt. No. 240-8).

That may be true, but the policy that is undermined is this court's ability to determine the propriety of injunctive relief in the first instance. *See, e.g., Zynga, Inc. v. Vostu USA, Inc., No. 11-CV-02959-EJD, 2011 U.S. Dist. LEXIS 89378, 2011 WL 3516164, at *3 (N.D. Cal. Aug. 11, 2011)*("But one clear policy that all federal courts recognize—even those which have been loath to interfere with foreign proceedings—is the need to protect the **[*34]** court's own jurisdiction."). There is a risk of inconsistent judgments if I were to find that Huawei is not entitled to seek injunctive relief for its SEPs. *See* *Microsoft I, 871 F. Supp. 2d at 1100* ("Courts have found that court policies against avoiding inconsistent judgments, forum shopping and engaging in duplicative and vexatious litigation sufficient to satisfy this step."). In addition, in the absence of an antisuit injunction, Samsung faces the risk of significant harm, not just in China, but with impacts percolating around the world. The Chinese injunctions would likely force it to accept Huawei's licensing terms, before any court has an opportunity to adjudicate the parties' breach of contract claims.[18] Under these circumstances, the Shenzhen Order "interfere[s] with 'equitable considerations' by compromising the court's ability to reach a just result in the case before it free of external pressure on [Samsung] to enter into a 'holdup' settlement before the litigation is complete." *Microsoft II, 696 F.3d at 886*. As in *Microsoft*, the Chinese actions "have frustrated this court's ability to adjudicate issues properly before it." *Microsoft I, 871 F. Supp. at 1100*. The integrity of this action, therefore, will be lessened without an anti-suit injunction. *See id.*

C. Vexatious [*35] or Oppressive

In *Microsoft II*, the Ninth Circuit concluded that the district court had not abused its discretion in finding that the timing and location of the foreign action "raise[d] concerns of forum shopping and duplicative and vexatious litigation." *Microsoft II, 696 F.3d at 886*. Samsung highlights the same concerns here, and once again insists that the district court's finding in *Microsoft* should control. Mot. at 19; *see* *Microsoft II, 696 F.3d at 886* (finding Motorola's proceedings in Germany to enforce its patents were "a procedural maneuver designed to harass Microsoft with the threat of an injunction removing its products from a significant European market and so to interfere with the court's ability to decide the contractual questions already properly before it.").

Huawei filed the Chinese actions at issue the day after it filed this one,[19] so the same timing concerns present in *Microsoft* are not present here. *See* *Microsoft II, 696 F.3d at 879* (noting that Motorola initiated the German patent litigation "several months into the ... domestic litigation"). But it did choose its home court for the majority of the Chinese actions, which implicates concerns of forum shopping. Huawei insists that the Chinese actions are neither

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[18] Even though the Shenzhen court evaluated the parties' licensing negotiations, it was not presented with breach of contract claims.

[19] Huawei phrases the timing as "simultaneously" because China is a day ahead of the United States. *E.g.*, Opp'n at 20.

duplicative nor vexatious because it committed **[*36]** to dismiss them if Samsung would consent to a court or arbitrator dictating the FRAND terms of a cross-license. But its own Vice President admitted that it uses injunctive relief "as a bargaining chip":

> Today, the number of disputes is on the rise, but we see fewer cases of injunction. Perhaps judges are quite reluctant to hear injunction cases because of its staggering impact on the market. Sure enough, the core issue is price; 90% or even 99% of the patent disputes are about price. Even if injunction order were to be enforced, does Huawei really want to kick Samsung out of China? Is it possible? Of course not. And is it possible for Apple to kick Samsung out of the US? No. That being said, when faced with potential licensees who are negotiating in bad faith, unwilling to pay fair royalties, you may want to file an injunction order with the court. At the end of the day, your purpose is to get the royalties in return, while using legal action as a bargaining chip. This is how things have changed over time.

Talk of Huawei's Jianxin Ding S-816 Samsung China (Stake Decl. ¶ 2; *id.*, Ex. 1; Dkt. No. 235-7). Huawei explains that this statement is consistent with its position that injunctive **[*37]** relief may be appropriate when a party has refused to comply with its FRAND obligations. And it insists that it filed the Chinese actions because it "did not know (and still does not know) the scope of ultimate rulings from this Court on FRAND." Opp'n at 20. Given the near simultaneity of the actions and the uncertainty over scope, I am unwilling to label the foreign suits "vexatious" or "oppressive." *See* *Microsoft II, 696 F.3d at 886* (explaining that "litigation may have some merit and still be 'vexatious,' which is defined as 'without reasonable or probable cause or excuse; harassing; annoying.'")(quoting *Black's Law Dictionary* 1701 (9th ed.2009)).

Since "at least one of the so-called '*Unteweser* factors' applies," I will proceed to assess whether the injunction's impact on comity is tolerable. *Microsoft II, 696 F.3d at 881*.

III. INJUNCTION'S IMPACT ON COMITY

"Comity is 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.'" *Gallo, 446 F.3d at 994* (quoting *Hilton v. Guyot, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895))*. In *Gallo*, the Ninth Circuit excerpted a "detailed analysis of comity" **[*38]** by the D.C. Circuit in *Laker Airways Ltd. v. Sabena Belgian World Airlines, 731 F.2d 909, 235 U.S. App. D.C. 207 (D.C. Cir. 1984)*. *Id.*

> "Comity" summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum.... However, there are limitations to the application of comity. When the foreign act is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation, undercutting the realization of the goals served by comity. No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act.

Id. at 995 (quoting *Laker Airways, 731 F.2d at 937*).

"*Gallo* requires not that we calculate the precise quantum of the injunction's interference with comity, but only that we estimate whether any such interference is so great as to be intolerable." *Microsoft II, 696 F.3d at 886*. In *Microsoft II*, the Ninth Circuit found that "comity is less likely to be threatened in the context of a private contractual dispute than in a dispute **[*39]** implicating public international law or government litigants." *Id. at 887*. The parties here find themselves "in the context of a private contractual dispute." As in that case, "it does not raise any 'public international issue.'" *Id. at 888* (quoting *Gallo, 446 F.3d at 994*).

Samsung points out that the Shenzhen Order provides that "Huawei can agree after the appeal that the injunction will not be enforced, and further states that the Shenzhen Court would also permit non-enforcement if the parties agree to an SEP cross-license." Shenzhen Order at 209; Xie Decl. ¶ 7. So the relief it seeks would have no impact on the Chinese courts; rather, it asks me to restrain Huawei from enforcing any injunction order until I have the opportunity to determine the propriety of injunctive relief for the parties' SEPs. It specifically notes that Huawei would remain free to seek damages for infringement of its Chinese patents while this action is pending.

Courts may also consider "[t]he order in which the domestic and foreign suits were filed" in evaluating the impact on comity. *See* *Microsoft II, 696 F.3d at 887*. As discussed, Huawei filed the Chinese actions the day after it filed the complaint here.[20] Since this action preceded the Chinese actions—if only by one day—enjoining **[*40]** the foreign action would not "intolerably impact comity." *Id.* The scope of the injunction further indicates that the impact on comity is tolerable. *See id.* Samsung seeks only to enjoin Huawei from enforcing the Chinese injunctions until I have an opportunity to evaluate the propriety of injunctive relief for the parties' SEPs. Since Samsung has appealed the injunction order, the parties estimate a few months before it becomes final. We are scheduled to proceed to trial in December of this year. The scope of this anti-suit injunction, limited to a particular order dealing with two patents, a specific form of relief, and estimated to last less than six months, presents a negligible impact on comity. *See id.*

IV. ADMINISTRATIVE MOTIONS

The parties filed administrative motions to seal portions of their briefing and attachments. Dkt. Nos. 234, 240, 244. I ordered the parties to file supplemental declarations in support of sealing certain material. Order (Dkt. No. 270). They submitted those declarations and narrowly tailored their requests for sealing only that information that could cause them competitive harm. Supp. Zhang Decl. ISO Huawei's Admin. Mot. (Dkt. No. 277); Supp. Gray Decl. ISO **[*41]** Samsung's Admin. Mot. (Dkt. No. 278). Because they have established compelling reasons for sealing their narrowly tailored requests, *Kamakana v. City & Cty. of Honolulu, 447 F.3d 1172, 1178 (9th Cir. 2006)*, their administrative motions are GRANTED.

CONCLUSION

In accordance with the foregoing, Samsung's motion to enjoin Huawei from enforcing the injunction orders issued by the Shenzhen court is GRANTED. Huawei should not seek to enforce those orders until I have the ability to determine the breach of contract claim it chose to present in this action prior to filing the Chinese actions.

IT IS SO ORDERED.

Dated: April 13, 2018

/s/ William H. Orrick

William H. Orrick

United States District Judge

End of Document

[20] As previously noted, Huawei insists that the actions were filed "simultaneously."

[United States ex rel. Millin v. Krause]

United States District Court for the District of South Dakota, Northern Division

April 14, 2018, Decided; April 19, 2018, Filed

1:17-CV-01019-CBK

Reporter

2018 U.S. Dist. LEXIS 65801 *; 2018 WL 1885672

UNITED STATES OF AMERICA, ex rel., DR. JOHN A MILLIN; and DR. JOHN A. MILLIN, individually, Relator, vs. LARRY F. KRAUSE, an individual; and KRAUSE-ALLBEE TRUCKING, INC., a South Dakota Corporation, Defendants.

Subsequent History: Motion denied by *United States ex rel. Millin v. Krause, 2018 U.S. Dist. LEXIS 81548 (D.S.D., May 15, 2018)*

Core Terms

Farm, Plans, false claim, farming operations, alleges, spouse, statute of limitations, ownership interest, plaintiffs', limitations period, motion to dismiss, pled, defendants', conspiracy, private plaintiff, unjust enrichment, intervene, farm subsidies, ownership, interpreting, documents, district court, civil action, entities, minutes, intracorporate conspiracy doctrine, eligibility, fraudulent, amend, cases

LexisNexis® Headnotes

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN1[] **Involuntary Dismissals, Failure to State Claims**

A motion to dismiss may be granted when a claim is barred under a statute of limitations. A court may dismiss a complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* when it appears from the face of the complaint that the claim is time-barred and no facts are alleged to avoid the bar of the statute. In deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must assume all facts in the complaint to be true and must construe all reasonable inferences most favorably to the complainant.

Business & Corporate Compliance > ... > Labor & Employment Law > Employer Liability > False Claims Act

Governments > Legislation > Statute of Repose

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] Employer Liability, False Claims Act

31 U.S.C.S. § 3731(b) provides that a civil action may not be brought under the False Claims Act (1) more than 6 years after the date on which a violation of 31 U.S.C.S. § 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by an official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

Business & Corporate Compliance > ... > Labor & Employment Law > Employer Liability > False Claims Act

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] Employer Liability, False Claims Act

Courts have recognized three approaches to interpreting how the statute of limitations in 31 U.S.C.S. § 3731(b) applies to actions brought under the False Claims Act by a private person in which the government declines to intervene. The first approach interprets 31 U.S.C.S. § 3731(b)(2) as applying to the government only and as inapplicable in cases where the government does not intervene. The second approach asserts that private parties are entitled to the 10 year statute of limitations in 31 U.S.C.S. § 3731(b)(2) and that the limitations period begins on the date the government should have known of facts material to the right of action. Finally, the third approach is that the private party stands in for the government where the government declines to intervene, and that the limitations period begins to run on the date that the plaintiff knew or should have known the facts relevant to the right of action.

Business & Corporate Compliance > ... > Labor & Employment Law > Employer Liability > False Claims Act

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > Tolling

HN4[] Employer Liability, False Claims Act

When considering which statute of limitations applies to qui tam actions brought by private individuals under the False Claims Act, in which the government declines to intervene, equitable tolling, codified for the government at 31 U.S.C.S. § 3731(b)(2), should similarly be available for a private plaintiff.

Governments > Legislation > Statute of Limitations > Tolling

HN5[] Statute of Limitations, Tolling

The fact that a federal statute sets a time limitation for a suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with legislative purpose. This is despite the fact that neither the legislative history nor the text of the statute clearly provide for such a right for a particular party, to the extent that one party must be substituted for another explicitly provided that right. Moreover, claims for equitable tolling apply where a plaintiff has been pursuing his or her rights diligently and where extraordinary circumstances prevented timely filing.

Business & Corporate Compliance > ... > Labor & Employment Law > Employer Liability > False Claims Act

Governments > Legislation > Interpretation

Governments > Legislation > Statute of Limitations > Time Limitations

HN6[] Employer Liability, False Claims Act

The plain meaning of *31 U.S.C.S. § 3731(b)*, providing a statute of limitations for private party claims under the *False Claims Act*, is ambiguous. Moreover, given the breadth of interpretations of the legislative history of this statute, it is equally as ambiguous. While the plain language of a statute is the starting point for statutory interpretation, and the purpose of statutory interpretation is to give effect to the intent of Congress, canons of statutory interpretation need not be conclusive and other circumstances evidencing congressional intent can overcome their force. This is undoubtedly so where both the plain language of the statute and legislative history are unclear.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > False Claims Act > Scope & Definitions > Qui Tam Actions

HN7[] Statute of Limitations, Time Limitations

In *False Claims Act* cases brought by a private party in the Northern Division of the United States District Court for the District of South Dakota, in which the government declines to intervene, the plaintiff's knowledge determines the applicable limitations period, under *31 U.S.C.S. § 3731(b)*, because the plaintiff stands in for the government and the limitations period begins to run on the date the plaintiff knew or should have known the facts relevant to the right of action, as qui tam plaintiffs are merely agents suing on behalf of the government, which is always the real party in interest.

Business & Corporate Compliance > ... > Corporations > Corporate Governance > Directors & Officers

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Labor & Employment Law > Employer Liability > False Claims Act > Scope & Definitions

Business & Corporate Law > Agency Relationships > Types > Employees & Employers

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN8[] Corporations, Directors & Officers

In order to survive a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff must allege sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A plausible claim must plead factual content that allows a court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A prima facie case under the False Claims Act (FCA) requires that (1) the defendant made a claim against the United States, (2) the claim was false or fraudulent, and (3) the defendant knew the claim was false or fraudulent. Liability under the FCA attaches to the claim for payment, rather than the underlying fraud. Under the FCA, a defendant must have actual knowledge, and act in deliberate ignorance of or have reckless disregard of the truth or falsity of the information in presenting a materially false claim. *31 U.S.C.S. § 3729(b)(1)(A)*. Proof of specific intent to defraud the government is not required. Further, the knowledge of officers and key employees of a corporation, obtained while acting in the course of their employment and within the scope of their authority, is imputed to the corporation itself.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

HN9[] Heightened Pleading Requirements, Fraud Claims

The heightened pleading standard for fraud under *Fed. R. Civ. P. 9(b)* applies to claims brought under the *False Claims Act*, to include reverse false claims. Under *Rule 9(b)*, a party must state with particularity the circumstances constituting fraud. To meet this standard, a plaintiff's complaint alleging fraud must identify who, what, where, when, and how. Pleading with the requisite particularity includes the requirement to plead the materiality of the false claims to payment. When a claim is based on facts peculiarly within the opposing party's knowledge, allegations may be pled on information and belief so long as they are accompanied by a statement of facts on which the belief is founded and the pleader identifies efforts made to obtain additional information. This relaxed standard, though, does not remove the plaintiff's requirement to plead the equivalent of the first paragraph of any newspaper story.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

Labor & Employment Law > ... > False Claims Act > Scope & Definitions > Qui Tam Actions

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN10[] Heightened Pleading Requirements, Fraud Claims

When a plaintiff bringing a qui tam action under the *False Claims Act* alleges a systematic practice of fraud, the plaintiff need not allege details of every alleged fraudulent claim but, if the defendants' actions could, but may not necessarily have led to the submission of false claims, must provide some representative examples of the defendants' alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors within the statute of limitations. A plaintiff may satisfy the particularity requirement of *Fed. R. Civ. P. 9(b)* in cases of systematic fraud without pleading representative examples of false claims where the plaintiff pleads particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted, such as by pleading details about the defendant's billing practices and pleading personal knowledge of the defendant's submission of false claims.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Notice Requirement

HN11[] Involuntary Dismissals, Failure to State Claims

When, on a motion to dismiss for failure to state a claim, extrinsic evidence outside the pleadings is considered by a court, the motion must be treated as one for summary judgment. However, a district court may consider materials necessarily embraced by the pleadings. When deciding a motion to dismiss, the court may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions. Where a party has actual notice of all the information in a movant's papers and has relied upon these documents in framing the complaint, the necessity of translating a *Fed. R. Civ. P. 12(b)(6)* motion into one under *Fed. R. Civ. P. 56* is largely dissipated.

Business & Corporate Compliance > ... > Labor & Employment Law > Employer Liability > False Claims Act

Governments > Legislation > Statute of Limitations > Time Limitations

HN12[] Employer Liability, False Claims Act

The limitations period under *31 U.S.C.S. § 3731(b)(1)* of the False Claim Act begins to run on the date the false claim was actually submitted.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN13[] Complaints, Requirements for Complaint

Allegations may be pled on information and belief when facts are likely to be peculiarly within the opposing party's knowledge, but such belief must be accompanied by facts justifying the belief and a statement identifying efforts made to obtain additional information.

Labor & Employment Law > Employer Liability > False Claims Act > Scope & Definitions

HN14[] False Claims Act, Scope & Definitions

A motion to dismiss may properly encompass the materiality of a defendant's false claims to the government's decision to pay a claim. The False Claims Act (FCA) defines materiality as having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. *31 U.S.C.S. § 3729(b)(4)*. The fact that the government is entitled to refuse payment if aware of a violation is insufficient to meet the materiality requirement. However, a false statement is considered material under the FCA if either (1) a reasonable person would likely attach importance to it or (2) the defendant knew or should have known that the government would attach importance to it.

Business & Corporate Compliance > ... > Agriculture & Food > Governments > Agriculture & Food

Labor & Employment Law > Employer Liability > False Claims Act > Scope & Definitions

HN15[] Governments, Agriculture & Food

When applying the *False Claims Act* to statements made to the United States Department of Agriculture, Farm Services Agency (FSA) in connection with farm subsidy payments, farm disaster payments, and loans for farmers, the ownership interest of individuals for an entity seeking benefits from the FSA, as well as their engagement in that entity, are central to the payment eligibility criteria for farm subsidies established in 7 C.F.R. pt. 1400 — Payment Limitation and Payment Eligibility. Indeed, identifying who or what is participating and therefore how payments may be attributed is the cornerstone to most program eligibility. A reasonable person would therefore likely attach importance to a statement of ownership interests to the FSA in a farm operating plan, and these considerations, in determining an individual's eligibility for farm subsidies, undoubtedly influence the payment of farm subsidies by the government as required by *31 U.S.C.S. § 3729(b)(4)*.

Business & Corporate Compliance > ... > Agriculture & Food > Governments > Agriculture & Food

HN16[] **Governments, Agriculture & Food**

The regulations codified at 7 C.F.R. pt. 1400 provide detailed guidance for the attribution of payments from the United States Department of Agriculture, Farm Services Agency by the pro rata share of a person's interest in an entity, used to establish an individual's cumulative payments against their annual payment limits, *7 C.F.R. § 1400.105*. Payment limitations per person are established in *7 C.F.R. § 1400.1(f)* and average adjusted gross income limitations are set forth in *7 C.F.R. § 1400.500(a) - (d)*. The payment eligibility requirements state that to be considered eligible to receive payments with respect to a particular farming operation, a person or legal entity must be actively engaged in farming with respect to such operation. *7 C.F.R. § 1400.201*. The requirement to be actively engaged in farming continues to be an area in which the government has recognized potential for fraud. Requirements for active engagement in farming are established separately for different entities or individuals engaged in farming operations.

Business & Corporate Compliance > ... > Agriculture & Food > Governments > Agriculture & Food

HN17[] **Governments, Agriculture & Food**

Under regulations of the United States Department of Agriculture, Farm Services Agency, for a farming operation conducted predominately by family members, in order to be actively engaged in fanning, an adult family member must (1) have a share of the profits or losses from the farming operation commensurate with such person's contribution to the operation and (2) make contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with such person's claimed share of the farming operation. *7 C.F.R. § 1400.208*. Contribution is defined as providing land, capital, or equipment assets, and the actions of providing active personal labor or active personal management to a farming operation in exchange for, or with the expectation of, deriving benefit based solely on the success of the farming operation. *7 C.F.R. § 1400.3*. Active personal management includes general supervision and direction of activities or services reasonably related and necessary to the farming operation, which may potentially not require physically visiting the farming operation.

Business & Corporate Compliance > ... > Agriculture & Food > Governments > Agriculture & Food

HN18[] **Governments, Agriculture & Food**

Under regulations of the United States Department of Agriculture, Farm Services Agency, a requirement to be actively engaged in farming adheres for members of a corporation, with the additional requirement that active personal labor-and active personal management is (i) performed on a regular basis, (ii) identifiable and documentable, and (iii) separate and distinct from such contributions of any other member of the farming operation. *7 C.F.R. § 1400.204(a)(2)(i) - (iii)*. As of 2011, an exception to the requirement that a member be actively engaged in farming exists where at least 50 percent of the stock is held by members that are actively providing labor or management. *7 C.F.R. § 1400.204(a)(2)*, *(c)(1)*. It is also possible, as of 2011, for one spouse to contribute either active personal labor, active personal management, or a combination of these for both spouses. *7 C.F.R. § 1400.204(a)(2)*.

Business & Corporate Compliance > ... > Agriculture & Food > Governments > Agriculture & Food

HN19[] **Governments, Agriculture & Food**

Under regulations of the United States Department of Agriculture, Farm Services Agency, like an exception for spouses included under corporations, as of 2009, a provision in the regulation under "Persons" indicates that where one spouse is actively engaged in farming the other spouse need not be. *7 C.F.R. § 1400.202(b)*. However, this provision specifically references such spouse's active engagement in farming as fulfilling the other spouse's requirement to do so under *7 C.F.R. § 1400.202(a)(1)(ii)*. It therefore does not nullify the requirement in the same section for each spouse to provide capital as provided in *7 C.F.R. § 1400.202(a)(1)(i)*. Nor does this provision alongside the less restrictive requirements for family members under *7 C.F.R. § 1400.208* or spousal members of a corporation under *7 C.F.R. § 1400.204(a)(2)* suggest that neither spouse is required to contribute capital to the farming operation.

Business & Corporate Compliance > ... > Agriculture & Food > Governments > Agriculture & Food

HN20[] **Governments, Agriculture & Food**

Under regulations of the United States Department of Agriculture, Farm Services Agency, the provisions of 7 C.F.R. pt. 1400 provide that any change in a farming operation that increase the number of persons or legal entities to which the provisions of the regulations apply must be bona fide and substantive. *7 C.F.R. § 1400.104*. It contains specific provisions for refunding payments received if the person or legal entity fails to comply with the provisions of the regulations and adopts or participates in adopting a scheme or device designed to evade the regulations. *7 C.F.R. § 1400.5*.

Antitrust & Trade Law > Clayton Act > Defenses

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > Defenses

Labor & Employment Law > Employer Liability > False Claims Act > Scope & Definitions

HN21[] **Clayton Act, Defenses**

The intracorporate conspiracy doctrine, developed within the context of ***antitrust law***, holds that a corporation cannot conspire with its employees, agents, or subsidiaries, as that would amount to conspiring with itself. The doctrine turns on specific antitrust objectives and at least one district court has held that it is not available under the False Claims Act (FCA). On the other hand, a handful of district courts have extended the intracorporate conspiracy doctrine to bar claims for conspiracy under the FCA. This includes two district court cases from the United States Court of Appeals for the Eighth Circuit, which assume that plaintiffs in a claim for conspiracy under the FCA must plead facts of conspiracy outside the corporate structure in order not to be barred by the intracorporate conspiracy doctrine.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Labor & Employment Law > Employer Liability > False Claims Act > Burdens of Proof

Labor & Employment Law > Employer Liability > False Claims Act > Scope & Definitions

HN22[] **Heightened Pleading Requirements, Fraud Claims**

The particularity requirement of *Fed. R. Civ. P. 9(b)* applies to conspiracy claims brought under the *False Claims Act*. To state a claim for conspiracy under *31 U.S.C.S. § 3729(a)(1)(C)*, it must be shown that the conspirators intended to defraud the government. Although it is not necessary to show that the conspirators intended a false record or statement to be presented directly to the government, the plaintiffs must establish that they agreed that the false record or statement would have a material effect on the government's decision to pay a false or fraudulent claim. A plaintiff need not provide proof of express agreement but must establish a tacit understanding between the parties which may be shown wholly through the circumstantial evidence of each defendant's actions.

Civil Procedure > Pleading & Practice > Pleadings > Complaints

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

Labor & Employment Law > Employer Liability > False Claims Act > Scope & Definitions

HN23[] **Pleadings, Complaints**

Pursuant to *Fed. R. Civ. P. 8(d)*, a party may plead two or more statements of a claim or defense alternatively or hypothetically. Where alternative statements are made, a pleading is sufficient if any one of them is sufficient. *Fed. R. Civ. P. 8(d)(2)*. Moreover, a party may state as many separate claims or defenses as it has, regardless of consistency. *Fed. R. Civ. P. 8(d)(3)*. This rule is also recognized in South Dakota. S.D. Codified Laws § 15-6-8(a), (e). The fact that a relator's claim for unjust enrichment may be inconsistent with claims brought under the *False Claims Act* is not a reason for dismissal.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN24[] **Equitable Relief, Quantum Meruit**

Unjust enrichment occurs when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying. To establish a prima facie claim for unjust enrichment in South Dakota, a plaintiff must claim that a defendant (1) received a benefit, (2) the defendant was cognizant of that benefit, and (3) the retention of the benefit without reimbursement would unjustly enrich the recipient. The relevant inquiry in determining whether the recipient was unjustly enriched is whether the circumstances are such that equitably the beneficiary should restore to the benefactor the benefit or its value. Further, an enrichment is unjust if it lacks an adequate legal basis, i.e., it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.

Contracts Law > Remedies > Equitable Relief > Quantum Meruit

HN25[] **Equitable Relief, Quantum Meruit**

While a claim for unjust enrichment may exist where a person is unjustly enriched at the expense of another, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," without the need to show that the claimant has suffered a loss. Where a breach of fiduciary duty is at issue, the defendant's benefit is regarded as being at the plaintiff's expense because it resulted in a wrong committed against him or her.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN26[] **Amendment of Pleadings, Leave of Court**

A decision whether to allow a plaintiff to amend a complaint is left to the sound discretion of a district court. Amendments may be denied where they unduly prejudice the non-moving party or are futile.

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Judges: CHARLES B. KORNMANN, United States District Judge.

Opinion by: CHARLES B. KORNMANN

Opinion

ORDER

BACKGROUND

On behalf of the United States and himself, Dr. John A. Millin ("Relator," together with the United States, "plaintiffs") filed suit on July 18, 2016, against Larry **[*2]** F. Krause and Krause-Allbee Trucking, Inc. ("defendants") in a *qui tam* action under the *False Claims Act ("FCA"), Title 31 U.S.C. § 3729, et. seq.*, as amended, to recover damages and penalties related to defendants' alleged false claims for payment to the United States Department of Agriculture, Farm Services Agency ("FSA") in connection with farm subsidy payments, farm disaster payments, and loans for farmers. Relator alleges that defendant Krause misrepresented the ownership of Krause-Allbee Trucking by submitting filings to the FSA stating that Relator and his then spouse, Lori Millin, maintained ownership interests in Krause-Allbee Trucking, when Relator did not maintain any such ownership interest. Relator states that he discovered he did not hold any ownership interest in Krause-Albee Trucking after divorce from his then spouse, when his attorney contacted defendants to request Krause-Allbee Trucking's financial statements.

Specifically, Relator alleges that Krause filed documents with the FSA or the United States Department of Agriculture or both in 2002, indicating that Relator and his then spouse owned stock in Krause-Allbee Trucking. Krause also allegedly signed and submitted to the FSA a document **[*3]** stating that Relator designated Krause-Allbee Trucking to receive FSA payments to which Relator was entitled. The same Farm Operating Plan listing ownership interests in Krause-Allbee Trucking was again filed in 2003 with the FSA. In 2004, 2005, and 2006, Relator alleges that Krause filed documents with the FSA, stating Relator and his then spouse held the same ownership interests in Krause-Allbee Trucking.

According to plaintiffs' Complaint, filings with the FSA on behalf of Krause-Allbee Trucking for 2007, 2008, and 2009 similarly list Relator and his then spouse as holding ownership interests in Krause-Allbee Trucking. Documents from 2009 include minutes of a corporate meeting dated January 14, 2009, indicating that Relator and his then spouse were the only stockholders of Krause-Allbee Trucking. Relator alleges that additional documents from 2009, including the Farm Operating Plan, list Relator and his then spouse as guarantors of a loan to Krause-Allbee Trucking from the First State Bank of Warner, but that both Krause and the First State Bank of Warner have represented that Relator never guaranteed such a loan. Relator further alleges that, from 2010-2015, Krause filed Farm Operating **[*4]** Plans with the FSA, listing Relator and his then spouse as holding ownership interests in Krause-Allbee Trucking.

In 2002, 2006, and 2009 the FSA sent Krause-Allbee Trucking letters confirming the stock ownership, stating that "[y]ou are 'actively engaged in farming' and eligible for payments and benefits" and "Adjusted Gross Income provisions have been met based on your certifications." According to plaintiffs' Complaint, Krause-Allbee Trucking received subsidies from the FSA of $307,924 in 2008, $62,506 in 2009, $347,134 in 2010, $72,205 in 2011, $258,104 in 2012 and $108,585 in 2013. Plaintiffs' Complaint argues that the alleged false statements regarding ownership interests were material to the FSA's grant of farm subsidies, because Krause's payments would have otherwise been capped by limits on an individual's receipt of farm subsidies. By listing Relator and his then spouse as owners of Krause-Allbee Trucking, plaintiffs' Complaint alleges that "[d]efendants were able to receive farm subsidy payments to which they would not have been entitled if Krause and his wife were listed as the owners of Krause-Allbee Trucking."

Plaintiffs' Complaint further states that Krause may have filed **[*5]** similar statements on behalf of Krause-Allbee Farming, Inc. or L&L General Partnership or both, and that these entities, along with K&L Land & Cattle, LLC, received subsidies from the FSA based on Farm Operating Plans submitted to the FSA.

Plaintiffs filed claims for relief under the FCA, *31 U.S.C. § 3729(a)(1)*, *(i)* for presenting a false claim for payment or approval, (ii) making or using a false record or statement material to a false claim, (iii) conspiring to defraud the Government, and (iv) using a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government (also called a "reverse false claim"). Plaintiffs' Complaint also seeks a declaratory judgment pursuant to *28 U.S.C. § 2201* for Relator regarding his ownership interest in Krause-Allbee Trucking, as well as a claim of unjust enrichment against defendants for receiving payments from farm subsidy programs on Relator's behalf.

Defendants move to dismiss plaintiffs' claims based on the statute of limitations codified in the FCA at *31 U.S.C. § 3731 (b)*, stating that the six-year limitation on claims bars "the majority of plaintiffs' claims. Defendants also submit that plaintiffs' Complaint failed to meet the plausibility requirement **[*6]** of *Fed. R. Civ. P. 8(a)* and the particularity requirement of *Fed. R. Civ. P. 9(b)* for fraud claims. Defendants further argue that plaintiffs' conspiracy claim is barred by the intracorporate conspiracy doctrine. Relator's request for declaratory judgment, defendants state, must be dismissed if the FCA claims are dismissed, as the *Declaratory Judgment Act* does not provide an independent basis for jurisdiction. Finally, defendants argue that Relator's claim for unjust enrichment must be dismissed, stating that Relator has not pled the elements required for such a claim. These arguments are addressed in turn below.

Plaintiffs filed an opposition to the motion to dismiss requesting, in the alternative, leave to amend the Complaint.

DECISION

I. The applicable statute of limitations under the FCA, *31 U.S.C. § 3731(b)*

HN1[] A motion to dismiss may be granted "when a claim is barred under a statute of limitations." *Bradley Timberland Res. v. Bradley Lumber Co., 712 F.3d 401, 406 (8th Cir. 2013)* (*citing* *Varner v. Peterson Farms, 371 F.3d 1011, 1016 (8th Cir. 2004))*. A court may dismiss a complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* when it appears from the face of the complaint that the claim is time-barred and no facts are alleged to avoid the bar of the statute. *Wong v. Wells Fargo Bank N.A., 789 F.3d 889, 897 (8th Cir. 2015)* (*citing* *Illig v. Union Elec. Co., 652 F.3d 971, 976 (8th Cir. 1995))*; *Varner v. Peterson Farms, 371 F.3d 1011, 1016 (8th Cir.2004)*; and *Brictson v. Woodrough, 164 F.2d 107 (8th Cir. 1947)*. In deciding a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)*, a court must assume "all facts in the complaint to be true" and must construe "all reasonable inferences **[*7]** most favorably to the complainant." *U.S. ex rel. Raynor v. Nat'l Rural Utilities Co-op. Finance. Corp., 690 F.3d 951 (8th Cir. 2012)* (*citing* *B&B Hardware, Inc. v. Hargis Indus., Inc., 569 F.3d 383, 387 (8th Cir.2009)*; and *Eckert v. Titan Tire Corp., 514 F.3d 801, 806 (8th Cir.2008))*.

Assuming that all of the facts in plaintiffs' Complaint are true and drawing inferences in plaintiffs' favor, plaintiffs' claims allege that defendants may have committed violations of the FCA each year from 2002-2015. However, **HN2**[] 31 U.S.C. § 3731(b) provides that a civil action may not be brought under the FCA

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

Whether 31 U.S.C. § 3731(b)(1) or (b)(2) applies in the instant case, then, determines whether false claims submitted after 18 July 2010 or 18 July 2006 remain viable. Because it is clear from the face of the Complaint that plaintiffs plead claims that may be barred by the statute of limitations—specifically, any false claims allegedly submitted by defendants prior to either of these dates—we may decide this issue as raised in the defendants' motion to dismiss.

Plaintiffs **[*8]** and defendants acknowledge that where, as here, the government declines to join a civil action brought by a private person, the Eighth Circuit has not determined which limitations period applies. Moreover, circuit courts are split on this issue. As a question of first impression in our circuit on which a number of courts are in disagreement, then, this Court undertakes a review of rationale given by leading opinions regarding which statute of limitations applies to private actions brought under the FCA.

Why Congress has not acted over a period of 25 years to address all these questions and different interpretations of the statute is a mystery to me. This inaction is a detriment to litigants and the courts.

a. Interpretations of *31 U.S.C. § 3731(b)* in the Eighth Circuit

In their motion to dismiss plaintiffs' claims as barred by the statute of limitations, defendants state that the six-year limitation applies here, "as the three-year limitation applies only to the government." In support of this statement, defendants cite an unreported case (*U.S. ex rel. Read v. Central Plains Clinic, 1998 U.S. Dist. LEXIS 15642, 1998 WL 663330 (D.S.D. 1998)*), an Eighth Circuit case in which the six-year statute of limitations was not on appeal and so not considered in the Court's decision (*Baycol Prods. Litig., 732 F.3d 869 (2013))*, and two cases from the District **[*9]** of Minnesota which cite an Eighth Circuit case, Joshi, as precedent (*U.S. ex rel. Dicken v. Nw. Eye Center, P.A., 2017 U.S. Dist. LEXIS 83130, 2017 WL 2345579 (D. Minn. 2017)*; and *U.S. ex rel. Sammarco v. Ludeman, 2010 U.S. Dist. LEXIS 17470, 2010 WL 681454 (D. Minn. 2010)* (unreported)). The Court in Joshi, however, in fact declined to decide whether *§ 3731(b)(2)* applies where the government does not intervene (*U.S. ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 559 (8th Cir. 2006))*. There is no case law that otherwise determines how this Court must decide this issue.

HN3[] Courts have recognized three approaches to interpreting how the statute of limitations in *31 U.S.C. § 3731(b)* applies to actions brought by a private person in which the government declines to intervene. The first approach, which defendants argue this court should adopt, interprets *§ 3731(b)(2)* as applying to the government only and as inapplicable in cases where the government does not intervene. *U.S. ex rel. Sanders v. N. Am. Bus. Indus., Inc., 546 F.3d 288 (4th Cir. 2008)*. The second approach asserts that private parties are entitled to the 10 year statute of limitations *§ 3731(b)(2)* and that the limitations period begins on the date the government should have known of facts material to the right of action. *U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., 474 F.Supp.2d 75 (D.D.C. 2007)*. Finally, the third approach is that the private party stands in for the government where the government declines to intervene, and that the limitations period begins to run on the date that the plaintiff knew or should have known the facts relevant to the right of action. *U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir. 1996)*.

b. First approach: Limiting private [*10] plaintiffs to the six year limitations period

In Sanders, the Fourth Circuit decided that, based upon a claimed plain reading of *§ 3731(b)*, it is clear that Congress intended *clause (b)(2)* of that section to apply only to cases in which the government is a party, as reading *clause (b)(2)* to apply when the government is not a party produces the "bizarre" result in which "the limitations period in a relator's action depends on the knowledge of a nonparty to the action." *U.S. ex rel. Sanders v. N. Am. Bus. Indus., Inc., 546 F.3d 288, 293 (4th Cir. 2008)*. Such an interpretation of the government's awareness of facts relevant to the claim "does not notify the relator of anything, so that knowledge cannot reasonably begin the limitations period for a relator's claims." *Id. at 294*. Moreover, the government official responsible for acting on such knowledge cannot "be charged with any responsibility other than to see that the government brings or joins an FCA action within the limitations period." *Id.* There is no responsibility for such official to assume that a private party will bring an FCA action.

The Fourth Circuit further explains that, following the Supreme Court's decision in Graham, it is clear that the reference to a "civil action" in *§ 3731(b)*'s preface should not be interpreted to mean that **[*11]** all civil actions are covered by each clause of *§ 3731(b)*, but rather that "only a subset of civil actions may benefit from the extended limitations period in *§ 3731(b)(2)*—those in which the government is a party." *Id. at 295* (*citing Graham Cty. Soil & Water Conservation Dist. v. ex rel. Wilson, 545 U.S. 409, 411, 125 S. Ct. 2444, 162 L. Ed. 2d 390 (2005)*). The Fourth Circuit notes that *§ 3731(b)(2)* is almost identical to another federal statute, *28 U.S.C. § 2416(c)*, which "tolls the generally applicable statute of limitations in actions brought by the United States—and only by the United States—until 'facts material to the right of action' are actually or constructively known by an 'official of the United States charged with the responsibility to act in the circumstances.'" *Sanders at 294* (internal citations omitted). It is argued then that Congress transcribed language enacted in *28 U.S.C. § 2416(c)*, which applies only to the government, when adopting *§ 3731(b)(2)*, suggesting that Congress intended *§ 3731(b)(2)* to similarly only apply to the government.[1] *Id.*

Interpreting *§ 3731 (b)(2)* to apply to private plaintiffs could result in unfavorable outcomes. In addition to requiring defendants, in asserting a statute of limitations defense, "to seek out and litigate the identity and knowledge of a government official not a party to the action," it would also allow private plaintiffs to delay in filing an action, **[*12]** increasing their own recovery in doing so and rendering the six-year statute of limitations in *§ 3731(b)(1)* superfluous. *Id. at 295*. A private plaintiff's failure to timely file a claim may also cause the government to lose the opportunity to bring a criminal action for the fraud, which must be filed "within five years of the violation," although this outcome could also occur in the event a plaintiff exercises the full six-year limitations period set forth in *§ 3731(b)(1)*. *Id.* (*citing 18 U.S.C. §§ 287*, *3282*). In the present case, there is no search required because the FSA operates in Aberdeen, S.D., and is readily available to litigants.

Sanders notes that the majority of federal circuit and district courts follow an approach which limits private plaintiffs to a six-year statute of limitations under the FCA. *Id. at 296*. While Sanders does not engage in an exhaustive inquiry into congressional intent and statutory history, the Fourth Circuit looks to the Tenth Circuit's decision in Sikkenga to support its argument that *§ 3731 (b)(2)* is adopted from *28 U.S.C. § 2416(c)*. In Sikkenga, the Tenth Circuit, outlining the different approaches to interpreting *§ 3731(b)*, acknowledges that the plain language of the statute "is ambiguous," and thereafter performs a lengthy statutory analysis, ultimately **[*13]** determining "that *§ 3731(b)* was not intended to apply to private qui tarn relators at all." *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 722, 725 (10th Cir. 2006)*. Sanders leverages this analysis in its decision. In fact, it is virtually impossible to determine what Congress intended,

c. Second approach: the government's knowledge determines the limitations period

In U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, the District Court for the District of Columbia held that the statute of limitations should begin to run when the government becomes aware of facts material to the

[1] This Court notes that, as articulated by the District Court in U.S. ex rel. Griffith v. Conn, *15 U.S.C. § 78u-6* ("Securities whistleblower incentives and protection") also contains language similar to that included in *§ 3731(b)(2)* that, like *28 U.S.C. § 2416(c)*, applies only to the government. *117 F.Supp.3d 961 (E.D.Ky. 2015)*.

claim. The District Court opined that, because § 3731(b)(2) does not explicitly exclude private plaintiffs, and because the phrase "whichever occurs last" appears, as offset, to apply both to § 3731(b)(1) and (b)(2), the prefatory language "[a] civil action" should render both (b)(1) and (b)(2) as applying to all civil claims. U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., 474 F.Supp.2d 75, 84, 85 (D.D.C. 2007). However, as discussed above, the Supreme Court expressly rejected this interpretation of § 3731(b)'s preface in Graham, and this Court is unpersuaded that any other reading would require interpreting "whichever occurs last" as applying only to § 3731(b)(2) as the District Court argues. Rather, it is clear that "whichever occurs last" determines which limitations period should apply should the government **[*14]** choose to intervene in a claim brought by a private plaintiff, in line with the Supreme Court's reading in Graham that "[a] civil action" does not include all civil actions,

After determining that the legislative history of the statute "shows, if anything, a desire to ensure that the government's rights are not impaired by the conduct of some other person," the Pogue opinion further reasons that § 3731 (b)(2) could not apply to a private plaintiff, because this would result in a situation where "the government could conceivably find itself time-barred when it intervenes in a *qui tarn* case in which a relator waited more than three years to bring suit." Id. at 87. This reasoning assumes that, in cases where the government does intervene, the government would not receive the benefit of a plain reading of the statute, contrary to the Pogue Court's own rationale for its interpretation of § 3731(b)(2). The Pogue Court observed that, interpreting § 3731(b)(2) such that the government is only bound by its own knowledge where it intervenes, would "allow the government to change the applicable limitations period by deciding to intervene," an outcome the Court characterizes as "unusual." However, I see nothing unusual in this outcome. As **[*15]** implicitly acknowledged by the Sanders decision, in a case brought by a private party, the private party will typically control when the government discovers the facts material to the right of action. Pursuant to § 3730(b), the government may elect to intervene in the action within 60 days (subject to permitted extensions) of the plaintiff filing its complaint. The complaint is not served on the defendant until ordered by the court. 31 U.S.C. § 3730(b)(2). The applicable statute of limitations, if at issue, could be apparent shortly after a private plaintiff files its complaint.

It is clear from the discussion in Sanders (outlined above) that interpreting § 3731 (b)(2) as applying to the government only results in outcomes that are unfavorable to the timely filing of suit, the government's rights to pursue fraud claims, and the convenience of both plaintiffs and defendants. Although Pogue takes issue with the rationale provided in decisions that follow Sanders that, were a private plaintiff not limited to the six year limitations period, that plaintiff might sleep on the claim, this argument is unconvincing. The Pogue decision argues that the first to file rule and public disclosure bar encourage private plaintiffs to file claims **[*16]** rapidly. U.S. ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., 474 F.Supp.2d 75, 84, 88 (D.D.C. 2007). However, for many private plaintiffs, as here, the likelihood of the fraud they have knowledge of becoming public or being acted on by another party is limited. Moreover, plaintiffs that are the original source of information for such fraud will be able to exercise an exception to the public disclosure bar. For the reasons stated here, this Court does not find the approach put forward by the District Court in Pogue persuasive.

d. Third approach: the plaintiff's knowledge determines the limitations period

The third approach to interpreting § 3731(b)(2) is that, in cases where the government chooses not to intervene, the plaintiff stands in for the government and the limitations period begins to run on the date the plaintiff knew or should have known the facts relevant to the right of action. In Hyatt v. Northrop Corp., the Ninth Circuit adopted this approach, relying, however, on the same argument, perhaps refuted by the Supreme Court's Graham decision, put forward by Pogue: that the prefatory language of § 3731(b) referring to "[a] civil action" should be read so that both §§ 3731(b)(1) and (b)(2) apply to any civil actions. U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211, 1214 (9th Cir. 1996). Noting that the legislative history is "at best ambiguous," particularly with regard to **[*17]** the use of the word "government," the Ninth Circuit posits that inconsistent use of "government" "is actually consistent with the [Court's] theory of the Act because *qui tam* plaintiffs are merely agents suing on behalf of the government, which is always the real party in interest." Id. at 1215. This Court agrees with the Ninth Circuit that the private plaintiff filing an FCA claim stands in for the government's interest. The Ninth Circuit's finding that the legislative history is ambiguous provides sufficient rationale to render this general observation dispositive in determining which limitations period applies to a plaintiff's claim in which the government does not intervene. I prefer to base my decision here on matters of equitable tolling and the facts of the present case.

The Ninth Circuit reasoned that ***HN4***[] equitable tolling, codified for the government in the FCA at *§ 3731(b)(2)*, should similarly be available for a private plaintiff. *Id. at 1216*. I agree with that proposition. The Ninth Circuit cited legislative history only in support of equitable tolling on the government's behalf. ***HN5***[] The fact that a federal statute sets a time limitation for a suit "does not restrict the power of the federal courts to hold that the **[*18]** statute of limitations is tolled under certain circumstances not inconsistent with legislative purpose" and I agree with that as well. *Am. Pipe & Const. Co. v. Utah, 414 U.S. 538, 559, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*. This is despite the fact that neither the legislative history nor the text of the statute clearly provide for such a right for a particular party, to the extent that one party must be substituted for another explicitly provided that right. Moreover, I note that claims for equitable tolling apply where a plaintiff has been pursuing his rights diligently and where "extraordinary circumstances" prevented timely filing. *Menominee Indian Tribe of Wisconsin v. U.S., 136 S.Ct. 750, 755, 193 L. Ed. 2d 652 (2016)* (internal citations omitted). All of that exists here.

The defendants were in charge of the defendant corporation's action and had sole control of corporate records. Mr. Krause misrepresented many times in writing and under oath the status of Relater and his then wife. It is possible, of course, that Relater and his then wife had rights, obligations, and legal status which were altered as a result of the divorce to shield corporate assets from any claims of Relator. These are questions of fact to be later determined. This is true also as to whether any guarantees of corporate debt were involved. I cannot imagine a clearer case in which **[*19]** equitable tolling should be used.

There is another logical reason why the longest period of tolling should be used. If the Court has erred in not using a six year statute of limitations and the case is tried with an award including more than a six year period, the case would be retried. I realize that the use of interrogatories to the jury may prevent this, but that remains to be seen,

e. The third approach as modified as set forth above should apply in the Northern Division of the District of South Dakota

It is clear from this overview of interpretations of *§ 3731(b)* that ***HN6***[] the plain meaning of the statute is ambiguous. Moreover, given the breadth of interpretations of the legislative history of this statute, we are persuaded that it is equally as ambiguous. While the plain language of a statute is the starting point for statutory interpretation, and the purpose of statutory interpretation "is to give effect to the intent of Congress," canons of statutory interpretation "need not be conclusive" and "other circumstances evidencing congressional intent can overcome their force." *U.S. v. Milk, 281 F.3d 762, 766, 767 (8th Cir. 2002)*; *U.S. v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000)* (internal citations omitted); and *Chickasaw Nation v. U.S., 534 U.S. 84, 94, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001)*. This is undoubtedly so where, as here, both the plain language of the statute and **[*20]** legislative history are unclear. ***HN7***[] The third approach, as modified, should be used in the Northern Division of the District of South Dakota in FCA cases in which the government does not intervene. In light of this determination, the Court finds that any false claims alleged by plaintiffs to have been made by defendants prior to 18 July 2006 are barred by the statute of limitations.

II. The complaint must plead claims for fraud plausibly and with particularity

HN8[] In order to survive a motion to dismiss for failure to state a claim on which relief can be granted, the plaintiff must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Torti v. Hoag, 868 F.3d 666, 671 (8th Cir. 2017)* (internal citations omitted). A plausible claim must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (internal citations omitted). A prima facie case under the FCA requires that "(1) the defendant made a claim against the United States; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false or fraudulent." *U.S. ex rel. Raynor v. Nat'l Rural Utilities Co-op. Finance, Corp., 690 F.3d 951, 955 (8th Cir. 2012)* (*citing*U.S. v. Basin Elec. Power Coop., 248 F.3d 781, 803 (8th Cir. 2001)). Liability under the FCA attaches to the claim for payment, rather **[*21]** than the underlying fraud. Baycol Prods. Litig., 732 F.3d 869, 874 (8th Cir. 2013).

Under the FCA, a defendant must have "actual knowledge," act "in deliberate ignorance of or have "reckless disregard of the truth or falsity of the information" in presenting a materially false claim. Baycol Prods. Litig., 732 F.3d at 875; 31 U.S.C. § 3729(b)(1)(A). Proof of specific intent to defraud the government is not required. U.S. ex rel. Quirk v. Madonna Towers, Inc., 278 F.3d 765, 767 (8th Cir. 2002). Further, the "knowledge of officers and key employees of a corporation, obtained while acting in the course of their employment and within the scope of their authority, is imputed to the corporation itself." Acme Precision Products. Inc. v. Am. Alloys Corp., 422 F.2d 1395. 1398 (8th Cir. 1970).

HN9[] The heightened pleading standard for fraud under Fed. R. Civ. P. 9(b) applies to claims brought under the FCA, to include reverse false claims. Raynor at 956; and Olson v. Fairview Health Services of Minnesota, 831 F.3d 1063, 1073 (8th Cir. 2016). Under Rule 9(b), a party "must state with particularity the circumstances constituting fraud." Raynor at 956. (internal citations omitted). "To meet this standard," the plaintiff's complaint "alleging fraud 'must identify who, what, where, when, and how.'" *Id.* (internal citations omitted). Pleading with the requisite particularity includes the requirement to plead the materiality of the false claims to payment. Olson at 1070; and Universal Health Services, Inc. v. U.S., ex rel. Escobar, 136 S.Ct. 1989, n.6, 195 L. Ed. 2d 348 (2016). When a claim is based on facts "peculiarly within the opposing party's knowledge," allegations may be pled "on information and belief so long as they are "accompanied **[*22]** by a statement of facts on which the belief is founded" and the pleader identifies "efforts made to obtain additional information." Drobnak v. Andersen Corp., 561 F.3d 778, 784 (8th Cir. 2009) (internal citations omitted). This relaxed standard, though, does not remove the plaintiff's requirement to plead "the equivalent of the first paragraph of any newspaper story." *Id.*

HN10[] When a plaintiff alleges a systematic practice of fraud, the plaintiff need not allege details of "every alleged fraudulent claim" but, if the defendants actions could, but may not necessarily have led to the submission of false claims, must provide "*some* representative examples of [the defendants'] alleged fraudulent conduct, specifying the time, place, and content of their acts and the identity of the actors" within the statute of limitations. U.S. ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 555, 557 (8th Cir. 2006) (affirming lower court's dismissal of complaint and refusal of leave to amend where plaintiff's specific claims of fraud were barred by the statute of limitations); and U.S. ex rel. Thayer v. Planned Parenthood of the Heartland, 765 F.3d 914, 918 (8th Cir. 2014) (clarifying the scope of the Joshi ruling). A plaintiff may satisfy the particularity requirement of Rule 9(b) in cases of systematic fraud without pleading representative examples of false claims where the plaintiff pleads "particular details of a scheme to submit false claims **[*23]** paired with reliable indicia that lead to a strong inference that claims were actually submitted," such as "by pleading details about the defendant's billing practices and pleading personal knowledge of the defendant's submission of false claims." Thayer at 918.

In light of this Court's determination regarding the applicable limitations period for plaintiffs' FCA claims, Relator's allegations of false claims defendant submitted on or after the date when "barring" first occurs must be pled with the requisite plausibility and particularity to withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6). This date is 18 July 2006. The Complaint alleges that defendants filed Farm Operating Plans "and other documents" every year from 2006 to 2015 indicating that Relator and his then spouse were each 50% shareholders in Krause-Allbee Trucking. In opposition to defendants' motion to dismiss, Relator appends Farm Operating Plans dated June 13, 2006, July 26, 2007, May 19, 2009, May 12, 2010, June 6, 2011, and July 23, 2013, as well as minutes of corporate meetings dated January 15, 2007, January 14, 2008, and January 14, 2009, among other documents. This Court will not consider facts pled by Relator outside of the statute of limitations **[*24]** as representative examples or fulfilling the requisite particular details of a pattern of fraud as such fraud must nonetheless not be time-barred. Joshi at 555. However, this Court considers the Farm Operating Plans as potentially representative examples of fraud which Relator alleges defendants committed from 2006-2015.

a. The Court may consider Farm Operating Plans and 2009 corporate minutes submitted by Relator

HN11[] When on a motion to dismiss for failure to state a claim, extrinsic evidence outside the pleadings is considered by the court, the motion must be treated as one for summary judgment. Mattes v. ABC Plastics, Inc., 323 F.3d 695, n.4 (8th Cir. 2003). However, a district court may consider materials "necessarily embraced by the pleadings." *Id.* (*quoting* Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)). When deciding a motion to dismiss, the court "may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions." Kushner v. Beverly Enters., Inc., 317 F.3d 820, 831 (8th Cir. 2003). Where a party "has actual notice of all the information in [a] movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated." Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991). Because the Complaint refers to the Farm Operating Plans and 2009 minutes of a corporate meeting, copies of which **[*25]** are included in the opposition to defendants' motion to dismiss, this Court will consider the Farm Operating Plans and 2009 minutes of corporate meeting without converting this motion to one for summary judgment. This Court need not consider the 2007 or 2008 minutes of meetings, as they are not mentioned in the Complaint.

The Farm Operating Plan dated June 13, 2006, is outside of the statute of limitations as HN12[] the limitations period under the False Claim Act § 3731 (b)(1) begins to run on "the date the false claim was actually submitted." Graham Cty. Soil & Water Conservation Dist. v. ex rel. Wilson, 545 U.S. 409, 415, 125 S. Ct. 2444, 162 L. Ed. 2d 390 (2005). The 2007 Farm Operating Plan is an update to the 2006 Farm Operating Plan and indicates no change to the share ownership provided therein: John Millin, 32%; Lori Millin, 43%; and Brian Ellison, 25%. The 2009 Farm Operating Plan is signed by Larry Krause and Lori A. Millin, who is listed as "President — Director" with Relator listed as "Vice President — Director," and each as holding 50% ownership in Krause-Allbee Trucking. The 2009 Farm Operating Plan lists Lori Millin as maintaining 50% "Active Personal" management of the company, with Relator maintaining 25% "Active Personal" management. Relator's management is described as including participating in management **[*26]** meetings and being responsible for major decisions. The plan also states that Lori and Relator are guarantors of a loan at "First State Bank of Warner in Warner, SD." The 2009 minutes of corporate meeting list Lori and John Millin as the only stockholders and directors. The 2010 and 2011 Farm Operating Plans are re-certifications of the 2009 Farm Operating Plan, signed by Lori A. Millin. The 2013 Farm Operating Plan, signed by Larry Krause on July 23, 2013, maintains the same ownership and active personal management interests in Krause-Allbee Trucking for both Lori Millin and Relator as stated in the 2011 plan. Relator includes correspondence from Krause's counsel, Kennith Gosch, dated June 22, 2015, stating that "John Millin is not now nor has he ever been a shareholder" in Krause-Allbee Trucking, as well as a letter from First State Bank, dated August 17, 2015, that states that "John Millin is not a guarantor for any obligation of Krause-Allbee Trucking." It appears to be undisputed that false information was submitted to the government many times.

The Complaint alleges that "[u]pon information and belief, documents filed in 2007, 2008, and/or 2009 with the FSA by Krause-Allbee Trucking, **[*27]** including Farm Operating Plans, show a similar ownership structure to that as stated in 2006." Further, the Complaint states that "[u]pon information and belief, Krause filed documents, including but not limited to Farm Operating Plans, in 2010 and 2011 on behalf of Krause-Allbee Trucking indicating that there were no ownership changes for 2010 and 2011" from the 2009 filings. The Complaint also alleges that "[u]pon information and belief," Krause filed 2012, 2013, 2014, and 2015 Farm Operating Plans indicating that Relator held a 50% ownership in Krause-Allbee Trucking. HN13[] Allegations may be pled on information and belief when facts are, as here, likely to be "peculiarly within the opposing party's knowledge," but such belief must be accompanied by facts justifying the belief and a statement identifying "efforts made to obtain additional information." Drobnak at 784. Relator supports the allegation that defendants filed Farm Operating Plans in 2007, 2009, 2010, 2011 and 2013 indicating Relator's ownership in Krause-Allbee Trucking with a copy of those plans. The opposition to defendants' motion to dismiss additionally identifies Relator's efforts, by way of e-mail communication through his counsel, **[*28]** to obtain additional information regarding his ownership interest from Krause. The 2007, 2009, 2010, 2011 and 2013 Farm Operating Plans are pled as representative of a scheme of fraud undertaken by defendants until 2015.

Relator has pled the "first paragraph of any newspaper story," meeting the heightened pleading requirements for Fed. R. Civ. P. 9(b) and plausibility requirements of Fed. R. Civ. P. 8(a) for claims beginning in 2007. Krause or Lori Millin submitted Farm Operating Plans in 2007, 2009, 2010, 2011 and 2013 to the FSA for farm subsidies. The plans are stamped with the date of receipt by the Brown County FSA in Aberdeen as July 26, 2007, May 19, 2009, May 26, 2010, June 8, 2011, and July 29, 2013, respectively. These Plans indicate an ownership interest in Krause-Allbee Trucking for Relator of 32 to 50%, although attorney Gosch has stated that Relator was never a shareholder in the company. The 2009-2013 Farm Operating Plans also indicate that Relator participated in management meetings on a regular basis and was responsible for major decisions, although Relator states that he had no engagement of any kind with the company. Farm Operating Plans determine "payment eligibility and limitation **[*29]** determinations for farm subsidies" as is clear from the form documents.

Moreover, the form Farm Operating Plans contain a certification section that defendant Krause signed stating that "I certify that all information entered on this document ... is true and correct," that "I understand that furnishing incorrect information will result in forfeiture of payments and may result in the assessment of a penalty," and that "it is my responsibility to timely notify FSA in writing of any changes that may affect these representations." It is clear that the requirements for a prima facie case under the FCA have been met by Relator, as Relator has demonstrated that (1) the defendants made claims against the United States—here, the FSA; (2) the claims were false or fraudulent in stating Relator's ownership interest; and (3) the defendants knew, or were at least in "reckless disregard of the truth or falsity of the information" of the claim. Relator has further sufficiently pled representative examples of a scheme of fraud—he has clearly specified "the time, place, and content" of the fraudulent behavior as well as "the identity of the actors"—to warrant retaining claims from 2007 to 2015 inclusive. **[*30]** *Joshi at 557*. Relator need not plead personal knowledge of defendants' submission of false claims where, as here, he is able to meet the standard set forth by Joshi.

b. Relator has demonstrated defendants' false claims were material to payment

Following *Escobar,* ***HN14***[] a motion to dismiss may also properly encompass the materiality of a defendant's false claims to the government's decision to pay a claim. The FCA defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." *31 U.S.C. § 3729(b)(4)*. The fact that the government is entitled to refuse payment if aware of a violation, as is suggested by the certification provision of the Farm Operating Plans, is insufficient to meet the materiality requirement. *Escobar at 2004*. However, a false statement is considered material under the FCA if "either (1) a reasonable person would likely attach importance to it or (2) the defendant knew or should have known that the government would attach importance to it." *U.S. ex rel. Miller v. Weston Educ., Inc., 840 F.3d 494, 503-4 (8th Cir. 2016)*. ***HN15***[] The ownership interest of individuals for an entity seeking benefits from the FSA, as well as their engagement in that entity, are central to the payment eligibility criteria for farm subsidies established in 7 CFR Part 1400 **[*31]** — Payment Limitation and Payment Eligibility. Indeed, "[i]dentifying who or what is participating and therefore how payments may be attributed is the cornerstone to most program eligibility." CONG. RESEARCH SERV., R44739, U.S. FARM PROGRAM ELIGIBILITY AND PAYMENT LIMITS 5 (2017). A reasonable person would therefore likely attach importance to the statement of ownership interests to the FSA in the Farm Operating Plan, and these considerations, in determining an individual's eligibility for farm subsidies, undoubtedly influence the payment of farm subsidies by the government as required by *§ 3729(b)(4)*.

The pertinent regulations in force at the time the 2009, 2010, 2011 and 2013 Farm Operating Plans were submitted demonstrate that the defendants' false claims were material to the government's decision to-pay claims. The version of 7 CFR Part 1400 in force in 2007 differs slightly from the versions discussed below, but is materially the same; differences are indicated with footnotes. ***HN16***[] The regulations codified at 7 CFR Part 1400 provide detailed guidance for the attribution of payments by the pro rata share of a person's interest in an entity, used to establish an individual's cumulative payments against their annual payment limits, *7 CFR § 1400.105*.[2] Payment limitations per person are established in *§ 1400.1(f)* and average adjusted gross income limitations are set forth in *§ 1400.500(a)-(d)*.[3] The payment eligibility requirements state that "[t]o be considered eligible to receive payments

[2] "While the 2007 regulations do not provide guidance for the attribution of payments, payment limitations per person are "applied on a 'direct attribution' method with respect to the individual or entity." *§ 1400.1(g)*, n.1.

with respect to a particular farming operation, a person or legal entity must be actively engaged in farming with respect **[*32]** to such operation." *7 CFR § 1400.201*. The requirement to be actively engaged in farming has evolved since its inclusion in the 1987 Farm Program Payments Integrity Act, but continues to be an area in which the government has recognized potential for fraud. CONG. RESEARCH SERV., R44656, USDA'S ACTIVELY ENGAGED IN FARMING (AEF) REQUIREMENT 3 (2016) (stating that the actively engaged in farming requirement may "facilitate[e] the creation of new farm operation members simply to expand an operation's farm payment receipts.") Requirements for active engagement in farming are established separately for different entities or individuals engaged in farming operations. What follows looks at the provisions governing potentially relevant entities for the current instance.

HN17[] For a farming operation conducted predominately by family members, in order to be actively engaged in fanning, the adult family member must

> (1) [h]ave a share of the profits or losses from the farming operation commensurate with such person's contribution to the operation and (2) [m]ake contributions to the farming operation that are at risk for a loss, with the level of risk being commensurate with such person's claimed share of the farming **[*33]** operation. *7 CFR § 1400.208*.[4]

Contribution is defined as "providing land, capital, or equipment assets, and the actions of providing active personal labor or active personal management to a farming operation in exchange for, or with the expectation of, deriving benefit based solely on the success of the farming operation." *7 CFR § 1400.3*. Active personal management includes "general supervision and direction of activities" or "[s]ervices reasonably related and necessary to the farming operation," which could potentially not require physically visiting the farming operation. However, taking Relator's allegations as true that Relator had no engagement of any type with the farming operation nor contributed any capital or other assets, this Court must presume for the purposes of deciding the motion to dismiss that Relator was not "actively engaged in farming," and that he otherwise made no "contributions to the farming operation."

HN18[] The requirement to be actively engaged in farming adheres for members of a corporation, with the additional requirement that the "active personal labor-and active personal management" is "(i) [performed on a regular basis; (ii) [identifiable and documentable; and (iii) [s]eparate and distinct **[*34]** from such contributions of any other ... member of the farming operation." 7 CFR § 1400, *204(a)(2)(i)-(iii)*.[5] As of 2011, an exception to the requirement that a member be actively engaged in farming exists where "[a]t least 50 percent of the stock is held by ... members that are actively providing labor or management." *7 CFR § 1400.204(a)(2)*, *(c)(1)*. It is also possible, as of 2011, for one spouse to contribute either active personal labor, active personal management, or a combination of these for both spouses. *7 CFR § 1400.204(a)(2)*. While the 2009, 2010, 2011 and 2013 Farm Operating Plans state that Lori Millin will "be responsible for the minor decisions," to include "financial" and "tax decisions," and will take responsibility for "the planning and direction of the farming operation," to include "mak[ing] the cattle buying decisions," "the major decisions," and "participat[ing] in management meetings on a regular basis," defendants provide no indication that Lori Millin was actively providing labor or management or otherwise seek to counter Relator's argument that these statements were fraudulently made. The 2007 Farm Operating Plan provides no indication that Lori or John Millin provided any management function. Since Relator states that his then-wife was **[*35]** not "actively engaged in the management of any farming operations" for the duration of his marriage, accepting his allegations as true, this Court must also presume that Lori Millin was not "actively providing labor or management" to the farming operation for the purpose of this motion to dismiss.

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[3] *See §§ 1400.1(g)*, *1400.600* (2007).

[4] The 2007 regulations state that "an adult family member who makes a significant contribution of active personal management, active personal labor, or a combination of active personal labor and active personal management shall be considered to be actively engaged in farming." The 2007 regulations do not define contribution. This does not change the analysis in the present paragraph.

[5] This clarification does not exist in the 2007 regulations; however, this does not change the analysis in this paragraph.

HN19[] Like the exception for spouses included under corporations, as of 2009, a provision in the regulation under "Persons" indicates that where one spouse is actively engaged in farming the other spouse need not be. *7 CFR § 1400.202(b)*. However, this provision specifically references such spouse's active engagement in farming as fulfilling the other spouse's requirement to do so under *§ 1400.202(a)(1)(ii)*. It therefore does not nullify the requirement in the same section for each spouse to provide capital as provided in *paragraph (a)(1)(i)*. Nor do we read this provision alongside the less restrictive requirements for family members under *§ 1400.208* or spousal members of a corporation under *§ 1400.204(a)(2)* as suggesting that neither, spouse is required to contribute capital to the farming operation. This Court notes that neither party has alleged that any property, to include marital property, was contributed to Krause-Allbee Trucking's farming operations by Lori or John Millin **[*36]** to fulfill the active personal management requirement. While the 2007 Farm Operating Plan states that Lori and John Millin contributed 846.4 acres of leased land to the farming operating for $50 per acre, and while such lease of land to the farming operation may be sufficient to satisfy the requirement for capital under 7 CFR § 1400, the spousal exception described here was not available in 2007, and defendants allege in the 2009 Farm Operating Plan that the cash-rent tenant rule is not applicable as John and Lori Millin will contribute active personal management. Nor is the loan with the First State Bank of Warner sufficient to satisfy the capital requirement, as any loan provided by a person to fulfill *paragraph (a)(1)(i)* must not be co-signed or guaranteed by "[a]ny other person" that "has an interest in such farming operation." The 2009, 2010, 2011 and 2013 Farm Operating Plans, however, list both John and Lori Millin as guarantors for the loan from the First State Bank of Warner, and Lori Millin is also listed as having an ownership interest in Krause-Allbee Trucking. Moreover, given Relator's allegations, representations regarding the loan must be presumed to be false.

HN20[] The provisions of 7 CFR Part 1400 moreover provide that **[*37]** "[a]ny change in a farming operation that would increase the number of persons or legal entities to which the provisions of this part apply must be bona fide and substantive." *7 CFR § 1400.104*.[6] It contains specific provisions for refunding payments received "if the person or legal entity fails to comply with the provisions of this part and adopts or participates in adopting a scheme or device designed to evade this part." *7 CFR § 1400.5*.[7] Defendants should have been aware, then, that the government would attach importance to the ownership interests in Krause-Allbee Trucking indicated on the Farm Operating Plan.

For the above reasons, this Court finds that (1) a reasonable person would likely attach importance to the ownership interests indicated on the Farm Operating Plans submitted to the FSA and (2) defendants should have known the government would attach importance to those representations. The false claims were then material to the government's decision to pay claims. This determination, alongside the determination that plaintiffs have pled representative examples of a prima facie case under the FCA, leads this Court to the conclusion that plaintiffs have clearly pled facts for fraud in connection with Krause-Allbee **[*38]** Trucking's claim for farm subsidies from 2007-2015 with the requisite particularity and plausibility under the FCA's *§§ 3729(a)(1)(A)* and *(a)(1)(B)*.

However, because Relator has pled no facts, other than Krause's alleged ownership, with regard to Krause-Allbee Farming, Inc., L&L General Partnership, and K&L Land & Cattle, LLC, any claims involving these entities should be dismissed. Moreover, Relator's reverse false claim under *§ 3729(a)(1)(G)* should also be dismissed, as Relator has alleged no facts showing that defendants' claims were either "material to an obligation to pay or transmit money or property to the Government" or that the defendants "knowingly concealed] or knowingly and improperly avoid[ed] or decreased] an obligation to pay or transmit money or property to the Government." *31 U.S.C. §§ 3729(a)(1)(G)*; *see also* *U.S. v. Q Intern. Courier, Inc., 131 F.3d 770, 773 (8th Cir. 1997)* (holding that reverse false claims require that "a defendant must have had a present duty to pay money or property" to the government). Rather, Relator's Complaint alleges defendants received unearned subsidies from the FSA, not that defendants avoided paying

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[6] *See* *§ 1400.109* (2007).

[7] The 2007 regulation reads slightly differently but is substantively the same: "All or any part of the payment otherwise due a person on all farms in which the person has an interest may be withheld or be required to be refunded if the person adopts or participates in adopting a scheme or device designed to evade this part or that has the effect of evading this part."

money owed to the government. While it is possible that defendants could have reduced loan repayment rates for loans received through farm subsidy programs, Relator has **[*39]** not pled this claim with any specificity.

III. Relator's claim for conspiracy under the FCA

Relator's final claim under the FCA is that Krause and Krause-Allbee Trucking "conspired with one another to defraud the government by getting false or fraudulent claims allowed or paid" in violation of 31 U.S.C."*§ 3729(a)(1)(C)*. Defendants state that this claim is barred by the intracorporate conspiracy doctrine. The Eighth Circuit has yet to determine the applicability of this doctrine to claims brought under the FCA. ***HN21***[] The intracorporate conspiracy doctrine, developed within the context of ***antitrust law***, holds that a corporation cannot conspire with its employees, agents, or subsidiaries, as that would amount to conspiring with itself. *See, e.g.*, *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. The doctrine "turns on specific antitrust objectives" and at least one district court has held that it is not available under the FCA. *Cedric Kushner Promotions. Ltd. v. King, 533 U.S. 158, 166, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*; and *U.S. ex rel. Harris v. Lockheed Martin Corp., 905 F.Supp.2d 1343 (N.D.Ga. 2012)* (holding that the intracorporate conspiracy doctrine does not apply to criminal conspiracies under *18 U.S.C. § 371* and that, because the conduct plaintiffs alleged would constitute a violation of both that statute and the civil liability provisions of *§ 3729(a)*, the intracorporate doctrine cannot shield the same conspiracy alleging criminal wrongdoing **[*40]** from civil liability); *see also* *U.S. v. President and Fellows of Harvard College, 323 F.Supp.2d 151, n.40 (D.Mass. 2004)* (stating that "it is questionable whether" the intracorporate conspiracy doctrine would apply to an FCA case but without ruling on the issue). On the other hand, a handful of district courts have extended the intracorporate conspiracy doctrine to bar claims for conspiracy under the FCA. *See* *U.S. v. Gwinn, 2008 U.S. Dist. LEXIS 26361, 2008 WL 867927, 24 (S.D.W.Va. 2008)* (collecting cases). This includes two district court cases from the Eighth Circuit, which assume that plaintiffs in a claim for conspiracy under the FCA must plead facts of conspiracy outside the corporate structure in order not to be barred by the intracorporate conspiracy doctrine. *U.S. ex rel. Scharber v. Golden Gate Nat'l Senior Care. LLC, 135 F.Supp.3d 944, 967 (D.Minn. 2015)*; and *U.S. v. Cathedral Rock Corp., 2007 U.S. Dist. LEXIS 88280, 2007 WL 4270784, 6 (E.D.Mo. 2007)* (not reported). This Court is persuaded by the rationale provided by the Northern District of Georgia: because the intracorporate conspiracy doctrine does not apply to criminal conspiracy, and because the conduct that Relator alleges would constitute a violation of both *18 U.S.C. § 371* and the civil liability provisions of *§ 3729(a)*, the intracorporate conspiracy must not shield the same conspiracy from civil liability. *See e.g.*, McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1034 (11th Cir. 2000)*.

This Court also finds that Relator has plead a claim under *31 U.S.C. § 3729(a)(1)(C)* with the particularity required of *Fed. R. Civ. P. 9(b)*. ***HN22***[] The particularity requirement of *Fed. R. Civ. P. 9(b)* applies to conspiracy claims brought under **[*41]** the FCA. *U.S. ex rel. Grubbs v. Kanneganti, 565 F.3d 180, 193 (5th Cir. 2009)*. To state a claim for conspiracy under *§ 3729(a)(1)(C)*, it must be shown that the conspirators intended "to defraud the government." *Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 553 U.S. 662, 672-73, 128 S. Ct. 2123, 170 L. Ed. 2d 1030 (2008)*. Although "it is not necessary to show that the conspirators intended the false record or statement to be presented directly to the Government," the plaintiffs must establish "that they agreed that the false record or statement would have a material effect on the Government's decision to pay the false or fraudulent claim." *Id.* A plaintiff need not provide proof of express agreement, but must establish "a tacit understanding between the parties" which may be shown "wholly through the circumstantial evidence of each defendant's actions." *Aguilar v. PNC Bank, N.A., 853 F.3d 390, 402 (8th Cir. 2017)*. Relator has pled facts of an agreement to support claims for conspiracy under *§ 3729(a)(1)(C)* by furnishing the minutes of Krause-Allbee Trucking's corporate meeting, dated January 14, 2009. These minutes of corporate meeting indicate that both John Millin and his then spouse are stockholders and officers of Krause-Allbee Trucking. This Court finds that these minutes of meeting, in addition to the Farm Operating Plans submitted by defendants, provide sufficient circumstantial evidence to establish a tacit understanding that defendants intended **[*42]** to defraud the government to support claims for conspiracy under *31 U.S.C. § 3729(a)(1)(C)*. Because I also hold that the intracorporate conspiracy doctrine does not apply to claims under the FCA, the claim for conspiracy under the FCA should not be dismissed.

IV. Declaratory judgment of ownership interests in Krause-Allbee Trucking

This Court will not dismiss Relator's claims for declaratory judgment of Relator's current or former ownership interest in Krause-Allbee Trucking under *28 U.S.C. § 2201*. As this Court will not dismiss all of Relator's claims under the FCA, independent federal jurisdiction exists as required under *28 U.S.C. § 2201(a)*. Defendants argue that this Court should nonetheless dismiss the request for declaratory judgment as "Krause-Allbee Trucking's ownership" is "a matter of state corporate and common law." However, this Court's jurisdiction over Relator's claim is proper as a matter of supplemental jurisdiction and defendants put forward no other reason that this claim should be dismissed. *28 U.S.C. § 1367*.

V. Relator's claim for unjust enrichment

HN23[] Pursuant to *Fed. R. Civ. P. 8(d)*, a party may plead "2 or more statements of a claim or defense alternatively or hypothetically." Where alternative statements are made "the pleading is sufficient if any one of them **[*43]** is sufficient." *Fed. R. Civ. P. 8(d)(2)*. Moreover, a party "may state as many separate claims or defenses as it has, regardless of consistency." *Fed. R. Civ. P. 8(d)(3)*. This rule is also recognized in South Dakota. *SDCL 15-6-8(a)*, (e). The fact that Relator's claim for unjust enrichment may be inconsistent with claims brought under the FCA is not a reason for dismissal.

In the instant case, Relator has pled a claim for unjust enrichment that is plausible on its face and that allows this court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Torti v. Hoag, 868 F.3d at 671*. ***HN24***[] Unjust enrichment "occurs 'when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.'" *Hofeldt v. Mehling, 2003 SD 25, 658 N.W.2d 783, 788 (S.D. 2003)*. To establish a prima facie claim for unjust enrichment in South Dakota, the plaintiff must claim that the defendant (1) received a benefit; (2) the defendant "was cognizant of that benefit"; and (3) "the retention of the benefit without reimbursement would unjustly enrich the recipient." *Mack v. Mack, 2000 SD 92, 613 N.W.2d 64, 69 (S.D. 2000)*. The relevant inquiry in determining whether the recipient was unjustly enriched "is whether the circumstances are such that equitably the beneficiary should restore to the benefactor the benefit or its value." **[*44]** *Dowling Family P'ship v, Midland Farms, 2015 SD 50, 865 N.W.2d 854, 863 (S.D. 2015)* (internal citations omitted). Further, "[a]n enrichment is unjust if it 'lacks an adequate legal basis; [i.e.,] it results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.'" *Id.* (internal citations omitted).

South Dakota state courts follow the Restatement of Restitution and Unjust Enrichment. *See, e.g.*, *FarmPro Services. Inc. v. Finneman, 2016 SD 72, 887 N.W.2d 72 (S.D. 2016)*; *Dowling Family P'ship, 2015 SD 50, 865 N.W.2d 854 (S.D. 2015)*; *Hofeldt, 2003 SD 25, 658 N.W.2d 783 (S.D. 2003)*; *Juttelstad v. Juttelstad, 587 N.W.2d 447, 1998 SD 121 (S.D. 1998)*; *Talley v. Talley, 1997 SD 88, 566 N.W.2d 846 (S.D. 1997)*; and *Hofer v. Bon Homme Hutterian Brethren, Inc., 79 S.D. 150, 109 N.W.2d 258 (S.D. 1961)*. ***HN25***[] While a claim for unjust enrichment may exist where a person "is unjustly enriched at the expense of another," "the consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss." Restatement (Third) of Restitution & Unjust Enrichment § 1, cmt. a (Am. Law Inst. 2011). Where the breach of fiduciary duty is at issue, "the defendant's benefit is regarded as being 'at the plaintiff's expense' because it resulted in a wrong committed against him." Daniel Friedmann, Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong, 80 COLUM. L. REV. 504, 504 (1980).

Accepting Relator's factual allegations as true, if the claims against defendants do not succeed under the FCA, Relator has nonetheless pled a prima facie case for unjust enrichment. The defendants (1) **[*45]** received a benefit of subsidies for their farm operation and Relator has pled that the inclusion of Relator's interest in Krause-Allbee Trucking on the Farm Operating Plans was material to the FSA's decision to issue those subsidies. Defendants, having drafted and submitted the Farm Operating Plans to the FSA, and received the subsidies, (2) were "cognizant of that benefit." Finally, as Relator was never compensated for the liquidation of his possible interest in Krause-Allbee Trucking, Inc., (3) "the retention of the benefit without reimbursement would unjustly enrich the recipient."

VI. Relator's request to amend the complaint

HN26[] A decision whether to allow a plaintiff to amend a complaint is "left to the sound discretion of the district court." *Popoalii v. Correctional Medical Services, 512 F.3d 488, 497 (8th Cir. 2008)* (internal citations omitted). Amendments may be denied where they unduly prejudice the non-moving party or would be futile. *Id.* Relator's request for leave to amend the Complaint in the brief in opposition to defendants' motion to dismiss violates one of the local rules in the District of South Dakota. D.S.D. LR 15.1. Without the court and defendants receiving a proposed amendment to the Complaint along with the motion to amend, granting the motion **[*46]** to amend Would allow Relator leeway to state unexpected claims. Allowing such would be unduly prejudicial to the opposing party. The motion to amend should therefore be denied, without prejudice.

ORDER

Now, therefore,

IT IS ORDERED:

1. Defendants' motion to dismiss, Doc. 33, is granted in part and denied in part. With regard to Count I — False Claims Act *§ 3729(a)(1)*, Count II — False Claims Act *§ 3729(a)(2)*, and Count III — Conspiring to Defraud the Government of plaintiffs' Complaint, Doc. 1, defendants' motion to dismiss is granted for any claims prior to July 18, 2006.
2. Defendants' motion to dismiss is granted in full for Count IV — Reverse False Claims of plaintiffs' complaint.
3. Defendants' motion to dismiss Count V — Declaratory Judgment and Count VI — Unjust Enrichment of plaintiffs' Complaint are denied.
4. Plaintiffs' request to amend the Complaint, Doc. 41, is denied, without prejudice.

Dated this 14th day of April, 2018.

BY THE COURT:

/s/ Charles B. Kornmann

CHARLES B. KORNMANN

United States District Judge

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Bank Leumi USA v. R&R Food Servs. LLC

United States District Court for the Central District of California

April 16, 2018, Decided; April 16, 2018, Filed

CV 17-7183-MWF (SSx)

Reporter

2018 U.S. Dist. LEXIS 226505 *

Bank Leumi USA v. R&R Food Services LLC, et al.

Prior History: *Bank Leumi USA v. R & R Food Servs., LLC, 2018 U.S. Dist. LEXIS 226504 (C.D. Cal., Apr. 16, 2018)*

Core Terms

alleges, conversion, written contract, sweep, funds, terms, Counterclaims, Authorization, unfair, leave to amend, fraudulent, documents, Dining, prong, contractual relationship, negligence claim, deposit account, fails, breach of contract claim, unfair competition, claim for relief, quotation, argues, marks

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Robert L Brown, JR, an individual, Defendant, Pro se, Laughton, OK USA.

For Robert L Brown, JR, an individual, Defendant: David Joshua Staub, LEAD ATTORNEY, Law Offices of D Joshua Staub, Los Angeles, CA USA.

Judges: MICHAEL W. FITZGERALD, United States District Judge.

Opinion by: MICHAEL W. FITZGERALD

Opinion

CIVIL MINUTES—GENERAL

Proceedings (In Chambers): ORDER RE: PLAINTIFF AND COUNTER-DEFENDANT BANK LEUMI'S MOTION TO DISMISS FIRST AMENDED COUNTERCLAIM [31]

Before the Court is the Motion to Dismiss First Amended Counterclaim (the "Motion") filed by Plaintiff and Counter-Defendant Bank Leumi USA ("Bank Leumi") on February 20, 2018. (Docket No. 31). On March 23, 2018, Defendant and Counterclaimant R&R Food Services, LLC ("R&R") filed an Opposition. (Docket No. 36). On April 2, 2018, Bank Leumi filed a Reply. (Docket No. 37). The **[*2]** Court held a hearing on April 16, 2018.

For the reasons set forth below, the Motion is **GRANTED *with leave to amend*** in its entirety.

R&R's breach of contract claim fails because it does not allege the terms of the relevant "written contract" between R&R and Bank Leumi. The allegations are too vague to determine whether or not there has plausibly been a breach.

R&R's negligence claim fails because R&R's Opposition does not grapple with Bank Leumi's arguments that banks owe no duty to monitor their depositors' accounts and that the claim is barred by the "economic loss" rule.

R&R's "unfair competition" claim (which, based on the Opposition, is construed as a UCL claim) fails because the FACC does not suggest that Bank Leumi engaged in "fraudulent," "unlawful," or "unfair" conduct within the meaning of the UCL.

Finally, R&R's conversion claim fails because the FACC does not suggest that Bank Leumi ever exercised dominion over R&R's funds to the exclusion of R&R; rather, it alleges that Bank Leumi allowed BCI to move (or "sweep") the funds from one account to another.

I. BACKGROUND

A. Bank Leumi's Complaint Seeking Declaratory Relief

On September 28, 2017, Bank Leumi, a New York chartered bank, **[*3]** filed a Complaint against R&R, an Oklahoma limited liability company, and Robert L. Brown, Jr., an Oklahoma resident and R&R's owner/manager, seeking declaratory relief. (Complaint (Docket No. 1) ¶¶ 1-3, 18-21). Bank Leumi alleges the following:

Defendant Brown, who is blind, is a licensed manager under the Randolph-Sheppard Act, *20 U.S.C. § 107*, a federal statute that "prioritizes the employment of blind persons in the operation and management of vending facilities on federal government property." (*Id.* ¶ 8).

Non-party Blackstone Consulting, Inc. ("BCI"), "is a U.S. minority-owned provider of government and private industry support services." (*Id.* ¶ 9).

At some point in 2013, the Oklahoma Department of Rehabilitation Services selected R&R and Brown to operate a "Full Food Service" contract (the "Dining Contract") at dining facilities at an Army base in Fort Sill, Oklahoma. (*Id.* ¶ 10). In September 2013, R&R and Brown entered a contract with BCI (the "R&R-BCI Contract") pursuant to which BCI agreed to provide "administrative, operational and accounting services, among other services, in connection with the [Dining] Contract." (*Id.* ¶ 11).

In connection with the R&R-BCI Contract, Defendants and BCI jointly **[*4]** opened an account at a Bank Leumi branch office in Los Angeles. (*Id.* ¶ 12). They named the account "R&R Food Services LLC" and provided BCI's Los Angeles address as the mailing address associated with the account. (*Id.* ¶ 13). Ronald Blackstone, BCI's principal, and certain other individuals affiliated with BCI were designated as administrators and authorized users of the bank account. (*Id.* ¶ 14). Defendants "granted written and oral authority for BCI and its agents to deposit [and to] withdraw funds from the Account by way of journals, checks and wires in order to fulfill the terms of the [Dining] Contract." (*Id.* ¶ 15).

Bank Leumi alleges that "a dispute exists between BCI and Defendants over the terms of the [Dining] Contract and specifically, the amount of proceeds from the [Dining] Contract properly owed to R&R and Brown as opposed to BCI and Blackstone, and vice versa." (*Id.* ¶ 16). BCI has sued R&R in the United States District Court for the Western District of Oklahoma in relation to those parties' dispute regarding the distribution of proceeds under the Dining Contract and the R&R-BCI Contract. (Docket No. 30).

Defendants have demanded in writing that Bank Leumi reimburse them **[*5]** approximately $7.6 million in "funds they contend were wrongfully withdrawn from the Account by BCI from January 2017 to August 2017." (Complaint ¶ 17).

Bank Leumi alleges that the contested withdrawals by BCI "were properly authorized by the [R&R-BCI Agreement] and pursuant to the documentation signed by Defendants in connection with the Account together with the course of dealing between and among BCI, Defendants, and [Bank Leumi] over the past almost four years." (*Id.*).

Bank Leumi seeks "a judicial determination of the parties' rights and duties and a judicial declaration stating that [Bank Leumi] did not violate any contractual agreement or standard of care owed to Defendants, if any, and that [Bank Leumi] acted properly in providing BCI and its agents with access to the Account." (*Id.* ¶ 21).

B. <u>R&R's First Amended Counterclaim</u>

On February 5, 2018, R&R filed its operative First Amended Counterclaims ("FACC") against Bank Leumi. (Docket No. 26). R&R alleges the following:

On September 17, 2013, "R&R entered into a written contract with Bank Leumi ... to open a deposit account." (FACC ¶ 1). On the same day, Brown, on behalf of R&R, signed the following seven documents in connection with **[*6]** the Bank Leumi account opening:

- "Deposit Account Signature Card";
- "Deposit Account Application";
- "Schedule 1 Authorized Signatory Certification";
- "Schedule 2 Optional Limitation for Authorized Signatories";
- "Schedule 3 Members/Ownership Certification," which states that Brown owns 100% of R&R;
- "Schedule 4 Customer Administrator Certification," which names Daniel Silver, a BCI employee, a "Customer Administrator" (the "Silver Authorization"); and
- "Payment Order Requests Agreement," which "identifies Brown as the only authorized requestor."

(*Id.* ¶¶ 7-12, 16, 23). R&R alleges that the Silver Authorization states that Daniel Silver "is not a token user"; "is not an approver"; and "is authorized for inquiry or input only." (*Id.* ¶¶ 13-15).

On the same day (September 17, 2013), Daniel Silver signed a "Schedule 4 Customer Administrator Certification," which R&R alleges "purports to give Jodi Park [another BCI employee] status as 'Customer Administrator'" and refers to as the "Park Authorization." (*Id.* ¶¶ 18, 22). As with the Silver Authorization, R&R alleges that the Park Authorization states that Jodi Park "is not a token user"; "is not an approver"; and "is authorized for inquiry or **[*7]** input only." (*Id.* ¶¶ 19-21).

On September 24, 2013, two Bank Leumi officers signed the "Application" (presumably the Deposit Account Application) and the Payment Order Requests Agreement. (*Id.* ¶¶ 24-25).

R&R alleges, upon information and belief, that "BCI and [Bank] Leumi entered into a written contract which governed account(s) that BCI maintained at [Bank] Leumi in 2017." (*Id.* ¶ 26).

R&R alleges that, on 13 separate occasions between February 6, 2017 and August 3, 2017, Bank Leumi, without obtaining authorization (verbal or written) from R&R or otherwise communicating with R&R, "permitted BCI to sweep" a total of $10,090,951.01 from "R&R's account ending in 4201 to BCI":

DATE	AMOUNT
2/6/17	$1,612,149.66
2/21/17	$1,524,544.97
3/6/17	$1,402.00
3/27/17	$34,223.08
4/10/17	$752,116.55

DATE	AMOUNT
4/17/17	$1,087,724.21
4/18/17	$1,127,002.64
5/3/17	$134,793.85
5/23/17	$1,165,703.03
5/31/17	$39,701.92
6/23/17	$1,216,912.59
7/17/17	$40,848.56
8/3/17	$1,353,827.95
TOTAL	**$10,090,951.01**

(*Id.* ¶¶ 29-86).

R&R alleges that, from January 2017 to August 2017, Bank Leumi issued R&R's monthly account statements to: R AND R FOOD SERVICES LLC C/O BLACKSTONE CONSULTING INC 11726 SAN VICENTE BLVD STE 550 LOS ANGELES CA 90049. (*Id.* ¶¶ 27, 28, 37, 46, **[*8]** 59, 72, 77, 82). R&R does not allege that Bank Leumi sent its monthly account statements to some other address prior to January 2017 or otherwise allege that addressing the account statements as it did between January 2017 and August 2017 was improper. (*Id.*, *passim*).

R&R asserts four claims for relief against Bank Leumi: (1) breach of written contract; (2) negligence; (3) "unfair competition"; and (4) conversion. (*Id.* ¶¶ 87-116).

II. PLEADING STANDARD

In ruling on the Motion under *Rule 12(b)(6)*, the Court follows *Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, *Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*, and their Ninth Circuit progeny. "Dismissal under *Rule 12(b)(6)* is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim for relief that is plausible on its face.'" *Iqbal, 556 U.S. at 678* (quoting *Twombly, 550 U.S. at 570*). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id. at 681* ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co., 751 F.3d 990, 996 (9th Cir. 2014)*. "Although 'a well-pleaded complaint may proceed even if it strikes **[*9]** a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Properties, 751 F.3d at 995* (quoting *Twombly, 550 U.S. at 556-57*) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal, 556 U.S. at 679*; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054 (9th Cir. 2011)*. "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc., 838 F.3d 958, 963 (9th Cir. 2016)* (quoting *Iqbal, 556 U.S. at 679*). Where the facts as pleaded in the complaint indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties, 751 F.3d at 996-97*; *see also Somers, 729 F.3d at 960*.

III. DISCUSSION

A. Breach of Contract

R&R alleges, "upon information and belief," **[*10]** that Bank Leumi "breached its written contract with R&R on [the 13 separate occasions between February 6, 2017 and August 3, 2017 discussed above] by allowing, permitting or facilitating the sweep of funds from R&R's account ending in 4201 to BCI because it did not have R&R's authorization for that sweep." (FACC ¶¶ 89-101). Conversely, R&R alleges that it "did all, or substantially all, of the things required of it under the terms of its written agreement with [Bank] Leumi." (*Id.* ¶ 88).

Bank Leumi primarily argues that R&R's breach of contract claim should be dismissed because it is impermissibly vague. The Court agrees.

R&R has alleged that, on September 17, 2013, in connection with opening the relevant Bank Leumi account, Brown (on behalf of R&R) signed seven different documents and that Daniel Silver (on behalf of BCI) signed one document. R&R also alleges that two Bank Leumi officers signed two documents — the "Application" and the "Payment Order Requests Agreement" **-** on September 24, 2013. Perhaps the "written contract" that R&R alleges Bank Leumi breached by "allowing, permitting or facilitating the sweep of funds" from its account is the "Application" and/or the "Payment Order **[*11]** Requests Agreement" (perhaps with the other documents incorporated by reference), but it is not at all clear from the FACC.

While R&R need not necessarily attach the alleged "written contract" to its FACC, it must at least quote the relevant provisions of that "written contract" or, at a bare minimum, describe them in enough detail to allow the Court to determine the nature of parties' obligations and if there has plausibly been performance on R&R's part and a breach on Bank Leumi's part. R&R's failure to do that is fatal to its breach of contract claim. *See, e.g., Conroy v. Capital One, N.A.*, No. EDCV 14-01314-VAP (RZx), 2014 WL 12586070, at *6 (C.D. Cal. Sept. 15, 2014) (dismissing breach of contract and good faith and fair dealing claims where plaintiff did "not attach these documents [comprising the alleged contract], set out their terms verbatim in the FAC, or provide a careful analysis of their terms.") (citing *McKell v. Washington Mut., Inc., 142 Cal. App. 4th 1457, 1489, 49 Cal. Rptr. 3d 227 (2006))*; *Kent v. Microsoft Corp., No. SACV 13-0091 DOC (ANx), 2013 U.S. Dist. LEXIS 93932, 2013 WL 3353875, at *3 (C.D. Cal. July 1, 2013)* (dismissing breach of contract claim where "Plaintiff provides no information as to what exactly was promised by the Defendant" and "does not provide any of the terms of his alleged contract with Defendant") (citing *McKell, 142 Cal. App. 4th at 1489*); *Alvarado v. Aurora Loan Services, LLC, No. SACV 12-0524-DOC-(JPRx), 2012 U.S. Dist. LEXIS 135637, 2012 WL 4475330, at *4 (C.D. Cal. Sept. 20, 2012)* (claim of breach **[*12]** of written contract requires attaching a copy, setting forth the terms verbatim, or at a minimum alleging the substance of the relevant terms, which is more difficult) (citing *Harris v. Rudin, Richman & Appel, 74 Cal. App. 4th 299, 307, 87 Cal. Rptr. 2d 822 (1999)* and *McKell, 142 Cal. App. 4th at 1489*).

In its Opposition, R&R argues that it has adequately pled "the existence of a contractual relationship between R&R and [Bank] Leumi..." (Opp. at 7). The Court does not doubt, based upon the Complaint and the FACC, that R&R and Bank Leumi had ***some*** contractual relationship. The FACC's failing lies not in pleading the ***existence*** of a contractual relationship but in pleading the ***terms*** of that contractual relationship.

In any Second Amended Counterclaims, R&R obviously must rectify this lack of pleading, preferably by attaching the documents that allegedly form the written contract.

Accordingly, the Motion is **GRANTED *with leave to amend*** as to the breach of contract claim.

B. Negligence

In connection with its negligence claim, R&R alleges that Bank "Leumi had a duty of care towards its depositor R&R" and that Bank Leumi breached that duty of care by "fail[ing] to adequately supervise its employees, fail[ing] to have proper procedures in place for the transfer of funds from a deposit account, and fail[ing] to follow standard **[*13]** banking practices..." (FACC ¶¶ 105-106). R&R alleges that these failures were manifested "in permitting the sweeps from R&R's account to BCI's account without obtaining R&R's permission...." (*Id.* ¶ 107).

Bank Leumi argues that R&R's negligence claim should be dismissed because (1) Under California law, Bank Leumi does not have a duty to supervise R&R's account activity; (2) R&R has not plausibly alleged that Bank Leumi failed to act reasonably under the circumstances; and (3) in light of the fact that R&R alleges only monetary losses in connection with a contractual relationship, the negligence claim is barred by California's "economic loss" rule. (Mot. at 10-15).

In its Opposition, R&R argues that "it is well established that a bank has 'a duty to act with reasonable care in its transactions with its depositors.... The duty is an implied term in the contract between the bank and its depositor.'" (Opp. at 10) (quoting *Chazen v. Centennial Bank, 61 Cal. App. 4th 532, 543, 71 Cal. Rptr. 2d 462 (1998))*. But *Chazen* says nothing about a bank's duty (or lack thereof) to police its depositor's account activity — and therefore does not rebut the first and second branches of Bank Leumi's argument.

Moreover, R&R has entirely ignored Bank Leumi's argument based on California's "economic **[*14]** loss" doctrine. The doctrine generally prohibits contracting parties from recovering in tort where their damages are purely economic and the alleged wrongdoing is within the scope of the contractual relationship. *See, e.g., In re iPhone Application Litig., 844 F. Supp. 2d 1040, 1064 (N.D. Cal. 2012)* ("[I]n California, a consumer may not recover under a negligence theory 'for purely economic loss due to disappointed expectations, unless he can demonstrate harm above and beyond a broken contractual promise.'") (quoting *Robinson Helicopter Co., Inc. v. Dana Corp., 34 Cal. 4th 979, 988, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004))*. Based on the allegations and arguments before it, the Court concludes that the doctrine applies.

Apart from the merits, the fact that Bank Leumi's arguments were ignored in the Opposition is itself a sufficient basis to dismiss the negligence claim. *See, e.g., Walsh v. Nev. Dep't of Human Res., 471 F.3d 1033, 1037 (9th Cir. 2006)* (plaintiff who failed to address issues raised in a defendant's motion to dismiss in his opposition brief "has effectively abandoned his claim, and cannot raise it on appeal"); *Silva v. U.S. Bancorp, No. 5:10-cv-01854-JHN-PJWx, 2011 U.S. Dist. LEXIS 152817, 2011 WL 7096576, at *4 (C.D. Cal. Oct. 6, 2011)* ("[T]he Court finds that Plaintiff concedes his ... claim should be dismissed because he failed to address Defendants' arguments in his Opposition."); *Conservation Force v. Salazar, 677 F. Supp. 2d 1203, 1211 (N.D. Cal. 2009)* ("Where plaintiffs fail to provide a defense for a claim in opposition, the claim is deemed waived.") (citing **[*15]** *Locricchio v. Office of U.S. Trustee, 313 Fed. Appx. 51, 52 (9th Cir. 2009))*

Accordingly, the Motion is **GRANTED *with leave to amend*** as to R&R's negligence claim.

C. "Unfair Competition"

R&R alleges that Bank Leumi acted "unfairly," "unlawfully," and "fraudulently" "when it allowed the sweep of funds from R&R's account ending in 4201 to BCI's account at [Bank] Leumi without having obtained R&R's authorization or permission for the sweeps." (FACC ¶¶ 109-111). Although R&R does not say so explicitly in the FACC, it is clear from the Opposition that R&R intends to assert a claim for relief under California's Unfair Competition Law ("UCL"), *Cal. Bus. & Prof Code § 17200 et seq.* (*See* Opp. at 10-12).

The UCL creates a private right of action for those injured by "any unlawful, unfair or fraudulent business act or practice." *Cal. Bus. & Prof. Code § 17200*. "Because the statute is written in the disjunctive, it is violated where a defendant's act or practice violates any of the foregoing prongs." *Davis v. HSBC Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012)*. The UCL "does not proscribe specific activities," but rather "borrows violations of other laws and treats them as unlawful practices that the [UCL] makes independently actionable." *Puentes v. Wells Fargo Home Mortgage., Inc., 160 Cal. App. 4th 638, 643-44, 72 Cal. Rptr. 3d 903 (2008)* (internal quotation marks and citations omitted). R&R appears to allege, without any factual adornment, that Bank Leumi violated all three prongs of the UCL. (*See* FACC ¶¶ 109-111). **[*16]**

Conduct is "fraudulent" under the UCL if it is "likely to deceive." *Morgan v. AT & T Wireless Servs., Inc., 177 Cal. App. 4th 1235, 1254, 99 Cal. Rptr. 3d 768 (2009)*. The particularity requirement of *Rule 9(b)* applies to claims under the fraudulent prong of the UCL. *See* *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*; *Sosa v. Bank of New York Mellon Trust, No. C 12-00144 LB, 2012 U.S. Dist. LEXIS 92291, 2012 WL 2568188, at *4 (N.D. Cal. July 2, 2012)*; *Briosos v. Wells Fargo Bank, 737 F. Supp. 2d 1018, 1033 (N.D. Cal. 2010)*. *Rule 9(b)* requires the plaintiff to allege "the who, what, when, where, and how" of the alleged fraudulent conduct, *Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)*, and "set forth an explanation as to why [a] statement or omission complained of was false and misleading," *In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994)* (en banc) (superseded by statute on other grounds). Nothing in the FACC suggests that Bank Leumi made ***any*** representations to R&R, let alone any deceptive representations. R&R thus fails to state a claim under the "fraudulent" prong of the UCL.

Conduct is "unlawful" under the UCL if it "violate[s] another 'borrowed' law." *Davis, 691 F.3d at 1168* (quoting *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal. 4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999))*; *cf.* *People ex rel. Bill Lockyer v. Fremont Life Ins. Co., 104 Cal. App. 4th 508, 515, 128 Cal. Rptr. 2d 463 (2002)* ("With respect to the *unlawful* prong, virtually any state, federal or local law can serve as the predicate for an action under *section 17200*.") (internal quotation marks, citations, and alterations omitted; emphasis in original). Because R&R has not plausibly alleged that Bank Leumi's complained-of actions violate any other independent law, it has not stated a claim under the "unlawful" prong of the UCL.

"The UCL does not define the term **[*17]** 'unfair,'" and "the proper definition of 'unfair' conduct against consumers is currently in flux' among California courts." *Davis, 691 F.3d at 1169* (internal quotation marks and citations omitted).

In the consumer context (as opposed to the competitor context), some California courts hold "that 'unfair' conduct occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'" *Id.* (quoting *S. Bay Chevrolet v. Gen. Motors Acceptance Corp., 72 Cal. App. 4th 861, 886-87, 85 Cal. Rptr. 2d 301 (1999))*. "Under this approach, courts must examine the practices' 'impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer.'" *Id.* (quoting *S. Bay Chevrolet, 72 Cal. App. 4th at 886*).

Other California courts, finding the above test "too amorphous," interpret "unfair" to mean "'conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.'" *Id.* (quoting *Cel-Tech, 20 Cal. 4th at 187*). In order to find "unfairness" under this test, the alleged wrongdoing must "'be tethered to some legislatively declared policy or proof of some actual or threatened **[*18]** impact on competition.'" *Id.* (quoting *Cel-Tech, 20 Cal. 4th at 185*).

No matter which test applies, R&R has not stated a claim under the "unfair" prong of the UCL. Under the first test, it is impossible to tell whether Bank Leumi's allowance of monetary "sweeps" from R&R's account might be deemed "immoral, unethical, oppressive, unscrupulous" and so forth without knowing whether the alleged "written contract" between R&R and Bank Leumi permitted BCI to make (and Bank Leumi to allow) such "sweeps." If that "written contract" permitted such "sweeps," Bank Leumi would have strong (and dispositive) "reasons [and] justifications" for allowing BCI to conduct the "sweeps." Under the second test, nothing in the FACC suggests that Bank Leumi's conduct towards R&R (or anyone else) threatens an incipient violation of an ***antitrust law*** or otherwise harms competition.

Accordingly, the Motion is **GRANTED *with leave to amend*** as to R&R's "unfair competition" claim.

D. Conversion

"Conversion is the wrongful exercise of dominion over the property of another." *Greka Integrated, Inc. v. Lowrey, 133 Cal. App. 4th 1572, 1581, 35 Cal. Rptr. 3d 684 (2005)* (internal quotation marks and citations omitted). In order to state a viable claim for conversion, a plaintiff must allege that (1) he owned or had a right to possess the property **[*19]** at the time of the conversion; (2) the defendant converted the property by a "wrongful act or disposition of property rights"; and (3) plaintiff suffered damages as a result. *Id.*

As Bank Leumi correctly argues, R&R's conversion claim fails because nothing in the FACC suggests that Bank Leumi actively pilfered or otherwise exercised dominion over R&R's funds; the FACC merely suggests that Bank Leumi allowed BCI to transfer these funds from one account to another. That transfer is insufficient for a viable conversion claim. *See, e.g., Spates v. Dameron Hosp. Assn., 114 Cal. App. 4th 208, 222, 7 Cal. Rptr. 3d 597 (2003)* ("Not every failure to deliver property to the rightful owner constitutes a conversion... The act of removing personal property from one place to another, without an assertion of ownership or preventing the owner from exercising all rights of ownership in such personal property, is not enough to constitute conversion.") (internal quotation marks and citations omitted); *Simonian v. Patterson, 27 Cal. App. 4th 773, 781-82, 32 Cal. Rptr. 2d 722 (1994)* ("The simple act of moving items" belonging to another did not constitute conversion where the defendant "did not exercise dominion over those items sufficient to convert them to his own use in denial of plaintiff's rights.").

Accordingly, the Motion is **GRANTED *with leave to amend*** as to R&R's **[*20]** conversion claim.

IV. CONCLUSION

For the reasons set forth above, the Motion is **GRANTED *with leave to amend*** in its entirety.

R&R shall file its Second Amended Counterclaims, if any, by **May 7, 2018**. While there may be a second set of counterclaims, there will be no third. Any future successful motion to dismiss the Second Amended Counterclaims will be granted ***without leave to amend***.

IT IS SO ORDERED.

Gomez v. Mort. Elec. Registration Sys.

United States District Court for the Central District of California

April 16, 2018, Decided; April 16, 2018, Filed

CV 17-8451 GW(PLAx)

Reporter
2018 U.S. Dist. LEXIS 67148 *

Francisco Gomez v. Mortgage Electric Registration Systems, Inc. et al.

Prior History: *Gomez v. Mortg. Elec. Registration Sys., 2018 U.S. Dist. LEXIS 4650 (C.D. Cal., Jan. 10, 2018)*

Core Terms

fraudulent, documents, unfair, cause of action, judicial notice, allegations, motion to dismiss, citizenship, removal, notice, amount in controversy, foreclosure, diversity, recorded, joined, argues, Reply, factual allegations, amended complaint, business practice, courts, pages, prong, modification, consumers, purposes, nominal, cases, original complaint, nominal defendant

Counsel: **[*1]** Eliel Chemerinski, Plaintiff, Pro se.

Attorneys for Defendants: Viddell Lee Heard.

Judges: Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

Opinion by: GEORGE H. WU

Opinion

CIVIL MINUTES - GENERAL

Proceedings: Plaintiff's Motion For An Order Remanding Removed Action Back to State Court [25];

Defendant Erica Jones Motion to Dismiss First Amended Complaint [33]

Defendant's Wells Fargo Bank, N.A., Mortgage Electronic Registration Systems, Inc., And HSBC USA N.A. Motion to Dismiss Verified First Amended Complaint [37]

The Court and counsel confer. The plaintiff submits on the tentative order.

Plaintiff's Motion For An Order Remanding Removed Action Back to State Court [25] is **DENIED**.

Defendant Erica Jones Motion to Dismiss First Amended Complaint [33] is **GRANTED** with leave to amend.

Defendant's Wells Fargo Bank, N.A., Mortgage Electronic Registration Systems, Inc., and HSBC USA N.A. Motion to Dismiss Verified First Amended Complaint [37] is **GRANTED** with leave to amend.

The Plaintiff's Second Amended Complaint is due no later than May 25, 2018.

I. Background

A. Procedural History

Plaintiff Francisco Gomez ("Plaintiff"), in pro per, brings this action against Defendants Mortgage Electronic Registration Systems, Inc. ("MERS"); **[*2]** HSBC Bank USA ("HSBC"); Quality Loan Services Corporation ("Quality"); Wells Fargo Bank, N.A. ("Wells Fargo" and together with MERS, and HSBC "Defendant Companies"); and Erica Jones ("Jones") concerning events surrounding the foreclosure of Plaintiff's real property. *See generally* First Amended Complaint ("FAC"), Docket No. 30.

Plaintiff initially filed in state court and Defendants timely removed the action on November 20, 2017, invoking diversity jurisdiction. *See* Notice of Removal ("NOR"), Docket No. 1 at 2. On January 25, 2018, the Court adopted its tentative ruling dismissing Plaintiff's original complaint with leave to amend. *See* Order, Docket No. 28; *see also* Notice of Removal, Ex. A ("Compl."), Docket No. 1-1. The court's review of the FAC indicates that there are minimal differences between the original Complaint and the FAC, other than the deletion of five causes of action. *See generally* FAC. Defendant Companies and Jones now move to dismiss in separate motions, pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(6)*. *See* Defendant Companies' Motion to Dismiss the FAC ("Companies' MTD"), Docket No. 37; Jones's Motion to Dismiss the FAC ("Jones's MTD"), Docket No. 33. Plaintiff filed two separate oppositions to those **[*3]** motions. Plaintiff's Opposition to Jones's MTD ("Pl.'s Opp. Jones's MTD"), Docket No. 39; Plaintiff's Opposition to Defendant Companies' MTD ("Pl.'s Opp. Companies' MTD"), Docket No. 40. Defendant Companies and Jones then filed separate replies in support of their motions. Defendant Companies' Reply in Support of Their MTD ("Companies' Reply MTD"), Docket No. 43; Jones's Reply in Support of Her MTD ("Jones's Reply MTD"), Docket No. 42. Additionally, Plaintiff moves to remand the action back to state court. Plaintiff's Motion to Remand ("MTR"), Docket No. 25. Defendant Companies filed their opposition to the MTR. Defendant Companies' Opposition to Plaintiff's MTR ("MTR Opp."), Docket No. 29. Plaintiff then filed his reply in support of the MTR. Plaintiff's Reply in Support of Motion to Remand ("MTR Reply"), Docket No. 36.

B. Plaintiff's Allegations

On May 8, 2007, Plaintiff obtained a residential home loan from non-party Mortgageit, Inc., in the amount of $825,000.00 (the "Loan"). *See* FAC ¶ 15; Defendant's Request for Judicial Notice ("RJN"), Ex. A ("Note") at pages 1-3, Docket No. 38-1. The Loan was secured by a Deed of Trust against the real property known as 3518 Abbey Lane, Oxnard, **[*4]** California (the "Property"). *See* FAC ¶ 1; RJN Ex. B ("DOT") at pages 5-22, Docket No. 38-1. The DOT was recorded on May 15, 2017. *See* DOT. NDEX West, LLC was substituted in as trustee on February 19, 2010. *See* RJN Ex. C ("Notice of Substitution I") at pages 23-25, Docket No. 38-1. MERS assigned the DOT to HSBC on February 24, 2010. FAC ¶ 18; RJN Ex. D ("First ADOT") at pages 26-27, Docket No. 38-1. Jones signed the First ADOT on behalf of MERS. FAC ¶ 18; First ADOT. Jones is identified as an Assistant Secretary of MERS. FAC ¶ 18. Plaintiff claims that Jones did not work for MERS at that time, nor has she ever worked at MERS. *Id.* ¶¶ 18, 21-25. Plaintiff further charges that the MERS Board never authorized Jones to assign the DOT on MERS' behalf. *Id.* ¶¶ 21-26. As a result, Plaintiff contends that the First ADOT is void and that the DOT was never assigned to HSBC. *Id.* ¶¶ 31-34. Plaintiff also alleges that Jones's lack of authorization to sign on MERS behalf means that the First ADOT "contains a fraudulent assertion that said [First ADOT] was either executed by an Officer of MERS, or was executed by one with valid power or authority to execute such a document for MERS as an officer . . **[*5]** . ." *Id.* ¶ 35.

Plaintiff also claims that the Note was never transferred from the original holder and that any such transfer made after the closing date would have violated the relevant Pooling and Servicing Agreement ("PSA"). *Id.* ¶¶ 18, 36. Plaintiff avers that the party that notarized the First ADOT did so with the knowledge that Defendant Jones lacked authorization to sign the transfer. *Id.* ¶¶ 38-41. Plaintiff contends that another assignment of the DOT was recorded, again bearing the signature of an individual not authorized by MERS to execute that document. *Id.* ¶¶ 45-48; RJN Ex. F ("Second ADOT") at pages 35-37, Docket No. 38-1. On March 3, 2014, a second Substitution of Trustee was recorded pursuant to which Quality became the new trustee under the DOT. FAC ¶ 72; RJN Ex. G.

In December of 2013, Plaintiff applied for a loan modification from Wells Fargo. *See* FAC ¶ 59. Wells Fargo declined his application. *Id.* ¶¶ 60-65. Plaintiff previously sought and received a loan modification in 2010. *See* RJN Ex. E ("LMA") at pages 28-34, Docket No. 38-1. A notice of default was recorded, followed by a Notice of Trustee's Sale, with the sale to take place on February 28, 2017. FAC ¶¶ 74-76. The **[*6]** Property was sold on February 28, 2017 to a third-party, who duly recorded the Trustee's Deed Upon Sale. *Id.* ¶ 76; RJN Ex. J ("DUTS") at pages 49-52, Docket No. 38-1.

II. Motion To Remand

Plaintiff moves to remand the case to state court, claiming the absence of complete diversity of citizenship. MTR ¶¶ 11-25.

A. Legal Standard

"Federal courts are courts of limited jurisdiction," and have subject matter jurisdiction only to the extent "authorized by Constitution and statute." *Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)* (citing *Willy v. Coastal Corp., 503 U.S. 131, 136-137, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)*; *Bender v. Williamsport Area School Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986))*. "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citing *Turner v. Bank of N. Am., 4 U.S. (4 Dall.) 8, 11, 1 L. Ed. 718, 4 Dall. 8 (1799))*; *McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 182-83, 56 S. Ct. 780, 80 L. Ed. 1135 (1936))*. The removal statute is strictly construed against removal jurisdiction, and "[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." *See* *Gaus v. Miles, Inc., 980 F.2d 564, 566 (9th Cir. 1992)* (citing *Boggs v. Lewis, 863 F.2d 662, 663 (9th Cir. 1988)*; *Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 818 (9th Cir. 1985)*; *Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979))*.

Diversity jurisdiction exists if the plaintiff has different citizenship from all defendants and the amount in controversy exceeds $75,000. *See* *28 U.S.C. § 1332(a)*; *Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978)*. For removals based in diversity, the removing defendant typically must show that the parties were completely diverse when the case was filed and removed, *Strotek Corp. v. Air Transp. Ass'n. of Am., 300 F.3d 1129, 1131 (9th Cir. 2002)*, and that the amount **[*7]** in controversy exceeded $75,000 at the time of removal, *Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1091 (9th Cir. 2003)*.

B. Analysis of Citizenship

1. Quality's Citizenship

The crux of the motion to remand rests on Quality's citizenship. Plaintiff contends that Quality is a citizen of California. MTR ¶ 12. Defendant Companies do not dispute that Quality is a citizen of California. *See generally* MTR Opp. Instead, they argue that Quality is a fraudulently joined and/or a nominal defendant, and the Court should therefore disregard its citizenship for diversity purposes. MTR Opp. at 2-8.

a. Nominal Defendant

Plaintiff argues that Quality never filed a declaration of non-monetary status pursuant to *California Civil Code § 2924l*. MTR ¶ 13. Though Quality did file a declaration of non-monetary status (sometimes referred to as "DNMS"), NOR, Ex. B at 132, Docket No. 1-1, Defendant Companies argue that Quality's "status as a nominal and fraudulent joined party is not based on the trustee's DNMS . . . Defendants do not rely on the DNMS or Plaintiff's failure to object to the DNMS. . . ."[1] MTR Opp. at 2. Instead, Defendants argue that aside from recording foreclosure notices, Plaintiff alleges no conduct by Quality to support its cause of action against Quality. MTR Opp. at 5.

Courts will ignore nominal parties' citizenship for jurisdictional purposes where they "have no interest in the action and are merely joined to perform the ministerial act of conveying the title if adjudged to the complainant." *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 873 (9th Cir. 2000)* (citations and quotations omitted, punctuation altered). While it is true that trustees are often deemed nominal parties, however, that is not the case where a complaint contains substantive allegations against the trustee. *See* *Osorio v. Wells Fargo Bank, No. C 12-02645-RS, 2012 U.S. Dist. LEXIS 78073, 2012 WL 2054997, at *2 (N.D. Cal. June 5, 2012)* ("Admittedly, trustees are often deemed nominal parties, but an exception is made where the complaint contains substantive allegations against the trustee or seeks to recover money damages from the trustee") (collecting cases, citations omitted).

Courts have remanded foreclosure actions on the grounds that Quality was not a nominal or fraudulently joined defendant, but those cases included allegations that Quality violated specific statutes. *See, e.g.,* *Javaheri v. JP Morgan Chase Bank N.A., No. CV-15-04762-DMG, 2015 U.S. Dist. LEXIS 134378, 2015 WL 5822579, at *2 (C.D. Cal. Oct. 1, 2015)* ("[The plaintiff] does allege that Quality improperly recorded a notice of sale against his property while his loan modification application **[*9]** was pending, in violation of *California Civil Code section 2924.18(a)(1)*"); *Mulleneaux v. Wells Fargo Bank, N.A., No. CV-17-00780-BRO, 2017 U.S. Dist. LEXIS 92569, 2017 WL 2604249, at *5 (C.D. Cal. June 15, 2017)* (plaintiff bringing substantive violations against Quality, including violations of *California Civil Code §§ 2923.55* and *2923.6(e)*); *Freeman v. Wells Fargo Bank, N.A., No. 16-CV-03790-RS, 2016 U.S. Dist. LEXIS 117709, 2015 WL 4535785, at *4 (N.D. Cal. Aug. 31, 2016)* (plaintiff claiming Quality violated *California Civil Code §§ 2923.55* and *2924.17*)).

Here, even in the original Complaint where Plaintiff attempted to plead six causes of actions, only the UCL claim was alleged against Quality (and that cause of action made only one implicit reference to Quality, in the header, alleging the UCL claim "Against All Defendants"). *See* Compl. ¶¶ 150-66. Plaintiff makes the same sole reference to Quality in a cause of action within the header of now Count I (formerly the fourth cause of action). FAC ¶¶ 132-53. Though the Complaint and FAC question Quality's role as trustee, the challenge to Quality's status as trustee is not part of the lone UCL claim against Quality nor does any of Quality's allegedly improper actions make up the UCL claim. FAC ¶¶ 86, 50-66, 132-53; Compl. ¶¶ 84, 150-66. To the Court, this demonstrates Quality's status as a nominal defendant in this action. Despite the chance to amend, Plaintiff alleged **[*10]** no substantive claim against Quality that could possibly form the basis of recovery.[2] Because Quality is merely trustee and the relevant

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[1] The Court would find that Quality's declaration of non-monetary status, dated November 15, 2017, was filed too close in time to the November 20, 2017 removal of this action. NOR; NOR, Ex. B (declaration of non-monetary status), Docket No. 1-1. Most courts have held that for a party to receive nominal party status through the filing of a declaration of non-monetary status, pursuant to *California Civil Code 2924l*, removal must occur after the 15-day statutory period has expired without objection. *See* *Melamed v. JPMorgan Chase Bank, N.A., No. LA CV-15-04314-JAK, 2015 U.S. Dist. LEXIS 138482, 2015 WL 5923533, at *4 (C.D. Cal. Oct. 8, 2015)*; *see also* *Silva v. Wells Fargo Bank N.A., No. CV 11-03200-GAF, 2011 U.S. Dist. LEXIS 64636, 2011 WL 2437514, at * 4 (C.D. Cal. June 16, 2011)* **[*8]** (citation omitted); *Jenkins v. Bank of Am., N.A., No. CV 14-04545-MMM, 2015 U.S. Dist. LEXIS 11528, 2015 WL 331114, at *6 (C.D. Cal. Jan. 26, 2015)*. Therefore, Quality's declaration of non-monetary status does not transmute nominal status to Quality.

[2] In one case granting a motion to remand, the court noted that Plaintiff challenged Quality's role as trustee, but that case also included substantive claims against Quality. *See* *O'Rourke v. Litton Loan Servicing LP, No. EDCV 11-00450-VAP(DTBx), 2011 U.S. Dist. LEXIS 163808, 2011 WL 13225138, at *7 (C.D. Cal. Aug. 15, 2011)* (holding that "Plaintiff's allegations against Quality

pleadings contain no causes of action against it (other than the UCL claim), the Court would find Quality to be a nominal defendant.[3] *See generally* Complaint; *see also generally* FAC.

b. Fraudulently Joined Defendant

Defendant Companies argue that Quality is also a fraudulently joined defendant. MTR Opp. at 3-8. Plaintiff argues that is not the case. MTR ¶¶ 16-24.

Because there is a general presumption against fraudulent joinder, defendants seeking to rely on the exception bear a "heavy" burden of proof. *Mendoza v. Host Int'l, Inc., No. CV 13-8671-GHK, 2014 U.S. Dist. LEXIS 13282, 2014 WL 367296, at *1 (C.D. Cal. Feb. 3, 2014)* (quoting *Hunter, 582 F.3d at 1046*). To meet that burden, the removing party "must negate every possible scenario within the ambit of a well-pled claim," *Iniguez v. Vantium Cap., Inc., No. C 13-00037-WHA, 2013 U.S. Dist. LEXIS 41776, 2013 WL 1208750, at *2 (N.D. Cal. Mar. 25, 2013)* (citations omitted), and must do so by "clear and convincing evidence," *Hamilton Materials Inc. v. Dow Chem. Corp., 494 F.3d 1203, 1206 (9th Cir. 2007)*. A defendant may present facts in the form of summary judgment-type evidence showing the joinder to be fraudulent. *McCabe, 811 F.2d at 1339*; *Morris, 236 F.3d at 1068* (citing *Cavallini v. State Farm Mutual Auto Ins. Co., 44 F.3d 256, 263 (5th Cir.1995)* ("[F]raudulent joinder claims may be resolved by 'piercing the pleadings' and considering summary **[*11]** judgment-type evidence")). But district courts "must resolve all disputed questions of fact," *Good v. Prudential Ins. Co. of Am., 5 F.Supp.2d 804, 807 (N.D. Cal. 1998)*, and "all material ambiguities in state law" in the plaintiff's favor, *Macey v. Allstate Prop. & Cas. Ins. Co., 220 F.Supp.2d 1116, 1117 (N.D. Cal. 2002)*. "Thus, if there is a non-fanciful possibility that plaintiff can state a claim under state law against the non-diverse defendants, the court must remand." *Barsell v. Urban Outfitters, Inc., No. 09-CV-2604-MMM, 2009 U.S. Dist. LEXIS 123475, 2009 WL 1916495, at *3 (C.D. Cal. July 1, 2009)* (quotations omitted); *Sun v. Bank of Am. Corp., No. 10-CV-4-AG, 2010 U.S. Dist. LEXIS 19554, 2010 WL 454720, at *3 (C.D. Cal. Feb. 8, 2010)* ("[I]n the Ninth Circuit, a . . . defendant is . . . fraudulently joined if, after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiff's favor, the plaintiff could not possibly recover against the [defendant]"). Failing to state a claim "is not sufficient to invoke fraudulent joinder or nominal party status." *Newman v. Select Portfolio Servicing, Inc., No. C-13-03685 JSC, 2013 U.S. Dist. LEXIS 151097, 2013 WL 5708200, at *4 (N.D. Cal. Oct. 21, 2013)* (citing *Latino v. Wells Fargo Bank, 2011 U.S. Dist. LEXIS 119804, 2011 WL 4928880, at *3 (E.D. Cal. Oct. 17, 2011))*.

Plaintiff argues that Quality is not a fraudulently joined defendant. MTR ¶¶ 16-24. Defendant Companies argue that Plaintiff's UCL claim against Quality is "based entirely on its recording of foreclosure notices." MTR Opp. at 5 (citing Compl. ¶¶ 72-74). Defendant Companies also note that the original Complaint does not reference Quality under the UCL cause of action. MTR Opp. at 5 (citing Compl. ¶¶ 150-166). **[*12]** The Court need not address whether Plaintiff is a fraudulently joined defendant because it has already found Quality to be a nominal defendant above. Quality's citizenship is therefore immaterial for diversity purposes.

2. Other Parties' Citizenship

Defendant Companies state in the NOR that Wells Fargo is a citizen of South Dakota, HSBC is a citizen of Virginia, MERS is a citizen of Delaware, and that Plaintiff is a citizen of California. *See* NOR at 2-5. Plaintiff does not dispute any of those contentions. *See generally* MTR. The Court will consider the aforementioned parties' citizenship as such.

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in the FAC include potentially substantive claims and, more critically, challenge Quality's role as the named Trustee. . . . [i]t is unclear whether Quality is a nominal defendant in this action.").

[3] Both the Complaint and the FAC make a number of factual allegations involving Quality. FAC ¶¶ 5, 73, 74, 75, 76, 83, 85-86, 104, 129; Compl. ¶¶ 5, 71-74, 81, 83-84, 102, 127, 183. In one of those factual allegations, Plaintiff challenges Quality's authority to act on behalf of the other defendants and questions whether Quality "validly substituted in as successor Trustee of Plaintiff's DOT." FAC ¶ 86; Compl. ¶ 84. Nonetheless, none of these factual allegations form the basis of a cause of action in either the Complaint or the FAC. *See generally* Compl.; *see also* FAC.

Because the Court disregards Quality's California citizenship, the Court would find that complete diversity of citizenship exists as to the remaining parties.

C. Analysis of Amount in Controversy

To invoke diversity jurisdiction, the party asserting jurisdiction must show the amount in controversy exceeds $75,000. *See* 28 U.S.C. § 1332(a); Valdez v. Allstate Ins. Co., 372 F.3d 1115, 1117 (9th Cir. 2004). "Where it is not facially evident from the complaint that more than $75,000 is in controversy, the removing party must prove, by a preponderance of the evidence, that the amount in controversy meets the jurisdictional threshold." Matheson v. Progressive Specialty Ins. Co., 319 F.3d 1089, 1090 (9th Cir. 2003) (per curiam). "While a defendant's notice of removal need **[*13]** include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold, evidence establishing the amount is required once the plaintiff contests, or the court questions, the defendant's allegation." Dart Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554, 190 L. Ed. 2d 495 (2014). Once the plaintiff contests, or the court questions the allegation and where "the complaint does not demand a dollar amount, the removing defendant bears the burden of proving by a preponderance of evidence that the amount in controversy exceeds $75,000." Kroske v. U.S. Bank Corp., 432 F.3d 976, 980 (9th Cir. 2005), *as amended on denial of reh'g and reh'g en banc* (Feb. 13, 2006) (quoting Singer v. State Farm Mut. Auto Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997)).

As the NOR points out, Plaintiff seeks damages of "no less than $2,000,000" and seeks to extinguish a residential home loan of $825,000. NOR at 10-13. The value of the Property upon foreclosure was $623,000. *Id.* at 13. The MTR does not dispute any of these figures nor does it argue that the amount in controversy requirement is not satisfied. *See generally* MTR. The Court would find the amount in controversy satisfied.

Therefore, because the Court finds complete diversity of citizenship and an amount in controversy in excess of $75,000, the Court concludes that it has subject matter jurisdiction over this action and denies Plaintiff's motion to remand.

II. Motion to Dismiss [*14]

A. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *see also* Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.").

In deciding a 12(b)(6) motion, a court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. Gompper v. VISX, Inc., 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir.)*, *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Where a plaintiff facing a 12(b)(6) motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be **[*15]** denied. *Id.*; Sylvia Landfield Trust v. City of Los Angeles, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not show[n] . . . the pleader is entitled to relief." *Iqbal, 556 U.S. at 679* (citations omitted).

Pro se filings are construed liberally. *See, e.g., Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010)*; *Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007)*. "Dismissal of a *pro se* complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." *Weilburg, 488 F.3d at 1205* (quoting *Schucker v. Rockwood, 846 F.2d 1202, 1203-04 (9th Cir. 1988))*; *see also* *Ramirez v. Galaza, 334 F.3d 850, 861 (9th Cir. 2003)* ("Leave to amend should be granted unless the pleading 'could not possibly be cured by the allegation of other facts and should be granted more liberally to pro se plaintiffs.'") (quoting *Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir. 2000)* (*en banc*).

B. Analysis

1. Defendant Companies' Request for Judicial Notice

Defendant Companies request that the Court take judicial notice of ten documents in deciding its Motion. *See generally* RJN. These ten documents are the same documents requested in its previous RJN. *See* November 27, 2017 Request for Judicial Notice, Docket No. 9. Plaintiff opposes this request. *See* Plaintiff's March 22, 2018 Memorandum of Points and Authorities in Opposition to Moving Defendants' RJN ("Opp. RJN"), Docket No. 41. Plaintiff echoes its **[*16]** reasoning regarding the prior request for judicial notice. *See* Opp. RJN; *see also* Plaintiff's December 27, 2017 Memorandum of Points and Authorities in Opposition to Defendant Companies' RJN, Docket No. 15.

Generally, a court may not consider material beyond the pleadings in ruling on a motion to dismiss for failure to state a claim. *Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)* (citation omitted). There are two exceptions: (1) when material is attached to the complaint or necessarily relied on by the complaint, and (2) when the court takes judicial notice of matters of public record, provided the facts are not subject to reasonable dispute. *Id. at 688-89* (further indicating that on a motion to dismiss, a court may properly look beyond the complaint to matters of public record and that doing so does not convert a *Rule 12(b)(6)* motion to one for summary judgment).

Here, Exhibits A through J are all properly subject to judicial notice. This is because two of these documents are referred to in the FAC and their authenticity is not questioned (Exs. A, E) while the remaining documents are true and correct copies of official public records (Exs. B-D, F-J). *See* RJN at 2-4. All of the documents are of the type that courts routinely take judicial notice of in foreclosure **[*17]** related cases. *See* *In re Davies, 565 F.App'x 630, 632 (9th Cir. 2014)* (holding that recorded assignment of deed trust was document of legal force and thus proper subject of judicial notice); *Farber v. JPMorgan Chase Bank N.A., No. 12-CV-2367-GPC-BGS, 2014 U.S. Dist. LEXIS 2203, 2014 WL 68380, at *3 (S.D. Cal. Jan. 8, 2014)* ("Federal courts routinely take judicial notice of facts contained in publically recorded documents, including Deeds of Trust, because they are matters of public record, and are not reasonably in dispute."). Moreover, many of these documents form the basis of Plaintiff's claims, are referred to throughout the FAC, and are explicitly incorporated by reference into the FAC. *See generally* FAC. As such, the Court grants Defendant Companies' RJN and will consider those documents incorporated by reference into the FAC for the purposes of the pending motions. *See* *Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994)* (indicating that "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading" may be considered in ruling on a motion to dismiss); *see also* *U.S. v. Ritchie, 342 F.3d 903, 908 (2003)* (holding that if a document forms the basis of a plaintiff's complaint, the district court may consider it as part of the complaint and assume its contents are true for purposes of a motion to dismiss under *Rule 12(b)(6)*).

Plaintiff **[*18]** argues that judicial notice of these documents is improper because the documents contain "a large number of material and relevant disputed factual claims . . . ." Plaintiff's Opposition to RJN at 4, Docket No. 41. Plaintiff further argues that judicial notice is improper because the documents are "the very type of documents that the Plaintiff asserts are void and unenforceable." *Id.* Plaintiff fails to identify any specific factual assertions that appear in these documents that are in dispute. Furthermore, while the Court takes judicial notice of the existence and recordation of the documents and the facts contained therein, it does not take notice that they *are legally valid and enforceable* documents. In other words, Plaintiff's arguments as to the fraudulent and void nature of the documents in question are not defeated through judicial notice alone.

In sum, the Court grants Defendant Companies' RJN in full.

2. Count I - UCL

Plaintiff alleges one cause of action in the FAC, rooted in the UCL. FAC ¶¶ 132-53. Only Paragraphs 147 through 151 were added to the UCL cause of action in the FAC; the rest are essentially copy pasted from the previous Complaint. *Id.* ¶¶ 147-51. Plaintiff cites law **[*19]** on unfair business practices in three of the five newly added paragraphs. *Id.* ¶¶ 147-49.

The UCL proscribes three avenues to challenge business practices: if they are "[1] unlawful, [2] unfair or [3] fraudulent . . . ." *Khoury v. Maly's of California, Inc., 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708, 712 (1993)*. First, unlawful business practices are those "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39, 33 Cal. Rptr. 2d 438 (1994)*. Second, unfair business practices "means conduct that threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527 (1999)*. Third, fraudulent business practices are those "likely to deceive the public." *McKell v. Washington Mut., Inc., 142 Cal. App. 4th 1457, 1471, 49 Cal. Rptr. 3d 227 (2006)*.

a. Standing to Bring UCL Claim

Defendant Companies argue that Plaintiff lacks standing under the UCL because he "fails to plead facts showing that he suffered any injury or loss, let alone an injury or loss due to Wells Fargo's alleged conduct in violation of the UCL." Companies' MTD at 13-14. Plaintiff counters that "Defendants' illegal, unfair and unlawful conduct caused Plaintiff's home to be sold in foreclosure." Pl.'s Opp. Companies' MTD at 11.

To establish statutory standing under the **[*20]** UCL, "a private plaintiff [must] have suffered 'injury in fact and lost money or property as a result of the unfair competition.'" *Rubio v. Capital One Bank, 613 F.3d 1195, 1203 (9th Cir. 2010)* (quoting *Cal. Bus. & Prof. Code § 17204*) (punctuation altered). To establish standing, then, a UCL plaintiff must show that he or she "'lost money or property' sufficient to constitute an 'injury in fact' under Article III of the Constitution, and also requires a 'causal connection' between [the defendant's] alleged UCL violation and [his or] her injury in fact." *Id. at 1203-04* (citations omitted); *Hall v. Time Inc., 158 Cal. App. 4th 847, 855, 70 Cal. Rptr. 3d 466 (2008)* ("The phrase 'as a result of' in its plain and ordinary sense means 'caused by' and requires a showing of a causal connection or reliance on the alleged misrepresentation").

As mentioned above, Plaintiff argues that Defendants' "illegal, unfair and unlawful conduct caused Plaintiff's home to be sold in foreclosure." Pl.'s Opp. Companies' MTD at 11. Defendant Companies argue that Plaintiff's financial hardship and resulting failure to make mortgage payments led to foreclosure, rather than Defendants' actions. Companies' MTD at 13-14. Without sufficient allegations that Defendants caused the loss of the Property, the Court would not find standing for Plaintiff to assert this cause of action. *See* *Hernandez v. Specialized Loan Servicing, LLC, No. CV 14-9404-GW, 2015 U.S. Dist. LEXIS 8695, 2015 WL 350223, at *8 (C.D. Cal. Jan. 22, 2015)* ("Without this allegation, the **[*21]** thing that caused [the plaintiff's] balance to increase or the title on her property to cloud under her then-existing mortgage was the failure to pay.") (citing *Hall, 158 Cal. App. 4th at 855*; *Schwartz v. Provident Life & Accident Ins. Co., 216 Cal. App. 4th 607, 613, 157 Cal. Rptr. 3d 275 (2013))*. The Court would therefore dismiss this claim.

b. Unlawful Prong

Plaintiff eliminated all causes of action in the FAC, except for Count I, formerly the fourth cause of action, alleging Defendants' violation of the UCL. *See generally* FAC. To the extent Count I is based on any of Plaintiff's prior causes of action eliminated from the FAC, this claim fails. *See Puentes v. Wells Fargo Home Mortg., Inc., 160 Cal.App.4th 638, 643-44, 72 Cal. Rptr. 3d 903 (2008)* ("[S]ection 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable . . . ."). Those claims are no longer part of this action and they were dismissed by the Court in their previous form. As such, Plaintiff's UCL claim fails on the unlawful prong because the FAC only contains that claim and no other independent causes of action. *See Ingels v. Westwood One Broad. Servs., Inc., 129 Cal. App. 4th 1050, 1060, 28 Cal. Rptr. 3d 933 (2005)* ("A defendant cannot be liable under *§ 17200* for committing 'unlawful business practices' without having violated another law.") (citation and internal quotation marks omitted).

c. Unfair Prong

"A business practice is unfair within the meaning of the UCL if it violates **[*22]** established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." *McKell v. Wash. Mut. Inc., 142 Cal. App. 4th 1457, 1473, 49 Cal. Rptr. 3d 227 (2006)*. The California Courts of Appeal have identified three different test for unfairness under the UCL:

> The test applied in one line of cases requires that the public policy which is a predicate to a consumer unfair competition action under the unfair prong of the UCL must be tethered to specific constitutional, statutory, or regulatory provisions.
>
> A second line of cases applies a test to determine whether the alleged business practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers and requires the court to weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.
>
> The test applied in a third line of cases draws on the definition of unfair in *section 5 of the Federal Trade Commission Act (15 U.S.C. § 45, subd. (n))*, and requires that (1) the consumer injury must be substantial; (2) the injury must not be outweighed by any countervailing benefits to consumers or competition; and (3) it must be an injury that consumers themselves could not reasonably have avoided.

*Phipps v. Wells Fargo Bank, N.A., No. CV 10-02025-LJO, 2011 U.S. Dist. LEXIS 10550, 2011 WL 302803, at *16 (E.D. Cal. Jan. 27, 2011)* **[*23]** (internal citations and quotation marks omitted).

In the FAC, Plaintiff alleges the same three pieces of conduct as "unfair" that he alleged in the original Complaint: (1) wrongful foreclosure; (2) requesting unnecessary documentation to "provide a basis for denying loss mitigation options, such as a loan modification" and for failing to properly consider Plaintiff's Loan Modification Agreement; and (3) failing to "investigate claims of loss mitigation approvals or defects with the foreclosing documents or appropriateness of the parties foreclosing and in doing so such activity provides the basis for an 'unfair' inquiry . . . ." FAC ¶ 135(a)-(c). Because the FAC contains substantially the same factual allegations as the Complaint, the Court would dismiss the cause of action under the unfair prong of the UCL because Plaintiff does not plead sufficient facts to support this claim, just as it failed to do so before. *See Mendiondo, 521 F.3d at 1104*.

d. Fraudulent Prong

To properly plead a UCL claim based on fraud, a plaintiff must "satisfy the particularity requirement of [*Federal Rule of Civil Procedure] Rule 9(b)*." *Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009)*. "A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. Instead, it is **[*24]** only necessary to show that members of the public are likely to be deceived." *Schnall v. Hertz Corp., 78 Cal. App. 4th 1144, 1167, 93 Cal. Rptr. 2d 439 (2000)* (citation and quotation marks omitted).

Plaintiff eliminated his *California Civil Code § 1572* causes of action against Erica Jones and MERS alleging fraud. *See generally* FAC. Even so, the Court previously dismissed those causes of action for failing to state a claim. As it stands, the FAC does not plead sufficient factual allegations demonstrating fraud, and cannot satisfy the particularity requirement of *Rule 9(b)*. Plaintiff makes conclusory statements such as "Defendant's scheme is premised on fabricating documents and using them . . . to conceal its fraudulent, illegal, and unfair practices." FAC

¶ 150. Plaintiff also alleges that "[t]he scheme is unquestionably unlawful, unfair, and fraudulent for purposes of *Section 17200*. It relies on fraudulent real estate documents to complete its schemes and continues in its loan modification procedural practices." *Id.* ¶ 151. The Court would find that Plaintiff has not pleaded with particularity a UCL claim under the fraudulent prong.

e. Insufficient Allegations Against Jones

Jones argues that there are no specific factual allegations as part of the UCL claim against her. Jones's MTD at 2-3. Plaintiff rebuts, pointing to various factual **[*25]** allegations in the Complaint against Jones, namely Jones's lack of authority to execute the First ADOT. Pl.'s Opp. Jones's MTD at 9-12. Though Plaintiff is correct that the FAC alleges that Jones lacked the authority to execute the First ADOT, it does not allege this as a basis for the UCL claim. FAC ¶¶ 18-35, 132-53. As such, the Court would also dismiss Count I in the FAC against Jones for containing insufficiently pleaded factual allegations against her. *See* *Mendiondo, 521 F.3d at 1104*.

f. Statute of Limitations on UCL Claim Against Jones

Jones argues that Plaintiff's UCL claim against her expired under the four-year statute of limitations because Jones executed the First ADOT over seven years ago. Jones's MTD at 2. Plaintiff rebuts, arguing that Jones's fraudulent concealment justifies the tolling of the statute of limitations until March 10, 2017. Pl.'s Opp. Jones's MTD at 5-9.

For the same reasons stated above and in the previous Order, Plaintiff has insufficiently pleaded fraudulent conduct. More specifically, he failed to plead the who, what, when, where and how of Jones's alleged fraudulent concealment, required to establish tolling. *Yumul v. Smart Balance, Inc., 733 F. Supp. 2d 1117, 1133 (C.D. Cal. 2010)* (holding that the plaintiff "failed adequately to allege fraudulent concealment sufficient **[*26]** to establish tolling."). The Court would therefore dismiss the UCL claims against Jones because her allegedly improper conduct occurred outside of the four-year period proscribed in the UCL. *See* *Cal. Bus. & Prof. Code § 17208*.

III. Conclusion

For the reasons stated above, the Court would **GRANT** Defendant Companies' MTD and **GRANT** Jones's MTD. The Court would dismiss the sole remaining claim in the FAC **WITHOUT** prejudice and would give Plaintiff 30 days to file a second amended complaint. As to Plaintiff's motion to remand, for the above reasons the Court would **DENY** that motion.

Neptun Light, Inc. v. City of Chi.

United States District Court for the Northern District of Illinois, Eastern Division

April 16, 2018, Decided; April 16, 2018, Filed

Case No. 17-CV-8343

Reporter

2018 U.S. Dist. LEXIS 63440 *; 2018-1 Trade Cas. (CCH) P80,355; 2018 WL 1794769

NEPTUN LIGHT, INC., Plaintiff, v. CITY OF CHICAGO; CHICAGO INFRASTRUCTURE TRUST; and AMERESCO, INC., Defendants.

Core Terms

luminaires, Lighting, bidding, anticompetitive, antitrust, alleges, manufacturers, proposals, rule of reason, market power, Sherman Act, anti trust law, specifications, Defendants', contractors, relevant market, purchaser, products

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Judges: Hon. AMY J. ST. EVE, United States District Court Judge.

Opinion by: AMY J. ST. EVE

Opinion

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Defendants City of Chicago (the "City"), Chicago Infrastructure Trust ("CIT"), and Ameresco, Inc. (collectively, "Defendants") have moved pursuant to *Federal Rule of Civil Procedure 12(b)(6)* to dismiss Plaintiff Neptun Light, Inc.'s Complaint alleging a violation of *Section 1 of the Sherman Act, 15 U.S.C. § 1*. (R. 18.) For the following reasons, the Court grants Defendants' motion.

BACKGROUND

This case concerns streetlights, and how the City went about procuring subcontractors to **[*2]** supply new and energy-efficient ones. The Complaint alleges that in November 2016 the City prepared a revamp of the City's lights with "smart lighting." To get the process underway, the City issued the Chicago Smart Lighting Project Request for Proposals ("RFP") to various contractors. (Compl. ¶ 22.) The City did so "in coordination" with CIT (*id.*), which is a nonprofit organization that assists the City "in providing alternative financing and project delivery options for transformative infrastructure projects" (*id.* ¶ 16). With their RFP, the City and CIT sought to "select a single Proposer that delivers the best value." (*Id.* ¶ 24.) The RFP therefore requested "competitive detailed proposals," or bids, and the City and CIT would consider only proposals that satisfied the RFP's stated criteria. (*Id.* ¶¶ 23-25.)

The RFP required that bids must include new "LED Luminaires," a type of efficient electric-lighting unit, and that those luminaires meet certain specifications for installation in 270,000 fixtures. (*Id.* ¶ 28.) These RFP specifications—including wattage, range, and weight requirements—were specific to various different "lighting contexts," such as alley, residential, or arterial **[*3]** streets. (*Id.* ¶ 30.) The RFP also attached Form 4, which contractors had to complete by filling in data for their luminaires. (*Id.* ¶ 32.) Contractors further had to submit physical samples with their bids under the RFP. (*Id.* ¶ 33.)

The RFP contemplated that the City and CIT could conduct a demonstration of the submitted luminaires, and if they did, they would "utilize the relevant samples submitted by each Proposer." (*Id.* ¶¶ 34-35.) A comprehensive demonstration, however, was to occur only after the deadline to submit bids. (*Id.* ¶ 37.) The RFP stated that its goal was "to create a fair and uniform basis for the evaluation of the Proposals" and that the City would award the contract to the "Proposer whose Proposal conforms to the requirements of the RFP" and after considering the criteria it would "determine which proposal represents the 'best value.'" (*Id.* ¶ 36.) The RFP initially called for bids by December 14, 2016, but through a later addendum dated December 9, 2016, the City and CIT moved the deadline to January 9, 2017. (*Id.* ¶ 39.)

The Complaint alleges that Defendants ran afoul of the RFP in an effort to steer the luminaire subcontracting deal to General Electric ("GE") Lighting **[*4]** and away from Neptun and other competitors. According to the Complaint, this effort became evident in December 2016. That month, the City and CIT performed a neighborhood demonstration, but rather than use luminaires supplied by "each" subcontractor, as the RFP contemplated, they used only GE Lighting's luminaires. (*Id.* ¶¶ 40-48.) The next month, on the deadline of January 9, 2017, the City and CIT received six proposals from contractors, including ones from Commonwealth Edison ("ComEd"), Aldridge Electric, Inc., Itron, Inc., and Ameresco. ComEd's proposal listed GE Lighting as the luminaire manufacturer, but explained that GE Lighting's luminaires could not meet each specification for all lighting contexts. (*Id.* ¶¶ 56, 57-58.) GE Lighting's luminaires also had not been independently tested by a recognized laboratory, as the RFP required. (*Id.* ¶¶ 57-61.) Similarly, Aldridge's bid listed GE Lighting, and Aldridge too conceded that GE Lighting's luminaires did not meet specifications. (*Id.* ¶¶ 62-64.)

Itron, meanwhile, listed Neptun as its luminaire subcontractor. Neptun, unlike GE Lighting, provided the required data and samples. (*Id.* ¶ 51.) Ameresco listed yet another luminaire manufacturer, **[*5]** but it noted that it could work with another "major manufacturer" already "aligned with another contractor" should "the CIT, City, and Parks have an interest in utilizing their products"—a not-so-subtle hint that Ameresco could secure GE Lighting's luminaires, according to the Complaint. (*Id.* ¶ 54.)

The City and CIT ultimately selected Ameresco as the project's contractor. No comprehensive demonstration of Ameresco's listed luminaires took place, however, as the RFP required. (*Id.* ¶ 66.) Instead, in February 2017, Ameresco notified Neptun that it was fielding additional luminaire sub-bids based on revised specifications. (*Id.* ¶ 68.) The City and CIT made many of those revisions to account for GE Lighting's shortcomings, according to the Complaint. Indeed, one of the revisions obviated the need to submit physical samples, which GE Lighting had failed to do in the first instance. (*Id.* ¶¶ 69, 72-73.) After receiving Ameresco's notice about the revised specifications, Neptun again had its luminaires tested independently, and it submitted documentation with its "best proposal," providing "all information the City asked for." (*Id.* ¶¶ 72, 70.) In March 2017, Ameresco informed Neptun that it **[*6]** was not selected for any lighting context. GE Lighting was selected for five. (*Id.* ¶¶ 74-75.)

The Complaint goes on to allege in some detail how Neptun's luminaires were more efficient—by cost, lifespan, wattage—than GE Lighting's in each of the five lighting contexts GE Lighting was awarded. (*Id.* ¶¶ 78-106.) Looking for answers, Neptun sent a letter to Ameresco. The letter noted that Neptun, unlike GE Lighting, was a Chicagoland company, and that it "performed unequivocally" better than the companies selected. Ameresco never responded. (*Id.* ¶¶ 108-109.) Neptun then turned to the City, which did respond, and stated that it had suggested to Ameresco to "reach out to the broadest possible market by contacting each of the manufacturers of the six proposals, including Neptun." (*Id.* ¶ 113.) The City asserted further that Neptun did not provide the "best value" considering several factors, including "local manufacturing capability, large-scale experience, low dirt depreciation, and affordable lifecycle cost." (*Id.* ¶ 114.) According to the Complaint, those assertions were not only unsupported, they were simply wrong. The Complaint alleges, for example, that Neptun already makes luminaires **[*7]** in a Chicago suburb (*id.* ¶ 119), has manufactured over 400,000 luminaires (*id.* ¶ 125), includes better sealing properties in its luminaires than GE Lighting (*id.* ¶ 128), and offers less expensive, longer lasting luminaires than GE Lighting (*id.* ¶ 131).

Based on the City's empty justifications and in light of how the luminaire bidding panned out, the Complaint claims that Defendants entered into an unlawful agreement in violation of *Section 1 of the Sherman Act*. That agreement, it alleges, entailed "relaxing" the specification requirements and then holding a "purportedly open and free competition to select luminaire manufacturers as a pretext in order to include GE Lighting as a luminaire manufacturer—notwithstanding the inferiority of GE Lighting's luminaires." (*Id.* ¶ 133.) The Complaint claims that not only did GE Lighting's selection contravene the RFP's stated goal to host a competitive bidding process and find the "best value," it also contravened Illinois law, which requires that "all purchase orders or contracts . . . involving amounts in excess of $10,000, made by or on behalf of [a] municipality, shall be let by free and open competitive bidding." (*Id.* ¶ 134 (quoting 65 ILC 5/8-10-3).) **[*8]** The Complaint alleges that Defendants' unlawful agreement to fix the bidding process for GE Lighting has harmed Neptun, which could have earned millions on the project, and Chicagoans, who now suffer less efficient and more expensive luminaires over their streets. (*Id.* ¶¶ 136-140.)

LEGAL STANDARD

"A motion to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)* challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." *Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 736 (7th Cir. 2014)*; *see also* *Hill v. Serv. Emp. Int'l Union, 850 F.3d 861, 863 (7th Cir. 2017)*. Under *Rule 8(a)(2)*, a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Fed. R. Civ. P. 8(a)(2)*. To survive a *Rule 12(b)(6)* challenge, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atlantic v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. Courts, of course, accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff's favor. *See, e.g.,* *Forgue v. City of Chicago, 873 F.3d 962, 966 (7th Cir. 2017)*. After "excising the allegations not entitled to the presumption" of truth, courts "determine whether the remaining factual allegations plausibly suggest an entitlement to relief." *McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011)*.

ANALYSIS

Antitrust law's precept is the protection of competition, not competitors. *See* *Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 747 (7th Cir. 2016)* (citing *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990))*; *Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986)*. It is not a catchall business tort designed **[*9]** to recompense the market's also-rans, even if their losses are the result of unfairness or deception. *See* *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980)*.

The Complaint claims that Neptun lost the luminaire deals, and GE Lighting won those deals, because Defendants entered into an anticompetitive agreement to that end which purportedly violated *Section 1 of the Sherman Act*. "To state a claim for a *Section 1* violation," a plaintiff "must plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (*i.e.*, an agreement); (2) a resultant unreasonable restraint of trade in a relevant market; and (3) an accompanying injury." *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties, No. 14-CV-02705, 2017 U.S. Dist. LEXIS 205845, 2017 WL 6821094, at *3 (N.D. Ill. Dec. 13, 2017)* (citing *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012))*. "Regarding the second element, where, as here, the alleged anticompetitive conduct does not amount to a *per se* violation of the Sherman Act, courts assess the defendants' conduct under the Rule of Reason analysis." *United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901, 923 (N.D. Ill. 2015)* (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007))*; *see also, e.g., FTC v. In. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* (the "test of legality [under the rule of reason] is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition").[1]

Generally, the rule of reason "requires not only that the plaintiff allege and prove anticompetitive effects, but additionally, as **[*10]** with all antitrust claims, that the injury complained of be of a type that the antitrust laws were designed to guard against, and further that the antitrust violation be the direct cause of plaintiff's injury." *Havoco, 626 F.2d at 556*. "More specifically, a plaintiff must show that the defendants' conduct had an anticompetitive effect in a relevant market, and that the defendants have market power in that market." *Triad Isotopes, 104 F. Supp. 3d at 923* (citing *Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004))*; *see also Slep-Tone Entm't Corp. v. Elwood Enters., Inc., 165 F. Supp. 3d 705, 713 (N.D. Ill. 2015)* ("the rule of reason requires a showing that the alleged violator has 'market power' through an agreement that has produced adverse or anticompetitive effects within the relevant and specifically defined geographic market").

The Complaint in this case falls short of pleading a rule-of-reason claim. "The first requirement in every suit based on the Rule of Reason is market power." *Menasha, 354 F.3d at 663*; *see also, e.g., Agnew, 683 F.3d at 335* ("As a threshold matter, a plaintiff must show that the defendant has market power"); *Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 251 (7th Cir. 1994)* ("Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason."); *Hardy v. City Optical Inc., 39 F.3d 765, 767 (7th Cir. 1994)* (reiterating the Seventh Circuit's "rule that substantial market power is a threshold requirement of all rule of reason" cases). Nowhere does the Complaint even attempt to allege that the **[*11]** City, CIT, or Ameresco have such power. *See, e.g., 42nd Parallel N. v. E St. Denim Co., 286 F.3d 401, 405 (7th Cir. 2002)* (affirming dismissal because the plaintiff "nowhere alleges that [the defendant] has such market power").

The Complaint likewise fails to allege a relevant market in which Defendants could have power. A plaintiff bears the "burden of describing a cognizable market under the Sherman Act." *Agnew, 683 F.3d at 346*; *accord Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 738 (7th Cir. 2004)* (a plaintiff must define both a product and a geographic market to describe a cognizable market). The Complaint simply makes no effort to do so. *See House of Brides, Inc. v. Alfred Angelo, Inc., No. 11 C 07834, 2014 U.S. Dist. LEXIS 1850, 2014 WL 64657, at *5 (N.D. Ill. Jan. 8, 2014)* ("[f]ailure to identify a relevant market is a proper ground for dismissing a Sherman Act claim") (citing *Nat'l Hockey League Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719-20 (6th Cir. 2003))*. Neptun, however, argues that there is "no dispute" about what the relevant market is; the Complaint alleges that the City asked Ameresco to obtain bids from "the broadest possible market" of luminaire manufacturers and the relevant geographic is, "obviously," the City of Chicago. (R. 30 at 7-8.) Even assuming the Complaint "identif[ied] the market for luminaire manufacturers" in Chicago, that is not a cognizable antitrust market. For one, "luminaire manufacturers" are not a product or a service. Further, to the extent Neptun means to reference a market for luminaires, there are insufficient **[*12]** allegations (and no arguments) explaining how that is a market independent of other lighting products. *See, e.g., Fed. Trade Comm'n v. Advocate Health Care Network, 841 F.3d 460, 467 (7th Cir. 2016)* ("Product markets usually include the product at issue and its substitutes, the other products that are reasonably interchangeable with it").

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[1] Neptun does not contest Defendants' assertion that this is a rule-of-reason case, as it is, given the allegedly vertical agreement. *Accord Leegin, 551 U.S. at 886-88*.

Setting those arguments aside, what the Complaint plainly takes issue with is not a lack of competition in a *market*, but a lack of competition with respect to one *customer* and one *contract*. But as the Seventh Circuit held in Havoco, "there must be some allegation of a harmful effect on a more generalized market than" a single purchaser and a single contract.[2] 626 F.2d at 558-59; *accord* City of New York v. Grp. Health Inc., 649 F.3d 151, 156 (2d Cir. 2011) ("A single purchaser's preferences . . . cannot define a market."); Smalley & Co. v. Emerson & Cuming, Inc., 808 F. Supp. 1503, 1512 (D. Colo. 1992), *aff'd*, 13 F.3d 366 (10th Cir. 1993) ("A relevant product market defined as one product sold to one customer does not make sense under the antitrust laws") (citing Havoco, 626 F.2d at 558).

Related to the Complaint's failure to allege a market is its failure to allege anticompetitive effects. In bringing a rule-of-reason claim, a "plaintiff must allege, not only an injury to himself, but an injury to the market as well." Agnew, 683 F.3d at 335 (quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984)). "[T]he absence of a sufficient allegation of anticompetitive effects in a Sherman Act complaint is fatal to the existence **[*13]** of the cause of action." Havoco, 626 F.2d at 554; *see also, e.g.,* Agnew, 683 F.3d at 335; 42nd Parallel, 286 F.3d at 405.

Courts have long recognized that it is not anticompetitive for purchasers to "exercise [their] independent discretion as to parties with whom [they] will deal." United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919); *accord Expert Masonry, Inc. v. Boone Cnty.,* Ky., 440 F.3d 336, 347 (6th Cir. 2006) ("there is no economic rationale to restrict, as a violation of Section 1, a buyer's latitude in selecting the entity from whom it will purchase products or services"). "[T]he normal principle," therefore, is that "a buyer is entitled to choose among various sellers who offer competing products or services." Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 539-40 (7th Cir. 1986) (parenthetically quoting Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982)). That principle applies even when the buyer's decision stemmed from unfair competition; "unfair competition, as such, does not violate the antitrust laws." Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 655 (7th Cir. 1984) ("The legislators who passed the Sherman Act did not make ordinary business torts federal torts for which treble damages could be recovered"). Thus, although the "manipulat[ion]" of a "bidding process" by a purchaser may give rise to "a claim grounded in tort or contract," "the absence of any allegation of an anticompetitive effect prevents these claims from coming within the purview of the antitrust laws." Car Carriers, 745 F.2d at 1109-1110 (stating also, "[t]ortious activities in the form, for example, of unfair competition **[*14]** do not contravene the antitrust laws unless accompanied by the requisite anticompetitive effect"); *see also* Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004) (even if Blue Cross "manipulated the bidding," "the antitrust laws are not meant to police bad management"); Sitkin Smelting & Ref. Co. v. FMC Corp., 575 F.2d 440, 448 (3d Cir. 1978) (where losing bidder complained that purportedly open bid system was in fact fixed by the biddee for another bidder, stating the conduct was "clearly reprehensible" but "the Sherman Act may not be extended beyond its intended scope and used to police the morals of the marketplace").

Neptun's theory of harm runs headlong into that law. Neptun's clearest articulation of the alleged harm is that "[d]esiring and selecting a more expensive and poorly-performing product in advance of any bidding, and irrespective of the performance . . . is anticompetitive." (R. 30 at 4-5.) That theory has no recognition in the law (as evidenced by Neptun's lack of caselaw support), and for good reason; otherwise, purchasers who make decisions that are anything from uninformed to thriftless would be subject to antitrust lawsuits and treble damages. *See, e.g.,* Expert Masonry, 440 F.3d at 348 (in an unsuccessful bidder case, "certainly antitrust liability cannot be premised on improvident business decisions"). Elsewhere, Neptun **[*15]** describes Defendants' failure to "hold[ ] a true competition." (R. 30 at 12.) But even if that were true, "[t]he Sherman Act does not require competitive bidding"; it prohibits only "unreasonable restraints on competition," and Neptun has failed to allege any such restraints. Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 694, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); *see also, e.g.,* JetAway Aviation, LLC v. Bd. of Cnty. Comm'rs of Cnty. of Montrose, Colo., 754 F.3d 824, 853-54 (10th Cir. 2014).

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[2] In a footnote, Neptun notes that other courts have "rejected" the "single contract theory." Whatever that means, this Court follows the Seventh Circuit, and its holding that, absent allegations that "a single purchaser represented the entire market for a commodity," a market definition of one purchaser is "so narrow" as to "discourage [rather] than to protect competition, the ward of the antitrust laws." Havoco, 626 F.2d at 559 & n. 6.

The Seventh Circuit was clear in *Havoco*: "a loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market." *626 F.2d at 558*. "Otherwise the mere fact that one party bid successfully against another party for a contract would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition." *Id.* This is precisely the sort of claim Neptun advances.[3] *Accord Nelson v. Monroe Reg'l Med. Ctr., 925 F.2d 1555, 1577 (7th Cir. 1991)*; *Triad Isotopes, 104 F. Supp. 3d at 925*; *see also, e.g., Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1370 (3d Cir. 1996)* ("assertions about improper bidding, without more, lack antitrust significance"); *Car Carriers, 745 F.2d at 1110* ("When stripped to its essential allegations, the complaint does no more than state plaintiffs' commercial disappointment at losing [Ford's] patronage.").

One final matter is worth addressing.[4] In addition to failing to state a rule-of-reason **[*16]** claim, Neptun alleges an "inherently implausible" conspiracy. *Car Carriers, 745 F.2d at 1109*. It claims that Defendants agreed to circumvent competitive bidding procedures and steer business toward a less efficient, more expensive competitor. But it provides no reason whatsoever as to why Defendants would conspire to injure themselves. It does not suggest that GE Lighting was somehow involved in the conspiracy, let alone name it as a defendant. Nor does it allege an iota of upside for Defendants in driving business toward a company that would cost them more money while providing a worse product. The Court "is not required to don blinders[,] ignore commercial reality," and permit such an illogical claim to enter costly antitrust discovery. *Id. at 1110*; *see also Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471-72 (7th Cir. 1992)* ("A theory of liability attributing irrationality to consumers does not get very far.").

CONCLUSION

Neptun has failed to allege an antitrust violation. Indeed, it is "hard to ignore the suspicion that the facts [of this case] have been forced into an antitrust mold to achieve federal jurisdiction." *Car Carriers, 745 F.2d at 1110*. The Court therefore grants Defendants' motion, but will dismiss the Complaint without prejudice. Neptun has until May 7, 2018, to file an amended complaint, **[*17]** if it believes it can articulate a claim consistent with this Opinion and its counsel's *Rule 11* obligations.

Dated: April 16, 2018

ENTERED

/s/ Amy J. ST. Eve

AMY J. ST. EVE

United States District Court Judge

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[3] Neptun's attempt to render *Havoco* ineffective by limiting its applicability to cases in which there is a single losing party is unavailing. *Havoco's* reasoning did not hinge on the fact that there was one injured plaintiff; as later courts have recognized, *Havoco* applies all the same when there are multiple unsuccessful bidders. *See, e.g., Triad Isotopes, 104 F. Supp. 3d at 925* (*Havoco* foreclosed antitrust claim alleging that "Defendants have reduced competition in the Chicago-area market by preventing legitimate low-cost *bidders* such as Plaintiff from competing equally" for a contract) (emphasis added).

[4] Because the points addressed are dispositive, the Court does not address Defendants' other arguments. *See Expert Masonry, 440 F.3d at 345* (questions of immunities should be considered only after determining whether an antitrust claim has been adequately asserted); *see also, e.g., Alarm Detection Sys., Inc. v. Orland Fire Prot. Dist., 194 F. Supp. 3d 706, 727 n. 8 (N.D. Ill. 2016)*.

Daldumyan v. World Fin. Group Ins. Agency, Inc.

Court of Appeal of California, Second Appellate District, Division Five

April 17, 2018, Opinion Filed

B277973

Reporter

2018 Cal. App. Unpub. LEXIS 2645 *; 2018 WL 1804889

ARTAK DALDUMYAN, Plaintiff and Appellant, v. WORLD FINANCIAL GROUP INSURANCE AGENCY, INC., Defendant and Respondent.

Notice: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

Prior History: [*1] APPEAL from judgment and order of the Superior Court of Los Angeles County, No. BC554536, Gail Ruderman Feuer, Judge.

Daldumyan v. World Fin. Group Ins. Agency, 2016 Cal. Super. LEXIS 44045 (Cal. Super. Ct., Aug. 5, 2016)

Disposition: Affirmed in part, reversed in part, with directions.

Core Terms

insurance agency, marketing company, commissions, termination, cause of action, associates, arbitration, providers, insurance product, sales, damages, hierarchy, intentional interference, employees, contracts, independent contractor, promissory estoppel, Marketing, prospective economic advantage, promise, appointments, insurance agent, products, representations, unfair, unfair competition, compliance, unjust enrichment, licensed, entity

Counsel: Law Office of Richard M. Foster, Richard M. Foster and Sylvia Sultanyan, for Plaintiff and Appellant.

Hunton & Williams, Phillip J. Eskenazi, Kirk A. Hornbeck, Andrew J. Peterson, for Defendant and Respondent.

Judges: KRIEGLER, Acting P. J.; BAKER, J., KIM, J.[*] concurred.

Opinion by: KRIEGLER, Acting P. J.

Opinion

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Plaintiff and appellant Artak Daldumyan appeals from a judgment following an order sustaining a demurrer as to certain causes of action and an order granting summary judgment as to the remaining causes of action in favor of defendant and respondent World Financial Group Insurance Agency, Inc. (the Insurance Agency). On appeal, Daldumyan contends: (1) the complaint stated causes of action for breach of an implied-in-fact contract, unjust enrichment, fraud, and violation of the unfair competition law (UCL) (*Bus. & Prof. Code, § 17200 et seq.*), or was capable of amendment to state these causes of action; (2) there are triable issues of fact with respect to his causes of action for promissory estoppel, intentional interference with contract, and intentional interference with prospective **[*2]** economic advantage; and (3) his claims are not barred by the doctrine of claim preclusion based on allegations in the complaint that the Insurance Agency is the alter ego of a marketing company, whose liability was determined in a prior arbitration action.

As to the ruling on the demurrer, we conclude that the complaint does not allege an implied-in-fact contract between Daldumyan and the Insurance Agency for payment of commissions, and it cannot be amended to do so. It also cannot state a quasi-contract claim for restitution, because the benefits received by the Insurance Agency were incidental to Daldumyan's performance of his written contract with the marketing company. The complaint alleged a cause of action for fraudulent concealment of material facts, however, namely that the Insurance Agency was created in August 2005 as a separate entity to collect commissions, with no obligation to pay compensation and without any notice to the agents selling the products. Daldumyan also has alleged a cause of action for violation of the unfair competition law based on an unfair or fraudulent business practice. The judgment must be reversed, and the demurrer to the causes of action for fraud **[*3]** and violation of the unfair competition law overruled.

Summary adjudication of the promissory estoppel cause of action was proper, however, because there was no evidence of any clear promise on behalf of the Insurance Agency or reliance by Daldumyan. The cause of action for intentional interference with prospective economic advantage was also properly adjudicated in favor of the Insurance Agency, because there was no evidence that the Insurance Agency's conduct relating to this claim was independently wrongful. Triable issues of fact exist as to the cause of action for intentional interference with contract, however, and summary adjudication must be denied as to that cause of action.

Daldumyan's surviving causes of action are not barred by the doctrine of claim preclusion, because the Insurance Agency's liability for the claims is not derivative of the liability of the party to the earlier action. The Insurance Agency's liability is based on actions that the Insurance Agency is alleged to have taken or failed to have taken, not because it stands in privity with the marketing company. We reverse the judgment, with directions.

FACTS AND PROCEDURAL BACKGROUND

In 1996, Daldumyan entered into **[*4]** an "Associate Membership Agreement" with World Marketing Alliance, Inc. (the Alliance) to sell insurance products. The Alliance was affiliated with WMA Securities, Inc. Daldumyan signed an acknowledgement stating, "I am or will soon apply to become an insurance agent of the insurance agency World Marketing Alliance and possibly a registered representative of the broker-dealer WMA Securities, Inc. (either or both referred to as [the Alliance])."

Daldumyan became a licensed insurance agent in 1996. As an independent contractor under the contract with Alliance, Daldumyan sold insurance products and recruited additional independent contractors in a hierarchical marketing structure. The contract provided for Daldumyan to receive commissions on the products and services that he sold and on products sold by the "downline" associates in his hierarchy. After Daldumyan obtained his securities license, he entered into a contract with WMA Securities as a registered representative.

In 2001, the insurance and financial services holding company Aegon, N.V., formed the wholly owned subsidiary World Financial Group, Inc. (the Marketing Company). The Marketing Company acquired select assets of the Alliance, **[*5]** including Daldumyan's contract. The Marketing Company is similarly a multi-level marketing organization that enters into contracts with independent contractors primarily to sell insurance products provided by other companies. The Marketing Company offers independent contractor insurance agents a business platform to run independent financial services and insurance businesses. The independent contractors are referred to as associates or agents. The agents may recruit additional individuals. Agents earn commissions on the insurance products that they sell personally and on the sales by agents who are recruited under them in their hierarchy.

Aegon owned or obtained another wholly owned subsidiary, which was renamed the Insurance Agency in 2001. The Insurance Agency holds the license to sell the insurance products that the independent contractor insurance agents sell. The Insurance Agency has distribution agreements with other insurance companies which provide for payment of commissions to the Insurance Agency on sales made by its agents. The Insurance Agency conducts business through the independent contractor agents who have contracted with the Marketing Company. The Marketing Company **[*6]** operates the computer system which computes and pays the insurance commissions earned by the independent contractors on the products sold through the Insurance Agency. For each policy sold, the computer system calculates the amount for each person entitled to a share of the commission.

Aegon also owns Transamerica Financial Advisors, Inc. (Financial Advisors), which is the successor to WMA Securities. Financial Advisors is a registered securities dealer and brokerage regulated by the Securities and Exchange Commission (SEC). Daldumyan became a representative and earned commissions from Financial Advisors. Financial Advisors also uses the Marketing Company to calculate commissions and issue payments to registered representatives in compliance with SEC regulations. There are no contractors recruited and commissions earned for other contractors' sales in this context.

Financial Advisors belongs to a self-regulatory group called the Financial Industry Regulatory Authority (FINRA). FINRA adopted rules governing the conduct of outside business activities and private securities transactions. FINRA members enforce the FINRA rules. Outside business activities and private securities transactions **[*7]** by registered representatives are not entirely prohibited, but the rules require disclosure before engaging in them.

In November 2011, the Marketing Company terminated an associate named Pedram Mehrian, who was below Daldumyan in his hierarchy, based on criminal charges for rape. Daldumyan's contract provided that a terminated associate's hierarchy would "roll up" to Daldumyan, meaning that every associate and registered representative should move one level closer to Daldumyan and increase Daldumyan's commissions. A few days after Mehrian's hierarchy automatically rolled up to Daldumyan, the hierarchy was restructured to allocate Mehrian's hierarchy to his brother, who was a junior associate below Daldumyan. Daldumyan complained to Xuan Nguyen, Kent Davies,[1] and Joseph DiPaolo about the improper transfer of Mehrian's hierarchy to his brother.

In May 2012, Daldumyan's clients told him that they were receiving telephone calls from Financial Advisors, the Marketing Company, and the Insurance Agency. The callers were asking whether Daldumyan had solicited them to invest in various businesses. The same person would call twice, once claiming to be with the Marketing Company and once claiming **[*8]** to be with the Insurance Agency. The Insurance Agency has a compliance department, which included Vice President Kathryn Taylor, Assistant Secretary Stephanie Hosier, and Lauren Hodges. The Insurance Agency's compliance department called all of Daldumyan's active clients and downline associates. Taylor, Hosier, and Hodges are employees of the Marketing Company, but perform work for the Marketing Company and the Insurance Agency. Daldumyan called Taylor about the concerns of his clients and associates. Taylor told him that they were following the regular routine that they conduct in any investigation.

In August 2012, the officers and directors of the Insurance Agency included Paul Mineck, Susan Davies, John Joseph, DiPaola, Leesa Easley, and Janice Curcio. They are also employees of the Marketing Company.

On August 17, 2012, Taylor sent an e-mail to a small number of individuals stating that the Insurance Agency received notification from Financial Advisors that Daldumyan had been terminated for cause. The Insurance Agency recommended that the Marketing Company follow suit based on certain provisions of the associate contract. Taylor explained that a virtual vote was being conducted on **[*9]** Insurance Agency agent Daldumyan and asked the recipients to select either "'[f]ollow suit with [Financial Advisors]' and terminate from the Marketing Company for cause," or "'Allow agent to stay with [the Marketing Company].'" Mineck, Susan, Lilian Palacio and Joseph voted to follow suit with Financial Advisors.

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[1] More than one participant has the last name Davies, so they will be referred to individually by their first names for clarity.

In August 2012, the Marketing Company terminated Daldumyan's agreement and stopped paying commissions to him.

Arbitration

On March 1, 2013, Daldumyan initiated an arbitration claim against the Marketing Company for several causes of action, including breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel, unjust enrichment, fraudulent inducement and intentional infliction of emotional distress. Daldumyan filed an amended demand increasing his demand from $10 million to $50 million dollars. Two arbitration hearings were held in July 2014.

Allegations of the Complaint in the Instant Case

On August 13, 2014, Daldumyan filed the complaint in the instant case against the Insurance Agency. Daldumyan filed an amended complaint on April 1, 2015, for breach of implied-in-fact contract, intentional interference with contract, intentional interference **[*10]** with prospective economic advantage, unjust enrichment, promissory estoppel, fraud, and violation of *Business and Professions Code section 17200*. In addition to the facts above, the complaint alleged that the Insurance Agency and the Marketing Company are affiliated, meaning they are subsidiaries that are both ultimately owned by Aegon. Prior to August 9, 2005, product providers paid the commissions that were earned by associates directly to the Marketing Company, who paid the associates their portions based on commission schedules. On August 9, 2005, the Insurance Agency registered as an active insurance agent with the California Department of Insurance. The Marketing Company became merely the payment coordinator for the Insurance Agency to process the payment of commissions earned through the sale of insurance products for product providers to associates as directed by the Insurance Agency. The Marketing Company is not an agent authorized to transact insurance business in California. On August 9, 2005, the Insurance Agency and the Marketing Company caused the appointments held by Marketing Company associates to become connected with the Insurance Agency's registration as an active insurance agent without any written notice **[*11]** to the Marketing Company associates. Pursuant to this arrangement, the Marketing Company asserts now that it is simply a paymaster for the Insurance Agency. The Marketing Company associates, including Daldumyan, were "kept in the dark regarding this move."

The Insurance Agency and the Marketing Company are alter egos of one another. They maintain such a unity of interest and ownership that the separate personality of the two corporations no longer exists. They use their purported separate corporate forms to perpetrate fraud, circumvent adjudication of disputes, and accomplish other wrongful and inequitable purposes. Since August 9, 2005, the Insurance Agency has retained a portion of the commissions earned by Daldumyan and continues to retain portions of commissions earned through his business.

The Marketing Company had no basis to terminate Daldumyan's agreement or to stop paying his vested commissions. The Insurance Agency acted in conjunction with the Marketing Company. The Marketing Company claimed to have terminated his contract because Financial Advisors terminated an agreement with him, but the contract did not permit for termination based on a termination of the agreement with **[*12]** Financial Advisors. Furthermore, the Financial Advisors termination was unauthorized and a sham. The Insurance Agency and the Marketing Company sent notices to insurance product providers with whom Daldumyan had appointments stating that he was no longer with the Marketing Company.

A. Implied-in-Fact Contract

Daldumyan's cause of action for breach of implied-in-fact contract additionally alleged that the Insurance Agency has selling agreements with other insurance companies that permit the Insurance Agency and the independent contractors to sell insurance products on behalf of the Insurance Agency. An implied-in-fact contract was formed between the Insurance Agency and Daldumyan on August 9, 2005. The implied contract incorporated certain provisions of Daldumyan's written contract, including paying commissions to Daldumyan (1) arising from the sale of the insurance products of the companies with which Daldumyan had appointments, and (2) arising from his hierarchy of several hundred associates, who were made Insurance Agency agents on August 9, 2005.

The implied contract required the Insurance Agency to pay commissions to Daldumyan for the sale of authorized products and services, income **[*13]** from trails, and income from renewals. Having received the benefit of the selling agreements with the various insurance companies, the Insurance Agency was to pay the commissions earned from the sale of the product providers pursuant to the commission schedules which Insurance Agency published through the Marketing Company's internal website. The Insurance Agency had a further duty to continue paying Daldumyan vested commissions generated by his hierarchy of downline associates, even if he chose to stop making sales. The Insurance Agency also had a duty not to interfere with his appointments with insurance product providers and his effort to sell the products of providers.

Daldumyan fully performed his obligations under the implied-in-fact contract. In August 2012, the Insurance Agency breached the contract by failing to pay Daldumyan commissions of approximately $70,000 that he earned and was owed from his own sales before his termination. Beginning in August 2012, the Insurance Agency breached the contract by failing to pay him commissions, including trail and renewal commissions. The contract was never terminated and there was no basis to terminate the contract. It was not dependent **[*14]** on his contract with Financial Advisors. Insurance Agency also breached the implied covenant of good faith and fair dealing by failing to pay commissions due and owing from direct sales and sales by downline associates without good, just or legitimate cause.

B. Tortious Interference with Contract

Daldumyan alleged with respect to the cause of action for tortious interference with contract that he had a valid contract with the Marketing Company, under which the Marketing Company agreed to pay a percentage of commissions and bonus pools. On August 9, 2005, the Insurance Agency, along with the Marketing Company, caused Daldumyan's appointments to be connected to the Insurance Agency without notification or authorization. The Insurance Agency knew about Daldumyan's contract with the Marketing Company and intended to interfere with it by connecting the appointments to the Insurance Agency. In August 2012, the Insurance Agency interfered with Daldumyan's contract with the Marketing Company by causing the Marketing Company to terminate its contract with Daldumyan without any basis or standing and causing a breach in the contractual relationship.

The Insurance Agency knew Daldumyan had been appointed **[*15]** with multiple insurance product providers on behalf of whom the Insurance Agency is listed as an authorized agent. By working with the Marketing Company to terminate Daldumyan's contract and withhold vested commissions, they also prevented him from selling products for providers and deprived him of future sales, commissions, trails and renewal income. The Insurance Agency and the Marketing Company sent notices to insurance product providers with which Daldumyan had appointments, stating that Daldumyan was no longer with the Marketing Company and forcing the termination of Daldumyan's appointments with multiple product providers. Daldumyan's contracts and appointments with various product providers were terminated, including ING, Allianz Life Insurance Company of North America, Western Reserve Life Assurance Company of Ohio, Transamerica Financial Life Insurance Company, and others. The Insurance Agency's conduct caused interference with Daldumyan's contracts with third party product providers, resulting in millions of dollars in damages.

C. Intentional Interference with Prospective Economic Advantage

With respect to his cause of action for intentional interference with prospective economic **[*16]** advantage, Daldumyan alleged that he built a client base of thousands of customers over 16 years as an associate of the Marketing Company. Around May and June 2012, the Insurance Agency and the Marketing Company contacted Daldumyan's customers in various manners, including telephone calls and letters. The Marketing Company claimed this investigation was conducted by the Insurance Agency, through Marketing Company employees using

Marketing Company resources. Daldumyan began receiving inquiries from his customers, who were concerned about the contacts. The Insurance Agency's conduct was intended to harass Daldumyan and interfere with his business relationships with customers. The interference caused damages in an amount to be proved at trial.

Daldumyan also recruited many associates to join the Marketing Company. By August 2012, he had a hierarchy of 480 "downline" agent associates. Daldumyan had existing business relationships with the associates in his hierarchy and a probability of future economic benefit from these relationships. In May and June 2012, the Insurance Agency and the Marketing Company contacted the downline associates through telephone calls and letters about various **[*17]** subjects under false pretenses. The Marketing Company claimed the investigation was conducted by the Insurance Agency, through Marketing Company employees using Marketing Company resources. The investigations gave the downline associates the impression that Daldumyan had engaged in wrongdoing. Daldumyan began receiving inquiries from concerned associates. The Insurance Agency and the Marketing Company made threats to Daldumyan's family members who were downline associates, including his father. The Insurance Agency's conduct was intended to harass Daldumyan and interfere with his prospective business relationships with the associates and his customers. The interference caused damages in an amount to be proved at trial.

The Insurance Agency further interfered with Daldumyan's existing business relationships with several product providers by working in conjunction with the Marketing Company to wrongfully terminate Daldumyan's contract. The Insurance Agency and the Marketing Company sent notices to the insurance product providers that Daldumyan had appointments with stating that he was no longer with the Marketing Company, forcing the termination of the appointments. As a consequence, **[*18]** Daldumyan was deprived of a future relationship with any of these product providers for at least three years following his termination. Had the Insurance Agency not interfered with Daldumyan's prospective economic advantage, Daldumyan would have continued to generate commissions since August 2012. The interference caused damages in an amount according to proof at trial.

D. Unjust Enrichment

Daldumyan alleged in his cause of action for unjust enrichment that he built his hierarchy and sold insurance products based on the Marketing Company's representations about the business, thereby permitting the Insurance Agency to collect a portion of the commissions generated by the sales. The Insurance Agency had wrongfully withheld payments of Daldumyan's commissions since August 2012, and failed to pay the commissions to him, so the Insurance Agency has been unjustly enriched by the benefit conferred upon it by Daldumyan in an amount to be determined at trial.

E. Promissory Estoppel

The cause of action for promissory estoppel alleged that to induce Daldumyan to sell products and grow his hierarchy of associates, the Marketing Company held itself out as a multi-level marketing company that offered **[*19]** a business platform to individuals seeking to run an independent financial services and insurance business. In reliance on these continued representations, Daldumyan dedicated time and money to build a business, under the belief that he was building his own independent business. The Insurance Agency uses Marketing Company employees to make representations through the Marketing Company, since the Insurance Agency does not have its own employees. The Insurance Agency is the entity allowed under California law to collect and pay commissions on the sale of insurance products. The Insurance Agency, through the Marketing Company, makes representations to its agents that the insurance business they are building is their own business in which they can become vested and continue to earn commissions from their sales and the commissions generated by their hierarchy even after they retire. After an agent retires, the Marketing Company claims it has sole discretion to terminate and divest associates of their own business and stop paying commissions. The Marketing Company steps into the shoes of the Insurance Agency when it discusses payment of commissions, appointments with product providers and **[*20]** communicating with associates, because the Insurance Agency does not have separate employees. Daldumyan relied on clear and unambiguous promises to dedicate 16 years to the Marketing

Company and affiliated companies, including the Insurance Agency. He was injured and suffered damages in an amount according to proof.

F. Fraud

Daldumyan alleged fraud in the creation of a scheme by the Insurance Agency and the Marketing Company. The Marketing Company uses the Insurance Agency to transact insurance business in the state of California without the Marketing Company having the proper licenses or being admitted as an authorized agent. To induce Daldumyan to sell the products of providers and to recruit a hierarchy of associates for the Insurance Agency, the Marketing Company held itself out as a multi-level marketing company that offers a business platform to individuals seeking to run an independent financial services and insurance business. In reliance on these representations, Daldumyan and other associates dedicated time and money to build a business and recruit associates, in order to collect commissions from their own sales and their associates' sales, under the belief that they were building **[*21]** their own independent business.

Since August 9, 2005, the Insurance Agency has been comprised of officers and directors who are also officers and directors of the Marketing Company. The Insurance Agency does not have its own employees. The Insurance Agency uses employees of the Marketing Company to make representations through the Marketing Company. The Insurance Agency is the entity that has the ability to collect and pay commissions based on the sale of insurance products as a licensed insurance agent in California. The Insurance Agency through the Marketing Company continually makes representations to its agents that the insurance business they are building is their own business in which they can become vested and earn commissions even after they retire. Then, the Marketing Company later claims it has sole discretion to terminate and divest associates of their own business and stop paying commissions.

The Insurance Agency intentionally leads associates to believe it is a department within the Marketing Company. Associates, including Daldumyan, are shocked to discover the Insurance Agency purports to be a separate entity on which they are dependent to receive payment of commissions, **[*22]** but with which they do not have a written contract. The Marketing Company employees cannot distinguish between the companies. The Insurance Agency concealed its intent to rely on a separate corporate existence from the Marketing Company in order to deprive Daldumyan of commissions due and owing to him, including vested commissions, and put up further legal road blocks to Daldumyan's attempts to seek judicial redress. The Insurance Agency and the Marketing Company knew the representations made to Daldumyan were false when they were made and they made the representations recklessly with disregard for the truth. Daldumyan's reliance was reasonable, and as a proximate result of the Insurance Agency's conduct, Daldumyan has been damaged in an amount according to proof at trial.

G. Unfair Competition

In Daldumyan's claim for violation of the unfair competition law, he alleged the Insurance Agency and the Marketing Company maintained such a unity of interest and ownership that the separate personalities of the two corporations no longer exist. They behaved in a manner inconsistent with the separate corporate existence of the two entities. They used their purported separate corporate forms to **[*23]** perpetrate fraud, circumvent adjudication of disputes, and accomplish other wrongful and inequitable purposes.

An agent must be licensed by the Department of Insurance to transact insurance business in California. The Marketing Company is not authorized to transact insurance business in California. The Insurance Agency and the Marketing Company have created an unlawful and fraudulent scheme through which the Marketing Company uses the Insurance Agency to transact insurance business in California without the proper licenses. The Marketing Company associates who are licensed by the Department of Insurance are designated by the Marketing Company and the Insurance Agency as authorized agents of the Insurance Agency without the consent of the associates.

The Insurance Agency retains a percentage of commissions generated by associates of the Marketing Company, who are licensed agents and sell products. The associates are required by contract to litigate disputes with the

Marketing Company in arbitration before the American Arbitration Association (AAA) pursuant to Georgia law. The Insurance Agency does not maintain written contracts with associates, so there is no forum selection for disputes **[*24]** between associates and the Insurance Agency. The Marketing Company and associates who are registered representatives of Financial Advisors are required by FINRA to arbitrate disputes between themselves and Financial Advisors through FINRA arbitration. The Insurance Agency, the Marketing Company, and their affiliated entities use their corporate forms to erect legal road blocks to associates seeking judicial redress of their wrongful conduct. The Insurance Agency, along with the Marketing Company, are structured so aggrieved associates do not have an appropriate forum to seek legal redress, because the Insurance Agency and the Marketing Company have defenses they raise in each forum. This conduct by the Insurance Agency is intended to deceive associates and is fraudulent and unfair. The Insurance Agency will continue to engage in these unlawful, unfair and fraudulent practices, and therefore, should be enjoined from engaging in such conduct.

Daldumyan sought an amount of damages to be determined at trial, injunctive and declaratory relief, punitive damages, and an order of costs and attorney fees.

Demurrer to Amended Complaint

The Insurance Agency filed a demurrer to the amended complaint **[*25]** in May 2015. The Insurance Agency argued in the demurrer that the complaint failed to state a cause of action for breach of contract because Daldumyan could not have both an express contract and an implied contract governing the obligation to pay him commissions on sales. The fraud claim did not allege a false representation attributable to the Insurance Agency, and the promissory estoppel claim was duplicative of the fraud claim. Daldumyan had not stated an unfair competition claim, because he had not alleged an independent, actionable wrong.

Daldumyan opposed the demurrer, and the Insurance Agency filed a reply. A hearing was held on June 2, 2015. Daldumyan argued with respect to the cause of action for fraud that the Insurance Agency had a duty to disclose the new entities were being formed, the Insurance Agency was directing that commissions be paid, and the Marking Company was the entity making payments to agents. As to the unfair competition claim, the trial court stated that the Marketing Company's violation of insurance law by selling insurance when the Insurance Agency held the license did not cause damages to Daldumyan. His termination and lost commissions did not result from **[*26]** the Marketing Company practicing without a license. The trial court acknowledged that Daldumyan was not relying on alter ego allegations to establish liability for the causes of action for intentional interference with contract, intentional interference with prospective economic advantage, and promissory estoppel.

The trial court sustained the demurrer without leave to amend as to the causes of action for breach of contract, unjust enrichment, fraud, and violation of *Business and Professions Code section 17200*. The court overruled the demurrer as to the causes of action for intentional interference with contract, intentional interference with prospective economic advantage, and promissory estoppel.

Arbitration Award

On May 28, 2015, following two additional days of arbitration hearings and briefing, the arbitrators issued an award in favor of Daldumyan on causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. The arbitration award contained the following findings:

Daldumyan's contract provided that the Alliance had contractual relationships with certain companies "(collectively, the 'Preferred Companies', or individually, a 'Preferred Company')" which authorized the Alliance or **[*27]** its members to sell various products and to designate Alliance members for appointment with the Preferred Companies as independent sales representatives with respect to their products and services. The termination provisions of Daldumyan's contract allowed the Alliance to terminate the agreement for cause, which included "any breach of the Associate's contract(s) with any of the Preferred Companies."

On August 12, 2012, Financial Advisors terminated Daldumyan's contract to sell securities after concluding that Daldumyan failed to timely disclose outside business activities and private securities transactions. The contract between Financial Advisors and Daldumyan was not within the scope of the arbitration clause, and Financial Advisors was not a party to the arbitration.

On August 20, 2012, the Marketing Company terminated its contract with Daldumyan, because Financial Advisors had terminated him as a registered securities representative. The Marketing Company divested him of commissions which had been vested as of the time of his termination based on the sales level he had attained in the hierarchy. The commission stream from a contractor who was terminated for committing a felony was **[*28]** transferred to another contractor downline from Daldumyan, rather than to Daldumyan.

The arbitrators found that Financial Advisors was not a product provider and was not considered a Preferred Company under the contract between the Marketing Company and Daldumyan. Since Financial Advisors was not a Preferred Company, any breach of Daldumyan's contract with Financial Advisors did not constitute a cause for termination under the agreement with the Marketing Company. The Marketing Company could not rely on Financial Advisors' termination of Daldumyan to terminate him from the Marketing Company. The arbitrators found the Marketing Company had no contractual right to terminate the contract with Daldumyan, divest him of his commissions and bonuses (past, present and future), or transfer the commission stream from the terminated contractor to a downline contractor.

The arbitrators also found that the Marketing Company breached its covenant of good faith and fair dealing with Daldumyan by transferring the commission stream improperly, terminating him and divesting him of his contractual rights. The record established that the acts were done to deprive him of the benefits of the contract and **[*29]** not in good faith. No additional damages were being assessed for this cause of action, however, because the damages awarded covered all allowable causes of action. The arbitrators concluded that there was insufficient evidence to find in favor of Daldumyan on the remaining causes of action for promissory estoppel, fraudulent inducement, unjust enrichment, and intentional infliction of emotional distress.

Daldumyan had sought as damages: (1) the loss of commissions earned on products sold by himself or members of his hierarchy prior to his termination; (2) the loss of commissions vested to him prior to his termination; (3) consequential economic damages; (4) attorney fees and costs; (5) punitive damages; and pre- and post-judgment interest.

The arbitrators concluded a reasonable assumption for Daldumyan's working life was 23 years based on his age, health and the nature of the work. The panel selected the model of damages provided by the Marketing Company which reflected their finding that both the termination and the transfer of commissions were improper. The panel concluded the Marketing Company's conduct did not warrant an award of punitive damages and denied Daldumyan's request for **[*30]** punitive damages.

After further proceedings to establish attorney fees and costs, the arbitrators awarded Daldumyan damages of $5,241,273.35, legal fees of $703,575, and costs of $72,855.86, plus post-award interest. In addition, the arbitrators ordered their fees, as well as the administrative expenses of the dispute resolution organization, to be paid by the Marketing Company. The Marketing Company was required to reimburse Daldumyan for the arbitration fees and expenses that he had paid of $115,946.80.

The sole dissenting member of the arbitration panel would have found any company contracting with the Marketing Company to be a Preferred Company under the associate contract, including Financial Advisors, and would have awarded substantially reduced damages in favor of Daldumyan. The Marketing Company filed a motion in federal court to vacate the arbitration award, which was denied. Daldumyan filed a motion to confirm the award in federal court, which the Marketing Company did not oppose. The federal court confirmed the arbitration award on November 23, 2015. On December 14, 2015, Daldumyan acknowledged that the Marketing Company had satisfied the judgment.

Motion for Summary Judgment [*31] and Supporting Evidence

In January 2016, the Insurance Agency filed a motion for summary judgment, or in the alternative summary adjudication, as to the remaining causes of action. The Insurance Agency argued that the claims that survived demurrer were barred by the doctrine of res judicata, because the complaint alleged the Insurance Agency was the alter ego of the Marketing Company. Daldumyan had already litigated his causes of action against the Marketing Company in the arbitration action. The arbitration ruling set a ceiling for recovery against any alter ego. The issue of his lost commission income had been determined, which was identical to the harm alleged in the instant action. Where the judgment has been fully satisfied, res judicata bars subsequent suit. In addition, the Insurance Agency argued that the alter ego allegation established it was in privity with the Marketing Company. Daldumyan could have raised his causes of action in the arbitration, which involve the same factual nucleus, because a nonsignatory can be compelled to arbitrate if sued as an alter ego.

In addition, the Insurance Agency argued that the promissory estoppel cause of action was based on four alleged **[*32]** promises: (1) Daldumyan would be paid commissions on sales of insurance products; (2) he would be paid commissions on sales of insurance products by downline associates in his hierarchy; (3) he would become vested in his commissions; and (4) he was building his own independent business. The promises alleged as the basis for promissory estoppel were made by the Marketing Company. No promise had been identified as having been made by the Insurance Agency. There also could be no promissory estoppel when a valid contract existed governing the subject matter.

Daldumyan did not identify independently wrongful conduct as the basis for his intentional interference with prospective economic advantage. He also did not allege specific economic relationships that offered a probability of future economic benefit.

Daldumyan could not rely on conduct by employees of the Marketing Company, through the alter ego allegation, to allege interference with contract, because the Marketing Company could not interfere with its own contract. A true statement to Daldumyan's insurance product providers that he was no longer with the Marketing Company could not serve as the basis for intentional interference either. **[*33]** Although the Insurance Agency's agreements with the product providers required the providers to terminate Daldumyan, the existence of the contracts was not actionable and there was no evidence that the Insurance Agency exercised its rights under those contracts.

The Insurance Agency submitted the declaration of its officer Paul Mineck in support of its motion for summary judgment. Mineck declared that he is an officer and Vice President of the Insurance Agency. He is also Senior Vice President and Chief Marketing Officer of the Marketing Company. He is an independent contractor with respect to Financial Advisors. In August 2012, the president and a vice president of Financial Advisors told him that Daldumyan's conduct with respect to undisclosed business activities, including his apparent conduct in connection with an Armenian timeshare project, appeared to violate FINRA's disclosure rules. Mineck understood that a violation of FINRA's rules would constitute a breach of a registered representative's contract with Financial Advisors. Their statements caused Mineck to wonder if the Marketing Company should terminate its business relationship with Daldumyan.

Financial Advisors held a meeting **[*34]** in August 2012 as part of its investigation to determine whether Daldumyan violated FINRA disclosure rules. Mineck participated in the meeting at the invitation of Financial Advisors as a representative of the Marketing Company. Mineck found Daldumyan's answers to questions to be evasive and not credible. Because the meeting focused on the securities aspect of Daldumyan's business, the Insurance Agency did not request to participate in the meeting.

Two days after Financial Advisors' termination of Daldumyan, the Marketing Company obtained a uniform termination notice for the securities industry stating that Financial Advisors had terminated Daldumyan for violating FINRA disclosure rules regarding outside business activities and private securities transactions. On August 17, 2012, Kathryn Taylor, an employee of the Marketing Company, requested that Mineck and several other employees of the Marketing Company vote on whether to terminate Daldumyan's contract based on Financial Advisors' termination. Taylor circulated the form from Financial Advisors with her request. The group unanimously voted to terminate the contract. On August 20, 2012, the Marketing Company provided notice to Daldumyan **[*35]** that his contract had been terminated for cause. The Marketing Company also provided this notice to other companies, including Transamerica Premier Life Insurance Company.

The Insurance Agency also submitted a request to take judicial notice of the arbitration award and Daldumyan's acknowledgement of payment of the judgment, in addition to a declaration from attorney Kirk Hornbeck.

Opposition to the Motion for Summary Judgment and Supporting Evidence

Daldumyan opposed the motion for summary judgment. He argued that claim preclusion did not apply, because the arbitration did not involve the same parties. The Insurance Agency had expressly asserted that the AAA did not have jurisdiction over it or the subject matter in Daldumyan's subpoena for records. He argued that the Insurance Agency and the Marketing Company relied on their separate legal existence in the arbitration and should not be able to bar claims against the Insurance Agency now, based on the allegations of alter ego liability. The purpose of the alter ego doctrine is to prevent misuse of the corporate laws and requires a finding of fact. The judgment against the Marketing Company was not for damages caused by the Insurance **[*36]** Agency. Daldumyan's recovery in the arbitration was for the Marketing Company's conduct and no determination had been made that the Insurance Agency was its alter ego.

Daldumyan noted that his claims against the Insurance Agency allow recovery of additional damages that are not limited to contract damages. For the torts of interference with contract or prospective economic advantage, he is entitled to compensation for all the detriment proximately caused by the tort, including unforeseen expenses, emotional suffering, damages to reputation, and punitive damages where the interference was done with malice.

Daldumyan pointed out that the Insurance Agency did not exist in 1996 when he entered into his contract with the Alliance and agreed to arbitrate any disputes. In the arbitration proceedings, the Marketing Company was uncooperative, refused to produce documents pertaining to commission payments that were relevant for calculating damages, and later produced information in a meaningless form, insisting it could not provide the information in a relevant form. Documents prepared by the marketing department showed Daldumyan's damages were many times the amount of the arbitration award, but **[*37]** the discovery was provided too late and the arbitration panel relied on the Marketing Company's calculation of damages. The information pertaining to commissions was in the Insurance Agency's control as the entity contracting with product providers.

With respect to promissory estoppel, Daldumyan argued that Insurance Agency executives and/or board members made representations pertaining to the compensation that Insurance Agency agents would earn from the sale of insurance products. The same individuals represented on behalf of the Insurance Agency that Daldumyan was building his own insurance agency, which entitled him to vested commissions from his own sales and from sales of other agents. Since the Marketing Company is not a licensed insurance agency and does not have contracts with product providers, the Marketing Company cannot have insurance agents. The representations had to have been made regarding the Insurance Agency compensating its agents to induce reliance by the agents.

On the issue of intentional interference with prospective economic advantage, Daldumyan argued the Insurance Agency violated the principal's duty to deal with an agent fairly and in good faith by conspiring **[*38]** with Financial Advisors and the Marketing Company to terminate his contracts with those companies. There were triable issues of fact to establish his expectation that he could continue to generate commissions from sales to his client base.

There were also triable issues of material fact as to his cause of action for intentional interference with contract. The Insurance Agency was aware that he had contracts with the Marketing Company and product providers. The Insurance Agency intentionally acted to induce the breach or disruption of those contracts, causing damages. Taylor is employed by the Marketing Company, but performs duties for the Marketing Company and the Insurance Agency. She worked as the compliance supervisor of the Insurance Agency's compliance department. She opened an investigation pertaining to Daldumyan on behalf of the Insurance Agency. Hodges, an Insurance Agency compliance specialist, participated in the investigation. The Insurance Agency's investigation file contained handwritten notes showing the Insurance Agency's attempt to find any purported violation to attribute to Daldumyan in order to terminate his relationship with the Marketing Company, Financial Advisors, **[*39]** and the product providers. Mineck voted with others to terminate Daldumyan's contract with Financial Advisors, although he did not work for Financial Advisors and conceded that there was no evidence of any violation of FINRA rules. Mineck and other Insurance Agency executives voted to terminate Daldumyan's contract with the Marketing Company. On August 17, 2012, the Insurance Agency notified Daldumyan that the contract with the Marketing Company was terminated.

In addition to compensatory damages in the form of lost income, Daldumyan sought punitive damages against the Insurance Agency for interference with Daldumyan's relationships with his customers.

Daldumyan submitted his own interrogatory responses in which he alleged detailed promises had been made by the Insurance Agency, by the Marketing Company acting on behalf of the Insurance Agency, or by the Marketing Company as the alter ego of the Insurance Agency. Daldumyan noted that the Insurance Agency and the Marketing Company had been evasive regarding what capacities individuals worked in when they performed certain functions. Both companies had promised to pay commissions on the sale of products through documentation provided by **[*40]** the Insurance Agency's employees. At every annual convention, key executives of the Insurance Agency and the Marketing Company, including Kent and Susan Davies, Mineck, DiPaolo, Joseph, and others represented to Daldumyan and other independent contractor agents that they would continue to earn commissions on insurance products they sold as insurance agents. These individuals also made promises on behalf of the Insurance Agency that Daldumyan, as an agent, would continue to earn commissions from the sale of products by his hierarchy. They represented on behalf of the Insurance Agency that he was building his own independent business which entitled him to commissions from his own sales and his hierarchy, and he was vested in these commissions. Daldumyan concluded that the representations were made on behalf of the Insurance Agency, because the Marketing Company cannot have independent contractor insurance agent and does not have contractual relationships with product providers to pay commissions. Daldumyan provided specific details from several convention presentations about the value for agents of the Insurance Agency in building their own agencies.

Daldumyan submitted his own declaration **[*41]** and the declaration of his attorney Sylvia Sultanyan. Daldumyan provided the Insurance Agency's responses to interrogatories in support of his opposition as well. In particular, the Insurance Agency responded that it delegated its obligation to pay commissions on the sale of any insurance products made by independent contractor insurance agents to the Marketing Company, which functioned as the Insurance Agency's "paymaster." Daldumyan had agreed to the arrangement by entering into the contract with the Alliance, which the Marketing Company acquired as an asset acquisition in 2001. Daldumyan, the Marketing Company, and the person most qualified at the Insurance Agency would know that agents of the Insurance Agency are paid exclusively by the Marketing Company. The Insurance Agency and the Marketing Company have a servicing arrangement pursuant to which the Marketing Company functions as the paymaster for the Insurance Agency, among other things, in exchange for a monthly expense allocation. In this manner, the Insurance Agency delegated its obligation to pay commissions on the sale of insurance products to the Marketing Company. The Insurance Agency has never paid Daldumyan any commissions. **[*42]** The selling agreements that the Insurance Agency has with insurance carriers entitled the Insurance Agency to commissions on any sales of insurance products that Daldumyan made through the Insurance Agency. The Insurance Agency has not paid any portion of commissions retained from the sale of insurance products to the Marketing Company. The Insurance Agency derives 99 percent of its revenues from commissions on the sale of insurance products and the remainder is from intercompany interest booked to the Insurance Agency. The Insurance Agency does not maintain hierarchies, which is exclusively a function of the Marketing Company's multi-level marketing platform.

Daldumyan also provided the Insurance Agency's discovery admissions. The Insurance Agency admitted that the individuals who work for the Insurance Agency do not work exclusively for the Insurance Agency. Pursuant to a servicing arrangement between the Insurance Agency and the Marketing Company, certain Marketing Company employees perform certain compliance-related, licensing, and/or other functions on behalf of the Insurance Agency in exchange for an expense allocation.

The Insurance Agency did not admit that it was the alter ego **[*43]** of the Marketing Company. It responded that the Insurance Agency and the Marketing Company are affiliates, not alter egos. They qualify as affiliates because they are independent subsidiaries under the common control of Aegon, but they are separate legal entities that operate as separate entities under the direction and control of different groups of officers and directors.

The Insurance Agency admitted that it receives commission income from insurance product providers based on the sales of insurance products by independent contractor insurance agents and that it has no obligation to pay the independent contractor agents a portion of the commissions arising from their sales. The Insurance Agency would not admit that it had an obligation to pay independent contractor agents a portion of the commissions arising from their sale of insurance products. The Insurance Agency also would not admit that it directs the Marketing Company to pay the independent contractor agents a portion of the commissions arising from their sales of insurance products or from the sales of their hierarchy of independent contractor agents. The Insurance Agency would not admit that it retained a portion of the commissions **[*44]** generated from the independent contractor agents' sales of insurance products.

The Insurance Agency admitted that it permitted Daldumyan to sell the insurance products of product providers with whom the Insurance Agency had selling agreements, in that Daldumyan was "piggybacking" on the Insurance Agency's relationships with the product providers as a sub-agent, but the right to collect the commissions generated from Daldumyan's sales belonged to the Insurance Agency alone.

The Insurance Agency admitted that it does not issue paychecks or any type of compensation to the Marketing Company employees who perform services for the Insurance Agency. Instead, the Marketing Company provides an expense allocation to the Insurance Agency in the form of a monthly journal entry, to compensate the Marketing Company and the Marketing Company employees who perform those services.

Daldumyan submitted copies of letters that he received from product providers stating they received requests to terminate his distribution channel contracts or stating that they were terminating his agreement due to a notification that he was no longer with the Marketing Company.

Daldumyan submitted the minutes of a committee **[*45]** meeting called by Taylor, which seem to be minutes of an Insurance Agency committee meeting. The voting members listed are Mineck, Joseph, Davies, and Lilian Palacio. Non-voting members listed who attended the meeting are DiPaola, Easley, Taylor, Suzanne Imbrogno, Tim Smith, Hosier, and Hodges. The minutes state that the Insurance Agency "will be on a stand still" until Daldumyan's termination notice from Financial Advisors is submitted. Easley asked if termination for cause on the broker-dealer side automatically led to termination on the agency side. Following an unrecorded discussion, Joseph stated that they would have a virtual vote after Financial Advisors had officially terminated Daldumyan, and he instructed that no information should be given unless someone requested it.

Daldumyan submitted copies of the virtual votes. He submitted a "WFG Compliance Complaint Log." A complaint or issue was raised by Kent and received by reviewers Hosier and Hodges on June 6, 2012. The log stated that the investigation information was provided to Financial Advisors because Daldumyan was approved with them. Financial Advisors determined that Daldumyan had participated in unapproved outside business **[*46]** activities, unapproved private securities transactions, and unapproved personal investments, so they terminated him for cause. The log stated, "Following suit, [the Insurance Agency] sent out a virtual vote and decided to terminate agent for cause of being terminated from [Financial Advisors]."

Daldumyan also submitted the Insurance Agency's written objections to his subpoena in the arbitration matter, including "because the AAA does not have the authority to compel the overbroad pre-hearing document production sought by the Subpoena of a non-party."

He submitted Kent's deposition testimony. Kent did not understand the technical connection between the Marketing Company and the Insurance Agency. As far as he understood, Taylor was the Director of the Insurance Agency Compliance and Hodges worked for the Insurance Agency in the same department. He was notified by the

Insurance Agency that Daldumyan was terminated. The Marketing Company did no investigation in connection with the termination of Daldumyan.

Daldumyan submitted Hodges's deposition testimony as well. Hodges stated that she is a Compliance Analyst for the Marketing Company and the Insurance Agency, but she is paid by the Marketing **[*47]** Company. Hodges made several specific handwritten notes, but has no recollection about where she obtained the information and only recalls speaking with Taylor about Daldumyan's investigation.

Daldumyan submitted portions of the reporter's transcript from the arbitration hearings. A witness testified in the arbitration that the Marketing Company does not have a compliance department. The employees for the Marketing Company are used in connection with the Insurance Agency in a compliance capacity on behalf of the Insurance Agency. Taylor and Hodges are employees of the Marketing Company, but their primary function is the duties that they perform on behalf of the Insurance Agency's compliance department. They are also involved in agency relations for the Marketing Company, which is conflict resolution between hierarchies. The hierarchies are a construct of the Marketing Company. Taylor and Hodges performed functions on behalf of the Insurance Agency as Marketing Company employees. The Insurance Agency does not have a payroll or a list of employees. Those functions are fulfilled by employees of the Marketing Company.

Daldumyan provided the deposition testimony of Janice Curcio, who was **[*48]** the person most qualified to testify for the Insurance Agency. The agents do not have their own contracts with product providers. Instead, they are listed with the product providers as sub-agents under the Insurance Agency. A conversation between Mehrian's brother and Kent in 2012 started the investigation into Daldumyan. The Insurance Agency's compliance department, specifically Taylor, and Financial Advisors' compliance department ran the investigation pertaining to Daldumyan. The concerns about Daldumyan's outside business activities related to a bank and a resort. Agents with knowledge of the outside business activities were brought to the Insurance Agency compliance department for interviews. Outside business activities are not prohibited for an insurance agent. Outside business activities are relevant to registered representatives of a broker-dealer, but the Insurance Agency is not a broker-dealer. The Insurance Agency's investigation into Daldumyan's outside business activities was part of the Insurance Agency's investigation file, because the Insurance Agency and Financial Advisors worked the cases at the same time and shared information.

Curcio explained that the practice was **[*49]** for the Insurance Agency to notify the product providers that the agent was appointed, and the Insurance Agency would keep the records.

Daldumyan provided the Marketing Company's interrogatory responses in the arbitration proceedings. The Marketing Company identified all persons with knowledge of the investigation suggesting Daldumyan violated FINRA rules and breached his Financial Advisors agreement to be Mineck, Joseph, Susan, Palacio, Taylor and Hosier. The Marketing Company has no selling agreements with insurance companies or mutual fund companies. The Marketing Company's function is to process commission payments received by either Financial Advisors or the Insurance Agency for payment to Marketing Company associates who are properly licensed, registered and appointed registered representatives of Financial Advisors, or properly licensed, appointed agents of the Insurance Agency.

Reply and Trial Court Ruling

The Insurance Agency filed a reply. A hearing was held on July 22, 2016. The trial court found privity existed between the Insurance Agency and the Marketing Company based on the allegations of the complaint that the Insurance Agency was the alter ego of the Marketing Company. **[*50]** There was no evidence that any employee of the Insurance Agency was separate from an employee of the company in arbitration. The gravamen of the complaint was that the Marketing Company terminated the written agreement and is liable to Daldumyan for vested commissions. Daldumyan stated that he was not seeking a double recovery. The trial court granted the motion for summary judgment on the ground that Daldumyan's recovery in the arbitration action covered the claims that had been asserted against the Insurance Agency or could have been asserted in the arbitration, even though the defendant at arbitration was the Marketing Company. The trial court entered judgment in favor of the Insurance Agency on August 5, 2016. Daldumyan filed a timely notice of appeal.

DISCUSSION

Demurrer

A. Standard of Review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or **[*51]** conclusions of law. [Citations.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*City of Dinuba v. County of Tulare (2007) 41 Cal.4th 859, 865, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* (*Dinuba*).)

When a demurrer is sustained without leave to amend, we determine "whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse." (*Dinuba, supra, 41 Cal.4th at p. 865*; *Doe v. United States Youth Soccer Assn., Inc. (2017) 8 Cal.App.5th 1118, 1122, 214 Cal. Rptr. 3d 552*.)

B. Implied-in-Fact Contract

Daldumyan contends the allegations of the complaint were sufficient to state a cause of action for breach of an implied-in-fact contract between the Insurance Agency and himself, or they could be amended to do so. We disagree.

An implied contract is one where the existence and terms of the agreement are manifested by the parties' conduct. (*Civ. Code, § 1621*.) In order to plead a cause of action for implied contract, "the facts from which the promise is implied must be alleged." (*Youngman v. Nevada Irrigation Dist. (1969) 70 Cal.2d 240, 247, 74 Cal. Rptr. 398, 449 P.2d 462*.) "Like an express contract, an implied-in-fact contract requires an ascertained agreement of the parties. (*Silva v. Providence Hospital of Oakland (1939) 14 Cal.2d 762, 773, 97 P.2d 798*; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 102, p. 144.)" (*Unilab Corp. v. Angeles-IPA (2016) 244 Cal.App.4th 622, 636, 198 Cal. Rptr. 3d 211*.)

The allegations of the complaint show there was no agreement between the Insurance Agency and Daldumyan for the Insurance Agency **[*52]** to make payments to Daldumyan. Daldumyan had a written contract to receive certain commissions from the Marketing Company in exchange for his performance under the associate contract. There is no allegation that he ever received payments from the Insurance Agency or expected to receive payments from the Insurance Agency. He was not even aware that the Insurance Agency had connected his appointment to the Insurance Agency's registration with the Department of Insurance. The Insurance Agency never made any payment to Daldumyan, so it did not establish any contract to make payments through its course of conduct. The Insurance Agency had selling agreements with insurance product providers that required the providers to pay amounts to the Insurance Agency based on products and services that the agents sold, but the agreements did not require the Insurance Agency to pay any amount to the agents. If the Marketing Company failed to pay Daldumyan the amounts that he was entitled to receive under his associate contract with the Marketing Company, the Insurance Agency had no separate or independent obligation to pay him those amounts based on an implied contract. The complaint fails to allege **[*53]** an implied contract for payment by the Insurance Agency, and Daldumyan has not shown that the complaint could be amended to allege an implied contract between these parties. Since the allegations and the briefs concern a contract for the payment of commissions, we do not consider whether an implied contract arose for any other purpose as a result of the Insurance Agency's conduct.

C. Quasi-Contract (Unjust Enrichment)

Daldumyan contends that the complaint alleges a cause of action for unjust enrichment, which is considered to be a quasi-contract claim for restitution. We disagree.

"'The right to restitution or quasi-contractual recovery is based upon unjust enrichment. Where one obtains a benefit which he may not justly retain, he is unjustly enriched. The quasi-contract, or contract "implied in law," is an obligation created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his former position by return of the thing or its equivalent in money. [Citations.] [¶] However, "[t]he mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor."' (1 Witkin, Summary of Cal. Law (9th **[*54]** ed. 1987) Contracts, § 91, pp. 122-123.) Thus, '[e]ven when a person has received a benefit from another, he is required to make restitution "only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it."' (*Ghirardo v. Antonioli (1996) 14 Cal.4th 39, 51, 57 Cal. Rptr. 2d 687, 924 P.2d 996*; accord, *First Nationwide Savings v. Perry (1992) 11 Cal.App.4th 1657, 1663, 15 Cal. Rptr. 2d 173*.)" (*California Medical Assn. v. Aetna U.S. Healthcare of California, Inc. (2001) 94 Cal.App.4th 151, 171, fn. 23, 114 Cal. Rptr. 2d 109*, italics omitted (*California Medical*).) "Ordinarily, restitution is required only if '"the benefits were conferred by mistake, fraud, coercion or request."' [Citation.]" (*Prakashpalan v. Engstrom, Lipscomb & Lack (2014) 223 Cal.App.4th 1105, 1132, 167 Cal. Rptr. 3d 832* (*Prakashpalan*).)

"[A] quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties' rights. (Cf. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal.App.4th 1359, 1387, 88 Cal. Rptr. 2d 802*; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal.App.4th 194, 203, 51 Cal. Rptr. 2d 622*; *Hedging Concepts, Inc. v. First Alliance Mortgage Co. (1996) 41 Cal.App.4th 1410, 1419-1420, 49 Cal. Rptr. 2d 191*.) 'When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract.' (*Hedging Concepts, Inc., at p. 1420*.)" (*California Medical, supra, 94 Cal.App.4th at p. 172*, fns. omitted.)

"In *Hedging Concepts*[*, supra*,] *41 Cal.App.4th 1410, 49 Cal. Rptr. 2d 191*, the appellate court stated: 'A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. [Citations.] However, it is well settled that there is no equitable basis for an implied-in-law **[*55]** promise to pay reasonable value when the parties have an actual agreement covering compensation.' (*Id. at p. 1419*.) The appellate court also stated: 'Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly missing contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply "missing" terms that are not missing. "The reason for the rule is simply that where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability . . . ."' (*Ibid.*)" (*California Medical, supra, 94 Cal.App.4th at p.172, fn. 27*.)

In *California Medical*, defendant insurance company Aetna collected premiums from enrollees and entered into contracts with intermediary companies that would pay physicians for services rendered to enrollees. The intermediaries contracted directly with the physicians, including provisions that the physicians would "look solely" to the intermediaries for payment for health services provided to enrollees in Aetna's plans. (*California Medical, supra, 94 Cal.App.4th at pp.156-157, fn. 7*.) Several intermediaries became insolvent **[*56]** and failed to pay physicians, despite having received payment from Aetna. The physicians filed an action against Aetna alleging quasi-contract, among other theories, to obtain payment. The appellate court held that as a matter of law, where the subject matter of the claim was governed by express contracts that defined the parties' rights, there could be no quasi-contract claim. In *California Medical*, the issue of whether the physicians were entitled to compensation from Aetna was addressed by the contracts between the physicians and the intermediaries, contracts between the intermediaries and Aetna, and contracts between the enrollees and Aetna, so there could be no action for quasi-contract in that case. (*Id. at pp. 172-173*.) The *California Medical* court further found that nothing in that case precluded Aetna's risk-shifting arrangement or obligated Aetna to guarantee payment to the physicians if the intermediaries failed to pay them after Aetna had made payments to the intermediaries for their services. (*Ibid.*)

Lastly, the court found that the physicians' quasi-contract claim also failed "because under the circumstances alleged here, any benefit conferred upon defendants by Physicians was simply an **[*57]** incident to Physicians' performance of their own obligations to Intermediaries under the Intermediary-Physician Agreements. (*Major-Blakeney Corp. v. Jenkins (1953) 121 Cal.App.2d 325, 340-341, 263 P.2d 655*.) As noted by the appellate court in *Major-Blakeney Corp.*, '"A person who, incidentally to the performance of his own duty or to the protection or the improvement of his own things, has conferred a benefit upon another, is not thereby entitled to contribution."' (*Id. at pp. 340-341*; accord, *Griffith Co. v. Hofues (1962) 201 Cal.App.2d 502, 508, 19 Cal. Rptr. 900*; see 1 Witkin, Summary of Cal. Law, *supra*, Contracts, § 97, pp. 126-127 ['where the plaintiff acts in performance of his own duty or in protection or improvement of his own property, any incidental benefit conferred on the defendant is not unjust enrichment'].)" (*California Medical, supra, 94 Cal.App.4th at p. 174*.)

In the instant case, no quasi-contract claim has been stated, because Daldumyan had a written contract with the Marketing Company. His successful performance under the associate contract entitled him to payments from the Marketing Company. Any benefits received by the Insurance Agency from product providers were simply incident to Daldumyan's performance of his contract with the Marketing Company. Since Daldumyan was not entitled to restitution, the trial court properly sustained the demurrer without leave to amend as to the quasi-contract claim for restitution of commissions **[*58]** received by the Insurance Agency based on sales of insurance products by Daldumyan and the associates in his hierarchy.

D. Fraud

Daldumyan contends that the complaint alleges a fraud cause of action based on fraudulent concealment and misrepresentation. We conclude that he stated a cause of action for fraudulent concealment.

"The elements of a claim for fraudulent concealment require the plaintiff to show that: '(1) the defendant . . . concealed or suppressed a material fact, (2) the defendant [was] under a duty to disclose the fact to the plaintiff, (3) the defendant . . . intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff [was] unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.' [Citation.] The duty to disclose may be established where there is a confidential relationship between the parties, defendant has made a representation which was likely to mislead due to the nondisclosure, there is active concealment of undisclosed matters, or one party has sole knowledge of **[*59]** or access to material facts and knows such facts are not known to or discoverable by the other party." (*Prakashpalan, supra, 223 Cal.App.4th at p. 1130*.)

In this case, Daldumyan alleged that on August 9, 2005, the Insurance Agency caused Daldumyan's appointment to become connected with the Insurance Agency's registration as an active insurance agent in California instead of the Marketing Company without providing any notice to Daldumyan. Beginning in August 2005, the Insurance Agency began collecting the commissions on sales made by Daldumyan and the associates in his hierarchy without any notice to associates or obligation to make payments to associates. Under Daldumyan's contract with the Marketing Company, he was required to arbitrate disputes with the Marketing Company under Georgia law, but the Insurance Agency was not required to arbitrate and was not subject to the jurisdiction of the arbitration proceedings, which increased the burden on Daldumyan when he sought resolution of his disputes. Without his knowledge, the restructuring potentially required litigation in multiple forums with the danger of conflicting results. The Insurance Agency had knowledge or access to the material facts about the effect of the corporate payment **[*60]** restructuring of which Daldumyan was not made aware. Daldumyan's complaint alleges that he was unaware of the material facts that the Insurance Agency concealed and his reliance on the fraudulent conduct was reasonable and justifiable. It also alleges that he was damaged according to proof at trial. This was sufficient to allege a cause of action for fraudulent concealment.

Daldumyan's fraud cause of action was also based on misrepresentations. "The elements of fraud are (1) the defendant made a false representation as to a past or existing material fact; (2) the defendant knew the representation was false at the time it was made; (3) in making the representation, the defendant intended to deceive the plaintiff; (4) the plaintiff justifiably relied on the representation; and (5) the plaintiff suffered resulting damages. (*Lazar v. Superior Court (1996) 12 Cal.4th 631, 638, 49 Cal. Rptr. 2d 377, 909 P.2d 981*.)" (*West v. JPMorgan Chase Bank, N.A. (2013) 214 Cal.App.4th 780, 792, 154 Cal. Rptr. 3d 285*.)

No justifiable reliance has been alleged as to these representations. The same types of representations were made by the Alliance and the Marketing Company before August 2005, namely, that the companies offered a business platform for individuals seeking to run an independent business and agents could build their own business in which they can become vested, **[*61]** continue to earn commission from their sales and the commissions generated by the hierarchies. Daldumyan invested nine years building a career in multi-level marketing of insurance products prior to August 2005—initially with the Alliance and continuing with the Marketing Company—based on these representations. Daldumyan's written contract governed the payment and vesting of commissions and the termination of the contractual rights. Daldumyan has not alleged that he took any action or refrained from taking any action in reliance on representations made after August 2005 by the Insurance Agency through the Marketing Company. The demurrer was properly sustained as to fraud based on misrepresentation, but must be overruled as to fraudulent concealment.

E. Unfair Competition

Daldumyan contends that the complaint alleged a cause of action for violation of the unfair competition law. We agree.

"The primary purpose of the UCL is '"the preservation of fair business competition." [Citations.]' (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co. (1999) 20 Cal.4th 163, 180, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (hereafter *Cel-Tech*).) This purpose includes '"the right of the public to protection from fraud and deceit."' [Citations.]" (*People ex rel. Bill Lockyer v. Fremont Life Ins. Co. (2002) 104 Cal.App.4th 508, 514-515, 128 Cal. Rptr. 2d 463*, italics omitted (*Fremont Life Ins. Co.*).)

The UCL defines "unfair competition" **[*62]** to include "any unlawful, unfair or fraudulent business act or practice." (*Bus. & Prof. Code, § 17200*.) "Written in the disjunctive, this language 'establishes three varieties of unfair competition.' (*Podolsky v. First Healthcare Corp. (1996) 50 Cal.App.4th 632, 647, 58 Cal. Rptr. 2d 89*.)" (*Fremont Life Ins. Co., supra, 104 Cal.App.4th at p. 515*.)

"The three prongs of the law have different thresholds. Under its 'unlawful' prong, 'the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.' (*Lazar v. Hertz Corp. (1999) 69 Cal.App.4th 1494, 1505, 82 Cal. Rptr. 2d 368*.) Thus, a violation of another law is a predicate for stating a cause of action under the UCL's unlawful prong." (*Prakashpalan, supra, 223 Cal.App.4th at p. 1133*.)

"To establish an unfair business act or practice, a plaintiff must establish the unfair nature of the conduct and that the harm caused by the conduct outweighs any benefits that the conduct may have. (*McKell v. Washington Mutual, Inc. (2006) 142 Cal.App.4th 1457, 1473, 49 Cal. Rptr. 3d 227*.)" (*Prakashpalan, supra, 223 Cal.App.4th at pp. 1133-1134*.) "A business act or practice is unfair when the conduct 'threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.' (*Cel-Tech*[*, supra*,] *20 Cal.4th at p. 187*.)" (*Prakashpalan, supra, 223 Cal.App.4th at p. 1133*.) "In a consumer case, determining whether a business practice is 'unfair' involves 'weigh[ing] the utility of the defendant's conduct against the gravity of the harm to the alleged **[*63]** victim.' (*Smith v. State Farm Mutual Automobile Ins. Co. (2001) 93 Cal.App.4th 700, 718, 113 Cal. Rptr. 2d 399*.)" (*Ibid.*)

"The *unfairness* prong has been employed to enjoin deceptive or sharp practices. [Citations.] The court also has determined that *unfair* business practices include unconscionable provisions in standardized agreements. (*People v. McKale (1979) 25 Cal.3d 626, 634-637, 159 Cal. Rptr. 811, 602 P.2d 731* [tenants of mobile home park required to sign documents that include illegal provisions].)" (*Fremont Life Ins. Co., supra, 104 Cal.App.4th at pp. 515-516*, fn. omitted.)

"Finally, the *fraud* prong of *section 17200* 'bears little resemblance to common law fraud or deception.' [Citation.] Under *section 17200*, '[t]he test is whether the public is likely to be deceived. [Citation.]' . . . [Citation.]" (*Fremont Life Ins. Co., supra, 104 Cal.App.4th at p. 516*.) "Thus, in order to state a cause of action based on a fraudulent business act or practice, the plaintiff must allege that consumers are likely to be deceived by the defendant's conduct. (*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal.3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*.)" (*Prakashpalan, supra, 223 Cal.App.4th at p. 1134*.) "Traditional fraud requirements, such as intent or actual reliance, are inapplicable to the UCL." (*Id. at p. 1133*.) "'This means that a *section 17200* violation, unlike common law fraud, can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. [Citation.]' [Citation.]" (*Fremont Life Ins. Co., supra, 104 Cal.App.4th at pp. 516-517*.)

"A distinguishing feature of the UCL is that it does not provide a private action for damages or other legal remedies. Instead, the UCL provides an equitable **[*64]** means to prevent unfair practices in the future and restore money or property to victims of those practices. [Citation.] Thus, remedies are limited to injunctive relief and restitution." (*Prakashpalan, supra, 223 Cal.App.4th at p. 1133*.) "'Injunctions are "the primary form of relief available under the UCL to protect consumers from unfair business practices," while restitution is a type of "ancillary relief."' [Citation.] Restitution is available 'to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition.' (*§ 17203*.)" (*In re Tobacco Cases II (2015) 240 Cal.App.4th 779, 790, 192 Cal. Rptr. 3d 881*.)

"'[T]he equitable remedies of the UCL are subject to the broad discretion of the trial court. [Citation.] The UCL does not *require* "restitutionary or injunctive relief when an unfair business practice has been shown. Rather, *[section 17203*] provides that the court '*may* make such orders or judgments . . . as may be necessary to prevent the use or employment . . . of any practice which constitutes unfair competition . . . or as may be necessary to restore . . . money or property.'"' [Citation.]" (*In re Tobacco Cases II, supra, 240 Cal.App.4th at p. 790*.)

In this case, both the unfair and fraud prongs of *section 17200* apply to the allegations. The difficulty that an independent contractor insurance agent would have in attempting to ascertain **[*65]** the corporate payment structure from the associate contract is unfair in the sense of a deceptive or sharp practice. The arbitration provisions in the associate contracts with the Marketing Company, while the Insurance Agency has the right to collect commissions and is not subject to the jurisdiction of the arbitration proceedings for purposes of discovery or resolution of any disputes, are at least unfair, and arguably unconscionable. The fact that information about the Insurance Agency's collection of commissions on sales from product providers without any corresponding obligation to pay compensation to agents is not conspicuously set forth in an agreement, waiver, or notice to the independent contract insurance agents is likely to deceive, which also brings this set of circumstances within the fraud prong of *section 17200*.

Daldumyan's complaint sought injunctive relief. We conclude that the complaint states a cause of action for violation of the unfair competition law. A private plaintiff has standing to bring an action under the UCL only if he or she "has suffered injury in fact and has lost money or property as a result of the unfair competition." (*Bus. & Prof. Code, § 17204*; *Durell v. Sharp Healthcare (2010) 183 Cal.App.4th 1350, 1359, 108 Cal. Rptr. 3d 682*.) Daldumyan lost commissions due to the **[*66]** improper termination of his associate contract. He was unable to obtain payment from the entity that collects the commissions because the payment structure had been changed without notification to the associates, and the nature of the separation was concealed from him and the other independent contractor agents. Instead of one economical arbitration to resolve his disputes, Daldumyan was required to pursue actions in two different forums to obtain discovery and resolution of the issues underlying his termination. He lost the business that he had spent his adult life building as a result of alleged interference by the Insurance Agency in his contract and did not have the recourse that he expected to be able to pursue, because he had been misled about, or the companies failed to notify him of, their separate nature. Daldumyan's allegations are sufficient to state that he suffered injury in fact and lost money or property because of the unfair competition.

Summary Adjudication

A. Standard of Review

"We review orders granting or denying a summary judgment motion de novo." (*Crown Imports, LLC v. Superior Court (2014) 223 Cal.App.4th 1395, 1403, 168 Cal. Rptr. 3d 228* (*Crown Imports*).) "'As to each claim as framed by the complaint, the defendant must present facts to negate an essential **[*67]** element or to establish a defense. Only then will the burden shift to the plaintiff to demonstrate the existence of a triable, material issue of fact. [Citation.]' [Citation.] 'There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.' (*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493*.)" (*Crown Imports, supra, 223 Cal.App.4th at p. 1403*.) "'We liberally construe the evidence in support of the party opposing summary [adjudication] and resolve doubts concerning the evidence in favor of that party.' (*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1037, 32 Cal. Rptr. 3d 436, 116 P.3d 1123*.)" (*Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261, 269, 220 Cal. Rptr. 3d 185*.)

B. Promissory Estoppel

Daldumyan contends there are triable issues of fact as to his cause of action for promissory estoppel. We disagree.

""'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance."'" [Citation.]" (*Granadino v. Wells Fargo Bank, N.A. (2015) 236 Cal.App.4th 411, 416, 186 Cal. Rptr. 3d 408* (*Granadino*).)

""[A] promise is an indispensable element of the doctrine of promissory estoppel. The cases are uniform in holding that this doctrine cannot be invoked **[*68]** and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his prejudice . . . ." [Citation.] The promise must, in addition, be "clear and unambiguous in its terms." [Citation.] "Estoppel cannot be established from . . . preliminary discussions and negotiations."' [Citation.]" (*Granadino, supra, 236 Cal.App.4th at p. 417*.) ""'Promissory estoppel applies whenever a "promise *which the promissor should reasonably expect* to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance" would result in an "injustice" if the promise were not enforced . . . .'" [Citation.]" (*Id. at p. 418*.)

Daldumyan alleged that the Insurance Agency promised through documentation provided by its employees to pay him commissions on the sale of products. He alleged that executives of the Insurance Agency and the Marketing Company represented at annual conventions that independent contractor agents would continue to earn commissions on insurance products they sold as insurance agents. These individuals also made promises on behalf of the Insurance Agency that Daldumyan, as an agent, would continue to earn commissions from the sale **[*69]** of products by his hierarchy. They represented on behalf of the Insurance Agency that he was building his own independent business which entitled him to commissions from his own sales and his hierarchy, and he was vested in these commissions. Daldumyan concluded that the representations were made on behalf of the Insurance Agency, because the Marketing Company cannot have independent contractor insurance agents and does not have contractual relationships with product providers to pay commissions. Daldumyan provided details of several convention presentations about the value for agents of the Insurance Agency in building their own agencies.

In response to the summary judgment motion, no evidence of a clear, unambiguous promise by the Insurance Agency was submitted. No evidence was submitted to support finding that any employee promised that the Insurance Agency would pay commissions to Daldumyan or other associates. In addition, there is no evidence that Daldumyan took any action or refrained from taking any action in reliance on the statements that he has submitted. Prior to 2005, Daldumyan worked for nine years to build a successful career selling financial and insurance products and **[*70]** recruiting associates. The promotional statements made in documents and at conventions were no different than the promises that caused him to enter into the associate contract with the Alliance and continued with the Marketing Company. Had the statements not been made after 2005, there is no evidence that Daldumyan would have taken any different action. Summary adjudication was proper for the cause of action for promissory estoppel.

C. Intentional Interference with Contract

Daldumyan contends that there are triable issues of material fact concerning his cause of action for intentional interference with contract. We agree.

"[A] stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract." (*Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal.3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587* (*Pacific Gas*).) The elements necessary to state a cause of action for intentional interference with contractual relations are "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Ibid.*)

"It is not a requirement **[*71]** that 'the defendant's conduct be wrongful apart from the interference with the contract itself. [Citation.]' (*Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal.4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (*Quelimane*).)" (*Popescu v. Apple Inc. (2016) 1 Cal.App.5th 39, 51, 204 Cal. Rptr. 3d 302*.)

A tort cause of action for interference with a contract cannot be maintained against a party to the contract or the agent of a party to the contract, because a party to a contract cannot interfere with its own contract. (*Asahi Kasei Pharma Corp. v. Actelion Ltd. (2013) 222 Cal.App.4th 945, 963-964, 166 Cal. Rptr. 3d 134* (*Asahi Kasei*); *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal.4th 503, 513, 507, 514, 28 Cal. Rptr. 2d 475, 869 P.2d 454*; *Mintz v. Blue Cross of California (2009) 172 Cal.App.4th 1594, 1604, 92 Cal. Rptr. 3d 422* ["it is settled that 'corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of the corporation's contract'"].) A corporate owner, however, does not have an absolute privilege to interfere with a subsidiary's contract. (*Asahi Kasei, supra, 222 Cal.App.4th at pp. 962*; *Collins v. Vickter Manor, Inc. (1957) 47 Cal.2d 875, 883, 306 P.2d 783* [privilege of corporation owners "to cause the corporation to discontinue its relations with plaintiffs, in the belief that such a course of action was in the best interests of the corporation, is a matter of defense, to be decided by a resolution of the factual issues presumptively involved"]; *Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal.App.3d 879, 882-883, 103 Cal. Rptr. 419* [parent corporation is not privileged under all circumstances to intentionally interfere with contract of a subsidiary].)

In the instant case, there were triable issues of fact as to whether the Insurance Agency interfered with the Marketing Company's **[*72]** contract with Daldumyan. Daldumyan submitted evidence from which a trier of fact could conclude that the Marketing Company and Daldumyan had a valid contract, of which the Insurance Agency was fully aware. The Insurance Agency was the entity that had a compliance department. There was evidence that the Insurance Agency investigated whether Daldumyan engaged in outside business activities, even though the activities were not prohibited under his contract with the Marketing Company and were unrelated to his ability to sell insurance products as an agent of the Insurance Agency. Mineck declared that employees of the Marketing Company voted to terminate Daldumyan's contract, but Daldumyan submitted evidence from which a trier of fact could conclude that the investigation and termination of Daldumyan was conducted in their capacities as officers and directors of the Insurance Agency, and as employees performing work for the Insurance Agency. Officers and directors of the Insurance Agency voted to terminate Daldumyan even though they had no contract with Daldumyan and were not parties to his contract with the Marketing Company. Based on the recommendation received from the Insurance Agency, **[*73]** the Marketing Company followed the direction of the Insurance Agency to terminate and divest Daldumyan. A trier of fact could find that the Insurance Agency's intentional acts in investigating and voting to terminate Daldumyan based on business activities that were not precluded under his contract with the Marketing Company were designed to induce a breach or disruption of his contractual relationship with the Marketing Company, and in fact caused a breach of his contractual relationship with the Marketing Company, resulting in damages to Daldumyan. The motion for summary adjudication of the cause of action for intentional interference with contract must be denied.

D. Intentional Interference with Prospective Economic Advantage

Daldumyan did not raise the issue of intentional interference with prospective economic advantage until his reply brief. We find no independently wrongful conduct has been alleged apart from the alleged interference itself, and therefore, summary adjudication of the cause of action for intentional interference with prospective economic advantage was proper.

"'The elements of a claim of interference with economic advantage and prospective economic advantage are: **[*74]** """ (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional [or negligent] acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]" [Citation.]' (*Winchester Mystery House, LLC v. Global Asylum, Inc. (2012) 210 Cal.App.4th 579, 596, 148 Cal. Rptr. 3d 412*.)" (*Crown Imports, LLC v. Superior Court (2014) 223 Cal.App.4th 1395, 1404, 168 Cal. Rptr. 3d 228* (*Crown Imports*).)

"An additional element is required. 'The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives, unless their interference amounts to independently actionable conduct. [Citation.]' (*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1158-1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937*.) As such, courts require an additional element, that the alleged interference must have been wrongful by some measure beyond the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740*.) For an act to be sufficiently independently wrongful, it must be 'unlawful, that is, . . . it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal **[*75]** standard.' (*Korea Supply Co. v. Lockheed Martin Corp., supra, 29 Cal.4th at p. 1159*.)" (*Crown Imports, supra, 223 Cal.App.4th at p. 1404*.)

"The independently wrongful act must be the act of interference itself, but such act must *itself* be independently wrongful. That is, '[a] plaintiff need not allege the interference and a second act independent of the interference. Instead, a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage. [Citations.]' (*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal.App.4th 1215, 1224, 42 Cal. Rptr. 3d 235*.)" (*Crown Imports, supra, 223 Cal.App.4th at p. 1404*.)

"It is the plaintiff's burden to plead and prove that the defendant's conduct is independently wrongful in order to recover. The fact that the defendant's conduct was independently wrongful is an element of the cause of action itself. (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal.App.4th 867, 881, 60 Cal. Rptr. 2d 830*.)" (*Crown Imports, supra, 223 Cal.App.4th at pp.1404-1405*.)

Daldumyan's allegations of interference with prospective economic advantage were based on the telephone calls that the Insurance Agency made to clients and associates during its investigation of Daldumyan's business activities. He has not provided evidence of any independent actionable wrongdoing in the Insurance Agency's telephone calls and questions to clients and associates beyond the interference with Daldumyan's prospective economic advantage. Summary adjudication **[*76]** of this cause of action is proper.

E. Claim Preclusion

Finally, the Insurance Agency contends Daldumyan's action is barred by the doctrine of claim preclusion. Specifically, the Insurance Agency contends that it is in privity with the Marketing Company for purposes of claim preclusion because Daldumyan alleged the Insurance Agency is the alter ego of the Marketing Company. The Insurance Agency asserts the judgment in the arbitration proceedings precludes Daldumyan from relitigating any causes of action resolved in the arbitration, as well as any causes of action that could have been raised in the arbitration. This analysis is incorrect.

"*Claim preclusion* 'prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them.' [Citation.] Claim preclusion arises if a second suit involves (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit. [Citations.] If claim preclusion is established, it operates to bar relitigation of the claim altogether." (*DKN Holdings LLC v. Faerber (2015) 61 Cal.4th 813, 824, 189 Cal. Rptr. 3d 809, 352 P.3d 378* (*DKN Holdings*).)

"*Issue preclusion* prohibits the relitigation of issues argued and decided in a previous case, even if the second **[*77]** suit raises different causes of action. [Citation.] Under issue preclusion, the prior judgment conclusively resolves an issue actually litigated and determined in the first action. [Citation.] There is a limit to the reach of issue preclusion, however. In accordance with due process, it can be asserted only against a party to the first lawsuit, or one in privity with a party." (*DKN Holdings, supra, 61 Cal.4th at p. 824*.)

"Issue preclusion differs from claim preclusion in two ways. First, issue preclusion does not bar entire causes of action. Instead, it prevents relitigation of previously decided issues. Second, unlike claim preclusion, issue preclusion can be raised by one who was not a party or privy in the first suit. (*Vandenberg v. Superior Court (1999) 21 Cal.4th 815, 828, 88 Cal. Rptr. 2d 366, 982 P.2d 229*.) 'Only the party *against whom* the doctrine is invoked must be bound by the prior proceeding. [Citations.]' (*Ibid.*) In summary, issue preclusion applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party." (*DKN Holdings, supra, 61 Cal.4th at pp. 824-825*.)

"When a defendant's liability is entirely derived from that of a party in an earlier action, claim preclusion bars the second action because **[*78]** the second defendant stands in privity with the earlier one. (See *Richard B. LeVine, Inc. v. Higashi (2005) 131 Cal.App.4th 566, 576-77, 32 Cal. Rptr. 3d 244*; *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal.App.4th 550, 557-558, 90 Cal. Rptr. 2d 469*.)" (*DKN Holdings, supra, 61 Cal.4th at pp. 827-828*.) """A claim against a defendant, based on the alter ego theory, is not itself a claim for substantive relief, e.g., breach of contract . . . , but rather, procedural, i.e., to disregard the corporate entity as a distinct defendant and to hold the alter ego individuals liable on the obligations of the corporation where the corporate form is being used by the individuals to escape personal liability, sanction a fraud, or promote injustice."' (*Greenspan v. LADT LLC [(2010) 191 Cal.App.4th 486,] 516, 121 Cal. Rptr. 3d 118*, citing *Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal.App.3d 1351, 1359, 251 Cal. Rptr. 859*.)" (*Wells Fargo Bank, N.A. v. Weinberg (2014) 227 Cal.App.4th 1, 7-8, 173 Cal. Rptr. 3d 113*.)

Daldumyan cannot maintain claims against the Insurance Agency where the Insurance Agency's liability is only derivative of the Marketing Company's liability. The causes of action remaining in the lawsuit, however, are based directly on the Insurance Agency's actions; liability does not depend on a finding of alter ego. In particular, the cause of action for intentional interference with contract is based on the Insurance Agency's liability for its own alleged actions to disrupt the contract between the Marketing Company and Daldumyan. No cause of action for intentional interference with contract was determined in the arbitration.

The cause of action for fraudulent **[*79]** concealment is also based on the Insurance Agency's own actions in that Insurance Agency failed to notify agents of changes. Fraudulent concealment was not a cause of action litigated in the arbitration proceedings. The cause of action for violation of *Business and Professions Code section 17200* was not a cause of action determined by the earlier arbitration proceeding, nor could it have been, because the provisions of California's unfair business law did not apply under the Georgia law applied in the arbitration. We note that Daldumyan is precluded, however, from relitigating the amount that he was damaged as a result of the Marketing Company's breach of the contract and the covenant of good faith and fair dealing. The arbitrators determined the issue of Daldumyan's damages for breach of contract, including the amount of lost commissions, the consequential economic damages, and his legal fees stemming from the arbitration proceedings. Judgment was entered by the federal court confirming the arbitration award in favor of Daldumyan. Daldumyan is bound by the issues conclusively determined in the prior proceeding. The issue of contract damages, including lost commissions and consequential economic losses, was actually litigated **[*80]** and necessarily decided in the earlier action to which Daldumyan was a party. He may continue to litigate issues pertaining to other relief, such as injunctive relief or tort damages that have not previously been determined.

DISPOSITION

The judgment is reversed. The order granting summary judgment and the order sustaining the demurrer are reversed. The trial court is directed to enter a new and different order sustaining the demurrer as to causes of action for implied-in-fact contract and unjust enrichment, but overruling the demurrer as to causes of action for fraudulent concealment and violation of *Business and Professions Code section 17200*. The trial court is also directed to grant summary adjudication of the causes of action for promissory estoppel and intentional interference with prospective economic advantage, but deny summary adjudication of the cause of action for intentional interference with contract. In the interests of justice, the parties are to bear their own costs on appeal.

KRIEGLER, Acting P. J.

We concur:

BAKER, J.

KIM, J.[*]

[*] Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

Clary v. State Farm Mut. Auto. Ins. Co.

Court of Appeal of Louisiana, Third Circuit

April 18, 2018, Decided

18-198

Reporter

246 So. 3d 8 *; 2018 La. App. LEXIS 740 **; 18-198 (La.App. 3 Cir. 04/18/18);; 2018 WL 1833890

MICHAEL CAL CLARY AND CATHERINE ANN HIXSON CLARY VERSUS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; STATE FARM FIRE AND CASUALTY COMPANY; STATE FARM GENERAL INSURANCE COMPANY; STATE FARM LIFE INSURANCE COMPANY; STATE FARM VP MANAGEMENT CORPORATION; INSURANCE PLACEMENT SERVICE, INC.; STATE FARM BANK, F.S.B.; PATRICK WHITE; KIMBERLY ROLLINS WHITE; GENE HAYMON; AND DAVID HAYMON

Prior History: [1]** APPEAL FROM THE FOURTEENTH JUDICIAL DISTRICT COURT, PARISH OF CALCASIEU, NO. 2015-2657. HONORABLE G. MICHAEL CANADAY, DISTRICT JUDGE.

Clary v. State Farm Mut. Auto. Ins. Co., 2017 La. App. Unpub. LEXIS 35 (La.App. 3 Cir., Feb. 15, 2017)

Disposition: MOTION TO DISMISS APPEAL DENIED. REVERSED; JUDGMENT RENDERED; REMANDED.

Core Terms

antitrust, consumers, allegations, trial court, no cause of action, violations, third party, restrain, alleged conspiracy, antitrust claim, conspiracy, entity

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders

Antitrust & Trade Law > Procedural Matters

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN1[] **State Regulation, Claims**

The denial of exceptions of no cause of action and no right of action are normally not appealable. However, *La. Rev. Stat. Ann. §§ 51:134* and *51:135* provide for an immediate appeal of such an interlocutory judgment related to antitrust claims.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Record on Appeal

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Preliminary Considerations > Justiciability > Standing

HN2[] **Standards of Review, De Novo Review**

A courts review of exceptions of no right of action and no cause of action are de novo. It is well settled that pursuant to *La. Code Civ. Proc. Ann. art. 2164*, an appellate court must render its judgment upon the record on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, judgments and other rulings. The appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. Memoranda and exhibits not filed in evidence are not part of the record on appeal. The briefs of the parties and the attachments thereto are not part of the record on appeal. Further, this court does not consider exhibits filed in the record which were not filed into evidence.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

HN3[] **Trade Practices & Unfair Competition, State Regulation**

The Louisiana antitrust laws were not enacted for the protection of competitors but were instead enacted to protect competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN4[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

When analyzing an alleged agreement to restrain trade the court must first determine whether it should be categorized as horizontal or vertical.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Scope

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN5[] **State Regulation, Claims**

Because Louisiana is a fact pleading state, *La. Code Civ. Proc. Ann. art 862*, a petition must set forth material facts upon which the alleged cause of action is based and conclusions of law are not sufficient to meet the injury requirement in an antitrust case and neither can it be met by broad allegations of harm to the market as an abstract entity. Moreover, not every business arrangement that restrains trade in some manner is illegal. Every claim made under *La. Rev. Stat. Ann. § 51:122* must include an allegation of damage to competition. Importantly, the United States Supreme Court has made it clear that even an act of pure malice by one business competitor against another does not, without more, state an antitrust claim; the antitrust laws do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in commerce. Of additional and significant importance in assessing a plaintiff's allegations of antitrust is the well-established jurisprudence which holds that only in exceptional circumstances can a single brand in a market of competing brands constitute a relevant market for antitrust purposes. And those circumstances are limited to situations in which consumers are locked in to a specific brand by the nature of the product.

Civil Procedure > ... > Service of Process > Proof of Service > Affidavits & Certificates of Service

Civil Procedure > Pleading & Practice > Pleadings > Time Limitations

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN6[] **Proof of Service, Affidavits & Certificates of Service**

A pleading is not filed in an action until it has been delivered to the clerk for that purpose; therefore, a party obliged to file a pleading within a time limitation must insure actual delivery, since it is the time when the clerk receives actual delivery of the pleading that is determinative of whether a pleading has been timely filed. A certificate of service upon opposing counsel is not considered a timely filing.

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George Fagan, Stephanie Villagomez Lemoine, Leake & Andersson LLP, New Orleans, Louisiana, Counsel for Third Party Defendant/Appellant: William Claude Coker, III.

Hunter W. Lundy, Matthew Lundy, Hunter, hunter, Lundy & Soileau, Lake Charles, Louisiana, Counsel for Plaintiffs: Michael Cal Clary and Catherine Ann Hixson Clary.

Mark N. Mallery, Lisa Diane Hanchey, Hal Unger, Jacob C. Credeur, Ogletree, Deakins, Nash, Smoak & Stewart, P.C., New Orleans, LA, Counsel **[**2]** for Defendants: State Farm Mutual Automobile Insurance Company; State Farm Fire and Casualty Company; State Farm General Insurance Company; State Farm Life Insurance Company; State Farm VP Management Corporation; Insurance Placement Services, Inc.; State Farm Bank, F.S.B.; Patrick White, and Kimberly Rollins White.

Scott J. Scofield, Phillip W. DeVilbiss, Scofield, Gerard, Pohorelsky, Gallaugher & Landry, Lake Charles, Louisiana, Counsel for Defendant/Plaintiff in Reconvention/Appellee: Gene Haymon.

Judges: Court composed of Sylvia R. Cooks, John D. Saunders, and Candyce G. Perret, Judges.

Opinion by: SYLVIA R. COOKS

Opinion

[*10] [Pg 1] **COOKS, Judge**.

In this expedited appeal we are asked to review the trial court's ruling denying Trey Coker's Exception of No Cause of Action regarding Gene Haymon's action based on *Louisiana's **Antitrust Law**, La.R.S. 51:122 et seq.*, and the trial court's ruling denying in part and granting in part an exception of no right of action raised by the trial court.

> ***HN1***[] The denial of exceptions of no cause of action and no right of action are normally **[*11]** not appealable. However, *La. R.S. 51:134* and *51:135* provide for an immediate appeal of such an interlocutory judgment related to antitrust claims. *See Plaquemine Marine, Inc. v. Mercury Marine, 2003-1036 (La.App. 1st Cir.7/25/03), 859 So.2d 110, 114, n. 3*.

HPC Biologicals, Inc. v. UnitedHealthcare of La., 16-585 p. 6 (La.App. 1 Cir. 5/26/16), 194 So.3d 784, 791-92. Gene Haymon asserts in his Motion to Dismiss **[**3]** Appeal that this appeal should be dismissed because Coker waived his right to an expedited appeal and failed to designate issues on appeal. We referred this motion to the merits and after due consideration the Motion to Dismiss Appeal is denied.

HN2[] Our review of exceptions of no right of action and no cause of action are de novo,[1] and:

> It is well settled that pursuant to *La. C.C.P. art. 2164*, an appellate court must render its judgment upon the record on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, judgments and other rulings. The appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. Memoranda and *exhibits not filed in evidence* are not part of the record on appeal. The briefs of the parties and the attachments thereto are not part of the record on appeal. Further, this court does not consider *exhibits filed in the record which were not filed into [Pg 2] evidence*. *Tranum v. Hebert, 581 So.2d 1023 (La.App. 1st Cir.1991)*, *writ denied*, *584 So.2d 1169 (La.1991)*.

Titlesite, L.C. v. Webb, 36,437 p. 12 (La.App. 2 Cir. 12/11/02), 833 So.2d 1061, 1068-69.

We first address the propriety of the trial court's denial of Coker's Exception of No Cause of Action regarding Gene Haymon's allegations of antitrust violations under Louisiana **[**4]** law. After conducting a de novo review we reverse the trial court and hereby render judgment in favor of Trey Coker granting his Exception of No Cause of Action for the alleged antitrust violations raised by Gene Haymon in his Original Answer and First Amended Answer, Reconventional Demand, Third Party Demand, and Cross Claim.[2]

The basis of Gene Haymon's antitrust claim is that Coker and Clary conspired to defame Gene Haymon in order to restrain the business of his son, David Haymon, as a State Farm Insurance agent. Gene asserts that he "need only allege the existence of an agreement between Mr. Coker and Mr. Clary that was knowingly entered into" and he maintains he has gone even further by alleging that "the conspiracy between Mr. Coker and Mr. Clary injured the competition in the Leesville market by *preventing Gene from practicing* [as a part-time agent with his son]" (emphasis added). He also alleges as a basis for his antitrust claim "that the conspiracy between Mr. Coker and Mr. Clary *prevented him from making money as a State Farm sub-agent*" (emphasis added). Additionally, Gene states at paragraph 120 of his "First Amended Answer . . .":

> **[*12]** [Pg 3] Coker's conspiracy with the Clary's **[**5]** and their private investigator(s) to defame Gene and David to increase Coker's State Farm business and 'help' Clary's lawsuit violates La. antitrust laws and has had the effect of reducing competition in the Vernon Parish insurance market. The Coker-Clarys anti-trust violations

[1] *See Vermilion Hosp., Inc. v. Patout, 05-82 (La.App. 3 Cir. 6/8/05), 906 So.2d 688* and cases cited therein.

[2] For the reasons that will later be discussed in this opinion, we cannot consider Haymon's proposed supplemental and amending petition. However, we note that if we were able to consider the allegations made in the proposed "First Supplemental and Amending Amended Answer, Reconventional Demand, Third Party Demand and Cross Claim" it would not alter our finding herein as the proposed pleading does nothing to cure the deficiencies.

> have caused, and continue to cause, great emotional harm to Gene and damage his reputation. Coker and the Clarys are thus solidarily liable for conspiracy to defame Gene in order to unreasonably restrain David's trade in violation of *La. R.S. 54:122* (sic).[3]

In his Third-Party Demand Gene Haymon alleges "State Farm's policy holders have contracts with State Farm, not State Farm's agents." Taking this allegation as truthful, as we must for these purposes, this demonstrates that there can be no antitrust injury to consumers that could result from the alleged conspiracy between Coker and Clary because any insurance contracts entered into by consumers will be with State Farm and not with any agent whose trade is allegedly restrained. Additionally, some three years ago when Gene Haymon sought to dismiss the antitrust claims asserted against him by the Clarys he maintained:

> There is no way Plaintiffs can plausibly allege customers **[**6]** cannot choose what insurance products they wish to purchase from whichever insurance company, or that consumers are harmed in any way in their choice and ability to purchase insurance policies from State Farm or any other insurer. Consumers could and can get insurance policies from any number of sources.

Gene Haymon also alleges, in paragraph 108 of his First Amended Answer:

> By 2012, State Farm's saturation policy had made it harder for individual agents to generate premiums. State Farm also eliminated many of the financial products agents could sell and reduced the percentage of agents' take on premiums charged on the remaining products. State Farm also greatly increased its premiums to cover for its devastating losses from weather-related events, thereby causing State Farm to price itself out of the market for a large number of budget-minded customers.

[Pg 4] Additionally, and even more telling, is Gene Haymon's allegation in paragraph 109 which states:

> Additionally, David [Haymon] and Clary both had to overcome competition by State Farm's two other Vernon Parish agents, including third party defendant Trey Coker, as well as agents from surrounding parishes.

Phrased another way, this **[**7]** last paragraph, taken as true, states that David Haymon, Clary and Coker all had to compete for consumers' business with each other and two other State Farm agents in Vernon Parish and an unspecified number of agents in surrounding parishes. Moreover, all of these State Farm Agents were competing against all other insurance companies' agents in the area for the local consumers' business. Thus, the alleged conspiracy to defame David and hurt his and/or Gene's bottom line presents no harm to consumers who are shopping for insurance in a very competitive market. This allegation belies any conceivable harm to competition or to consumers and indeed indicates that the alleged conspiracy did not and could not harm consumers. It directly contradicts the conclusory assertion that the alleged conspiracy "had the effect of reducing competition in the **[*13]** Vernon parish insurance market." ***HN3***[] The antitrust laws *were not enacted for the protection of competitors* but were instead enacted *to protect competition. See* *Plaquemine Marine, Inc. v. Mercury Marine, 03-1036 (La.App. 1 Cir. 7/25/03), 859 So.2d 110*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, and *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. The only real injuries alleged to have resulted from the alleged conspiracy are monetary and emotional damages to Gene Haymon, not to consumers.

Louisiana Revised Statutes 51:122 provides: **[**8]**

> [Pg 5] A. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.
>
> B. Whoever violates this Section shall be fined not more than five thousand dollars, or imprisoned, with or without hard labor, not more than three years, or both.
>
> C. For purposes of this Title, a parent corporation, limited liability company, partnership, or partnership-in-commendam is not capable of conspiring with any subsidiary that it controls, and each such controlled subsidiary is not capable of conspiring with any other wholly owned subsidiary controlled by the same common parent.

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[3] The reference should be to *La. R.S. 51:122*.

D. For the purposes of this Part only, an officer or employee of a legal entity is not capable of conspiring with the legal entity or with another officer or employee of the legal entity when they are acting on behalf of the entity.

HN4[] When analyzing an alleged agreement to restrain trade the court must first determine whether "it should be categorized as horizontal or vertical." *HPC Biologicals, Inc., 194 So.3d at 793*. The trial court at one point in the hearing expressed the thought that Gene Haymon's allegation of antitrust violations "appears to be more horizontal [but] I think there's components **[**9]** that are going to overlap with vertical." Gene Haymon asserts his allegations set forth a horizontal violation. We find the allegations establish neither. A horizontal combination occurs between competitors to restrain trade at the same level of distribution and generally are considered a "per se" violation of the antitrust laws. *See* *Van Hoose v. Gravois, 11-976 (La.App. 1 Cir. 7/7/11), 70 So.3d 1017*. A vertical restraint on trade is imposed by persons who are at differing levels of distribution, most commonly by the one who is higher up the chain of distribution. To prove a vertical restraint on trade a plaintiff must prove the alleged restraint violates the "rule of reason." *Van Hoose, 70 So.3d at 1022*. *See* *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*.

[Pg 6] ***HN5***[] Because our state is a fact pleading state, *La.Code Civ.P. art 862*, a petition must set forth material facts upon which the alleged cause of action is based and "conclusions of law are not sufficient" to meet the injury requirement in an antitrust case and neither can it be met "by broad allegations of harm to the 'market' as an abstract entity." *Plaquemine Marine, Inc. 859 So.2d at 118*, and cases cited therein. Moreover, "not every business arrangement that restrains trade in some manner is illegal[.]" *Id.* Every claim made under *La.R.S. 51d:122* "must include an allegation of *damage to competition*." *Id.* (emphasis added). Importantly, **[**10]** the United States Supreme Court has made it clear that "[e]ven an act of pure malice by one business competitor against another does not, without more, state an antitrust claim; **[*14]** the antitrust laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in [] commerce." *Plaquemine Marine, Inc., 859 So.2d at 119*, *citing* *Brooke Group Ltd. v. Brown & Williamson Tobacco Group, 509 U.S. 209, 225, 113 S.Ct. 2578, 2589, 125 L. Ed. 2d 168 (1993)*. Of additional and significant importance in assessing Gene Haymon's allegations of antitrust is the well-established jurisprudence which holds "that only in exceptional circumstances can a single brand in a market of competing brands constitute a relevant market for antitrust purposes." *HPC Biologicals, Inc., 194 So.3d at 794*, *citing* *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 488 (5th Cir. 1984)*. And "[t]hose circumstances are limited to situations in which consumers are 'locked in' to a specific brand by the nature of the product." *Id., citing* *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481-82, 112 S.Ct. 2072, 119 L. Ed. 2d 265 (1992)* and *PSKS, Inc. v. Legion Creative Leather Prods., Inc., 615 F.3d 412, 418 (5th Cir. 2010)*, *cert denied 562 U.S. 1217, 131 S.Ct. 1476, 179 L. Ed. 2d 301 (2011)*. Gene Haymon's allegations clearly state that the insurance [Pg 7] consumers in Vernon Parish are not locked in to any specific brand of insurance nor are they in any way locked in to dealing with any particular State Farm agent if they desire to contract insurance with State Farm. Gene Haymon's allegations fall far short of articulating any form of antitrust violation **[**11]** under state or federal law and as we have noted herein, even if we were to consider his proposed additional pleadings he still would not meet the test. For the reasons stated we reverse the trial court's ruling and hereby grant Trey Coker's exception of no cause of action to Gene Haymon's claims based on antitrust.

We also find the trial court erred in considering any of the allegations contained in the proposed "First Supplemental and Amending Amended Answer, Reconventional Demand, Third Party Demand and Cross Claim" and we cannot and have not considered it in our de novo review of this matter. On December 29, 2017, Gene Haymon filed a "Motion for Leave to File First Supplemental and Amending Amended Answer, Reconventional Demand, Third Party Demand and Cross Claim." Attached to the motion as an Exhibit was Gene Haymon's proposed "First Supplemental and Amending" pleading. The trial court issued a rule to show cause on January 18, 2018, concerning this Motion for Leave to File setting a hearing date on the motion for February 7, 2018. The court held the hearing on February 7, 2018, and because of the time-consuming nature of the matter continued to hear various motions and exceptions **[**12]** on the next day, February 8, 2018. During the course of the hearing on February 8, 2018, the trial court stated from the bench that it would grant Gene Haymon's Motion for Leave to File his proposed "First Supplemental and Amending Amended" pleading. As the hearing on Coker's exceptions progressed the trial judge, over multiple objections by opposing counsel, considered both the earlier pleading, which had been filed of [Pg 8] record in October 2017, and the later *proposed* "Supplemental Amending Amended . . ." pleading which had not been filed in the record. By the date of the hearing the "First Supplemental and Amending Amended Answer, Reconventional Demand, Third Party Demand and Cross Claim" had not been officially and properly filed in the record and had not been served on the adverse parties. Gene Haymon filed his First Amended Answer, Reconventional Demand, Third Party Demand, and Cross Claim by presenting it to **[*15]** the clerk's office for filing,[4] accompanied by the filing fee and costs for service, but by the date of the hearing he had done no such filing of the "First Supplemental and Amending Amended Answer . . ." nor had he paid any filing fee or costs for service nor directed **[**13]** the clerk to serve the pleading.

> It is settled that ***HN6***[] a pleading is not "filed in an action" **until it has been delivered to the clerk <u>for that purpose</u>**; therefore, a party obliged to file a pleading within a time limitation must insure actual delivery, since it is the time when the clerk receives actual delivery of the pleading that is determinative of whether a pleading has been timely filed. *Squatrito v. Barnett, 338 So.2d 975 (La.App. 4th Cir.1976)*.
>
> . . . .
>
> A certificate of service upon opposing counsel is not considered a timely filing. *Squatrito, supra.*

American Bank & Trust Co. v. Huval Financial Services, 460 So.2d 91, 93 (La.App. 3rd Cir. 1984) (emphasis added).

The proposed "First Supplemental Amending Amended Answer . . ." exists in the record *only as an exhibit* attached to a motion. At the hearing in which the [Pg 9] trial court said he granted the motion for leave to file, the exhibit was not introduced as evidence and to date, as pointed out by Mover in brief and at oral argument, has not been officially filed in the record "for the purpose" intended.

Lastly, we find there is no support in Louisiana law for a trial court issuing an advisory opinion or declaratory ruling finding a pleading states a cause of action or right of action when such an exception has not been filed alleging such deficiencies. We therefore reverse the trial court's ruling **[**14]** that denied in part and granted in part an exception of no right of action based upon the unfiled pleading.

The trial court judgment denying Trey Coker's Exception of No Cause of Action is hereby reversed, vacated, and judgment is rendered granting Trey Coker's Exception of No Cause of Action.

All costs of this appeal are assessed against Gene Haymon.

MOTION TO DISMISS APPEAL DENIED.

REVERSED; JUDGMENT RENDERED; REMANDED.

End of Document

[4] After a hearing on Gene Haymon's Motion for Leave to File his First Amended Answer the trial court granted the motion and ordered that the pre-trial order previously decreed be amended to change the deadline to file pleadings in the matter to December 31, 2017. This Order was signed on October 30, 2017. On October 31, 2017, counsel for Gene Haymon sent a copy of the pleading to the clerk of court accompanied by a cover letter along with a fee of $500.00 to cover the cost of filing and service. That pleading was stamped by the clerk of court dated October 31, 2017, as the date filed in the record.

Sumotext Corp. v. Zoove, Inc.

United States District Court for the Northern District of California, San Jose Division

April 19, 2018, Decided; April 19, 2018, Filed

Case No. 16-cv-01370-BLF

Reporter
2018 U.S. Dist. LEXIS 67179 *; 2018-1 Trade Cas. (CCH) P80,366; 2018 WL 1876937

SUMOTEXT CORP., Plaintiff, v. ZOOVE, INC., et al., Defendants.

Prior History: *Sumotext Corp. v. Zoove, Inc., 2016 U.S. Dist. LEXIS 44061 (N.D. Cal., Mar. 31, 2016)*

Core Terms

leases, moving party, allegations, monopolization, entities, numbers, motion to dismiss, conspiracy, Sherman Act, alleged facts, antitrust, customers, competitor, terminated, unilateral, relevant market, joined, conspiracy to monopolize, leave to amend, quotation, marks, motion for sanctions, alleged conspiracy, contracts, sanctions, restraint of trade, business decision, registry, parties, mobile

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Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER DENYING MOTION TO DISMISS BROUGHT BY ZOOVE, VHT, VHT STARSTAR, AND STARSTEVE; GRANTING MOTION TO DISMISS BROUGHT BY MBLOX WITHOUT LEAVE TO AMEND; DENYING MBLOX'S MOTION FOR SANCTIONS; AND SETTING CASE MANAGEMENT CONFERENCE

[Re: ECF 220, 221, 222, and 224]

Plaintiff Sumotext Corporation ("Sumotext") brought this action to enforce its alleged rights to lease StarStar numbers — vanity mobile dial codes such as "**LAW" and "**MOVE" — from Defendant Zoove, Inc. ("Zoove").[1] Zoove administers the national mobile dial code registry ("the registry"), and it has exclusive rights to operate StarStar numbers for all major carriers, including AT&T, Verizon Wireless, T-Mobile, and Sprint. Sumotext built a business around leasing StarStar numbers from Zoove and subleasing them to customers while providing related software and services. That business was successful until Zoove was acquired by Defendant VHT StarStar, after which Zoove terminated all Sumotext's existing StarStar leases and offered new leases at rates 1,000 times what Sumotext had been paying. Zoove's acquisition and **[*3]** subsequent dealings with Sumotext allegedly were in furtherance of an unlawful conspiracy to monopolize the StarStar market. Sumotext asserts claims against Zoove, VHT StarStar, and others for violations of federal ***antitrust law*** and state common law.

This order addresses two motions to dismiss Sumotext's third amended complaint ("TAC") pursuant to *Federal Rule of Civil Procedure 12(b)(6)* and a motion for sanctions against Sumotext pursuant to *Federal Rule of Civil Procedure 11* and *28 U.S.C. § 1927*. For the reasons discussed below, the motion to dismiss brought by Defendants Zoove, VHT StarStar, Virtual Hold Technology LLC ("VHT"), and StarSteve, LLC ("StarSteve") is DENIED[2]; the motion to dismiss brought by Defendant Mblox, Inc. ("Mblox") is GRANTED WITHOUT LEAVE TO AMEND; and the motion for sanctions brought by Mblox is DENIED. A Case Management Conference is set for May 24, 2018.

I. BACKGROUND[3]

Sumotext began leasing StarStar numbers from Zoove in 2012. TAC ¶¶ 22-24. Sumotext struggled initially, but eventually it built up a successful business based on subleasing StarStar numbers to customers while also providing related software and services. *Id.* ¶¶ 27-28. In 2014, Mblox acquired Zoove as a wholly owned subsidiary. *Id.* ¶¶ 7, 29. During Mblox's ownership, Sumotext continued **[*4]** with its successful business model. *Id.* ¶¶ 29-35. By that time, many competitors had followed Sumotext into the StarStar product/service market, which Sumotext describes as containing three segments: the leasing segment, the reselling (subleasing) segment, and the servicing segment. *Id.* ¶¶ 28, 106, 116-18.

One such competitor, StarSteve, decided to combine with Zoove in order to monopolize the StarStar market. *Id.* ¶¶ 65-67. In pursuit of that goal, StarSteve entered into a letter of intent ("LOI") with Mblox in September 2015, outlining a deal in which StarSteve would acquire Mblox, StarSteve and Mblox would divide StarStar customers and territories, and other competitors would be barred from the market. *Id.* ¶¶ 68-69. However, StarSteve determined that it lacked the capital and expertise to go forward with the acquisition of Zoove on its own. *Id.* ¶ 70. StarSteve ultimately entered into a joint venture with VHT to create a new limited liability company, VHT StarStar, for the purpose of acquiring Zoove, monopolizing the StarStar market, and eliminating Sumotext as a competitor. TAC ¶¶ 71-73. As part of the pre-acquisition due diligence for VHT StarStar's purchase of Zoove, Mblox disclosed **[*5]** all of its customer agreements, including its contracts with Sumotext. *Id.* ¶ 75. VHT, StarSteve, and VHT StarStar used that confidential information to target Sumotext's customers, approaching them and representing that Sumotext did not have the right to renew its StarStar leases and that those leases would be terminated upon VHT StarStar's purchase of Zoove. *Id.* ¶ 76. According to Sumotext, those representations were false and were made to persuade Sumotext's customers to abandon it and lease StarStar numbers directly from Zoove and VHT StarStar. *Id.* ¶¶ 76-77.

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[1] It appears that Zoove now does business as "StarStar Mobile." For the sake of simplicity, the Court will refer to the Zoove/StarStar Mobile entity as "Zoove."

[2] Zoove, VHT StarStar, and VHT filed a motion to dismiss (ECF 222) which was joined by StarSteve (ECF 224).

[3] The background section is drawn from Sumotext's factual allegations, which are accepted as true for purposes of evaluating the *Rule 12(b)(6)* motions to dismiss. *See* *Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 690 (9th Cir. 2011)*.

Sumotext became aware of the above-described conduct and informed Mblox that it objected to the sale of Zoove. TAC ¶¶ 79-81. Sumotext "warned Mblox from completing the transaction — thus furthering, joining, and profiting from the conspiracy — in the face of known unlawful schemes." *Id.* ¶ 81. Mblox nonetheless went forward with the sale of Zoove to VHT StarStar in December 2015. *Id.* ¶ 97.

After the sale, Zoove — controlled by StarSteve, VHT, and VHT StarStar — terminated all of Sumotext's StarStar leases in breach of written contracts. TAC ¶¶ 100-01. Sumotext was informed that it could lease StarStar numbers only if it agreed **[*6]** to onerous new leasing terms which included an increase in rates from an average of $500 per month per StarStar number to an average of $500,000 per month per number. *Id.* ¶ 102. Others in the market were targeted as well. *Id.* ¶ 104. For example, Dawson Law Firm's lease fee for **CRASH was raised from $1,000 per month for a nationwide lease to $5,000 per month for just the South Florida Region. *Id.* Another lessee, A-Z Lock and Key, was not permitted to renew its lease of **LOCKS. *Id.*

Sumotext, then under the belief that VHT had acquired Zoove, filed this action against VHT and Zoove in March 2016 for breach of contract and related state law claims. Compl., ECF 1. Sumotext later added StarSteve, VHT StarStar, and Mblox as defendants and expanded its pleading to assert federal antitrust claims as well as state law claims. The operative TAC contains claims for: (1) breach of contract against Zoove; (2) breach of the implied covenant of good faith and fair dealing against Zoove; (3) tortious interference with contract against VHT, StarSteve, and VHT StarStar; (4) restraint of trade in violation of *Section 1* of the Sherman Act against VHT, StarSteve, VHT StarStar, Zoove, and Mblox; and (5) conspiracy **[*7]** to monopolize and monopolization in violation of *Section 2* of the Sherman Act against VHT, StarSteve, VHT StarStar, Zoove, and Mblox. TAC, ECF 185-4.

Two separate *Rule 12(b)(6)* motions are pending before the Court, one brought by Zoove, VHT, VHT StarStar, and StarSteve, and the other by Mblox. Both motions are limited to Sumotext's federal antitrust claims (Claims 4 and 5). Sumotext's state law claims (Claims 1, 2, and 3) are not at issue. Mblox also has filed a motion for sanctions against Sumotext.

II. MOTIONS TO DISMISS

A. Legal Standard

"A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (quoting *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001))*. While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

B. Zoove, VHT, VHT StarStar, and StarSteve

Zoove, VHT, VHT StarStar, and StarSteve (collectively, "Moving Parties") contend that Sumotext has failed to state a claim against them for violation **[*8]** of the Sherman Act under either *Section 1* (Claim 4) or *Section 2* (Claim 5).

1. Sherman Act *Section 1* (Claim 4)

Claim 4 alleges restraint of trade in violation of *Section 1* of the Sherman Act. That section provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*. To plead a *Section 1* claim, a plaintiff "must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove: (1) a contract, combination or conspiracy among two or more persons or distinct business entities; (2) by which the persons or entities intended to harm or restrain trade or commerce among the several States, or with foreign nations; (3) which actually injures competition." *Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 (9th Cir. 2008)*.

Moving Parties argue that Sumotext fails to meet this pleading standard in two respects. First, they assert that Sumotext does not plausibly allege injury arising from a combination or conspiracy between two or more entities, because the facts upon which the *Section 1* claim is based are equally consistent with unilateral business decisions by Zoove. To the extent that other entities were involved in Zoove's decisions, **[*9]** Moving Parties assert that the common ownership of those entities dictates that they be viewed as a single enterprise which cannot collude with itself. Second, Moving Parties contend that the TAC does not contain sufficient factual particularity as to who at each of the defendant companies did what, and when, to join and further the conspiracy. *See Kendall, 518 F.3d at 1048* (finding *Section 1* claim deficient where it did not "answer the basic questions: who, did what, to whom (or with whom), where, and when?"). The Court addresses those arguments in turn.

a. Unilateral Business Decisions

Section 1 "does not reach conduct that is wholly unilateral." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (internal quotation marks and citation omitted). "Unilateral conduct by a single firm, even if it appears to restrain trade unreasonably, is not unlawful under *section 1* of the Sherman Act." *The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988)* (internal quotation marks and citation omitted). Moving parties contend that all of the conduct of which Sumotext complains, e.g., Zoove's termination of Sumotext's StarStar leases and increased pricing for new leases, are just as consistent with unilateral business decisions by Zoove as they are with an unlawful conspiracy. Under those circumstances, Moving Parties argue, Sumotext does not plausibly **[*10]** allege a *Section 1* violation. *See Twombly, 550 U.S. at 557* (discussing "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement"); *Kendall, 518 F.3d at 1049* ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

Moving Parties' argument might be persuasive were Sumotext relying solely on allegations that Zoove terminated its StarStar leases and increased its pricing. However, the TAC contains other allegations that plausibly suggest an agreement by VHT and StarSteve — two separate entities — to acquire Zoove for the purpose of monopolizing the StarStar market and eliminating Sumotext as a competitor. Prior to Mblox's sale of Zoove, Sumotext was the strongest competitor in the StarStar market by volume of StarStar leases and revenue. TAC ¶ 103. As soon as StarSteve and VHT agreed to form VHT StarSteve for the purpose of acquiring Zoove, they went after Sumotext's customers aggressively. *Id.* ¶¶ 71-78. Steve Doumar of StarSteve, Wes Hayden of VHT, and Greg Garvey of VHT told Sumotext's customers that Sumotext did not have the right **[*11]** to renew its StarStar leases and that those leases would be terminated once VHT StarStar acquired Zoove. *Id.* ¶¶ 76-79. Those communications interfered with Sumotext's relationships with its customers, making it difficult for Sumotext to collect on outstanding invoices and thus affecting Sumotext's cash flow. *Id.* ¶¶ 77-78. Once VHT StarStar acquired Zoove, Hayden and Garvey replaced Zoove's directors and senior officers with themselves. *Id.* ¶ 271. Doumar, Hayden, and Garvey, acting on behalf of VHT, StarSteve, and VHT StarStar, caused Zoove to terminate Sumotext's StarStar leases and offer new leases "so onerous that it would have prevented Sumotext from reselling its StarStar numbers." *Id.* ¶¶ 99-102. For example, the rate for Sumotext to lease a StarStar number was increased from $500 per month per number to $500,000 per month per number. *Id.* ¶ 102.

The Court concludes that these allegations constitute "enough factual matter (taken as true) to suggest that an agreement was made." *See Twombly, 550 U.S. at 556*. "Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will **[*12]** reveal evidence of illegal agreement." *Id.* Such a reasonable expectation is raised here. Of course, Sumotext will have to prove the illegal agreement in order to prevail on its *Section 1* claim, and proof may be difficult to muster. However, Sumotext's ability to prove its claims is a question for another day. *See Twombly, 550 U.S. at 556* (a complaint that alleges facts sufficient to suggest an anticompetitive agreement "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.") (internal quotation marks and citation omitted).

Relying on *Copperweld*, Moving Parties argue that to the extent other entities were involved in Zoove's business decisions, the Zoove-related entities constitute a single enterprise which cannot collude with itself. In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act." *Copperweld, 467 U.S. at 771*. In a later decision, *American Needle*, the Supreme Court clarified that the appropriate inquiry "is one of competitive reality," and that "it is not determinative that two parties to an alleged *§ 1* violation **[*13]** are legally distinct entities." *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 196, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. "The key is whether the alleged contract, combination . . . , or conspiracy is concerted action — that is, whether it joins together separate decisionmakers." *Id. at 195*.

Based on the allegations of the TAC, *Copperweld* does not appear to be applicable. Sumotext alleges that StarSteve and VHT initially formed the conspiracy to monopolize at a time when the two companies were entirely separate entities which were horizontal competitors of Sumotext. Compl. at 2:17-23, ¶¶ 71-73. Moving Parties argue that those allegations are factually incorrect, and that "VHT ultimately bought Zoove outright through a wholly owned subsidiary, rather than in a joint venture with StarSteve." Motion to Dismiss at 8, ECF 222. Moving Parties also dispute Sumotext's characterization of VHT as a horizontal competitor. *Id.* at 14. While Moving Parties ultimately may disprove Sumotext's allegations, at this stage in the proceedings the Court's role is not to resolve factual disputes but to determine whether the TAC states a viable *Section 1* claim. It does for the reasons discussed herein.

It is unclear which, if any, of the defendant entities may be viewed as a single enterprise after Zoove was acquired. While **[*14]** it is alleged that VHT StarStar wholly owned Zoove after the acquisition, StarSteve and VHT remained distinct entities with StarSteve owning a minority of the shares in VHT StarStar and VHT owning a majority. TAC ¶¶ 7, 71-72. Some district courts within the Ninth Circuit have held that minority ownership in a corporation is insufficient to trigger *Copperweld*. See, e.g., *Aspen Title & Escrow, Inc. v. Jeld-Wen, Inc., 677 F. Supp. 1477, 1486 (D. Or. 1987)* ([O]nly corporations which are owned 100% in common, or a de minimis amount less than 100%, are covered by the *Copperweld* rule.").

Moving Parties rely on *Freeman*, in which the Ninth Circuit held that the single-entity rule may apply to "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit." *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1147-48 (9th Cir. 2003)* (internal quotation marks and citation omitted). However, "the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity." *Id. at 1148*. "[T]he single-entity inquiry is fact-specific." *Id.* In *Freeman*, the case had reached the summary judgment stage and thus that fact-specific inquiry was resolved on a fully developed record. It may be that once **[*15]** the record in this case is fully developed, Moving Parties will be able to demonstrate that the single-entity rule does apply. Because application of the rule is not apparent from the TAC, however, the rule does not constitute a basis for dismissal of Sumotext's *Section 1* claim at the pleading stage.

Moving Parties' arguments based on Zoove's asserted unilateral business decisions and on the single-entity rule thus do not warrant dismissal of Sumotext's *Section 1* claim.

b. Factual Particularity

Nor is the Court persuaded by Moving Parties' assertion that the TAC lacks sufficient factual particularity as to the role of each defendant. The Court dismissed Sumotext's prior iteration of its pleading in part because of a failure to distinguish between defendants that Sumotext referred to as the "VHT StarStar Parties." Order of June 26, 2017

("June 2017 Order") at 16, ECF 175. The Court noted that allegations which lump multiple defendants together are insufficient to put any one defendant on notice of the conduct upon which the claims against it are based. *See* *Chuman v. Wright, 76 F.3d 292, 295 (9th Cir. 1996)*. Moving Parties contend that the TAC does not cure this defect, and that it fails to allege each defendant's role in the conspiracy. *See* *In re TFT-LCD (Flat Panel) Antitrust Litig., 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008)* (complaint **[*16]** "must allege that each individual defendant joined the conspiracy and played some role in it"). However, the TAC distinguishes between the defendants, identifies the individuals who acted on behalf of the entity defendants, and explains each defendant's role in the alleged conspiracy. For example, Sumotext identifies the founders of the conspiracy as Doumar, Hayden, and Garvey; explains which entities those individuals represented and in what capacity, and describes the conduct each individual undertook on behalf of his corporate entity. TAC ¶¶ 65-68, 70-78, 133-41. Claims 4 and 5 break down the antitrust claims element by element, identifying by name each individual and entity whose conduct forms the basis of the claims. While Moving Parties do cite some instances where Sumotext used terms such as "monopolists" and "members of the joint venture," the Court has no difficulty concluding that the TAC as a whole identifies each defendant's role with adequate particularity.

Accordingly, Moving Parties' motion to dismiss Sumotext's *Section 1* Claim (Claim 4) is DENIED.[4]

2. Sherman Act *Section 2* (Claim 5)

Claim 5 alleges conspiracy to monopolize and monopolization in violation of *Section 2* of the Sherman Act. That section **[*17]** provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony." *15 U.S.C. § 2*. To state a civil claim for conspiracy to monopolize, the plaintiff must allege facts showing: (1) the existence of a combination or conspiracy to monopolize; (2) an overt act in furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust injury. *Paladin Assocs., Inc. v. Montana Power Co., 328 F.3d 1145, 1158 (9th Cir. 2003)*. To state a civil claim for monopolization under this provision, the plaintiff must allege facts showing: (1) the possession of monopoly power in the relevant market; (2) the willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Somers v. Apple, Inc., 729 F.3d 953, 963 (9th Cir. 2013)*.

Sumotext alleges a "successful conspiracy to monopolize." TAC ¶ 302. Moving Parties contend that Sumotext has not made out a claim of monopolization for several reasons. First, they argue that Sumotext does not adequately plead a relevant market, because Sumotext defines the relevant market as the market for Zoove's StarStar leases. Second, even assuming that the relevant market is the StarStar market as alleged by Sumotext, Moving Parties assert **[*18]** that Sumotext does not allege facts showing that Defendants' conduct resulted in monopolization of the market. Moving Parties also dispute Sumotext's position that the StarStar numbers are an essential facility, and they argue that absent application of the essential facilities doctrine, Sumotext's monopolization claim against Zoove is inadequate. And finally, Moving Parties argue that if Defendants are treated as a single entity, Defendants cannot be liable simply because it holds a natural monopoly on its own product (StarStar numbers).

For the most part, Moving Parties' arguments are merely a rehash of arguments previously rejected by the Court in its order addressing motions to dismiss the second amended complaint. *See* June 2017 Order, ECF 175. No party sought reconsideration of that ruling, and the Court sees no need to revisit it in detail here. Moving Parties' arguments regarding the *Section 2* claim therefore are addressed briefly as follows.

a. Relevant Market

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[4] In setting forth its reasoning for this ruling, the Court has touched on only those portions of the TAC necessary to dispose of the grounds for dismissal argued in the motion: that Sumotext's allegations are equally consistent with unilateral business decisions by Zoove and that Sumotext has failed to allege each defendant's role in the conspiracy with adequate particularity. The Court need not, and does not, address every issue raised in the parties' briefing, for example, whether Sumotext's group boycott theory properly is evaluated as per se unlawful or under the rule of reason.

"In order to state a valid claim under the Sherman Act, a plaintiff must allege that the defendant has market power within a relevant market." *Solyndra Residual Trust v. Suntech Power Holdings Co., 62 F. Supp. 3d 1027, 1044 (N.D. Cal. 2014)* (internal quotation marks and citation omitted). "A relevant market has two dimensions: **[*19]** the relevant geographic market and the relevant product market." Id. (internal quotation marks and citation omitted). Where the complaint's definition of relevant market is facially unsustainable, the antitrust claim may be dismissed. *Id.* (internal quotation marks and citation omitted).

Sumotext alleges that "[t]he relevant product/service market is the national market for mobile dial codes, which is comprised of three segments: leasing, reselling, and servicing (collectively, the "Market"). TAC ¶ 106. Sumotext also alleges that "[t]he relevant geographic market for mobile dial codes is the United States because mobile dial codes are: a. Registered and leased from the Registry on a nationwide basis; b. Supported by all major wireless carriers in the U.S.; and c. Called from and interconnected to phone lines throughout all the fifty states." *Id.* ¶ 107.

The Court previously found this market definition to be adequate for pleading purposes, rejecting the argument that Sumotext cannot define the relevant market to comprise a commodity controlled solely by Zoove. June 2017 Order at 16, ECF 175. While recognizing that the Sherman Act generally does not restrict a private business from exercising **[*20]** its own independent discretion as to parties with whom it will deal, *see Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, the Court found that Sumotext had alleged facts sufficient to bring this case within a narrow exception to the general rule on the basis that the registry is an "essential facility." June 2017 Order at 16. The Court acknowledged the defense argument that Sumotext had not alleged facts showing that StarStar numbers cannot be reasonably or practically replicated, and considered Defendants' speculation that StarStar numbers are interchangeable with all telephone numbers, with 800 numbers, and with web-based links. *See MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1129-30 (9th Cir. 2004)* ("A facility is essential only if it is otherwise unavailable and cannot be reasonably or practically replicated.") (internal quotation marks and citation omitted). However, the Court concluded that Sumotext had alleged facts sufficient to support its position that the registry is an essential facility. June 2017 Order at 16. The Court noted that whether Sumotext's definition ultimately will stand was not a question to be answered on a motion to dismiss. *Id.*

Moving Parties simply ignore the Court's prior ruling, repeating arguments that the Court already has rejected, for example, that Zoove has a **[*21]** unilateral right to choose with whom it deals; and that Sumotext has not alleged facts showing that StarStar numbers are not reasonably interchangeable with 10-digit phone numbers, 5-digit common short codes, and internet domain names. Repetition of arguments previously considered and rejected by the Court does not constitute a basis for dismissal under *Rule 12(b)(6)*.

b. Monopolization

Moving Parties argue that Sumotext has not alleged facts showing specific intent to control prices or destroy competition in the relevant market as required for a monopolization claim. They argue that Zoove's conduct was motivated by legitimate business reasons, and that Zoove's unilateral decision to change its business model cannot give rise to a *Section 2* claim regardless of who owns it.

As an initial matter, specific intent is required only for the claim of conspiracy to monopolize, not for a claim of monopolization itself. *See Somers, 729 F.3d at 963* (listing elements of claim for monopolization); *Paladin, 328 F.3d at 1158* (listing elements of conspiracy to monopolize). Moreover, the Court cannot make a factual finding that Zoove's conduct was motivated by unilateral, legitimate business justifications as Moving Parties seem to want. Moving Parties urge the Court to **[*22]** disregard as irrelevant Sumotext's allegations regarding the change in ownership of Zoove, because Zoove always had and still has sole authority with respect to StarStar leases and could have engaged in exactly the same conduct even if it had been retained by Mblox. The fact that Zoove *could* have made a unilateral business decision to terminate Sumotext's StarStar leases even if Doumar, Hayden, Garvey, and their respective companies had never entered the picture is not relevant. As discussed in Section II.B.1.a above, it is alleged that StarSteve and VHT entered into a joint venture to acquire control of Zoove and eliminate Sumotext as a competitor, and that they succeeded in both goals. Those allegations, and the supporting facts discussed above, are sufficient to make out a *Section 2* claim.

c. Essential Facilities Doctrine

Moving Parties dispute the application of the essential facilities doctrine. That argument is addressed in part above in connection with Sumotext's market definition.

The Court addresses one additional argument made by Moving Parties: that even if the registry is an essential facility, Sumotext has not alleged that Zoove refused to deal with Sumotext. Moving Parties argue **[*23]** that it appears on the face of the complaint that Zoove did offer to deal with Sumotext, pointing to allegations that Zoove offered StarStar leases to Sumotext at approximately a 10,000% mark-up. "An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal." *MetroNet, 383 F.3d at 1132*. Another court in this district has held that a 400% price increase was tantamount to a refusal to deal. *See Safeway Inc. v. Abbott Labs., No. C 07-05470 CW, 2010 U.S. Dist. LEXIS 2145, 2010 WL 147988, at *7 (N.D. Cal. Jan. 12, 2010)*. This Court concludes that Sumotext's allegation of the mark-up in the lease rate from $500 per month per StarStar number to $500,000 per month per StarStar number, along with allegations regarding other new lease conditions, are sufficient to allege a practical refusal to deal. *See* TAC ¶¶ 102, 167.

d. Single Entity Monopolization

Finally, Moving Parties argue that if all Defendants are viewed as a single entity, there can be no viable *Section 2* claim. However, a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability. *See Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)*; *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467, (1985)*.

Accordingly, Moving Parties' motion to dismiss Sumotext's *Section 2* Claim (Claim 5) is DENIED.

C. Mblox

Mblox moves to dismiss Claims 4 and 5 under the *Sherman Act* — the only claims asserted **[*24]** against it — on three grounds. Mblox argues that the TAC does not contain facts showing that Mblox: (1) joined in the alleged conspiracies, (2) had specific intent to seize monopoly power, or (3) caused Sumotext antitrust injury. Because the first ground is dispositive, the Court need not reach the other two.

The Court granted Mblox's motion to dismiss the second amended complaint on the basis that Sumotext had not alleged facts showing that Mblox had joined the alleged conspiracies to restrain trade under *Section 1* of the Sherman Act or monopolize under *Section 2* of the Sherman Act. June 2017 Order 8-10, ECF 175. The Court summarized the evidentiary facts that had been alleged, namely, that Mblox: failed to enforce a confidentiality agreement with the VHT StarStar parties; sold Zoove for a premium price, and assigned Sumotext's contracts, with knowledge that Sumotext's contracts would be terminated after the sale; and retained certain of its existing customers when it sold Zoove. *Id.* The Court found that although those factual allegations perhaps could give rise to an inference that Mblox entered into the alleged conspiracies, they just as easily give rise to an inference that Mblox made a legitimate **[*25]** business decision to sell Zoove and retain certain of its customers. *Id.* at 9. The Court relied on *Syufy Enterprises* in concluding that Mblox's participation in the conspiracy could not be inferred from Mblox's knowledge that the other defendants intended to terminate Sumotext's contracts following Mblox's sale of Zoove. *See Syufy Enterprises v. Am. Multicinema, Inc., 793 F.2d 990, 1000 (9th Cir. 1986)* ("[A] supplier who licenses a product to another does not join the licensee in a conspiracy to monopolize merely because the licensee turns around and exploits the license for its own monopolistic purposes.").

With respect to Sumotext's arguments that Mblox's retention of certain StarStar numbers supported its *Section 2* claim, the Court agreed that the type of carve-out referenced by Sumotext might give rise to a plausible inference that Mblox joined the alleged conspiracies, but it indicated that it could not draw such an inference from the bare-bones allegations provided in the second amended complaint. The Court granted Sumotext leave to amend its Sherman Act claims against Mblox on that basis.

In the TAC, Sumotext repeats the allegations previously found to be deficient by the Court regarding Mblox's failure to enforce the confidentiality agreement and sale of Zoove with knowledge **[*26]** that Sumotext's contracts would be terminated after the sale. TAC ¶¶ 142-66. Sumotext does expand on its allegations regarding Mblox's alleged carve-out, alleging that Tom Cotney of Mblox "inserted language in the agreements" to (1) "carve out exclusive rights to lease StarStar numbers to a list of over 30 marquee prospective StarStar customers"; and (2) "block Mblox's rivals from leasing, reselling or servicing mobile dial codes." TAC ¶ 166; 287. Those allegations do not specify which "agreements" contained the language in question. In fact, the quoted language is drawn from the September 2015 LOI between Mblox and StarSteve, which never came to fruition, and a November 2015 draft of the Stock Purchase Agreement ("SPA") between Mblox and VHT StarStar, which was not the final version executed. TAC Exhs. 9, 12. As discussed above, StarSteve did not go forward with the purchase of Zoove pursuant to the LOI. Moreover, the portion of the LOI referenced in the TAC is designated as non-binding. The Final SPA between Mblox and VHT does not contain any of the language quoted in the TAC regarding the alleged carve-out and horizontal restrictions. Final SPA, ECF 208-3. Although the Final SPA **[*27]** is not attached to Sumotext's pleading, it is referenced in the TAC and the Court considers it under the incorporation by reference doctrine. *See* *Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005)*.

Sumotext argues that the Court should not assume that the carve-out and horizontal restrictions negotiated by Mblox in earlier, non-final documents were abandoned just because those provisions were not included in the Final SPA between Mblox and VHT StarStar. Sumotext speculates that the parties may have secretly entered into carve-out and horizontal restriction provisions despite the fact that it appears from the Final SPA that Mblox actually exited the StarStar market. The Court finds Sumotext's theory to be implausible. Certainly it is not more plausible than the other possibility, which is that the Final SPA actually contains the whole of the parties' agreement and Mblox actually left the StarStar market. Consequently, Sumotext has failed to allege facts showing that Mblox joined the alleged conspiracies. *See* *Twombly, 550 U.S. at 557* (discussing "[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement"); *Kendall, 518 F.3d at 1049* ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants **[*28]** as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws.").

For these reasons, Sumotext's claims against Mblox are subject to dismissal. In reaching this conclusion, the Court has paid particular attention to Sumotext's contention that Mblox may be liable for selling Zoove with knowledge that the buyers intended to breach Sumotext's contracts. Sumotext has not cited, and the Court has not discovered, a single case imposing antitrust liability in similar circumstances. Absent such authority, the Court is not persuaded that a seller's knowledge that the *buyer* may engage in illegal conduct renders the seller culpable.

A district court ordinarily must grant leave to amend unless one or more of the *Foman* factors is present: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by amendment, (4) undue prejudice to the opposing party, and (5) futility of amendment. *Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*; *see also* *Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003)* (discussing *Foman* factors). While the Court finds no undue delay (factor 1) or bad faith (factor 2), the other factors favor dismissal without leave to amend. Despite multiple opportunities to amend its pleading, Sumotext has failed **[*29]** to allege a viable claim against Mblox (factor 3). Sumotext's repeated attempts to cure the defects in its claims against Mblox have prejudiced Mblox's ability to obtain resolution (factor 4). And finally, the Court is satisfied that Sumotext has made its best efforts to state a viable claim against Mblox and it has come up short; any further opportunity to amend likely would be futile (factor 5).

Accordingly, Mblox's motion to dismiss Claims 4 and 5 (the only claims against it) is GRANTED WITHOUT LEAVE TO AMEND.

III. MOTION FOR SANCTIONS

Mblox moves for sanctions against Sumotext for continuing to assert claims against Mblox in the TAC. Mblox's motion is brought under *Federal Rule of Civil Procedure 11* and *28 U.S.C. § 1927*.

A. Legal Standards

Rule 11 of the Federal Rules of Civil Procedure imposes upon attorneys a duty to certify that they have read any pleadings or motions they file with the court and that such pleadings and motions are well-grounded in fact, have a colorable basis in law, and are not filed for an improper purpose. *Fed. R. Civ. P. 11(b)*. If a court finds a violation of this duty, it may impose appropriate sanctions to deter similar conduct. *Fed. R. Civ. P. 11(c)(1)*; *see also Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)* ("[T]he central purpose of *Rule 11* is to deter baseless filings in district court."). However, "*Rule 11* is an extraordinary remedy, one to be exercised **[*30]** with extreme caution." *Operating Eng'rs Pension Trust v. A-C Co., 859 F.2d 1336, 1345 (9th Cir. 1988)*. *Rule 11* sanctions should be reserved for the "rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *Id. at 1344*. "Where, as here, the complaint is the primary focus of *Rule 11* proceedings, a district court must conduct a two-prong inquiry to determine (1) whether the complaint is legally or factually 'baseless' from an objective perspective, and (2) if the attorney has conducted 'a reasonable and competent inquiry' before signing and filing it." *Christian v. Mattel, Inc., 286 F.3d 1118, 1127 (9th Cir. 2002)*.

Under *28 U.S.C. § 1927*, a court may impose sanctions on an attorney who unreasonably and vexatiously multiplies the proceedings. The statute is intended to deter harassing legal tactics and to compensate their victims. *See Haynes v. City and Cty. of San Francisco, 688 F.3d 984, 987-88 (9th Cir. 2012)*. A court may award sanctions under *§ 1927* if the moving party shows (1) that opposing counsel acted unreasonably; (2) that, by doing so, counsel multiplied proceedings; and (3) that counsel acted with subjective bad faith. *MGIC Indem. Corp. v. Moore, 952 F.2d 1120, 1121 (9th Cir. 1991)*.

B. Discussion

The Court is quite familiar with the parties, counsel, and the claims in this action, having presided over significant motion practice since the complaint was filed more than two years ago. The Court has no difficulty **[*31]** in concluding that the requirements for sanctions under *Rule 11* and *§ 1927* are not present here. Although the Court ultimately has dismissed Sumotext's claims against Mblox without leave to amend, the Court cannot say that any iteration of the complaint was objectively baseless. Mblox was in the thick of the transaction that led to the exclusion of Sumotext from the StarStar market, and the Court was not satisfied until this last round of motion practice that Sumotext ultimately could not state a claim against Mblox.

It is clear that Sumotext's counsel conducted a reasonable and competent inquiry before filing each of the pleadings, including the operative TAC. The fact that the Court was not persuaded by Sumotext's arguments regarding the significance of Mblox's alleged knowledge of the other defendants' intentions does not mean that those arguments were frivolous. The Court is satisfied that counsel did not violate *Rule 11* by filing the TAC, or act with subject bad faith as required for sanctions under *§ 1927*.

Mblox's motion for sanctions against Sumotext is DENIED.

IV. ORDER

(1) The motion to dismiss brought by Defendants Zoove, VHT StarStar, VHT, and StarSteve is DENIED;

(2) The motion to dismiss brought by **[*32]** Mblox is GRANTED WITHOUT LEAVE TO AMEND;
(3) The motion for sanctions brought by Mblox is DENIED; and
(4) A Case Management Conference is set for 11:00 a.m. on May 24, 2018 to discuss the case schedule in light of the Court's rulings on the motions to dismiss.

Dated: April 19, 2018

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I.

United States District Court for the District of Rhode Island

April 23, 2018, Decided; April 23, 2018, Filed

C.A. No. 13-405 WES

Reporter

311 F. Supp. 3d 468 *; 2018 U.S. Dist. LEXIS 69737 **; 2018-1 Trade Cas. (CCH) P80,362; 2018 WL 1934188

STEWARD HEALTH CARE SYSTEM, LLC; BLACKSTONE MEDICAL CENTER, INC., f/k/a STEWARD MEDICAL HOLDING SUBSIDIARY FOUR, INC.; BLACKSTONE REHABILITATION HOSPITAL, INC., f/k/a STEWARD MEDICAL HOLDING SUBSIDIARY FOUR REHAB, INC., Plaintiffs, v. BLUE CROSS & BLUE SHIELD OF RHODE ISLAND, Defendant.

Prior History: Steward Health Care Sys., LLC v. Blue Cross & Blue Shield, 997 F. Supp. 2d 142, 2014 U.S. Dist. LEXIS 20304 (D.R.I., Feb. 19, 2014)

Core Terms

Blue, negotiations, network, antitrust, conspiracy, summary judgment, conditions, patients, Skiing, damages, providers, regulations, Team, acquire, termination, rates, anticompetitive, parties, material modification, reimbursement rate, reasons, monopolize, contracts, email, conversations, subscribers, Counts, terms, healthcare, acquisition

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate when the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. A court draws all reasonable inferences in favor of the non-moving party while ignoring conclusory allegations, improbable inferences, and unsupported speculation. Id.

Civil Procedure > ... > Summary Judgment > Opposing Materials > Accompanying Documentation

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN2[] **Opposing Materials, Accompanying Documentation**

On a motion for summary judgment, the onus is on the moving party to demonstrate that no genuine dispute of material fact exists. Once the moving party makes this showing, the nonmoving party must point to specific facts demonstrating a trialworthy issue. Rather than rest upon the mere allegations or denials in the pleading, the nonmovant must set forth specific facts showing that there is a genuine issue of material fact as to each issue upon which it would bear the ultimate burden of proof at trial. Evidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial.

Antitrust & Trade Law > Sherman Act

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN3[] **Antitrust & Trade Law, Sherman Act**

The provisions of the Rhode Island Antitrust Act mirror those of *§§ 1* and *2 of the Sherman Act*, *15 U.S.C.S. §§ 1* and *2*, and are construed in the same manner as the federal statutes.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] **Scope, Monopolization Offenses**

The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

HN5[] **Actual Monopolization, Claims**

Section 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize any part of the trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 2*. The elements of monopolization are (1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN6[] Actual Monopolization, Anticompetitive & Predatory Practices

In the absence of any purpose to create or maintain a monopoly, the *Sherman Act* does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. However, the high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified. That is, under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN7[] Actual Monopolization, Claims

In Data General, the First Circuit interpreted Aspen Skiing as casting serious doubt on the proposition that the United States Supreme Court has adopted any single rule or formula for determining when a unilateral refusal to deal is unlawful. Indeed, the court recognized that under Aspen Skiing a monopolist's unilateral refusal to deal may arise in very different situations. Other courts have likewise acknowledged that refusal-to-deal law generally -- and Aspen Skiing and Trinko specifically -- is concerned with harm to competition without a valid business justification, which can manifest itself in myriad ways.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Evidence > Burdens of Proof > Burden Shifting

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN8[] Actual Monopolization, Claims

In Data General, the First Circuit set forth a burden-shifting framework that requires a plaintiff to prove a prima facie case that includes showing a monopolist's unilateral refusal to deal with its competitors (as long as the refusal harms the competitive process). Once proved, the monopolist may nevertheless rebut such evidence by establishing a valid business justification for its conduct. The court added that, in general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not. In essence, a unilateral refusal to deal is prima facie exclusionary if there is evidence of harm to the competitive process; a valid business justification requires proof of countervailing benefits to the competitive process.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN9[] Actual Monopolization, Claims

An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal for purposes of *§ 2 of the Sherman Act*, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN10[] **Scope, Monopolization Offenses**

The law does not impose, and a court may not dictate, the precise terms that a defendant must accept; but the law does impose a duty on the defendant to compete fairly, and specifically to not forego short term profits for the purpose of blocking competition and maintaining a monopoly. And in order to enforce this duty, the court -- in fact the jury -- must consider the parties' conduct in the context of the particular markets at issue. Antitrust analysis must sensitively recognize and reflect the distinctive economic legal setting of the regulated industry to which it applies.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN11[] **Conspiracy to Monopolize, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. *15 U.S.C.S. § 1*. A conspiracy is born when two or more entities that previously pursued their own interests separately combine to act as one for their common benefit. *Section 1* by its plain terms reaches only "agreements" -- whether tacit or express.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN12[] **Conspiracy to Monopolize, Elements**

At the summary judgment stage a *15 U.S.C.S. § 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently. It does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors. In addition, the United States Supreme Court has limited the range of permissible inferences from ambiguous evidence in a *§ 1* case, holding that, at summary judgment, conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy that allows plaintiffs' evidence to reach a jury. But this evidence will reach the jury when it shows parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Evidence > Types of Evidence > Circumstantial Evidence

HN13[] **Conspiracy to Monopolize, Elements**

If a plaintiff builds its *15 U.S.C.S. § 1* case around circumstantial evidence, it must rely on "plus factors" as proxies for direct evidence of an agreement. Plus-factor evidence is evidence pointing toward conspiracy; that is, evidence tending to rule out the possibility that the defendants were acting independently.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN14[] **Conspiracy to Monopolize, Elements**

Courts have identified -- and the First Circuit in Evergreen and R.M. Packer Co. countenanced -- a non-exhaustive list of three *15 U.S.C.S. § 1* plus factors: (1) evidence that the defendant had a motive to enter into an antitrust conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) evidence implying a traditional conspiracy. The third factor, evidence implying a traditional conspiracy, consists of non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN15[] **Conspiracy to Monopolize, Elements**

A tacit understanding or a wink and a nod can be sufficient for a *15 U.S.C.S. § 1* conspiracy.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN16[] **Conspiracy to Monopolize, Elements**

The United States Supreme Court long ago dispensed with the notion that a court can slice and dice the record in a way that scrutinizes each individual piece of evidence for conspiratorial motive under *15 U.S.C.S. § 1*. Rather, a court must evaluate the evidence based on its aggregate effect, and draw reasonable inferences from the evidence as a whole.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN17[] **Actual Monopolization, Claims**

A plaintiff's monopolization and conspiracy claims are not mutually exclusive. To be clear, behavior consistent with unilateral self-interest refers to lawful independent conduct that furthers competition. There is no discernible reason why an antitrust plaintiff cannot assert both a unilateral monopolization claim and a conspiracy claim; and indeed, the case law supports that these claims can coexist.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

HN18[] **Conspiracy to Monopolize, Elements**

In *15 U.S.C.S. § 1* cases where acts against self-interest are not fully explained, traditional evidence of conspiracy, i.e., conversations, assurances, and swapping value among the alleged conspirators, prove instructive.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN19[] **Conspiracy to Monopolize, Elements**

Section 1 of the Sherman Act prohibits conspiring to restrain trade whereas § 2 forbids conspiring to attain or maintain a monopoly. Beyond the common requirement of agreement, a § 1 conspiracy has different elements than a § 2 conspiracy. While § 1 of the Sherman Act forbids contracts or conspiracies in the restraint of trade or commerce, § 2 addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.

Torts > ... > Contracts > Intentional Interference > Elements

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN20[] Intentional Interference, Elements

Although it may be sufficient, it is not necessary for a plaintiff to lodge a successful antitrust claim in order to prove a claim for tortious interference with contractual relations or interference with prospective contractual relations.

Antitrust & Trade Law > Sherman Act > Claims

HN21[] Sherman Act, Claims

To prove causation, a Sherman Act plaintiff must demonstrate that its injury was caused "by reason of" the defendant's anticompetitive conduct. 15 U.S.C.S. § 15(a). A plaintiff need not prove that the antitrust violation was the sole cause of its injury, but only that it was a material cause. The law recognizes that when an injury is attributable to other factors independent of the challenged conduct, a plaintiff has not met its burden.

Antitrust & Trade Law > Sherman Act > Claims

HN22[] Sherman Act, Claims

Antitrust laws have been interpreted to incorporate common law principles of causation. Contingencies, conjecture, and speculation will not support a finding of proximate cause, and will, therefore, not support a finding of antitrust liability.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN23[] Sherman Act, Claims

In the context of an alleged Sherman Act injury, whether the defendants' assumed conduct had been a substantial or material cause of the losses claimed by plaintiff is properly a factual determination for jury.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN24[] Actual Monopolization, Anticompetitive & Predatory Practices

To create a jury question on harm to competition in the First Circuit, evidence of actual, present competition is not necessary as long as the evidence shows that the potential for competition exists.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Claims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Affirmative Defenses

Torts > Remedies > Damages > Reductions of Damages

Antitrust & Trade Law > Sherman Act > Defenses

HN25[] **Actual Monopolization, Claims**

Although antitrust plaintiffs have a duty to mitigate their losses, the failure to mitigate is an affirmative defense, which the defendant must plead and prove.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN26[] **Remedies, Damages**

Any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of an antitrust violation.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN27[] **Contract Interpretation, Good Faith & Fair Dealing**

Virtually every contract contains an implied covenant of good faith and fair dealing between the parties.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN28[] **Remedies, Damages**

When an antitrust plaintiff demonstrates it has been damaged, a jury may award nominal damages.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN29[] **Exemptions & Immunities, Parker State Action Doctrine**

The state-action doctrine immunizes from challenge conduct that is the intentional or foreseeable result of state or local government policy. And it has two elements for immunizing supposed compelled conduct: first, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the state itself.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN30[] **Parker State Action Doctrine, Local Governments & Private Parties**

In Patrick, the United States Supreme Court set forth that the active supervision requirement of the state-action doctrine mandates that the state exercise ultimate control over the challenged anticompetitive conduct. The mere presence of some state involvement or monitoring does not suffice. To invoke the doctrine also necessitates that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

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Judges: William E. Smith, Chief United States District Judge.

Opinion by: William E. Smith

Opinion

[*472] **OPINION AND ORDER**

WILLIAM E. SMITH, Chief Judge.

I. Background[1]

In this antitrust action, Plaintiffs Steward Health Care System, LLC, Blackstone Medical Center, Inc., f/k/a Steward Medical Holding Subsidiary Four, Inc., and Blackstone Rehabilitation Hospital, Inc. (collectively, **[**3]** "Steward") claim Defendant Blue Cross & Blue Shield of Rhode Island ("Blue Cross") unlawfully blocked Steward from entering the Rhode Island health care and health insurance markets, by thwarting its attempt to purchase a failing community hospital in receivership, Landmark Medical Center ("Landmark"), in Woonsocket, Rhode Island. (Pls.' Corrected Statement of Disputed Facts ("SDF") ¶ 49, ECF No. 171-1.)

This is a complicated case, and the area of ***antitrust law*** governing the claims is, to put it kindly, confused and opaque. As explained in detail below, the Court's view on the outcome of this motion has changed as a result of careful and complete review of the record and the law; and without question, this is a close case - one that highlights the difficulty of applying less-than-clear antitrust doctrines and precedents to one of the most complicated and volatile sectors of the national economy. In the end, the analysis below has convinced the Court that a trial is required on all counts of Steward's Amended Complaint (ECF No. 90), and therefore Blue Cross's Motion for Summary Judgment (ECF No. 157) will be denied in full (Counts I-XVIII).

A. Landmark

Landmark Medical Center ("Landmark") **[**4]** is a "community based" hospital **[*473]** that has served northern Rhode Island since 1988. See Landmark Medical Center, History, https://www.landmarkmedical.org/About-Us/History.aspx (last visited Apr. 16, 2018). In 2008, facing increasingly difficult financial straits, Landmark entered receivership under the supervision of the Rhode Island Superior Court. (SDF ¶¶ 53, 62.) After entering receivership, Landmark operated under a court-appointed Special Master. (Id. ¶ 62.) Justice Michael Silverstein of the Rhode Island Superior Court oversaw the receivership proceedings and appointed attorney Jonathan Savage as Special Master. (Id. ¶ 63.) Special Master Savage solicited bids for Landmark from prospective buyers, including hospital systems Lifespan, Prime, and Steward. (Id. ¶ 64.)

As early as 1996, Lifespan sought to potentially acquire Landmark. (Id. ¶ 65.) Lifespan's interest resurfaced in the context of Landmark's receivership proceedings in April 2009 when the Special Master requested that Maria Montanaro, then-CEO of Thundermist Health Center ("Thundermist"),[2] "outline a plan for how health services would be delivered in Woonsocket in the event that Landmark were to close." (SDF ¶ 66; Dep. **[**5]** of Maria Montanaro ("Montanaro Dep.") at 38-39, SDF Ex. 27, ECF No. 206-27.) The plan devised by Montanaro "called for the elimination of inpatient acute care at Landmark, and for the facility to provide primarily urgent care, emergency services, and outpatient surgery." (Id. ¶ 67; SDF Ex. 101, ECF No. 210-13; Dep. of Mary Wakefield ("Wakefield Dep.") at 31:1-6, SDF Ex. 30, ECF No. 206-30; Montanaro Dep. at 42:1-45:3, SDF Ex. 27; Dep. of George Vecchione ("Vecchione Dep.") at 14:8-14:14, SDF Ex. 29, ECF No. 206-29.) Underlying the plan was the idea that "a viable way to sustain Landmark hospital given its current financial and operational burdens [did] not appear to exist." (SDF ¶ 69.)

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[1] This factual discussion, as well as the facts noted throughout this opinion, are taken from the parties' statements of undisputed and disputed facts, as well as the attached exhibits; where disputed, inferences are drawn in favor of the nonmoving party, Steward.

[2] Thundermist is a "major primary care provider" with a large group of primary care physicians that serves many patients in the Woonsocket area. (Pls.' Corrected Statement of Disputed Facts ("SDF") ¶ 47, ECF No. 171-1; id. ¶ 83; Dep. of Robert E. Guyon 94:8-9, SDF Ex. 5, ECF No. 206-5 (explaining Thundermist is key source of prospective patients for area hospitals)). Thundermist provides care to many people who are poor and historically uninsured or underinsured. Few of Thundermist's patients are commercially insured. (See, e.g., SDF Ex. 128, ECF No. 160-29; see also Thundermist Health Center, About Us,, http://www.thundermisthealth.org/AboutUs/AboutUsOverview.aspx (last visited Apr. 16, 2018) ("Thundermist Health Center's goal is to bring healthcare to the people who need it most. . . . Nearly 40% of Thundermist's 42,000 patients in 2013 were uninsured. In 2014, we provided $6.6 million in unreimbursed care."). "Thundermist wanted a future for health care delivery in which it would play a significant role." (Pls.' Statement of Additional Undisputed Facts ("SAUF") ¶ 155, ECF No. 177-1; SAUF Ex. 50, ECF No. 177-51.)

B. The Steward Model

Steward is a for-profit hospital system,[3] which owns and operates multiple hospitals in neighboring Massachusetts.[4] (Id. ¶¶ 9, 11.) In its contracts with Massachusetts health insurance companies, Steward receives compensation on a per-member-per-month ("PMPM") basis rather than a fee based on individual service(s) performed. (Id. ¶ 15.) As Steward describes it, this is a "risk-based" model, in which Steward shoulders "some amount of financial risk of providing **[**6]** healthcare services to the health insurers' members." (Id.) To be **[*474]** successful, such a relationship requires a "working, constructive business relationship that involves the sharing of information and other cooperation" between health insurers and Steward.[5] (Id. ¶ 16.) Moreover, the success of Steward's healthcare vision requires that "the payer and provider must together develop a system for sharing the health-care and health-expense history of the insured patient population, also develop an analytic for total medical expense ('TME') of that population, and agree on reasonable grounds for reducing TME and improving the quality of care." (Pls.' Statement of Additional Undisputed Facts ("SAUF") ¶ 196, ECF No. 177-1.)

Steward's vision was to offer a new, atypical health-care-provider model to Rhode Island. (SDF ¶ 35.) This model was premised on "(1) right-siting care, such that community-based, routine services are performed in community settings, whether hospitals, urgent care centers, ambulatory services centers, or physicians' offices; (2) improving the quality of care provided in the community; [and] (3) negotiating on behalf of an integrated network of physicians and hospitals to drive **[**7]** lower premiums." (SDF ¶ 40.) In exchange for participation in its own "narrow network," Steward would accept lower reimbursement rates. (Id.)

As a part of Steward's vision, its executives believed it could turn around the quality problems Landmark faced; indeed, "that was the fundamental premise of Steward's turnaround plan for the hospital." (SDF ¶ 54.) "Landmark quality of care is generally good, although it has room for improvement." (Id.)

Steward's long term goals extended beyond Landmark; it wanted to acquire more hospitals in Rhode Island. (SDF ¶ 28.) To this end, Steward petitioned the state legislature to amend the Rhode Island Hospital Conversion Act "to eliminate a three-year waiting period between hospital acquisitions by for-profit hospitals, which would have allowed Steward to buy more than one Rhode Island Hospital in a three year period." (SAUF ¶ 139.)

C. The Caritas and Steward Bid To Acquire Landmark

In August 2010, over one year after the receivership commenced, Caritas, Steward's predecessor, submitted a bid to acquire Landmark.[6] (SDF ¶ 76.) A contract with Blue Cross was a precondition to Caritas's proposed Asset Purchase Agreement ("APA"). (Id. ¶ 77.) Feeling that it **[**8]** lacked the essential partners, including Blue Cross, for a successful transaction over Landmark, Caritas withdrew its bid in December 2010. (Id. ¶ 78.) In a press release following the failed transaction, the Special Master "indicated critical discussions related to reimbursement rates with Blue Cross/Blue Shield of Rhode Island did not produce tangible results." (Id.) He added, "To date, this has been our biggest hurdle. Unfortunately, attempts to address our inadequate reimbursement rates with Blue Cross were not productive and in fact stalled our negotiations with Caritas." (Id.)

In May 2011, Steward submitted a new bid to acquire Landmark. (SDF ¶ 79.) An APA was proposed, and although amended fifteen times, this mostly extended the closing deadlines. (Id. ¶¶ 79, 81, 82.) While the various APA versions included numerous conditions, "[n]ot all important matters were included as conditions in the APA, **[*475]** nor were all conditions in the APA clearly 'important.'" (Id. ¶ 79.) Rather than rigid requirements, Steward considered the conditions to be "flexible leverage points for negotiations," or even "window dressing." (Id. ¶¶ 79,

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[3] Cerberus Capital Management, LP owns a majority and controlling interest in Steward. (SDF ¶ 9.)

[4] At its inception in 2010, Steward owned six hospitals in Massachusetts; by 2012, it owned eleven hospitals. (SDF ¶ 11.)

[5] Steward's risk-based-contract model also contemplates that Steward would compete to an extent with health insurers "for the same premium dollars and Steward performs some functions traditionally performed by insurers." (SDF ¶ 16.)

[6] Steward's acquisition of Caritas was finalized in November 2010. (SDF ¶ 13.)

82.) Indeed, after realizing certain conditions could not be **[**9]** met, Steward nevertheless plowed ahead in attempting to acquire Landmark. (Id. ¶ 79.)

For example, the APA submitted in March 2012 included the following conditions: "An agreement to purchase 100% of Rhode Island Specialty Hospital" ("RISH"); a Memorandum of Understanding ("MOU") with Thundermist; and "[a]n agreement to purchase the interest of 21st Century Oncology ('21st Century') in Southern New England Regional Cancer Center ('SNERCC'), a cancer treatment facility owned jointly by 21st Century and Landmark."[7] (SDF ¶ 81.) Steward made clear that it would consider waiving the Thundermist and SNERCC conditions if and when it became necessary, if that meant Steward would successfully acquire Landmark. (Id. ¶ 82.) ("You know, at the end of the day, it's us and Blue Cross that need to come to an agreement.").

The key to Steward's effort to acquire Landmark was an acceptable arrangement with Blue Cross on reimbursement rates, because, as with all Rhode Island hospitals, this was the primary source of income for services rendered at Landmark. (See id. ¶ 98; SAUF ¶ 173.) For about a year from September 2011 to September 2012, with the assistance of various facilitators, Steward and Blue Cross **[**10]** exchanged numerous and detailed reimbursement-rate proposals for Landmark. (SDF ¶ 86.) Over the course of these negotiations, Steward saw Blue Cross as "moving backwards" because its offers of rate increases always included "quality targets that were unrealistic, given Landmark's condition." (Id.) Blue Cross would not discuss modifying these targets, even though it had done so for other providers. (Id. ¶ 88.) In one of the last mediation sessions the parties had with the Rhode Island Attorney General, the Attorney General informed Steward executives that Blue Cross "just do[es]n't want you to do business in this state." (Id. ¶ 86.)

Steward believed Blue Cross's proposed quality metrics (a part of Blue Cross's Standard Quality Program) were unattainable, so over the long course of negotiations, it proposed quality metrics different than those Blue Cross advanced, but which it believed to be achievable. (SDF ¶ 100.) For example, in September 2011, Steward introduced a proposal for quality metrics "based on year-over-year improvement at Landmark, as opposed to targets based on national averages." (Id.) At every turn, Blue Cross rejected Steward's proposals and refused to stray from its **[**11]** Quality Program's methodology.[8] (Id.)

Beyond the financial issues, Steward needed and wanted Blue Cross to be a "'willing partner.'" (Id. ¶ 88.) After all, the viability of Steward's proposed model turned on a "non-hostile relationship" with Blue Cross. (Id.) Although not expressly set out as an APA condition, everyone involved understood that an agreement with Blue Cross was essential for a successful **[*476]** contract over Landmark. (SDF ¶ 112.)

On August 6, 2012, negotiations being facilitated by the Attorney General came to an acrimonious stop when Steward's team walked away in response to what it viewed as an unproductive, obstinate negotiating approach by Blue Cross. (Id. ¶ 86.) Steward's decision to walk away was met with considerable anger because at the time, some viewed Steward as petulantly abandoning a process that so many people had invested in deeply.[9] Nonetheless, with some prodding, the parties reengaged. (SDF ¶ 87.)

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[7] The conditions with respect to Thundermist and SNERCC, however, were later omitted from the May 2011 APA and the first *seven amendments* to the APA. (SDF ¶ 82.)

[8] Such provisions were eventually included in the agreed-upon quality program between Blue Cross and Prime, which eventually acquired Landmark. (SDF ¶ 100.) Additionally, "Blue Cross made changes in its quality program for Prime that it had refused to make for Steward, including measuring certain quality metrics against Landmark's past performance and not against national averages." (Id. ¶ 101.)

[9] This ire was best reflected in a letter sent to Steward by the Attorney General. (SDF Ex. 207, ECF No. 204-10.) This letter was met with a fiery and pointed response from Dr. de la Torre, Steward's CEO, summarizing what Steward viewed as Blue Cross's bad faith tactics and the Attorney General's bias and intimidating behavior. (Def.'s Statement of Undisputed Facts ("SUF") Ex. 102, ECF No. 169-33.)

On September 4, 2012, Steward sent a letter to Justice Silverstein that offered two, alternative paths to finalizing the Landmark acquisition. (SDF ¶ 114.) One path consisted of "satisfying the three conditions, with or without an agreement with Blue Cross." (Id. **[**12]**) The other required an agreement with Blue Cross but waived the RISH and Thundermist conditions, and allowed Steward to "deal with SNERCC later." (Id.) A final mediation session with retired Chief Justice Frank Williams of the Rhode Island Supreme Court occurred on September 12, 2012. (Id. ¶ 89.) Alas, this mediation too was unsuccessful. (See id.) Steward publicly announced its decision to withdraw its Landmark bid on September 27, 2012. (Id.) Steward announced,

> In order to move forward with Steward's model of care several conditions needed to be met. These conditions were clearly spelled out in the Asset Purchase Agreement and accepted by the Court. These conditions have not been met. When we were notified that these conditions could not be met, we presented a second path by which we would waive two of these conditions. This alternate condition was also not met.

(Id. ¶ 117.) The difference between Steward's and Blue Cross's rate proposals is the subject of considerable dispute, but, as calculated by Steward, was $3 million. (See SDF ¶ 97.)

D. The "Red Team"

Blue Cross's Chief Financial Officer ("CFO") Michael Hudson, an individual involved in Steward negotiations from August to September 2012, spearheaded what Blue Cross called the "Red Team" in July 2012. (SDF ¶ 87.) The Red Team was a group of Blue Cross employees charged with identifying and analyzing potential competitive threats. (SDF ¶ 87; SAUF ¶ 142.) One of those employees was Linda Winfrey, an Assistant Vice President at Blue Cross responsible for gauging "risks to the enterprise up to and including disruption of services." (SDF ¶ 87.) AVP Winfrey had been considering these issues for **[**13]** Blue Cross since at least May 2012, when she circulated (and later presented at an executive leadership meeting) a document that highlighted Blue Cross's most pressing threats; at the top of that list was the "potential of new competitors entering the market including Accountable Care Organizations (ACO)," which could "result in significant enrollment losses and could negatively affect our long term viability as a health plan." (Id.) In a similar presentation in July 2012, "Competition in the Post-*PPACA* World," "ACO: Supplier Leverage" and "Limited Network Carrier (Steward/Fallon?)" were pinpointed as "new threats" with a high "likelihood of entry to RI market" and a substantial "adverse impact on BCBSRI." (Id.) AVP Winfrey also approved the idea of analyzing Steward's **[*477]** prospective threat in the first round of the Red Team's analysis. (Id.) In that analysis, the Red Team included "a map to show just how well positioned [Steward is] in the southeast part of MA . . . they have St. Anne's, Good Sam's, Morton, Norwood . . . they basically have RI bordered. Then Landmark would be the tip of the spear." (Id.)

Blue Cross expressed concern about ACOs and risk-based contracting, which could strip **[**14]** some or all of an insurance company's traditional functions, and the profits associated with insurance companies bearing risk. (See, e.g., SAUF ¶ 146; SAUF Ex. 35, ECF No. 177-36 at 12 ("[T]he possibility exists for the ACO to develop a level of integration that makes an outside insurer redundant"); Dep. of Dorothy Coleman ("Coleman Dep.") at 435:3-13, 437:18-438:5, SAUF Ex. 7, ECF No. 214-7 (highlighting risk that ACO might team up with an insurance company, which could severely test Blue Cross's relevance)). Blue Cross viewed these issues, referred to as "disintermediation," and the process of "providers becoming payers," as existential threats. (See SAUF ¶ 146.) Blue Cross CEO Peter Andruszkiewicz testified in his deposition that "disintermediation," i.e., "providers becoming payers" and "eliminat[ing] the intermediary known as the payer" "was a concern among my team, me, and every health insurance executive in the United States at this time frame." (Dep. of Peter Andruszkiewicz ("Andruszkiewicz Dep.") at 93, SAUF Ex. 6, ECF No. 214-6.) Likewise, Mark Waggoner, a member of Blue Cross's Executive Leadership Team ("ELT") and a key participant in Caritas discussions, recalled "discussion **[**15]** at Blue Cross at about this same time about the possibility that the ACO model or integrated delivery system could in some sense replace a conventional insurance company" because "you saw some of that happening in some parts of the country" and disintermediation was the "trend in [nationwide] conversations at that point in time." (Dep. of Mark Waggoner ("Waggoner Dep.") at 298, SAUF Ex. 11, ECF No. 214-11.)

The Red Team also analyzed other prospective scenarios, including one in which Prime entered Rhode Island. (SAUF ¶ 147; SAUF Ex. 37, ECF No. 177-38; SAUF Ex. 38, ECF No. 177-39.)

E. Blue Cross's Contract with Landmark

Under the *twelfth amendment* to Landmark's Hospital Participation Agreement with Blue Cross, the Landmark-Blue Cross contract was set to expire July 16, 2012. (SDF ¶ 102.) With negotiations faltering, on May 21, 2012, Blue Cross filed an application for a material modification with the Rhode Island Department of Health ("DOH"), which included draft notice letters informing Blue Cross's subscribers and providers that Landmark might go "out of network." (Id. ¶ 104.) Upon receipt of Blue Cross's material-modification application, the DOH informed Blue Cross that it should send "revised member **[**16]** and physician notification letters" detailing "that until the Department completes its review of this potential change and issues its determination, members will be able to continue to receive covered services at [Landmark and RHRI] at the in-network benefit level, if [the material modification] is not approved prior to the termination of the contract." (Id. ¶ 105.)

This material modification request sent shock waves through the receivership players. On July 2, 2012, Special Master Savage, noting the critical stage of negotiations between Steward and Blue Cross, sought a temporary restraining order ("TRO") from Justice Silverstein to stop Blue Cross from putting Landmark out of network and distributing the letters to subscribers and providers. The Superior **[*478]** Court denied the TRO on July 6, 2012; and on July 9, 2012, Blue Cross mailed letters to providers and subscribers explaining that Landmark might soon be "out of network."[10] (Id. ¶¶ 107-08.) On July 16, 2012, Blue Cross's contract with Landmark terminated; thereafter Blue Cross compensated subscribers directly for healthcare services provided at Landmark. (Id. ¶ 109.) Landmark remained out of network until August 31, 2012, when Blue **[**17]** Cross and Landmark agreed to extend the terms of their participation contract until three months after a buyer acquired the hospital. (Id. ¶ 110.) In agreeing to extend the Landmark contract with Blue Cross as part of a settlement approved by Justice Silverstein, the Special Master felt he had no choice but to bend to Blue Cross's will given the hopsital's precarious condition. With court approval, on September 12, 2012, Landmark was officially back in network. (Id.)

In June 2012, Blue Cross's contracting group considered the risks facing Blue Cross if it chose not to renew any of its contracts with various community hospitals, including Landmark. (SAUF ¶ 179.) Blue Cross knew that removing a hospital from its network could substantially cost Blue Cross because it would force its subscribers to access other, more expensive, in-network hospitals (such as Rhode Island Hospital, Miriam Hospital, or Women's & Infants Hospital). (Id.) Blue Cross also knew that without a contract, Landmark might be forced to close. (Id.) Steward suggests, and Court accepts as true for purposes of this motion, that "Blue Cross knew that the material modification process typically took 4-6 months, and that **[**18]** the cost of being out of contract with [Landmark/]Steward in advance of DOH approval would cost Blue Cross an estimated $3 million per month." (Id. ¶ 180.) Even without contemplating this cost, Steward adds, it would cost Blue Cross much more to remove Landmark from its network than "what Steward was then seeking in terms of reimbursement rate increases." (Id. ¶ 181.) Nevertheless, in spite of knowing full well the short term costs of its decision, Blue Cross concluded that the "path forward for Landmark was to 'hold our position since the material modification ha[d] already been filed.'" (Id.)

Steward states: "Despite the financial risk to Blue Cross of pursuing the material modification, Blue Cross' demands in exchange for a swift resolution on the material modification were those that it believed were necessary to end Steward's bid for the hospital. As Mike Hudson, Blue Cross' CFO and then lead negotiator with Steward explained, he was not going to even talk further with Steward until he learned whether Landmark accepted Blue Cross' terms, since those terms '[c]ould force Steward's hand — if they [Landmark] agreed to the contract, then Steward is likely out." (Id. ¶ 184.)

F. Blue **[**19]** Cross Reaches a Deal with Prime over Landmark

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[10] Although Blue Cross had from time to time filed paperwork to initiate the material-modification process during lagging negotiations with other hospitals, this move was unprecedented: "at no time before the Landmark situation had it ever sent out letters to subscribers and doctors alerting them that any other hospital was about to be out of network." (SAUF ¶ 175.) "Nor had Blue Cross ever before stopped payments to a hospital that was still officially 'in network' and instead directed payments to the subscribers, leaving to the hospital the difficult burden of collecting the monies due from the patients themselves." (Id. ¶ 176.)

Once Steward withdrew from the process, Prime[11] submitted a proposed APA for Landmark to the Special Master on **[*479]** September 26, 2012. (SDF ¶ 119.) After lengthy negotiations, Prime acquired Landmark on December 31, 2013. (Id. ¶¶ 122, 125.) The quality program Blue Cross reached with Prime included provisions that it would not accept when presented by Steward, namely evaluating Landmark "based on improvement in Landmark's performance against past performance" rather than national averages. (Compare SDF Ex. 195 at 6-7, ECF No. 203-16, and SDF Ex. 198 at 14, ECF 204-1 ("Blue Cross Blue Shield of Rhode Island Hospital Quality Program 2014") ("BCBSRI compares each hospital . . . to the threshold targets established using the national average results from a selected comparison measurement period . . . unless otherwise determined by contract."), with SDF Ex. 197 at 11, ECF No. 203-18 (Blue Cross and Prime agreement over Landmark) ("Both parties to establish mutually agreeable improvement targets based on Landmark's own baseline CY 2013 data . . . .")). Although Prime has succeeded to some degree in righting the ship for Landmark by increasing patient **[**20]** volume and revenue, (see SDF ¶ 127), it is hotly disputed whether Prime brought efficiency and innovation to Rhode Island through Landmark. (See id.; SDF Ex. 37 at 25, ECF No. 171-38 (noting Landmark's operating expenses under Prime increased from $109.3 million in 2013 to $130.6 million in 2015 and $130.4 million in 2016). Indeed, Prime has not developed an ACO, a significant physician network, or risk-based contracts. (See SAUF ¶ 197; Prime 30(b)(6) Dep. of Richard R. Charest ("Charest Dep.") at 74:10-76:5, 85:10-15, SAUF Ex. 14, ECF No. 214-14 ("We don't have risk-based contracts."); SAUF Ex. 102 at 3, ECF No. 215-27 (Jones of Thundermist recalling meeting with Prime CEO, where "it was clear to me that the Prime model does not consider health care efficiency as an overall goal.")). Although at Landmark now "[t]here's a nice piano in the entrance" and "[i]t's looking nicer," Prime has not made substantive improvements "in terms of quality or community partnership." (SAUF ¶ 201; Dep. of Charles "Chuck" Jones ("Jones Dep.") 286:18-287:4, SAUF Ex. 12, ECF No. 214-12.)

G. Procedural History

Steward filed its first complaint against Blue Cross on June 4, 2013, in which Steward alleged that **[**21]** Blue Cross's unilateral conduct violated *Section 2 of the Sherman Act* and *Section 6-36-5 of the Rhode Island Antitrust Act*. (Compl. ¶¶ 62-114, ECF No. 1.) On July 15, 2013, Blue Cross moved to dismiss Steward's complaint (ECF No. 16); this Court denied Blue Cross's motion on February 19, 2014 (ECF No. 34); see also *Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 997 F. Supp. 2d 142 (D.R.I. 2014)* ("Steward I"). Following the commencement of discovery, Steward filed an amended complaint on August 26, 2015, adding claims under *Section 1 of the Sherman Act*, suggesting Blue Cross's conduct was part of a conspiracy with Lifespan and Thundermist to keep Steward out of Rhode Island.

On July 14, 2017, Blue Cross moved for summary judgment on all counts of Steward's amended complaint. Steward filed a response in opposition (ECF No. 172) on August 11, 2017, to which Blue Cross replied (ECF No. 219) on August 25, 2017. The Court heard oral argument by the parties on September 26, 2017 (ECF No. 229). With a firm trial date approaching in January 2018, on November 29, 2017, the Court issued a Notice Regarding Defendant's Motion for Summary Judgment (ECF No. 338) indicating that it tentatively had decided to grant Blue Cross's summary-judgment **[*480]** motion on all counts, and cancelling the trial date. The Court noted **[**22]** that an Opinion and Order would be forthcoming. Since that Notice, the Court's assessment of Blue Cross's motion has evolved; this Opinion and Order sets forth the reasons for the Court's determination that summary judgment should be denied.

II. Legal Standard

HN1[] Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 832 F.3d 1, 7 (1st Cir. 2016)* (quoting *Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*. The Court "draws all

[11] With forty-four hospitals and 43,500 employees, in fourteen states, Prime has substantial experience in the business of reviving distressed hospitals. (SDF ¶ 120.)

reasonable inferences in favor of the non-moving party while ignoring conclusory allegations, improbable inferences, and unsupported speculation." Id. (quoting *Alicea v. Machete Music, 744 F.3d 773, 778 (1st Cir. 2014))*.

HN2[] The onus is on the moving party to demonstrate that no genuine dispute of material fact exists. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "Once the moving party makes this showing, the nonmoving party must point to specific facts demonstrating a trialworthy issue." *United States v. Giordano, 898 F. Supp. 2d 440, 447 (D.R.I. 2012)*. Rather than rest "upon the mere allegations or denials in the pleading," the nonmovant "must set forth specific facts showing that there is a genuine issue of material fact as to each issue upon which **[**23]** [it] would bear the ultimate burden of proof at trial." *Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 53 (1st Cir. 2000)*. "[E]vidence illustrating the factual controversy cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve at an ensuing trial." *Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989)*.

III. Discussion

A. The Refusal-To-Deal Claim (Counts I, II, V, VI, IX, X, XIII, and XIV)[12]

In 1980, Judge Keith of the Sixth Circuit Court of Appeals complained that the question of when "a monopolist ha[s] a duty to deal . . . is one of the most unsettled and vexatious in the antitrust field." *Byars v. Bluff City News Co., 609 F.2d 843, 846 (6th Cir. 1980)*. Although nearly forty years of ink has spilled on the topic - including the Supreme Court's - Judge Keith's lament is as apt today as it was when Jimmy Carter was President.[13] As **[*481]** one commentator succinctly put it, "There is a problem with *Section 2* of the Sherman Act: nobody knows what it means." Thomas A. Lambert, Defining Unreasonably Exclusionary Conduct: The "Exclusion of a Competitive Rival" Approach, *92 N.C. L. Rev. 1175, 1177 (2014)*. Nevertheless, this Court must resolve the difficult (and admittedly close) Sherman Act *section 2* question posed by this case: has Steward raised a triable issue as to whether Blue Cross engaged in a predatory refusal to deal **[**24]** by blocking Steward from entry into the Rhode Island health care and health insurance markets? While the question is close - and indeed the Court was initially inclined to grant summary judgment - careful consideration of the case law, facts, and the applicable antitrust policy objectives, has convinced the Court that the answer is yes, and therefore Blue Cross's motion must be denied.

HN5[] *Section 2* of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations." *15 U.S.C. § 2*. "The elements of monopolization are '(1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[14] *Díaz Aviation Corp. v. Airport Aviation Servs., 716 F.3d 256, 265 (1st Cir.*

[12] To the extent that Steward asserts claims under the Rhode Island Antitrust Act, as opposed to the *Sherman Act*, this Court, like the parties, analyzes the claims together, here and throughout this Opinion (including Steward's conspiracy claims). See *R.I. Gen. Laws § 6-36-2(b)*; *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 239 F. Supp. 2d 180, 186-87 (D.R.I. 2003)* (***HN3***[] "The provisions of the *Rhode Island Antitrust Act* mirror those of *§§ 1-2* of the Sherman Act . . . and are construed in the same manner as the federal statutes."). For similar reasons, the Court likewise does not separate out Steward's monopsonization and attempted monopsonization claims from Steward's monopolization and attempted monopolization claims. See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320-22, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)* (***HN4***[] "The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization.").

[13] Indeed, one recent law review article recounts various descriptions for the standard to discern exclusionary conduct in a manner that this Court can appreciate. See Katharine Kemp, A Unifying Standard for Monopolization: "Objective Anticompetitive Purpose", 39 Hous. J. Int'l L. 113, 115 (2017) ("The standards applicable to the second element, exclusionary conduct, have been variously described as 'vacuous,' 'uncertain,' 'elusive,' 'unclear,' 'unsettled,' 'oxymoronic,' 'in substantial disarray,' 'in dire need of correction,' and plagued by 'serious definitional inadequacies.'" (citations omitted)).

[14] Blue Cross's monopoly power - which is "typically proven by defining a relevant market and showing that the defendant has a dominant share of that market" - has been assumed by the parties for purposes of this motion. *Díaz Aviation Corp. v. Airport*

2013) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)). **HN6**[] "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal **[**25]** . . . ."[15] United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919). "However, '[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.'" Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)). That is, "[u]nder certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2." Id.; see also Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448, 129 **[*482]** S. Ct. 1109, 172 L. Ed. 2d 836 (2009) ("[T]here are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct.").

The two leading cases in this area - Aspen Skiing and Trinko - are well-known, often-cited, and require detailed discussion. Aspen Skiing involved the Aspen ski area, which comprised four distinct mountains. The defendant owned three mountain areas, and the plaintiff owned the fourth. For more than fifteen years, the parties had arranged to issue a joint-ski pass for access to all four mountains. So when the defendant suddenly terminated the joint-ski-pass agreement, the plaintiff - concerned that skiers would no longer frequent its mountain without a joint-ski pass available - "tried a variety of increasingly desperate measures to re-create the joint ticket, even to the point of in effect offering to buy the defendant's **[**26]** tickets at retail price." Trinko, 540 U.S. at 408-09 (citing Aspen Skiing, 472 U.S. at 593-94). The defendant steadfastly refused to recreate the joint-ski-pass arrangement. Aspen Skiing, 472 U.S. at 594. The issue before the Aspen Skiing Court was whether defendant Ski Co., in terminating its four-mountain ticket with plaintiff Highlands, was "attempting to exclude rivals on some basis other than efficiency." Id. at 605. The Court concluded that there was sufficient evidence to suggest that the defendant "was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," and therefore upheld a jury verdict for the plaintiff. Id. at 610-11.

Several years later, in Trinko, the Court reconsidered Aspen Skiing and distinguished it. 540 U.S. at 408-11. Trinko involved firms regulated under the Telecommunications Act of 1996, which required that incumbent local exchange carriers ("ILECs"), like defendant Verizon, share (i.e., "unbundle") aspects of its network with prospective entrants, competitive local exchange carriers ("CLECs"). 540 U.S. at 402. The plaintiff lodged a class action pursuant to § 2 on behalf of CLECs, which complained that Verizon filled rivals' orders in a slow and discriminatory manner so as to **[**27]** discourage customers from choosing its competitors' services. Id. at 404-05. The Court held that the facts of Trinko were not comparable to those in Aspen Skiing. Id. at 408-11. In doing so, it noted that the Aspen Skiing Court "found significance in the defendant's decision to cease participation in a cooperative venture," adding that the "unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." "Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent." Id. at 409.

Both Aspen Skiing and Trinko provide significant guidance on what a refusal-to-deal claim might (Aspen Skiing) - or might not (Trinko) - look like. But neither dictated what such a claim must look like. As this Court reads these cases, they do not specify granular factual predicates that must be present for a refusal-to-deal claim to move forward; rather, the Supreme Court identified facts that, in the circumstances of each case, pointed toward conduct that may or may not be characterized as "exclusionary" or "anticompetitive." Aspen Skiing, 472 U.S. at 603-04. In Aspen

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Aviation Servs., 716 F.3d 256, 265 (1st Cir. 2013) (citing Coastal Fuels of P.R., Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 196-97 (1st Cir. 1996)).

[15] The Supreme Court in Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004) quoted this passage from United States v. Colgate & Co. but left out the key qualifying language, "In the absence of any purpose to create or maintain a monopoly[.]" 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919). Although this omission perhaps reflects the Supreme Court's narrowing of Section 2 liability in Trinko, the qualifying language in Colgate has never been countermanded and appears to remain the standard.

Skiing, the Supreme Court concluded **[**28]** "Ski Co.'s decision to terminate the all-Aspen ticket" could "fairly be characterized as exclusionary . . . ." *472 U.S. at 604*. When the Court discussed **[*483]** and distinguished Aspen Skiing in Trinko, it noted that "[t]he Court there found significance in the defendant's decision to cease participation in a cooperative venture." *540 U.S. at 409* (citing *472 U.S. at 608, 610-11)*; the Court added, "[t]he unilateral termination of a voluntary . . . course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." Id. (emphasis added); and finally, "the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent." Id. (second emphasis added). The Court's descriptive, provisional language makes clear that it regarded Aspen Skiing as a paradigmatic example of - not a paint-by-numbers kit for - unlawful refusals to deal. See *Trinko, 540 U.S. at 411* ("Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.").

Much of the confusion over Aspen Skiing and Trinko results from courts of appeals that either misread or deliberately extend the holdings of these cases, construing them in a rigid fashion to require, for **[**29]** example, an explicit prior course of dealing.[16] See, e.g., *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1074 (10th Cir. 2013)* ("First, as in Aspen, there must be a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival.") (emphasis added); *In re Elevator Antitrust Litig., 502 F.3d 47, 52 (2d Cir. 2007)* (requiring "alleg[ation] that defendants terminated any prior course of dealing" as "the sole exception to the broad right of a firm to refuse to deal with its competitors"); *Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004)* ("Trinko now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under Aspen."). Novell (authored by now-Justice Gorsuch) and In re Elevator Antitrust Litigation, in particular, use emphatic language to describe the "mandatory" holding of Trinko; Covad uses less strident words ("effectively makes . . . unilateral termination . . . a requirement"). But without sugar-coating it, Aspen Skiing and Trinko just do not say what these courts say they do. And while there may be antitrust policy reasons that support pulling back the reins on refusal-to-deal claims, it is up to the Supreme Court to take this step. Until then, Aspen Skiing and Trinko, in this Court's view, should be applied as written, in concert with the instructive holdings **[**30]** of the First Circuit.[17]

The First Circuit has not had occasion to interpret Trinko, but what it has said about Aspen Skiing is instructive. ***HN7***[] In Data General Corp. v. Grumman Sys. Support Corp., the court interpreted Aspen Skiing as "casting serious doubt on the proposition **[*484]** that the Court has adopted any single rule or formula for determining when a unilateral refusal to deal is unlawful." *36 F.3d 1147, 1183 (1st Cir. 1994)*, abrogated on other grounds by *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)*. Indeed, the court recognized that under Aspen Skiing "a monopolist's unilateral refusal to deal" may arise "in . . . very different situation[s]." Id.

Other Courts have likewise acknowledged that refusal-to-deal law generally - and Aspen Skiing and Trinko specifically - is concerned with harm to competition without a valid business justification, which can manifest itself in myriad ways. See, e.g., *In re Thalomid & Revlimid Antitrust Litig., No. 14-6997 (KSH) (CLW), 2015 U.S. Dist. LEXIS 177541, 2015 WL 9589217, at *15 (D.N.J. Oct. 29, 2015)* ("[The defendant] reads Aspen Skiing and Trinko too narrowly. The termination of the dealing between Ski Co. and Highlands was used as circumstantial evidence of Ski Co.'s demonstrated anticompetitive motivation, along with its lack of legitimate business justifications for doing so."); *Helicopter Transp. Servs. v. Erickson Air-Crane, Inc., No. CV 06-3077-PA, 2008 U.S. Dist. LEXIS 3466, 2008 WL*

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[16] Indeed, at the motion-to-dismiss stage, this Court may well have implied that Steward must meet what the Court described as the "baseline requirements" of a refusal-to-deal claim: the "unilateral abandonment of a voluntary course of dealing, forsaking of short-term profits, refusal to transact business with the plaintiff even if compensated at rates set by the defendant, and concomitant inability to provide a legitimate business rationale . . . ." *Steward I, 997 F. Supp. 2d at 153*. After a more careful review of the cases, however, the Court is of the view that to require, without exception, each of these factors to make out a refusal-to-deal claim (as Blue Cross would have it) is to misconstrue Aspen Skiing and Trinko.

[17] A policy reason against requiring the termination of a prior course of dealing is that to do so would be to discourage new, mutually beneficial market arrangements, thereby entrenching the status quo. See *Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986)* (Posner, J.) ("[T]he law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation.").

151833, at *9 (D. Or. Jan. 14, 2008) **[**31]** ("That Erickson and HTS had no prior course of dealing is immaterial. The Supreme Court has never held that termination of a preexisting course of dealing is a necessary element of an antitrust claim. It was merely one of several facts in Aspen Skiing that supported a finding that the refusal to deal was intended to exclude competition rather than to advance a legitimate business interest.").[18]

The question this Court must decide on summary judgment, then, is whether a genuine and material factual dispute exists as to whether Blue Cross's conduct, which Steward characterizes as a unilateral refusal to deal with Steward, amounts to illegal exclusionary conduct as opposed to lawful, vigorous competition. Data General provides a rubric to assess this question. There, ***HN8***[] the court set forth a burden-shifting framework that requires a plaintiff to prove a prima facie case that includes showing "a monopolist's **[**32]** unilateral refusal to deal with its competitors (as long as the refusal harms the competitive process)." *Data General, 36 F.3d at 1183*. Once proved, the monopolist "may nevertheless rebut such evidence by establishing a valid business justification for its conduct."[19] *Id. at 1183*. The court added:

> **[*485]** In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not. In essence, a unilateral refusal to deal is prima facie exclusionary if there is evidence of harm to the competitive process; a valid business justification requires proof of countervailing benefits to the competitive process.

Id. (internal citations omitted).

Blue Cross has not structured its summary judgment argument to correspond to the Data General burden shifting rubric; it has instead directed its argument almost exclusively at Steward's theory at the prima-facie stage, while peppering its argument here and there with legitimate business reasons for its behavior. Likewise, **[**33]** the Court will not attempt to frame its analysis along a strict Data General framework, but will deal with the arguments, essentially as presented by Blue Cross. The bottom line is that the evidence Steward has presented meets its prima facie burden, and Blue Cross's claim of legitimate business reasons - to the extent the Court can identify them[20] - is sufficiently rebutted by Steward.

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[18] Indeed, commentators more-or-less agree that the Supreme Court has chosen not to enunciate an all-encompassing framework for refusal-to-deal liability. See, e.g., James A. Keyte, The Ripple Effects of Trinko: How It Is Affecting *Section 2* Analysis, 20 Antitrust 44, 49 (Fall 2005) ("Lower courts . . . have not read Trinko as even attempting to construct a generalized predation test or endorsing any particular analysis . . . ."); Robert A. Skitol, Three Years After Verizon v. Trinko: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law, 6 Antitrust Source 1, 1 (2007) ("Today, after more than three years of experience with lower courts' applications of the Court's ruling, Trinko has proven to be among the least satisfactory antitrust opinions of the Supreme Court in the past three decades. It has unsettled more than it has settled; made the law less rather than more predictable; and exacerbated more than resolved the most contentious controversies in monopolization and attempted monopolization cases."); Edward D. Cavanagh, Trinko: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?, *59 Me. L. Rev. 111, 126 (2007)* ("The question of when non-price exclusionary behavior by a monopolist is unlawful is complex. The Court in Trinko chose not to articulate a bright-line rule.").

[19] The D.C. Circuit Court of Appeals endorsed a similar burden-shifting framework in *United States v. Microsoft Corp., 253 F.3d 34, 58-59, 346 U.S. App. D.C. 330 (D.C. Cir. 2001)*. There, recognizing the difficulty in "stating a general rule between exclusionary acts, which reduce social welfare, and anticompetitive acts, which increase it," the court laid out a five-step framework to decide "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition." *Id. at 58-59*. The Microsoft five-step framework, while not binding, may be useful at trial in framing instructions for the jury.

[20] Blue Cross's argument rests primarily upon a theory that it did not, as a matter of law, refuse to deal with Steward in violation of *Section 2*. Its legal argument is incorrect for the reasons explained.

Aspen Skiing and Trinko, properly read, provide useful guidance as to whether Blue Cross's conduct amounted to a refusal to deal motivated by anticompetitive animus. While the indicators of anticompetitive animus here vary somewhat from what the Supreme Court identified in *Aspen Skiing* and *Trinko*, those differences are reflective of the very different marketplaces at issue (healthcare and health insurance as opposed to ski resorts and regulated telecommunications). Potentially anticompetitive behavior by market participants is bound to manifest itself differently in different markets. See *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466-67, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***.").

Here, Steward sets forth an abundance of evidence that points toward a "distinctly **[**34]** anticompetitive bent," which could in turn persuade a reasonable jury that Blue Cross unlawfully monopolized the relevant markets by excluding Steward from Rhode Island.

Some of the evidence that supports Steward's theory, viewed in the light most favorable to Steward, is as follows.[21] The first category of evidence that points toward exclusionary conduct concerns Blue Cross's conduct with respect to Landmark itself and whether Blue Cross terminated its prior course of dealing with Landmark to keep Steward out of Rhode Island. The evidence suggests that Blue Cross terminated a longstanding, presumably profitable course of dealing with Landmark in order to block Steward. It is of no consequence **[*486]** that Blue Cross did not have or terminate a prior course of dealing directly with Steward at Landmark, for the reasons discussed above; the critical question is how Blue Cross dealt with Landmark in the context of the effort by Steward to purchase it.

It is undisputed that Blue Cross and Landmark entered into a hospital-participation agreement in 2006, which had been routinely extended multiple times. (SDF ¶ 57.) That all ended when Blue Cross allowed its contract with Landmark to expire on July **[**35]** 16, 2012. (See id. ¶¶ 102, 109.) In May 2012, while in the midst of difficult negotiations with Steward in connection with Steward's bid to acquire Landmark through the receivership, Blue Cross filed the necessary papers with the DOH for a "material modification" - i.e., official permission to remove Landmark from its provider network. (SDF ¶ 104; SDF Ex. 202, ECF No. 212-45.) This step was not necessarily unusual, as Blue Cross had, on other occasions, taken steps to institute the material modification process with the DOH when negotiations with other hospitals stalled. (SAUF ¶ 175.) Blue Cross, however, did not stop there. Although it had not yet received DOH approval, on July 9, 2012, Blue Cross informed subscribers via letter that the Landmark contract would expire on July 16, and "[i]f the [DOH] approves the network change, Landmark Medical Center will be considered out of network on August 1, 2012 . . . ." (SAUF Ex. 84 at 2, ECF No. 215-9.) Blue Cross added, "Despite our continued efforts to resolve the current situation, we feel it's important to notify our members that a resolution is doubtful at this time." (Id.)

Never before had Blue Cross mailed a letter to doctors and subscribers **[**36]** notifying them of the immediate and impending removal of a member hospital from its network. To be clear, it was not just the notification that was remarkable; never before or since has Blue Cross kept true to its initial material modification application promise by actually allowing a hospital to go "out of network."[22]

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[21] As with the factual background presented at the outset of the Opinion, this review of Steward's evidence is not intended to be exhaustive. Rather, it simply highlights a sample of Steward's factual presentation, which is sufficient under *Rule 56* to raise a genuine and material factual dispute requiring a trial.

[22] Deposition testimony of Blue Cross employees is enlightening. Blue Cross's CFO Michael Hudson testified:

> Q. Has it been Blue Cross's experience that when it sends out letters announcing that hospitals are going to be out of network after a certain date, that those letters have no impact on usage of the hospital?
>
> A. I don't have data that indicate that one way or the other. I would say that the point is, no hospital's ever been out of network. . . . But in the time I was there, with no hospital that I was aware of, nor any, you know, significant medical group have they ever actually gone nonparticipating.
>
> . . .

The consequences of Blue Cross permitting a hospital to - for the first time ever - go "nonparticipating," and of sending a letter to members about it were significant; so significant, in fact, that the Special Master tried to put a halt to it and to extend Blue Cross's contract with Landmark. (SDF ¶ 103; SDF Ex. 90, ECF No. 210-2; SDF Ex. 219, ECF No. 213-14.) On July 2, 2012, the Special Master moved for **[*487]** an emergency TRO "to preserve the status quo by restraining Blue Cross . . . from notifying subscribers or the public that it has filed a request for material modification of health insurance plans in order to remove Landmark Medical Center . . . from its provider network." (SAUF ¶ 177; SAUF Ex. 83 at 3, ECF No. 215-8.) In that filing, the Special Master argued that, "[s]ending a letter to subscribers and providers notifying them that LMC and RHRI will be out-of-network providers after August 6, 2012 is premature and very likely misleading and inaccurate. . . . [g]iven the hurdles that Blue Cross must overcome to obtain DOH approval and such additional federal **[**38]** approvals that may be needed." (SAUF Ex. 83 at 5-6.) He added, "Injunctive relief is further warranted to protect Landmark, patients and physicians from the chaos and confusion that will result from a letter that incorrectly advises them that [Landmark] and RHRI will be out-of-network providers as of August 6, 2012."[23] (Id. at 9.)

Blue Cross's conduct in removing Landmark from its network and prematurely notifying subscribers about such a possibility strayed far from its ordinary course of dealing with Landmark, or any other hospital for that matter. A reasonable jury could conclude that Blue Cross's uniquely hard-core approach with respect to Landmark, just as negotiations with Steward were at a critical stage, was not a legitimate business decision, but was designed to kill the Steward acquisition. Indeed, Blue Cross itself implicitly recognized this in its application for material modification to the DOH: "Despite our best efforts to provide Steward with a fair and reasonable rate . . . we are concerned that we may not be able to come to an agreement with Steward . . . . If we are not able to come to agreement with Steward by [July 16, 2012], Landmark will then become non-participating in **[**39]** the BCBSRI network." (SDF Ex. 202 at 2.)[24] It is undisputed that Landmark remained out of network until August 31, 2012, at which point the Special Master and Blue Cross agreed to extend the terms of the hospital participation contract until three months after a buyer acquired Landmark. (SDF ¶ 110.) The Special Master agreed to this settlement, however, only because Landmark's condition once removed from network left him no other choice but to accept whatever terms Blue Cross demanded. (SDF Ex. 205 at 3, 4, ECF No. 204-8 (in Special Master's emergency petition to superior court for instructions on September 6, 2012, explaining that Landmark going out of network caused "the cash receipts of Landmark" to "decline[] precipitously" and "a substantial loss of patients" and "The Special Master believes that the very survival of Landmark and RHRI is at stake and that he had no other alternative but to execute

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> Q. Can you remember any other occasion during your tenure at Blue Cross where, with respect to one of the hospitals in Rhode Island, you sent out letters to people saying, On such-and-such a date, Westerly or South County or whoever it might be, is going to be out of network?
>
> A. Not in the time I worked there.

(Dep. of Michael Hudson ("Hudson Dep.") 146:2-16, 148:4-10, SAUF Ex. 9, ECF No. 214-9.)

And Shawn Donahue, Blue Cross's Director of Government Relations, had a consistent recollection:

> Q. So since 2012, has Blue Cross sent out letters to members **[**37]** informing them that a hospital will be removed from its network?
>
> A. . . . I don't recall that I'm aware of any such letters.

(Dep. of Shawn Richard Donahue ("Donahue Dep.") at 310:5-9, SAUF Ex. 8, ECF No. 214-8.)

[23] It is of little consequence that Justice Silverstein did not grant the TRO; the important point is that the Special Master perceived this move by Blue Cross as a potentially catastrophic economic event.

[24] Other evidence the jury may have to consider includes the Attorney General's comment to Steward officials at a negotiation session that, Blue Cross "just do[es]n't want you to do business in this state." (SDF ¶ 86 (quoting Dep. of Joseph Maher at 182:21-183:17, SDF Ex. 7, ECF No. 206-7; see also Dep. of Ralph de la Torre at 167:17-23, SDF Ex. 1, ECF No. 206-1 ("The message is Blue Cross is going to do anything to keep you out. They literally cut off funds to a hospital that is going bankrupt, and the Special Master is powerless to change it. The judge, he's kind of there, kind of not. It's another body shouting a clear message that, 'They just don't want you.'").

the MOU on the conditions imposed by Blue Cross . . . ."); Dep. of Jonathan N. Savage at 143:4-5, SDF Ex. 28, ECF No. 206-28 (Special Master describing his agreement to Blue Cross's **[*488]** MOU as "an absolute and total capitulation" to Blue Cross's terms)).

Blue Cross knew how its demands **[**40]** could impact Steward. As Blue Cross CFO (and then-lead negotiator) Mike Hudson made clear in an email leading up to Landmark moving back in network and in the midst of the Blue Cross-Steward negotiations: "Landmark asked the judge to have us pay them instead of the member and was willing to accept the prior contracted rates. . . . Could force Steward's hand - if [Landmark] agree[s] to the contract, then Steward is likely out." (SDF Ex. 91, ECF No. 210-3.) And it appears that's precisely what happened.

Next, and perhaps most importantly, Steward presents plethora evidence that Blue Cross sacrificed short-term profits for the longer-term benefit of eradicating potential competition from Steward. For example, in June 2012, Blue Cross conducted a "Contract Renewal Risk Analysis & Strategic Assessment," in which it "identif[ied] and weigh[ed] the risks to BCBSRI and [its] members associated with the failure to reach agreement [with] four community hospitals currently in negotiation" including Landmark.[25] (SAUF Ex. 71 at 2-3, ECF No. 214-71.) Blue Cross identified a number of financial "risks" in the event of non-renewal or termination of a community-hospital contract, including "[f]inancial **[**41]** exposure of non-participation status and flow of services to other entities." (Id. at 3.) These financial exposure risks included: (1) "payment to full charge exposure upon non-participation," i.e., having to pay hospitals at regular, undiscounted rates for patients who still used the now out-of-network hospital; and (2) the cost of "moving services to higher cost hospitals," i.e., having to pay higher reimbursement rates at the other in-contract hospitals where subscribers would now seek care because Blue Cross removed their previous top-choice hospital from the network. (Id.) This latter category was most potentially impactful because, Blue Cross recognized, "[a]ll" of the four community hospitals with contracts set to expire in 2012 (including Landmark) "are in dire financial trouble and all are likely to fail if their BCBSRI agreement is not renewed." (Id.)

In its internal analysis, Blue Cross calculated exactly how much it would cost to pay the reimbursement rate increases Steward was seeking (i.e., the "[p]osition [v]ariance based on current [negotiation] positions") and compared it to how much it would cost to allow Landmark to go out of network, and likely shut its doors. (Id. at 4-5.) Blue Cross **[**42]** estimated that Landmark going out of network and/or closing would cost Blue Cross $9.8 million. (Id. at 5.) This exceeded by over $4 million the amount Blue Cross estimated it would lose if it accepted the rate increases proposed by Steward for Landmark, which would cost $5.4 million.[26] (Id. at 4.)

In one presentation slide titled "Risk Factors Integrated View," Blue Cross uses a graphic to assess and value the various "risk factors" for each of the four community **[*489]** hospitals, assigning each risk factor a value between one and four points. (Id. at 8.) In the "Financial Impact" category evaluated by Blue Cross, Landmark was the only hospital of the four to receive a full four points. (Id.) With respect to the three other community hospitals, Blue Cross assessed that "[b]ecause of [the] significant risk," it would consider additional rate increases and work toward achieving contracts to keep these hospitals in network. (See id. at 9.) Despite identifying an out of contract or closed Landmark as its most serious risk, Blue Cross elected to stay the course: "We recommend that we continue to hold our position with Landmark since the material modification has already been filed." (Id.) Blue Cross had on occasion before filed **[**43]** papers to initiate material modification for negotiation leverage when discussions with other hospitals lagged, but in those instances Blue Cross always reached an agreement before taking the extreme and unusual step of announcing to its members that a hospital would be out-of-network and allowing a contract to terminate. (See SAUF ¶ 175; Hudson Dep. at 146:21-148:16, SAUF Ex. 9; Donahue Dep. 310:2-13, SAUF Ex. 8

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[25] The objective of this assessment by Blue Cross was to "provide recommendations taking into account the relevant considerations and how best to strategically proceed." (SAUF Ex. 71 at 3, ECF No. 214-71.)

[26] And, Steward contends there is more. This loss does not include the pre-material modification costs estimated to be $3 million per month, over a period of four to six months. (SAUF ¶ 180; SAUF Ex. 71; Dep. of Mark Waggoner at 184:12-185:3, SAUF Ex. 11, ECF No. 214-11.). Notably, even Blue Cross's estimate that Steward's proposal would cost $5.4 million is disputed. Steward suggests it would have cost $3 million, (see SDF ¶ 97; DSUF Ex. 102, ECF No. 169-33 (de la Torre letter to Attorney General)), which, if true, would make this loss even greater.

("There's been contentious negotiations adversarial, but they generally get resolved before they get to this phase.")).

This evidence more than suffices to create a trial-worthy issue as to whether Blue Cross sacrificed short-term profits (by letting the Landmark contract lapse) for the long-term benefit of keeping Steward out of Rhode Island. And if more were needed, which it is not, Steward's experts confirm this point. (See SAUF ¶ 182; Expert Report of Professor Leemore Dafny, SAUF Ex. 22 at 13, ECF No. 214-22 ("[T]hese analyses corroborate BCBSRI's contemporary analyses showing that rejecting Steward's offers was costly to BCBSRI.")).

Steward also presents evidence to suggest that the proposals made and rejected by Blue Cross amounted to a refusal to deal, because Blue Cross **[**44]** negotiated in bad-faith. This evidence is complicated in light of what both parties acknowledge is the "complex and highly differentiated" aspect of hospital services, (see Def.'s Mem. in Supp. of Mot. for Summ. J. ("Def.'s Mem.") 29, ECF No. 157); Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. ("Pls.' Resp.") 32, ECF No. 172-1); but Blue Cross cannot hide behind this complexity to escape the material factual disputes that Steward has effectively uncovered. For present purposes, the Court need not decide the proper methodology to assess appropriate hospital reimbursement rates (indeed, both parties have different takes on this subject, which itself suggests it is a matter for trial). It is sufficient that Steward has sufficiently created a factual dispute as to whether Blue Cross refused to deal with Steward over Landmark by proposing rates below the averages it paid to other Rhode Island hospitals, and rejecting proposals consistent with what it accepted for other hospitals, essentially negotiating in bad faith with Steward.

The evidence Steward sets forth is as follows. It is not disputed that Blue Cross pays a range of reimbursement rates to various hospitals in Rhode Island. In **[**45]** 2010 when Caritas (Steward's predecessor) first attempted to acquire Landmark, an OHIC study titled "Variations in Hospital Payment Rates by Commercial Insurers in Rhode Island" reported that the rates paid to Landmark were twenty-two percent below the average for all Rhode Island hospitals, and even farther below the rates that some Lifespan and CNE-affiliated hospitals received. (SDF Ex. 67 at 16 & Fig. 10, ECF No. 208-11.) Steward argues the highest rate increase it proposed to Blue Cross (in May 2012) was for Landmark to be reimbursed at ninety-five percent of the average Blue Cross paid to all hospitals in Rhode Island, with an option to receive an **[*490]** additional five percent based on quality, which practically amounted to about a fifteen percent rate increase.[27] (See SAUF Ex. 106, ECF No. 215-31; SAUF ¶ 203.) What is important is that Steward has produced evidence that it proposed reimbursement rates for Landmark at a level lower than what Blue Cross was paying other hospitals (based on averaging the rates).

Blue Cross argues that "the undisputed evidence shows that the rates Blue Cross offered Steward at Landmark were higher than the rates Blue Cross paid comparable hospitals for **[**46]** comparable services." (Def.'s Mem. 29-30.) At summary judgment this Court need not accept at face value what Blue Cross contends are the appropriate hospital comparators. Indeed, Blue Cross undermines its own position on this point in its brief: after suggesting what the proper hospital-rate comparison should be, i.e., which hospitals Landmark can and cannot be compared to for calculating reimbursement rates, in other parts of its brief it argues that because hospital services are so different, no two hospitals can really be compared for these purposes at all. (See id.) Then, remarkably, Blue Cross pivots again to argue that the appropriate comparison is actually between Steward and Prime, the entity that ultimately acquired Landmark.[28] (See, e.g., id. at 34.)

Regardless of what it now asserts for purposes of this motion, Blue Cross's own evidence and analysis supports the premise that Blue Cross had been comparing Landmark to other hospitals - including Lifespan and CNE hospitals that Blue Cross more generously reimbursed - because patients would be leaving Landmark for those hospitals upon Landmark's closure. (See, e.g., SAUF Ex. 71.) The upshot is that, at trial, Steward and Blue Cross will **[**47]** have the opportunity to argue which hospitals Landmark should and should not properly be compared to for rate-

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[27] Steward also offered Blue Cross a lower rate increase for Landmark of 7.4% per year for two years, to be offset by significant reductions in Blue Cross's payments to Steward's St. Anne's hospital. (See SDF Ex. 157 at 5, ECF No. 199-12.)

[28] Blue Cross may ultimately be correct that the terms on which it eventually agreed with Prime are relevant for some purpose at trial, but the Court need not decide that question on this motion.

increase purposes. While Blue Cross's view of this world of rate setting may ultimately persuade a jury that it was operating in good faith and not refusing to deal, summary judgment is not appropriate.

Although the Court is satisfied that the above discussion explains why Steward's refusal-to-deal claim must advance to trial, Blue Cross has raised several additional arguments to rebut Steward's *Section 2* claim. None of these arguments change the outcome.

First, Blue Cross argues that it could not have refused to deal because "it was Steward that walked away from negotiations and refused to deal." (Def.'s Mem. 17.) As a matter of law, it does not matter that Steward "walked away" from the negotiating table, if Blue Cross made an offer that it knew could not be accepted. See *MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132-33 (9th Cir. 2004)* (***HN9***[] "An offer to deal with a competitor only on unreasonable terms and conditions can amount to a practical refusal to deal."). Blue Cross's own belief in its good faith and its suggestion that it invested "enormous effort to try to get a deal done with Steward at Landmark," (Def.'s Mem. 20), is not dispositive at summary **[**48]** judgment; the record contains sufficient evidence from which a reasonable juror could conclude otherwise, i.e., that Blue Cross was moving backwards in negotiations with **[*491]** Steward, including imposing knowingly unattainable quality metrics on Steward. Specifically, Steward contends that Blue Cross responded to Steward's proposals with counter-proposals that moved backwards then requested a response, effectively attempting to force Steward to bargain against itself. (See, e.g., SDF Ex. 155, ECF No. 211-12; SDF Ex. 179, ECF No. 212-22; SDF Ex. 180, ECF No. 212-23; see also Rich Dep. 193:24-194:6, SDF Ex. 11, ECF No. 206-11 ("I think this is part of the fundamental problem in Mark [Waggoner's] email, his last sentence. . . . 'We welcome a proposal.' We had already bid. They gave us a bid that was effectively lower, and they're asking us for a counter, what we believe to be [bargaining] against ourselves."). Next, Steward cites comments by Andruszkiewicz in an August 6, 2012 Providence Business News article, indicating that Blue Cross might offer a "limited-network" product that could exclude certain hospitals, including Landmark. (See SDF Ex. 181, ECF No. 212-24.) And finally, Steward points **[**49]** to an email from Mark Hudson of Blue Cross to Mark Rich of Steward - both lead negotiators for the respective entities - in which Hudson writes,

> You reiterated your demand that Landmark be included in all BCBSRI products, including those that may have a limited or tiered network. In the event BCBSRI offers products with tiers in the future, the tiers will be determined based on cost and quality. Granting preferred status to providers who otherwise wouldn't qualify would impair the quality of any tiered product, especially when granting such status was made to an organization that refuses to participate in quality improvement initiatives.

(SDF Ex. 182 at 3, ECF No. 212-25.) A jury will have to decide if this was, as Steward contends, bad faith, backward negotiations, or as Blue Cross says, just good business.

Next, Blue Cross argues that in order for Steward's claim to move forward, this Court must "impose on a state-regulated insurer a novel antitrust duty to purchase hospital services." (Def.'s Mem. 34.) In suggesting that Steward's legal theory is "unprecedented," Blue Cross argues that "Steward asks this Court to find that Blue Cross had an antitrust duty to accept particular reimbursement **[**50]** rates proposed by the acquirer of a failing Rhode Island hospital." (Id. at 35.) This is melodrama, as are Blue Cross's unsubstantiated assertions that to allow Steward's claim to clear summary judgment requires the Court to "assum[e] the role of a regulator of health insurer provider networks," and thus "upset the delicate balance that OHIC and Blue Cross strike when fulfilling their public interest missions." (Id. at 35-36.)

It is simply incorrect to say that to recognize the possibility of a refusal-to-deal by Blue Cross requires the Court to impose a "novel antitrust duty" by requiring that Blue Cross accept the reimbursement rates that Steward proposed. ***HN10***[] The law does not impose, and this Court may not dictate, the precise terms that Blue Cross must accept; but the law does impose a duty on Blue Cross to compete fairly, and specifically to not forego short term profits for the purpose of blocking competition and maintaining a monopoly. And in order to enforce this duty, the Court - in fact the jury - must consider the parties' conduct in the context of the particular markets at issue. *Town of Concord v. Bos. Edison Co., 915 F.2d 17, 22 (1st Cir. 1990)* (Breyer, C.J.) ("[A]ntitrust analysis must sensitively recognize and reflect the distinctive economic legal setting **[**51]** of the regulated industry to which it applies." (internal quotations and citations omitted)). If the jury finds in favor of Steward, it will need to consider the question of damages (discussed below), but none of this equates to the result Blue Cross purportedly fears.

[*492] In addition, Blue Cross overstates the role of OHIC regulations and the supposed "delicate balance" that enforcing the antitrust laws would upset in this case. Indeed, the meager regulatory context at play here is far different from what the Supreme Court recognized - and underscored - in Trinko. OHIC's role is distinguishable from the FCC's regulatory function in Trinko, both in scope and effect.

In Trinko, the Supreme Court emphasized "[t]he specific nature of what the 1996 [Telecommunications] Act compels," which included "statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service." *540 U.S. at 409, 412*. "Authorization by the FCC require[d] state-by-state satisfaction of *§ 271*'s competitive checklist, which as [the Court has] noted includes the nondiscriminatory provision of access to UNEs." *Id. at 412*.

There is nothing even close to this enforced infrastructure sharing arrangement in the OHIC scheme. The **[**52]** RI OHIC regulatory scheme is essentially a rate setting mechanism, one that ensures that rates will not increase too much in a given year without good reasons and approval.[29]

Further, the "Office of Health Insurance Commissioner" does not regulate health care providers or doctors nor the prices they charge for services; instead, as its name suggests, it regulates health insurers and insurance. (Dep. of former OHIC Commissioner Chris Koller ("Koller Dep.") at 225:22-226:3, SDF Ex. 26 ("Q. If a hospital had requested a waiver, would you have considered it? A. We have no jurisdiction over hospitals.").

So rather than present "a regulatory structure designed **[**53]** to deter and remedy anticompetitive harm," *Trinko, 540 U.S. at 412*, in which circumstances "the additional benefit to competition provided by antitrust enforcement will tend to be small," id., here, as in similar cases, "[t]here is nothing built into the regulatory scheme which performs the antitrust function," id. (alteration in original) (quoting *Silver v. N.Y. Stock Exch., 373 U.S. 341, 358, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963))*. Thus, "the benefits of antitrust are worth its sometimes considerable disadvantages." Id.

For all the reasons discussed above, Steward's refusal-to-deal claims for unlawful monopolization and monopsonization clear the summary-judgment bar. Blue Cross's motion for summary judgment with respect to these counts will therefore be denied.[30]

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[29] The 2012 Rate Approval Conditions provided,

> Upon written request of an issuer, supported by the hospital's written agreement with the issuer's request, the Commissioner may approve exceptions to the index limit for those hospital contracts which the issuer demonstrates, to the Commissioner's satisfaction, align significant financial responsibility for the total costs of care for a defined population and set of services in manners generally consistent with the alternative Medicare payment mechanisms proposed under the *Affordable Care Act*. Issuers are encouraged to file such requests.

(SDF Ex. 43 at 2, ECF No. 206-43.) And former OHIC Commissioner Chris Koller testified: "[W]e would consider and possibly approve exceptions to the index limit and the quality incentives. In other words . . . this was a wide-open area if the hospital and the issuer -- the insurer --wanted to do something different." (Dep. of Chris Koller ("Koller Dep."), SDF Ex. 26 at 235:16-21, ECF No. 206-26.)

[30] One final point: Steward also points to Blue Cross's conduct toward St. Anne's and Morton - two Steward-owned hospitals in the area of Massachusetts bordering Rhode Island with which Blue Cross had direct, prior dealings - as evidence of its anticompetitive bent toward Steward/Landmark. This too is complicated, but in summary, Blue Cross proposed shifting patients who used St. Anne's and Morton to the "BlueCard" program, which allowed Blue Cross to pay the reimbursement rates negotiated between Blue Cross Blue Shield of Massachusetts ("BCBSMA") and Steward, rather than renegotiating new contracts with new rates with these hospitals. Blue Cross forecasted that this move would annually save it $3.2 million. But it would lose about half of that because the BlueCard Program imposed a hefty administrative fee. (SAUF Ex. 89 at 4; SAUF Ex. 90.) So Steward offered Blue Cross a better deal: a new direct contract with St. Anne's at the same rates paid by BCBSMA, but without the administrative fee. (See SDF ¶ 136.) Steward's proposal offered Blue Cross the added benefit that its Medicare Advantage program subscribers could continue to access these hospitals, whereas under the BlueCard program, they could not.

[*493] B. The Conspiracy Claims

1. Conspiracy in Restraint of Trade (Counts IV, VIII, XII, and XVI)

Blue Cross also moves for summary judgment with respect to Steward's conspiracy claims.[31] ***HN11***[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. A conspiracy is born when "two or more entities that previously pursued their own interests separately . . . combin[e] to act as one for their common benefit." *Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. "*Section 1* by its plain **[**54]** terms reaches only 'agreements'— whether tacit or express." *White v. R.M. Packer Co., 635 F.3d 571, 575 (1st Cir. 2011)* (emphasis added) (citing *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*.

Importantly, ***HN12***[] "at the summary judgment stage a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." *Twombly, 550 U.S. at 554 (2007)* (citing *Matsushita, 475 U.S. at 574*).[32] "It does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors." *R.M. Packer Co., 635 F.3d at 575*. "In addition, the Supreme Court has 'limit[ed] the range of permissible inferences from ambiguous evidence in a *§ 1* case,' holding that, at summary judgment, 'conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy' that allows plaintiffs' evidence to reach a jury." *Id. at 577* (alteration in original) (emphasis added) (quoting *Matsushita, 475 U.S. at 588*). But this evidence will reach the jury when it shows 'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" Id. (quoting *Twombly, 550 U.S. at 557 n.4*).

[*494] ***HN13***[] Steward builds its case **[**55]** around circumstantial evidence, so it must rely on "plus factors" as "proxies for direct evidence of an agreement." *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 46 (1st Cir. 2013)* (quoting *In re Flat Glass Antitrust Litig., 385 F.3d 350, 359-60 (3d Cir. 2004))*. Plus-factor evidence is "evidence pointing toward conspiracy," *R.M. Packer Co., 635 F.3d at 577*, that is, evidence "tend[ing] to rule out the possibility that the defendants were acting independently," *Twombly, 550 U.S. at 554*.

HN14[] Courts have identified - and the First Circuit in Evergreen and R.M. Packer Co. countenanced - a non-exhaustive list of three *Section 1* plus factors: "(1) evidence that the defendant had a motive to enter into a[n] [antitrust] conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 321-22 (3d Cir. 2010)* (quoting *Flat Glass, 385 F.3d at 360*); cf. *Twombly, 550 U.S. at 557* ("A statement of parallel conduct . . . needs some . . . further circumstance," or "further factual enhancement" to plead a plausible *§ 1* claim). "The third factor, 'evidence implying a traditional conspiracy,' consists of 'non-economic evidence "that there was an actual, manifest agreement not to compete,"' which may include 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are

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(See SAUF Ex. 89; SAUF ¶ 187.) Blue Cross rejected these entreaties as well, arguably forsaking short term profits for the purpose of further impeding Steward's effort to break into Rhode Island.

[31] Like Steward's refusal-to-deal claim, the Court analyzes Steward's conspiracy counts brought under the Rhode Island Antitrust Act together with Steward's conspiracy counts brought under the *Sherman Act*. (See supra note 13.)

[32] The law of conspiracy, like refusal-to-deal law, is no model of clarity for trial courts trying to make sense of - and apply - its standards. See, e.g., 1 John J. Miles Health Care and ***Antitrust Law*** § 2A:6 (2018) ("The line between permissible inference and impermissible speculation is not clear and never will be."); William H. Page, Tacit Agreement Under *Section 1* of the Sherman Act, 81 Antitrust L.J. 593, 594 (2017) ("The outcomes on these motions depend in large part on what the courts think a Section 1 agreement is. Even after 125 years of Section 1 litigation, however, the meaning of that fundamental concept remains uncertain.").

shown.'" *In re Ins. Brokerage Antitrust Litig., 618 F3d at 322* (quoting *Flat Glass, 385 F.3d at 361*); see **[**56]** also *In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661 (7th Cir. 2002)*; 6 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 1434b (2017).

Before delving into the evidence, a few other fundamental principles are worth noting. The first concerns "conspiracy." Blue Cross tries hard to raise the bar on Steward, suggesting that an illicit "agreement" requires explicit evidence that minds have met. (See Def.'s Mem. 42-45.) This is not correct. ***HN15***[] A tacit understanding or a wink and a nod can be sufficient.[33] See *United States v. Beaver, 515 F.3d 730, 738 (7th Cir. 2008)* ("Although the existence of . . . an agreement is the essence of the government's *§ 1* conspiracy allegation . . . . the government was required only to establish that the [defendants] had a tacit understanding based upon a long course of conduct to limit their discounts." (internal quotation marks and citations omitted)); *Am. Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* ("Where the circumstances **[*495]** are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."); *Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir. 1965)* ("[I]t is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including **[**57]** the conduct of the defendants charged. A knowing wink can mean more than words." (citation omitted)).

Second, and perhaps more important for dealing with Blue Cross's motion, ***HN16***[] the Supreme Court long ago dispensed with the notion that a court can slice and dice the record in a way that scrutinizes each individual piece of evidence for conspiratorial motive. Rather, **[**58]** the Court must evaluate the evidence based on its aggregate effect, and draw reasonable inferences from the evidence as a whole. *Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* ("In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."); *United States v. Patten, 226 U.S. 525, 544, 33 S. Ct. 141, 57 L. Ed. 333 (1913)* ("It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." (citations omitted)); *Evergreen, 720 F.3d at 47* ("While each of [plaintiff's] allegations of circumstantial agreement standing alone may not be sufficient to imply agreement, taken together, they provide a sufficient basis to plausibly contextualize the agreement necessary for pleading a *§ 1* claim.").

With these principles guiding its analysis, the Court finds in the record substantial evidence that, for conspiracy purposes,[34] tends to exclude an inference of independent conduct. In marshalling the evidence, Steward highlights

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[33] Blue Cross is wrong to suggest that the law forbids only outright confessions of anticompetitive animus. See 3B Areeda & Hovenkamp, supra, ¶ 308. The Seventh Circuit has persuasively addressed this issue:

> [N]o single piece of the evidence that we're about to summarize is sufficient in itself to prove a price-fixing conspiracy. But that is not the question. The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment. . . . We tried in *Troupe v. May Department Stores Co., 20 F.3d 734, 736-37 (7th Cir. 1994)*, to straighten out the confusing (and, as it seems to us, largely if not entirely superfluous) distinction between direct and circumstantial evidence. The former is evidence tantamount to an acknowledgment of guilt; the latter is everything else including ambiguous statements. These are not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial.

In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661-62 (7th Cir. 2002).

[34] At the outset, ***HN17***[] Steward's monopolization and conspiracy claims are not mutually exclusive. The Court rejects Blue Cross's suggestion that because Steward argues Blue Cross had unilateral, illicit motives to exclude Steward, it necessarily acted "consistent with its unilateral self-interest" and thus could not have illegally conspired against Steward. To be clear, behavior consistent with unilateral self-interest refers to lawful independent conduct that furthers competition. See *In re Flat Glass Antitrust Litig., 385 F.3d 350, 360-61 (3d Cir. 2004)* ("Evidence that the defendant acted contrary to its interests means

four separate but related episodes: (1) the "treat-and-transfer" model developed by Lifespan and Thundermist, with Blue Cross's encouragement, for a failed Landmark; (2) rate concessions **[**59]** offered by Lifespan to Blue Cross in exchange for additional patient volume; and Thundermist's decisions to (3) shift OB patients and (4) reject an MOU with Steward (including a proposal that **[*496]** Thundermist itself had proposed). (See Pl.'s Resp. 43-67.)

First, a reasonable juror could conclude that part of the agreement between Blue Cross, Lifespan, and Thundermist to block Steward from Rhode Island was premised on the treat-and-transfer plan proposed as an alternative to Steward acquiring Landmark. The treat-and-transfer model, which sought to make Landmark "less than a full-service, acute-care hospital," (Wakefield Dep. at 32:1-6, SDF Ex. 30), was conceived in April of 2009 by Maria Montanaro, then-CEO of Thundermist, in a letter to Special Master Savage.[35] (See SDF Ex. 101). Landmark was placed in receivership in 2008, (see SDF ¶ 62), around the same time Caritas emerged as a prospective acquirer of the hospital. (See SDF Ex. 102 at 4-5, ECF No. 210-14.) In May 2009 in a letter to Justice Silverstein, Montanaro detailed her concerns regarding Landmark's "possible affiliation with Caritas Christi." (Id.) She wrote,

> To me, this should not be about the **[**60]** survival of an institution, but rather about how to best deliver the highest quality, most cost-effective care in northern RI. It is possible, that the most sustainable model of high quality, cost effective care would be one that does not include a full service, licensed hospital.

(Id. at 5.)

The evidence also supports the inference that Blue Cross was in on the plan for treat-and-transfer as the alternative to a Caritas/Steward-owned Landmark. In the fall of 2010, Caritas took part in discussions and meetings with Blue Cross over acquiring Landmark. (SDF Ex. 108, ECF No. 210-20; SDF Ex. 109, ECF No. 210-21.) On November 18, 2010, Mark Waggoner of Blue Cross reported to Blue Cross's ELT that then-Blue Cross CEO Jim Purcell wanted Blue Cross to occupy a greater role over Landmark's future. He stated:

> Jim Purcell called me earlier this week to chat about Caritas/Landmark. He seems to be leaning more towards to wanting to step off of the sideline and play more of a broker role in a local solution to Landmark. Apparently, he had a conversation earlier in the week with M. Montan[a]ro of Thundermist . . . that may have influenced his thinking a bit about the role we might play.

(SDF Ex. 105 at 2, ECF **[**61]** No. 210-17.) Before getting back to Caritas, Purcell touched base with Lifespan and Thundermist to convey his reaction to the Caritas proposal and a plan for Lifespan and Thundermist to meet with Justice Silverstein to discuss treat-and-transfer: "Maria [Montanaro (Thundermist)] and George [Vecchione (Lifespan)] know we'll send our letters this Wednesday [the rejection letter to Caritas and the Special Master], and they will ask for a meeting with the Judge." (SDF Ex. 107 at 2, ECF No. 210-19.) Lifespan and Thundermist conferred about how to keep Blue Cross happy and on board: "It is important to BCBSRI to head in this direction [integrated service delivery networks], and would give them further reasons to support our work together on the model we are proposing." (SDF Ex. 111 at 3, ECF No. 210-23.)

Before meeting with the judge, Blue Cross first huddled with Lifespan and Thundermist. (SDF Ex. 113 at 2, ECF No. 210-25.) Notes from that meeting indicate that discussion topics included: (1) undermining Caritas's efforts to

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evidence of conduct that would be irrational assuming that the defendant operated in a competitive market."). There is no discernable reason why an antitrust plaintiff cannot assert both a unilateral monopolization claim and a conspiracy claim; and indeed, the case law supports that these claims can coexist. See, e.g., *Microsoft Corp., 253 F.3d at 70* (rejecting defendant's argument that "the District Court's holding of no liability under *§ 1* necessarily precludes holding it liable under *§ 2*."); *United States v. Dentsply Int'l, Inc., 399 F.3d 181, 197 (3d Cir. 2005)* ("[A] finding in favor of the defendant under *Section 1* of the Sherman Act . . . [does] not 'preclude the application of evidence of . . . exclusive dealing to support the *[Section] 2* claim.' . . . A court's refusal to accept one theory rather than another [does not] undermine[] the claim as a whole . . . [and] the [plaintiff] can obtain all the relief to which it is entitled under *Section 2* and has chosen to follow that path without reference to *Section 1* . . . ." (quoting *LePage's, Inc. v. 3M, 324 F.3d 141, 157 n.10 (3d Cir. 2003))*).

[35] It appears undisputed that this plan was conceived prior to Steward coming into the picture. This simple fact does not, however, defeat the powerful inference gleaned from the evidence that the treat-and-transfer model resurfaced with Steward in mind, once it entered the picture.

acquire Landmark; and (2) underscoring treat and **[*497]** transfer as the preferred alternative. (See SDF Ex. 117 at 2, ECF No. 210-29.) In 2012, CEO Peter Andruszkiewicz of **[**62]** Blue Cross (Purcell's successor) and CEO George Vecchione of Lifespan discussed the treat-and-transfer plan in the context of Andruszkiewicz's calculation that Landmark would not go to Steward. (See SDF Ex. 118, ECF No. 210-30.) Montanaro, who by then had left Thundermist to become a Blue Cross consultant, reported to Chuck Jones, her successor as Thundermist CEO:

> Peter [Andruszkiewicz] tells me that he believes Steward will fail to acquire here in RI. He has no intention of giving into their demands. He has talked with George [Vecchione], who has told him "with as much certainty as he has ever heard George use" that Lifespan WILL step in and take over the hospital, following the model we developed with them years ago. Peter wants to see Care NE then do the OB piece. He talked with George and his leadership about this yesterday.

(SDF Ex. 118 at 2.) Montanaro concluded her email with a prediction about Landmark: "Peter thinks it will be Lifespan." (Id.) An internal Lifespan email, sent a few weeks later adds more. Lifespan's new CEO Timothy Babineau (Vecchione's successor) wrote to his leadership team:

> Peter [Andruszkiewicz] called me yesterday to update me on a 5 hour meeting he had on **[**63]** Monday with the AG, Steward (Ralph himself!) and George Nee trying to mediate an agreement. At the end of the day, BCBSRI put an offer on the table that Peter described as still being within OHIC's guidelines. He did not elaborate and I did not ask.
> They are meeting again next Monday (5 hours scheduled) during which Steward is supposed to react/accept/counter BCBSRI most recent offer.
>
> The real reason for the phone call was for Peter to let me know that he told the AG that it was his (Peter A's) understanding that Lifespan would be willing/interested to re-engage in discussions with Landmark should Steward pull out. He indicated the AG heard that but seemed (in Peter's words) "underwhelmed". I affirmed that this was still our position but offered no specifics. **Question**---is it worth a call to the AG to re-affirm our position, or should we remain on the sidelines at this point?

(SDF Ex. 120 at 2, ECF No. 210-32.) Lifespan's CFO clarified, "Peter's saying, you know, there's another alternative; you don't have to come so hard after me." (Wakefield Dep. 181:13-15. SDF Ex. 30.)

The above evidence, when stitched together, makes clear that a reasonable juror could conclude that the treat-and-transfer **[**64]** model for Landmark was one part of an understanding between Blue Cross, Lifespan, and Thundermist aimed at keeping Steward out of Rhode Island.

The next conspiratorial "episode" cited by Steward concerns the link between rate concessions for Blue Cross by Lifespan in exchange for increased patient volume, which presumably would come from Landmark. Steward concedes that Thundermist is not directly implicated in this chapter of the conspiracy saga.[36]

[*498] First, Steward offers evidence to make sense of why Lifespan would suddenly retreat from what had been otherwise highly contentious negotiations with Blue Cross. (See SAUF Ex. 77, ECF No. 215-2; SAUF ¶ 170 (Lifespan demanding rate increases in excess of six percent and adjusting its position only nominally over several months)). Lifespan informed Blue Cross that it would only back down on its rate demands in exchange for additional patients: "Lifespan is willing to consider more substantive reductions to their position only if Blue Cross can provide additional service volume." (SAUF Ex. 78 at 5, ECF No. 215-3.)

Now, Steward asks, where might Blue Cross come up with more patient volume to satisfy Lifespan? A reasonable juror could conclude **[**65]** that the answer was Landmark. It was no secret that Lifespan would be the primary beneficiary of a weakened or defeated Landmark. (See SAUF Ex. 75 at 9, ECF No. 182-15 (Blue Cross noting

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[36] Although Thundermist is not directly linked to this part of Steward's theory, it does not have to be. See *Pinkerton v. United States, 328 U.S. 640, 646, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)* (no requirement that each conspirator actively participate in each act in furtherance of the conspiracy); *United States v. Barker Steel Co., 985 F.2d 1123, 1129-30 (1st Cir. 1993)*. This makes sense, especially in light of the directive that this Court view the evidence in totality rather than isolation.

subscribers in vicinity of Landmark used Lifespan hospitals, Miriam and RIH); (SAUF Ex. 71 at 6) (evaluating effect of Blue Cross's failure to renew Landmark contract: "Rhode Island and Miriam would see an influx of the majority of medical/surgical and outpatient services"); SAUF Ex. 22 at Fig. 35 (predicting Landmark going "out of network" would cause nearly forty-five percent of previous-Landmark patients to use a Lifespan hospital). Indeed, Lifespan mapped out Landmark's impact on RIH and Miriam, whether it thrived under Steward's ownership or failed if "Steward bails." (SAUF Ex. 69, ECF No. 214-69.) Unsurprisingly, Lifespan predicted a vast financial reward in the event that Landmark went under, and it forecasted a significant financial blow if Steward acquired Landmark. (Id.)

But that's not all. Steward also cites the June 2012 Blue Cross Contract Analysis in which Blue Cross identified the hefty cost of failing to renew community hospitals like Landmark because patients dispersing to costlier **[**66]** hospitals came with an added financial sting to Blue Cross. In this context, Blue Cross's analysis recommended "[w]ith Lifespan and CNE facilities as a primary recipient of the service migration, we would engage discussions with these systems to establish a longer term plan to develop service capacity at favorable payment levels." (SAUF Ex. 71 at 9 (emphasis added)). Blue Cross added, "[b]y doing so, we would be in a better position to manage the impact to the network and more strategically leverage options that currently do not exist." (Id.) In an update to that same July 2012 presentation, Blue Cross added that "in order to address the potential movement of services to other hospitals in the future, we have initiated discussions with Lifespan on opportunities involving additional volume and the impact on payment levels." (SAUF Ex. 76 at 7, ECF No. 215-1.) In August 2012, Blue Cross documented that "Lifespan is willing to consider more substantive reductions to their position only if Blue Cross can provide additional service volume." (SAUF Ex. 78 at 5.)

Seemingly out of the blue, in September 2012, at the same time negotiations with Steward were cratering, Lifespan's rate demands declined **[**67]** to 4.8% for commercial. (SAUF Ex. 79 at 3, ECF No. 215-4) (email summarizing Lifespan's proposal). According to Blue Cross documents, Steward asserts, this pivot saved Blue Cross nearly $12 million, and was in stark contrast to the ordinary course of highly contentious Lifespan-Blue Cross negotiations that preceded it. (Compare SAUF Ex. 80, ECF No. 215-5 (showing total savings (loss) with respect to Lifespan as "$11,862,139"); with SAUF Ex. 81, ECF No. 215-6 (email from Blue Cross CFO Coleman to Andruszkiewicz and Waggoner regarding 2011 Lifespan negotiations) ("BCBSRI **[*499]** achieved (almost) Lifespan's original request of $24 [million] in additional revenue. Just a friendly reminder of how much we gave to the cause."). A reasonable juror could conclude that Blue Cross secured rate concessions from Lifespan in exchange for added patient volume, which could only come from Landmark, once Steward was removed from the picture.

The next chapter of Steward's conspiracy claim colors the alleged role played by Thundermist. Steward contends that Thundermist's decisions to (1) move OB patient referrals from Landmark to Women & Infants Hospital in 2011 and (2) to not sign an MOU to be an affiliated **[**68]** provider with Steward/Landmark were similarly motivated by exclusionary goals.

With respect to Thundermist's shift of OB patients, a reasonable juror could conclude that it was one piece of the larger plan to exclude Steward. First, in November 2011, Jones of Thundermist sought "for Lifespan to commit to support publicly our shared vision of health care in Northern Rhode Island in the face of a threatened or actual Steward departure." (SDF Ex. 125, ECF No. 210-37.) In other words, before pulling the trigger on a shift of patients, Jones needed cover and support from Lifespan:

> I remain inclined to move Thundermist's OB service to [Women & Infants hospital, part of Care New England]. I therefore need to take Jon Savage and Steward at their words and prepare to defend my decision against a Steward announcement to abandon Landmark and publicly blame Thundermist for the decision.
>
> In this context it will be important for me to be able to point to Lifespan's interest in developing an appropriate care model for Northern Rhode Island. Given the timeframe involved, I believe a letter to me (or press release if you prefer) describing the model of care Lifespan would be willing to support publicly, **[**69]** with Thundermist, in Northern Rhode Island.

(Id.) Remarkably, in spite of the fact that Thundermist's patients would be sent to CNE - Lifespan's primary competitor - Lifespan agreed to annually pay Thundermist $150,000, which replaced annual payments from

Landmark that would cease upon terminating the Landmark arrangement. (SDF Ex. 125; Jones Dep. at 109:7-110:14, 115:7-18, SDF Ex. 24, ECF No. 206-24 ("Q. Okay. So because the Women and Infants deal wasn't going to include Thundermist being paid for that, you told Lifespan that by moving to Women and Infants, you were going to lose the $135,000 that you were getting from Landmark and you wanted their help in making that up? A. Yes.").

The explanations provided by Thundermist and Lifespan do little to clear the air about this strange payment. In his deposition, Jones suggested that this "[f]inancial support" was "to support development of these more closely integrated networks of care." (SDF Ex. 125.) Lifespan's George Vecchione in turn said: "It wasn't just to fill a loss, a gaping hole, and no prospects for benefit. Frankly, I viewed it as an investment." (Vecchione Dep. 140:4-12, SDF Ex. 29.) And, as noted above, in an email to Jones, **[**70]** Montanaro wrote that Blue Cross's Peter Andruszkiewicz "want[ed] to see Care NE then do the OB piece." (SDF Ex. 118 at 2.) These explanations raise more questions than answers, and at least give the appearance of Blue Cross acting as a puppet-master distributing the spoils. And the payment persisted for six consecutive years. (Wakefield Dep. 172-174, SDF Ex. 30.) In her deposition, CFO Wakefield could not pinpoint another circumstance, with the exception of unions, where Lifespan "supported" an organization to the tune of $150,000. (Id. at 174. But see Vecchione Dep. 139-140, SDF Ex. 29 (recalling **[*500]** two grants from Lifespan, one to Thundermist and another to Providence Health, but noting, "There's not many of them")). Curiously, Lifespan did not keep track nor inquire of what purpose Thundermist put the $150,000, and there were no real conditions imposed on how Thundermist disbursed Lifespan's generous donation. CEO Jones testified that the payment had no strings attached:

> Q. And under this agreement, besides reporting and keeping track of things, what is Thundermist required to do in return under the public health grant agreement?
> A. Continue to provide charity care for our community.
>
> Q. Do you **[**71]** do the same things you had to do anyways?
> A. Yes.
> Q. So there's no new obligations imposed by this?
> A. No.
> Q. This was just giving you 150,000 and you have to meet certain reporting requirements for legal purposes?
> A. Yes.
> Q. And was reporting to Lifespan required?
> A. No.
> Q. And did you do any reporting to Lifespan about what you did with the money?
> A. No.

(Jones Dep. at 127:19-128:16, SDF Ex. 24.) And Lifespan CEO George Vecchione testified consistently:

> Q. And did she [Montanaro], in fact, put some of the money to that use, to your knowledge?
> A. I don't . . . recall. What she did with the money, I don't know. It's not that I don't recall, I don't know.
> Q. Meaning that you don't think you ever knew?
> A. Correct.
> Q. Part of the grant process is not some sort of follow-up by the recipient to say, Gosh, here's the great things we do with your money?
> A. Correct. Um-hm.
> Q. Can you - I take it you can't point to some particular thing that Thundermist did thanks to the grant money that you were providing, or can you?
> A. I can't.

(Vecchione Dep. at 141:3-19, SDF Ex. 29.) Although early on in the Lifespan-Thundermist negotiations, Lifespan's grant had been incorporated into the two entities' Partnership Model, **[**72]** (see SDF Ex. 128, ECF No. 210-40), the funds were later buried in a different "Public Health Grant Agreement," which unlike the former, was never disclosed to the DOH. (Jones Dep. at 129-130, SDF Ex. 24.) Moreover, in the context of anticipating Thundermist's prospective relationship with Steward if it acquired Landmark, Jones detailed how he saw the interplay between OB patients and a Steward presence:

> I think if they stay, whether or not we move OB, our relationship with Steward becomes more complicated . . . . If they stay and we don't want to cooperate with them, I believe they could do some damage or at least make

> life difficult for us to do anything but cooperate. So although I wouldn't be happy about the scenario where we move OB and Steward decides to stay, I don't think it's that much different from the scenario where we do nothing, and they decide to stay. Either way, Thundermist's ability to make independent decisions in the best interests of our patients could be compromised by a Steward presence. That threat only goes away entirely if we move OB.

(SDF Ex. 126, ECF No. 210-38.)

And what role did Blue Cross play in all of this? In addition to Lifespan, Jones looked to Blue **[**73]** Cross to provide assurances **[*501]** that they too would stand behind his decision to shift patients. Prior to making the OB-patient-shift announcement, Jones intended to "set up [a] meeting between Peter A [of Blue Cross] and George [of Lifespan] to get commitments on a common communications plan." (SDF Ex. 129, ECF No. 210-41.) Soon-to-be consultant for Blue Cross and former CEO of Thundermist, Montanaro, offered a helping hand to Thundermist. (SDF Ex. 130, ECF No. 210-42 ("Nice talk with Peter A. He thinks you should walk away from Landmark and let them close. He said [to] call him and he will talk to you about it, if you want."; see also Andruszkiewicz Dep. at 270:4-5, SDF Ex. 12, ECF No. 206-12 ("I supported his decision.")). This was the support Jones wanted and needed to move forward with the shift - and Blue Cross delivered. (See SDF Ex. 131, ECF No. 210-43 ("Chuck felt supported by Peter's earlier call.")). At the end of the day, rather than an "independent" decision by Thundermist, a reasonable juror could conclude that Thundermist's shift of OB patients from Landmark to Women & Infants, and the concomitant payment from Lifespan, was all part of an understanding to keep Steward out **[**74]** of Rhode Island.

The final, and perhaps most glaring part of Steward's conspiracy story concerns Thundermist's abrupt rejection of an MOU with Steward. Throughout the time period that treat and transfer and OB patient shifting was being discussed, Thundermist was also in talks with Steward. Jones had been working with Steward on an MOU that considered, among other things, patient referrals and certain areas of exclusivity with Steward/Landmark. (See SDF Ex. 133, ECF No. 210-45; SDF Ex. 134, ECF No. 210-46.) Although Thundermist and Steward traded various MOU proposals, on May 11, 2012, Jones met with Steward and indicated that he was no longer willing to enter any agreement. Perhaps most illuminating, Jones would not even sign the April 30 proposal that he had himself proposed to Steward.

And indeed, the evidence indicates that Jones did not come to this epiphany on his own; behind the scenes, Jones surveyed a wide range of opinions in approaching his talks with Steward. He "talked with Peter A (BCBSRI) and Dennis Keefe (CNE). These conversations, and discussions with just about every other health leader in RI, have helped me clarify a bit." (SDF Ex. 135, ECF No. 210-47.)

But it was Blue **[**75]** Cross that had Jones all eyes and ears. Jones's follow-up notes from the May 11 meeting with Steward recount why he did not sign the MOU: "[y]ou're asking me to give up participation with an organization that has 70% market share?" (SDF Ex. 139, ECF No. 210-51.) Jones's reaction to Blue Cross's apparent pressure is even more peculiar given the few commercially insured patients Thundermist had, and the fact that Thundermist's capacity would not have been affected by either version of the proposed MOU. (See Jones Dep. at 292, SDF Ex. 24 ("Q. [I]s there anything that the agreement would have prevented you from doing with an insurer that you've now done? A. No, I don't think so. I can't think of anything."). Later, Jones erased any doubt about Blue Cross's influence on his approach to an MOU with Steward. (See id. at. 216:2-13 ("Q. 'You have no market share in Rhode Island. You're asking me to give up participation with an organization that has 70 percent market share?' That's a reference to Blue Cross. Correct? A. Yes. Q. And that was the concern that the deal with Steward would give you -- give up your opportunity to have participation with Blue Cross. Correct? A. As an example of the **[**76]** - yes, of what could happen."). In the aftermath of his Steward meeting, Jones calculated how he would - and would not - broach the subject with the press: "If we respond, we cannot avoid **[*502]** the statement that we have not reached agreement with Steward. I wouldn't even say that 'we have not yet reached agreement' because that infers an agreement is possible." (SDF Ex. 140, ECF No. 210-52.) He added, "[o]ur close partners know what our position is and inferring in a public statement that there's still hope for an agreement seems disingenuous." (Id.)

Jones's "close partners," namely Blue Cross by way of Montanaro, also played a role in making sure Jones was prepared for his Steward meeting. (SDF Ex. 141 at 3, ECF No. 210-53 (Interoffice Memorandum from Montanaro to

Blue Cross executives) ("Chuck Jones continues to seek m[y] advice on issues with Steward Healthcare."). And when Jones offered to pay Montanaro for the "long meeting" in which she helped Jones craft "talking points," she insisted that would not be necessary: "No need to bill you I was on BCBS's dime and spent the time with their full support. They think very highly of you and were happy to contribute me to the cause today." (SAUF **[**77]** Ex. 51 at 2, ECF No. 214-51; see also id. (email from Montanaro to Jones) "Nice job taking it in and pushing some of the points. I am impressed. I thanked Peter [Andruszkiewicz] for you in hosting the meeting at BCBS today. He said he ran into Constantino,[37] who was saying he thinks the 'air is coming out of Steward[']s balloon.'"). Montanaro even drafted a proposed letter to be sent from Jones to Steward with a list of reasons to resist Steward. (SAUF Ex. 55, ECF No. 214-55.) She instructed Jones: "As groups line up and pick sides, so will Thundermist need to do the same . . . . This will be true as you deepen your relationship with payers and with some, but not all of the hospitals with which you currently have referral relationships." (emphasis added). Jones heard the message loud and clear, which explains his eventual refusal to sign any version of a Steward MOU, including the version he had crafted. (SDF Ex. 139.) A reasonable juror could conclude that, instead of an independent action by Thundermist, Jones's choice was to align with Blue Cross (and Lifespan) to keep Steward out of Rhode Island.

Finally, ***HN18***[] in cases **[**78]** where acts against self-interest are not fully explained, traditional evidence of conspiracy, i.e., conversations, assurances, and swapping value among the alleged conspirators, prove instructive. See *R.M. Packer Co., 635 F.3d at 583*. And as the aforementioned evidence makes clear, the indicators pointing to a conspiracy are numerous in this case. The record is replete with assurances, conversations, and exchanges of value. Ultimately, Steward has provided more than enough evidence that tends to exclude the inference of independent conduct; and a reasonable juror could conclude that the conduct of the players here amounted to an illicit agreement to keep Steward out of Rhode Island. For these reasons, Blue Cross's motion with respect to Steward's conspiracy claims must be denied.

2. Conspiracy To Monopolize/Monopsonize (Counts III, VII, XI and XV)

HN19[] *Section 1* of the Sherman Act prohibits conspiring to restrain trade whereas *Section 2* forbids conspiring to attain or maintain a monopoly.[38] Blue Cross's argument **[*503]** on summary judgment is that "conspiracy claims under *Section 1* and *Section 2* will both fail if . . . the record does not show an unlawful agreement," (see Blue Cross's Reply in Supp. Mot. for Summary J. 30 n.16); see also *W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* ("To prevail on a *section 1* claim or **[**79]** a *section 2* conspiracy claim, a plaintiff must establish the existence of an agreement . . . ."). As discussed infra, the Court disagrees with Blue Cross about what the record shows on this point, i.e., a reasonable juror could find an illicit agreement between Blue Cross, Lifespan, and Thundermist on these facts. Beyond this common requirement of agreement, a *Section 1* conspiracy has different elements than a *Section 2* conspiracy. See, e.g., *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1231 (10th Cir. 2017)*; *Invamed, Inc. v. Barr Lab., 22 F. Supp. 2d 210, 217 (S.D.N.Y. 1998)* ("While *section 1* of the Sherman Act forbids contracts or conspiracies in the restraint of trade or commerce, *section 2* 'addresses the actions of single firms that monopolize or attempt to monopolize, as well as conspiracies and combinations to monopolize.'" (quoting *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993))*). Yet Blue Cross - as the movant - has not sufficiently parsed these substantive differences, nor has it specifically challenged Steward's *Section 2* conspiracy claim by attacking the presence of specific intent to enable or maintain a monopoly or monopsony position between Blue Cross, Lifespan, and Thundermist. See *In re Zinc Antitrust Litig., 155 F. Supp. 3d 337, 382 (S.D.N.Y. 2016)* ("The specific intent to monopolize, rather than the power to exclude competitors, is the key element of a conspiracy to monopolize claim."); *Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co, 926 F. Supp. 2d 36, 47 (D.D.C. 2013)* (dismissing *Section 2* conspiracy claim that

[37] This is a reference to former State Representative and House Finance Committee Chairman, Steven Costantino, then-Secretary of Health and Human Services, with significant involvement in the Rhode Island health care and insurance marketplace. See Ian Donnis, Steven Costantino Appointed To Head Vermont Insurance Program, Rhode Island Public Radio (Feb. 9, 2015), http://ripr.org/post/steven-costantino-appointed-head-vermont-insurance-program . Constantino is now commissioner of the Department of Vermont Health Access. See id.

[38] For purposes of this motion, the Court need not separately discuss Steward's conspiracy-to-monopolize and conspiracy-to-monopsonize claims, as the relevant analysis is the same.

lacked factual allegations about "how the **[**80]** defendants used the agreement to monopolize the rail freight market"). While Steward appears to have mustered little evidence to support Blue Cross may ultimately merit judgment as a matter of law on Steward's conspiracy to monopolize/monopsonize claims, for now it survives summary judgment because Blue Cross has not specifically addressed it, beyond unsuccessfully arguing that there was no evidence of agreement. Therefore, summary judgment is denied on Counts III, VII, XI, and XV.

C. State-Law Tort Claims (Counts XVII and XVIII)

Much of Blue Cross's argument on Steward's state law claims is built on the proposition that, "[w]here conduct does not violate the antitrust laws, the conduct also is not tortious as a matter of law because '***antitrust law*** provides the best available barometer — indeed the only available barometer — of whether or not Blue Cross'[s] conduct can be found to be "wrongful" or "illegitimate"—and hence, tortious.'" (See Def.'s Mem. 79 (quoting *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I., 883 F.2d 1101, 1114 (1st Cir. 1989))*). Because the Court has found that Steward's antitrust claims are viable, it follows that Steward's state-law-tort claims survive summary judgment.[39]

[*504] D. Blue Cross's Remaining Arguments

Blue **[**81]** Cross makes several independent and substantial arguments to support its summary judgment motion, all of which fail, but which require some discussion.

1. Causation

Blue Cross suggests that other superseding causes are responsible for Steward's alleged injuries, namely (1) Steward's apparent inability to satisfy the APA conditions unrelated to Blue Cross; and (2) the OHIC regulations that allegedly cabined the rates that Blue Cross could offer Steward.

HN21[] To prove causation, a *Sherman Act* plaintiff must demonstrate that its injury was caused "by reason of" the defendant's anticompetitive conduct. *15 U.S.C. § 15(a)*. The parties agree that a plaintiff "need not prove that the antitrust violation was the sole cause of [its] injury, but only that it was a material cause." *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1103 (1st Cir. 1994)*. Causation is a factor that establishes antitrust standing. See *Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 120-21 (1st Cir. 2011)*. The law recognizes that when an injury "[i]s attributable to . . . other factors independent of" the challenged conduct, a plaintiff has "not . . . met its burden." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 126-27, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*.

As this Court said at the motion-to-dismiss stage, ***HN22***[] "[A]ntitrust laws have been interpreted to incorporate common law principles of causation." *Steward I, 997 F. Supp. 2d at 158* (quoting *Rhode Island Laborers' Health & Welfare Fund v. Philip Morris, Inc., 99 F. Supp. 2d 174, 187 (D.R.I. 2000)* (alteration in original)). "'Contingencies, conjecture, and **[**82]** speculation will not support a finding of proximate cause,' and will, therefore, not support a finding of antitrust liability." Id. (quoting *Philip Morris, Inc., 99 F. Supp. 2d at 187*).

Steward has presented sufficient evidence to survive summary judgment and to place the causation question before the jury. Specifically, there is a material factual dispute about whether failure to reach a deal with Blue Cross caused Steward to abandon the Landmark negotiations, in the form of (1) testimony of Steward witnesses; (2) conduct of Steward players; and (3) conduct of other key players.

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[39] Incidentally, the Court rejects Blue Cross's spin on Ocean State Physicians. A close reading of that opinion makes clear that, ***HN20***[] although it may be sufficient, it is not necessary for a plaintiff to lodge a successful antitrust claim in order to prove a claim for tortious interference with contractual relations or interference with prospective contractual relations. *Ocean State Physicians, 883 F.2d at 1114* ("To be sure, not all business torts are 'exclusionary' under the antitrust laws. In an appropriate case, a plaintiff might fail to establish an antitrust violation but still establish that certain torts had been committed." (citation omitted)); see also *Kartell v. Blue Shield of Mass., Inc., 749 F.2d 922, 933-34 (1st Cir. 1984)* (highlighting possibility that Blue Shield's conduct - though not an antitrust violation - "might amount to minor business torts").

Blue Cross asserts that a "force other than the antitrust violation fully accounts for" Steward's alleged injury because Steward would not waive and could not satisfy three conditions in the APA: (1) the RISH condition (the May 2011 APA encompassed a condition for Landmark's purchase of 100% of RISH); (2) the Thundermist condition (a MOU with Thundermist); and (3) the SNERCC condition (that Landmark attain a majority interest in SNERCC, owned by 21st Century). (Def.'s Mem. 55 (quoting *In re Canadian Import Antitrust Litig., 470 F.3d 785, 791-92 (8th Cir. 2006)))*. Steward's evidence sufficiently calls into question whether each or any of these conditions were requirements, or more akin to bargaining chips in Steward's quest to **[**83]** reach an acceptable agreement with Blue Cross over Landmark.

Just a sample of Steward's evidence makes the point: Steward highlights extensive testimony that reaching a deal with Blue Cross was the only dispositive condition for Steward. (See, e.g., Dep. of Ralph de la Torre ("de la Torre Dep.") at 45-46, **[*505]** SDF Ex. 1, ECF No. 206-1 ("A. I firmly believe at every stage of this agreement, and still believe now, that there is only one predicate condition to success in that area in caring for the totality of the patient, and that's Blue Cross Blue Shield, okay. . . . So that was the only truly predicate condition."); id. at 49-50 ("I mean, conditions can be on a document, but at the end of the day, I think everybody understood that it was Blue Cross . . . the AG never called in 21st Century Oncology. They never called in Thundermist. It was always Blue Cross. Again, actions speak louder than words. That's pretty clear to me that everybody understood that it was us and them at the end."); Dep. of Joshua Putter at 98:2-11, SDF Ex. 9, ECF No. 206-9 ("[S]o the cancer center wasn't like a go, no-go type of thing. We were going to acquire Landmark and figure out the cancer center strategy. We wanted to acquire **[**84]** it. That wasn't a, if we don't acquire all of it, we're not going to do it type of decision. . . . [W]e, Steward, abandoned the Landmark deal because of the Blue Cross rates, not because of the cancer center.")).

As to the first two conditions (RISH and Thundermist), Steward set forth, for instance, a letter to Justice Silverstein on September 4, 2012, in which Steward informed the court that, "progress on the three conditions has been fleeting" and "as an alternative, [Steward] proposed that if BCBSRI is able to execute a participation agreement with Steward, Steward Health Care will waive conditions (i) [MOU with Thundermist] and (ii) [100% interest in RISH] . . . ." (SDF Ex. 144 at 3, ECF No. 210-56.) Similarly, Steward sets forth evidence that it was willing to waive the SNERCC condition. (See, e.g., de La Torre Dep. at 122-123, SDF Ex. 1 ("Q. . . . [D]id Steward, to your knowledge, ever express to anyone, mediator, attorney general, Jon Savage, Justice Silverstein, anybody, that Steward would waive condition (iii), meaning an agreement with 21st Century where Steward would own 100 percent of SNERCC? A. Absolutely."); id. at 123 ("A. I can unequivocally tell you that I expressed it to Savage, **[**85]** unequivocally. And I'm pretty sure that I said to the judge, 'With the appropriate contract, we could even waive [the SNERCC condition,]' but that's harder to come by.")).

As to Blue Cross's second causation argument (that OHIC regulations capped what Blue Cross could offer Steward and therefore caused Steward's alleged injury) Steward sets forth sufficient evidence to create a jury question. As discussed supra, the OHIC regulations themselves and communications by OHIC belies Blue Cross's rigid reading of the regulations. Blue Cross reluctantly acknowledges this when it states, "[u]nder certain narrow circumstances, OHIC considered waivers from these regulations from other insurers." (Def.'s Mem. 66.)

It is not dispositive (even if true, which Blue Cross can attempt to show at trial) that Steward "never discussed any such exception with OHIC." (Id.) Steward advances sufficient evidence to suggest it was Blue Cross - and not Steward - that had the burden to raise such exceptions with OHIC. (See SDF Ex. 43 at 2, ECF No. 206-43 ("Issuers [insurers] are encouraged to file such requests [for exceptions].")). After all, as discussed above, OHIC regulates health insurers - not hospitals and **[**86]** doctors.

Moreover, the facts suggest that Blue Cross never viewed the OHIC regulations as inflexible as it now casts them, (see Def.'s Mem. 66.), and that Steward did in fact raise the issue of approaching OHIC for an exception, in the context of bundling rate increases and quality metrics with Steward's other hospitals in Massachusetts and Landmark. Steward proposed "bundling" reimbursement agreements for Landmark, St. Anne's, and Morton whereby **[*506]** Steward would accept a lower increase for St. Anne's and Morton hospitals to achieve higher rates at Landmark, while still satisfying OHIC. And Blue Cross recognized the potential viability of this approach in spite of OHIC. (See, e.g., BCBSRI/Steward Proposal Summary August 5, 2012 3, SDF Ex. 186, ECF No. 212-29 ("BCBSRI agrees with Steward's proposed concept of bundling several of its hospitals in a way that creates value and will allow BCBSRI to justify additional increases at Landmark for 2012; while aligning with the OHIC Hospital Contracting Conditions.")).

Moreover, Steward's evidence refutes, or at least creates a factual dispute, with respect to Blue Cross's suggestion that "[t]he other major insurers in Rhode Island—Tufts and United" **[**87]** understood too that "the OHIC regulations were binding." (Def.'s Mem. 66; see also 2011 OHIC Standards 16, SDF Ex. 44 ("Too much prescriptiveness may encourage an excessive focus on compliance and discourage the kind of payment reform and innovation which was intended."); id. (suggesting OHIC approved contracts involving United and Tufts where OHIC conditions were not fully complied with); Dep. of Todd Whitecross at 120, SDF Ex. 31, ECF No. 206-31 (suggesting Tufts offered rate increases above OHIC cap because at that time, it "didn't have a formal relationship with [Prime]")).

It will be for the jury to decide the extent OHIC regulations entered into the parties' negotiations calculus and whether they or something else caused Steward's alleged injury. This is not simply a question, as Blue Cross suggests, of "interpreting regulatory text in light of government purposes," a matter of law reserved for this Court, (see Def.'s Mem. 66 (quoting *Kolbe v. BAC Home Loans Servicing, LP, 738 F.3d 432, 443 (1st Cir. 2013)))*; instead, it is a factual question of what caused Steward's attempted acquisition of Landmark to fail, as to which Steward will bear the ultimate burden of proof at trial. See *Addamax Corp. v. Open Software Found., 152 F.3d 48, 54 (1st Cir. 1998)* (***HN23***[ ] In the context of an alleged *Sherman Act* injury, "whether the defendants' **[**88]** assumed conduct had been a substantial or material cause of the losses claimed by [plaintiff]" was properly a "factual determination" for jury).

2. Harm to Competition

Blue Cross claims summary judgment should also enter because there is no evidence that Blue Cross's alleged conduct harmed competition. It argues: (1) merely swapping out one potential buyer (Steward) for another actual buyer (Prime) is of no inherent consequence under the antitrust laws; and (2) Prime's acquisition of Landmark benefited consumers (and thus competition) because Prime charges lower prices than those Steward would have charged. This argument is a silver bullet aimed at the wrong target.

HN24[ ] To create a jury question on harm to competition in this circuit, "evidence of actual, present competition is not necessary as long as the evidence shows that the potential for competition exists." *Sullivan, 34 F.3d at 1100*. The Sullivan court's discussion of harm to competition is particularly instructive. There, defendants the National Football League and multiple organizations that owned NFL franchises (collectively, "NFL"), appealed a jury finding that the NFL had harmed competition and therefore violated the antitrust laws by prohibiting member-football-team **[**89]** owners from offering public stock in their teams. *Id. at 1094*. The plaintiff, a former owner of the New England Patriots, prevailed at trial after challenging the NFL's policy that required him to sell his team to a private buyer rather than to the public. Id. In asserting **[*507]** there was inadequate evidence of harm to competition, the NFL endorsed a narrow conception of competition, suggesting "that the alleged effect of its ownership policy [was] to reduce prices of NFL team ownership interests, rather than to raise prices which is normally the measure of an injury to competition." *Id. at 1101*. The court rejected the NFL's tapered vantage point and declared, "The Supreme Court has emphasized, however, that overall consumer preferences in setting output and prices is more important than higher prices and lower output, per se, in determining whether there has been an injury to competition." Id. (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (NCAA)*). The court added, "regardless of the exact price effects of the NFL's policy, the overall market effects of the policy are plainly unresponsive to consumer demand for ownership interests in NFL teams. . . . Thus, a jury could conclude that the NFL's policy injured competition by making the relevant market **[**90]** 'unresponsive to consumer preference.'" Id. (quoting *NCAA, 468 U.S. at 107*). In the face of the NFL's suggestion that plaintiff's "position was based on nothing more than sheer speculation," the Court emphasized that "[i]t would be difficult indeed to provide direct evidence of competition when the NFL effectively prohibits it." *Id. at 1100*. Thus, Sullivan countenances that measuring harm to competition is more complicated than simply assessing price and output - evidence of efficiency is also pertinent. See *id. at 1100-02*.

Blue Cross misses this when it declares, "[i]n order to establish harm to competition, a plaintiff must show 'a reduction in output and an increase in prices in the relevant market.'" (Def.'s Mem. 69 (quoting *Sterling Merch., 656 F.3d at 121* (first emphasis added))). Blue Cross omits the qualifying language, derived from *Sullivan, 34 F.3d at 1097*, that harm to competition is "usually measured" in this way. This case is far from "usual" - and it is not an instance where prospective harm to competition can only be assessed by a reduction in output or an increase in consumer prices.[40]

Blue Cross's argument that swapping out one potential hospital buyer for another actual buyer only works if the jury rejects Steward's theory that what it brought to the marketplace was a **[**91]** new competitive health care delivery model that Blue Cross feared and sought to defeat. In other words, there is a difference, Steward contends, in a "Steward Landmark" and a "Prime Landmark," and this affects the legal parameters for assessing harm to competition. Blue Cross's own assessments acknowledge that Steward offered something new and different to Rhode Island. (See, e.g., Andruszkiewicz Dep. at 297:9-13, SAUF Ex. 6 ("The other, which actually is a positive in terms of Steward's acquisition of Landmark, was that we knew that they did bring some innovation, a different kind of model for the way care was delivered, and we thought that was a good thing."); id. at 27:11-27:8, 39:9-39:12 ("[Dr. de la Torre and Steward] have their model and I think it's an advancement over, you know, what's been happening in Massachusetts" "because it's moving away from sort of the siloed sort of approach by providers and the fee for service only, you know, methodology of providers getting paid.")). The same was true of Thundermist's early assessments of the Steward model. In a September 28, 2011 email to Montanaro, Jones writes:

> **[*508]** met with Steward . . . [g]enerally impressed with what they are doing, **[**92]** including developing partnerships with tertiary hospitals for specialty care and progress on radiology quality. Showing very good quality and cost results on the MA AQC. With the new Tufts plan offering 15-30% discounts for their community model of care, they are a serious threat to the status quo.

(SAUF Ex. 98 at 2, ECF No. 215-23.) And Montanaro's March 26, 2010 testimony before Justice Silverstein strikes the same chord:

> Now that we have health care reform and we understand much more about the direction in which health care is going, a great deal of change is going to be needed among all hospital systems and their relationship to primary care and specialist care. In my preliminary conversations with Ralph de la Torre and his senior leadership team at Caritas, I feel very confident and actually enthusiastic about . . . their approach to meeting those opportunities and challenges across their whole system; and particularly . . . for the care delivery in northern Rhode Island.

(SAUF Ex. 99 at 61:5-17, ECF No. 215-24.) Blue Cross also recognized the value of the plan Steward offered and acknowledged that Prime was not - and never purported to be - Steward. (See SAUF Ex. 101 at 2, ECF No. **[**93]** 215-26 (email from Blue Cross's Mark Waggoner to Blue Cross employees) (comparing "Prime, vs. a few months ago w Steward" and outlining the logic to explain variances in negotiation rates with Steward versus Prime: "we believed there to be extensive value to engaging with Steward at higher rates given the integrated delivery capabilities they could bring to the market in year 3?"); Jones Dep. 285-286, SAUF Ex. 12 (describing conversation with Dr. Reddy of Prime, who "didn't know what an ACO was" which, among other things, made it "clear to [Jones] that the Prime model does not consider healthcare system efficiency as an overall goal"); id. at 286:18-287:4 ("Q. And [Prime] made improvements in how [Landmark] looks or repair it or make it more modern or anything? A. There's a nice piano in the entrance, and I think they've redone a couple -- I took a tour of one of the floors. It looks nicer, yes. Q. Has there been any substantive improvement at Landmark, in your view? A. Not in terms of quality or community partnership, no.")). Even Prime acknowledged that it had none of Steward's ambitions with respect to bringing a risk-based model or ACOs into Rhode Island. (Charest Dep. at 74:10-17, **[**94]** SAUF Ex. 14 ("Q. [D]oes Prime have any plans to participate in an ACO product in Rhode Island? A. No. . . . They've not found an ACO product that's been acceptable to them"); id. at 85:15 ("We don't have risk-based contracts.").

What Steward claims it could have introduced into the Rhode Island health care and health insurance markets was potentially beneficial to competition, and blocking it had potential antitrust consequences. See, e.g., *Federal Trade*

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[40] Although, Blue Cross cannot, as a matter of undisputed fact, satisfy that test either.

Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d 109, 146 (D.D.C. 2004) ("An important consideration when analyzing possible anticompetitive effects is whether the acquisition would result in the elimination of a particularly aggressive competitor in a highly concentrated market . . . ." (citations and quotations omitted)); cf. Brooke Grp. v. Brown & Williamson, 509 U.S. 209, 223-24, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993) (describing "maverick" firm, i.e., a firm that, for a variety of reasons, is more likely to "stray[] from the group"); United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 79 (D.D.C. 2011) ("In the context of ***antitrust law***, a maverick has been defined as a particularly aggressive competitor that 'plays a disruptive role in the market to the benefit of customers.'" **[*509]** (quoting Merger Guidelines § 2.1.5)). That is, it is both legally and factually important to the antitrust analysis that Steward - a hospital owner that wanted to bring change and to eventually compete to **[**95]** potentially minimize or displace the modern and traditional role of insurance companies - was swapped out with a hospital system that concededly had no - and was even arguably troubled by - such aspirations. (See Jones Dep. at 286:7-10, SAUF Ex. 12.)

The evidence that Blue Cross's alleged refusal to deal with Steward harmed competition is plentiful. Steward presents evidence that Blue Cross's "Red Team"[41] - the group of employees and consultants who considered business threats - identified and analyzed Steward's potential competitive impact.[42] (See, e.g., SAUF Ex. 31, ECF No. 214-31 (presentation to Blue Cross's ELT of potential competitive "risks to BCBSRI" of a Steward ACO partnering with Tufts to offer a new, less-expensive, higher-quality product to Rhode Island); SAUF Ex. 28, ECF No. 214-28 (email between Red Team members) ("One thought I had was in order to really press the issue of how big a potential threat Steward is, maybe change the map to show just how well positioned they are in the southeast part of MA...they have St. Anne's, Good Sam's, Morton, Norwood, and Quincy...they basically have RI bordered. Then [L]andmark would be the tip of the spear. . . . It'll look like they're **[**96]** getting ready for a blitzkrieg!"); SAUF Ex. 29.) Steward presents evidence that Blue Cross employees were apprehensive that if Steward acquired Landmark, in addition to its continued operation of hospitals in nearby Massachusetts, the "Steward Community Choice health plan" with rates "15% to 30% below a comparable broad network plan" offered in partnership with Tufts in Massachusetts could more effectively infiltrate Rhode Island. (See, e.g., SAUF Ex. 32, ECF No. 214-32 (email from Blue Cross employee Daniel Belvin to other employees: "I do not expect to see this move [of Steward's Community Choice Plan] in Rhode Island at launch since the required physicians and hospitals are all community hospitals and affiliated physicians in Massachusetts (Saint Anne's in Fall River is the closest at this time). However, if the Landmark acquisition goes through it could lead to a more effective entry point for this product into our market."); cf. SAUF Ex. 23 at 3, ECF No. 214-23 (Sept. 2012 Red Team Scenarios, "Expansion of Community Choice Product into Rhode Island": "However with Steward facilities in nearby Fall River (St. Anne's Medical Center) and Taunton (Morton Hospital), Bristol and Newport **[**97]** counties may also be served, bringing cost-effective coverage to more than 72% of the state's population."). And Steward presents evidence that Blue Cross was generally anxious about the potential competitive impact that ACOs and risk-based contracting **[*510]** posed for insurance companies. (See, e.g., SAUF Ex. 35 at 11 ("Just supporting such structures is insufficient because the possibility exists for the ACO to develop a level of integration that makes an outside insurer redundant."); Coleman Dep. at 435-38, SAUF Ex. 7 (Blue Cross's then-CFO describing how an ACO in collaboration with a hospital could risk "disintermediation" of Blue Cross, i.e., "the health care insurance company is no longer relevant"); Andruszkiewicz Dep. at 93:3-5, SAUF Ex. 6 (describing "disintermediation" as the provider "eliminat[ing] the intermediary known as the payer and [then] becom[ing] the provider and payer"); id. at 93:7-13 ("And so [disintermediation] was a concern among my team, me, and every health insurance executive in the United States at this time frame. And so we're walking here the fine line, in the way I guess I'd describe it, between having a partnership with this provider and

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41 The Red Team's motto was "Attack Adapt Advance" and its logo appears to be a hatchet enclosed within the "shield" of Blue Cross's emblem. (See, e.g., SAUF Ex. 29 at 2, ECF No. 214-29.)

42 Blue Cross has its own assignment of meaning to the Red Team documents, which may ultimately persuade the jury. The Red Team's September 2012 presentation to Blue Cross's ELT included a disclaimer that, "Information included in the presentation is for illustrative purposes only; names and scenarios do not represent real life situations and parties could be interchanged." (SAUF Ex. 31 at 2.) Despite Blue Cross's proviso, how close the Red Team's analysis tracks in time and substance the reality of what Steward was seeking to bring to Rhode Island does more than raise a few eyebrows - it raises a genuine factual dispute over the meaning of the Red Team documents to both Blue Cross and this case. Indeed, the Red Team's cast of characters included those with major influence in real-life negotiations, including Consultant Maria Montanaro. (See id.)

protecting ourselves **[**98]** from them taking away our business."); Waggoner Dep. at 298:9-21, SAUF Ex. 11 ("Q. [W]asn't there some discussion at Blue Cross at about this same time about the possibility that the ACO model or integrated delivery system could in some sense replace a conventional insurance company? A. I'm sure there was. I don't recall, you know, specific conversations. But the trend in conversations at that point in time, there was a lot of conversation like that in the country at that point in time.")).

Blue Cross's second argument that Prime's acquisition of Landmark benefited consumers (and thus competition) because Prime charges lower prices than those Steward proposed is saturated with material factual disputes. Even assuming that the calculus is as narrow at Blue Cross suggests, Steward presents evidence that a Steward-owned Landmark would have saved Blue Cross (and therefore consumers) money. (See, e.g., SAUF Ex. 86 at 6, ECF No. 215-11 ("Redirection of care to lower cost, non-network community hospital would have tremendous impact on lowering healthcare costs."); Eisenstadt Rep. ¶ 58, SDF Ex. 39, ECF No. 206-39 ("Steward would not have needed to achieve any volume growth at **[**99]** Landmark relative to 2011 for BCBSRI and its employer accounts to have been financially better off in 2015."). But see Noether Rep. ¶¶ 203-12, SDF Ex. 40, ECF No. 206-40 (Blue Cross's expert concluding Blue Cross saved money with Prime)). At bottom, whether competition was harmed is a matter of how the jury sees the question and assesses the facts.

Finally, Blue Cross's argument that "the actual evidence, as opposed to speculation about the future effect of Steward's business plans, shows that Steward's acquisition of Landmark would have harmed Rhode Islanders in the form of higher healthcare costs." (Def.'s Mem. 74.) Like the boy who kills his parents and then pleads for mercy as an orphan, Blue Cross's argument is the height of chutzpah. Steward cannot be faulted for having no direct evidence of the competitive benefits that it could have brought to Rhode Island when the barricade was erected by Blue Cross's allegedly exclusionary conduct. The Supreme Court long ago closed the door to this reasoning when it stated, "the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp., 79 F.3d 182, 200 (1st Cir. 1996)* (quoting **[**100]** *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 256, 66 S. Ct. 574, 90 L. Ed. 652 (1946))*. To modify slightly what the First Circuit said in Sullivan, "It would be difficult indeed to provide direct evidence of competition when [Blue Cross] effectively prohibit[ed] it." *34 F.3d at 1100*.

[*511] 3. Damages

Blue Cross suggests that the Court should exclude Steward's damages model because all but a small portion of its damages could have been mitigated, and that Steward's damages model clashes with Steward's claims because it does not distinguish between damages caused by lawful versus unlawful conduct.[43]

Several overarching principles guide the Court's analysis. First, ***HN25***[] although antitrust plaintiffs have a duty to mitigate their losses, see, e.g., *Golf City, Inc. v. Wilson Sporting Goods, Co., 555 F.2d 426, 436 (5th Cir. 1977)*, the failure to mitigate is an affirmative defense, which the defendant must plead and prove. See, e.g., *Pierce v. Ramsey Winch Co., 753 F.2d 416, 436-37 (5th Cir. 1985)* ("[D]efendant bears the burden of demonstrating a failure to mitigate . . . ."); *Malcolm v. Marathon Oil Co., 642 F.2d 845, 863 (5th Cir. 1981)* ("[T]he burden of showing that the victim of [the anticompetitive] conduct failed to minimize his damages rests with the wrongdoer." (quotations and citations omitted)). And second, on a summary-judgment motion, the defendant must clear that hurdle as a matter of undisputed fact. See *Creative Copier Servs. v. Xerox Corp., No. Civ.A 301CV155SRU, 2005 U.S. Dist. LEXIS 19402, 2005 WL 2175138, at *5 (D. Conn. Sept. 2, 2005)* (deeming mitigation of damages **[**101]** in antitrust case a "classic example of a disputed issue of material fact").

It is also significant that, ***HN26***[] "any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." *Comcast Corp. v. Behrend, 569 U.S. 27, 133 S. Ct. 1426, 1433, 185 L. Ed. 2d 515 (2013)*. Blue Cross asserts that Steward could

43 This section cross-references Steward's previously filed Motion in Limine To Exclude Damages Testimony of Keith Ghezzi and Marc Sherman (ECF No. 161).

have mitigated all but $800,000 of its damages by accepting Blue Cross's proposed reimbursement rates. This factual assertion essentially acknowledges that summary judgment is not appropriate. In reality, this part of Blue Cross's motion amounts to a motion in limine to restrict the evidence of damages at trial. It asks the Court to shun Steward's liability case as a matter of law. However it is characterized, the argument is rejected. Blue Cross suggests that Steward - in the midst of intense and seemingly ongoing, good-faith negotiations - was required to step back, identify a breach, i.e., an antitrust violation, and then accept Blue Cross's latest offer (having determined it was in bad faith), because not doing so would neglect its duty to mitigate. This is nonsensical, and, not surprisingly, finds no support in the law, in antitrust or otherwise. Cf. *In re Kellett Aircraft Corp., 186 F.2d 197, 198-99 (3d Cir. 1950)* ("The rule **[**102]** of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of showing that the injured person might have taken steps which seemed wiser or would have been more advantageous . . . ."); *Koby v. United States, 53 Fed. Cl. 493, 497 (2002)* ("Accordingly, courts have been reluctant to require parties, under the duty to mitigate, to deal further with the breaching party . . . ."). The offer Blue Cross says Steward should have accepted is part and parcel of Blue Cross's alleged anticompetitive conduct; it cannot be said that, as a matter of law, the duty to mitigate required Steward to accept Blue Cross's arguably bad faith offers in order to mitigate.

As to Blue Cross's suggestion that Steward's damages model is based in part on Blue Cross's failure to participate in a **[*512]** "collaborative relationship" with Steward and that holding Blue Cross responsible for failing to engage in such a relationship exceeds the law's proscription with respect to "lawful" conduct, Blue Cross can make this argument at trial. For now, Steward has created a genuine dispute of material fact that Blue Cross would, if it had acted in good faith, implemented a **[**103]** rate agreement with Steward that included a collaborative, risk-based agreement in year three, which is consistent with an antitrust approach to calculating damages: "an expert may construct a reasonable offense-free world as a yardstick for measuring what, hypothetically, would have happened 'but for' the defendant's unlawful activities." *LePage's, Inc. v. 3M, 324 F.3d 141, 165 (3d Cir. 2003)*. Part of the world Steward constructs as the reality but for Blue Cross's refusal to deal with Steward embraces a "cooperative" business relationship between Steward and Blue Cross - not because the antitrust laws required such a relationship, rather because the parties projected such an arrangement through their course of dealing. In other words, Steward's expert simply details what is implicit in every contract: the duty of good faith and fair dealing. See *Dovenmuehle Mortg., Inc. v. Antonelli, 790 A.2d 1113, 1115 (R.I. 2002)* (per curiam) (***HN27***[] "[V]irtually every contract contains an implied covenant of good faith and fair dealing between the parties." (quoting *Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1342 (R.I. 1996))*. It is premature to conclude, as Blue Cross does, that accepting Steward's damages model fails to distinguish between lawful and unlawful conduct. Unlike the many cases Blue Cross cites in which conduct had already been deemed lawful or unlawful, **[**104]** here there is no previously adjudicated, lawful conduct to filter out from Steward's model. Cf. *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1163 (7th Cir. 1983)* (reversing jury award where plaintiff's damages model assumed illegality of all of defendant's charged acts, when liability was predetermined as to only seven). And based on the viability of Steward's claims as outlined above, summary judgment is not the time to test Blue Cross's damages theory.

A final point: although damages will be further examined at trial, a plaintiff is not required to quantify damages to sustain a damages award in this context; ***HN28***[] when an antitrust plaintiff demonstrates it has been damaged, a jury may award nominal damages. See *Sciambra v. Graham News, 892 F.2d 411, 415 (5th Cir. 1990)* ("[P]roof of an antitrust violation and the fact of damage is a sufficient basis for an award of nominal damages."); *Home Placement Serv., Inc. v. Providence J. Co., 819 F.2d 1199, 1207, 1210 (1st Cir. 1987)* (affirming nominal damages award where plaintiff established fact of damage but did not set forth adequate evidence "to permit a trier of fact to ascertain the amount of damages by just and reasonable inference"). Blue Cross's declarations over damages do not suffice to grant summary judgment against Steward.

4. State-Action Doctrine

Finally, Blue Cross avers that the state-action doctrine forecloses Steward's antitrust claims **[**105]** because state regulation compelled the supposedly unreasonable rates that Blue Cross offered. As a matter of law, the Court doubts that the state-action doctrine contemplates these circumstances, and, even if it did, Blue Cross's argument is deficient for many of the reasons outlined above with respect to the OHIC regulations.

HN29[] The state-action doctrine immunizes from challenge conduct that is the intentional or foreseeable result of state or local government policy. See *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. And it has two elements **[*513]** for immunizing supposed compelled conduct: "[f]irst, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Ca. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978))*. For purposes of argument, Steward concedes the first prong and solely addresses the second, the "active supervision prong."

HN30[] In Patrick v. Burget, the Supreme Court set forth that "the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct." *486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*. The "mere presence of some state involvement or monitoring does not suffice." Id. To invoke the doctrine also necessitates that "state officials have **[**106]** and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Id.; see also *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634-35, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)* ("[The active-supervision inquiry's] purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. . . . The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."). A brief summation of the state-action doctrine standard alone crystallizes why it does nothing to bar Steward's claims here. Because it cannot be said that Blue Cross's "anticompetitive acts were truly the product of state regulation," Blue Cross cannot "claim state-action immunity from *Sherman Act* liability." *Patrick, 486 U.S. at 100*; see also *Ticor, 504 U.S. at 636* ("state-action immunity is disfavored.").

In any event, assuming arguendo that that the doctrine somehow contemplates these circumstances, Steward easily overcomes it. As a matter of disputed fact: (1) OHIC has no authority over hospitals - only health insurers; (2) based on OHIC's own publications, OHIC **[**107]** has previously excepted application of its regulations for certain hospitals, and OHIC regulations are not inflexible in the sense that they would prohibit Blue Cross from ever offering rate increases of a certain amount. Thus, Steward has at least created a material factual dispute regarding the "active supervision" prong. Blue Cross's request for summary judgment on this ground fails.

E. Conclusion

For the reasons outlined above, the Court DENIES Blue Cross's Motion for Summary Judgment (ECF No. 157) on all Counts of Steward's Amended Complaint (ECF No. 90). Accordingly, Counts I-XVIII will proceed to trial.

IT IS SO ORDERED.

/s/ William E. Smith

William E. Smith

Chief Judge

Date: April 23, 2018

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Texas v. O.S.T Lounge

United States District Court for the Southern District of Texas, Houston Division

April 23, 2018, Decided; April 23, 2018, Filed, Entered

CIVIL ACTION NO. H-18-578

Reporter

2018 U.S. Dist. LEXIS 68034 *; 2018 WL 1936119

THE STATE OF TEXAS, Plaintiff, v. O.S.T LOUNGE, et al., Defendants.

Core Terms

alcohol, federal law, federal issue, preempts, state law, implicates, regulation, state-law, argues, interstate, preemption, disputed, removal, liquor

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Judges: Lee H. Rosenthal, Chief United States District Judge.

Opinion by: Lee H. Rosenthal

Opinion

MEMORANDUM AND OPINION GRANTING THE PLAINTIFF'S MOTION TO REMAND

The State of Texas sued O.S.T. Lounge in Texas state court, alleging that the Lounge is an unlicensed after-hours bar that sells alcohol without the required permits and that has been linked to repeated criminal activity and violence. The State assert claims for common nuisance under *Chapter 101 of the Texas Alcoholic Beverage Code*, for selling alcohol without the required licenses or permits, for common nuisance under *Texas Civil Practice & Remedies Code §§ 125.001-125.047*, and seeks injunctive relief.

O.S.T. Lounge removed, arguing that the State's claims are "predicated on the effect and interpretation of federal regulation," making federal-question jurisdiction proper. (Docket Entry No. 1 at 2). The **[*2]** State moves to remand, arguing that there is no federal question and no federal removal jurisdiction. (Docket Entry No. 3). The parties agree that the petition, on its face, asserts only state-law claims. (Docket Entry No. 3 at 2; Docket Entry No. 5 at 2). The issue is whether federal law preempts the state-law claims or whether the claims require the resolution of a substantial disputed question of federal law.

"Under th[e] 'well-pleaded complaint' rule, a federal court has original or removal jurisdiction only if a federal question appears on the face of the plaintiff's well-pleaded complaint; generally, there is no federal jurisdiction if the plaintiff properly pleads only a state law cause of action." *Bernhard v. Whitney Nat'l Bank, 523 F.3d 546, 551 (5th Cir. 2008)*. "Even an inevitable federal defense does not provide a basis for removal jurisdiction." *Id.*

The "artful pleading doctrine" is a narrow exception that allows removal only "where state law is subject to complete preemption." *Id.* (citing *Terrebonne Homecare, Inc. v. SMA Health Place, Inc., 271 F.3d 186, 188-89 (5th Cir. 2001)* ("The artful pleading doctrine does not apply, however, unless federal law completely preempts the field.")).

Complete preemption is present when a "federal statute `so forcibly and completely displaces state law that the plaintiff's cause of action **[*3]** is either wholly federal or nothing at all.'" *Hoskins v. Bekins Van Lines, 343 F.3d 769, 773 (5th Cir. 2003)* (quoting *Carpenter v. Wichita Falls Ind. School Dist., 44 F.3d 362, 366 (5th Cir. 1995))*. The Supreme Court recognizes complete preemption only in three areas: the Labor Management Relations Act, ERISA, and the National Bank Act. *See* *Ben. Nat'l Bank v. Anderson, 539 U.S. 1, 8, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)*. This case implicates none of those statutes, and complete preemption does not apply.

A second exception allows removal of "a case pleading only state law claims" if "the vindication of a right under state law necessarily turn[s] on some construction of federal law." *Bernhard, 523 F.3d at 551* (quoting *Franchise Tax Bd. v. Const. Laborers Vacation Trust, 463 U.S. 1, 9, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983))*. "The federal courts have jurisdiction over a state law claim that 'necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.' *Id.* (quoting *Grable & Sons Metal Prods. v. Darue Eng 'g & Mfg., 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005))*. "[T]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Willy v. Coastal Corp., 855 F.2d 1160, 1168 (5th Cir. 1988)*.

O.S.T. Lounge argues that the State's state-law claims "depend on the resolution of federal law" because those state laws "attempt to regulate in an area where there has been a history of significant federal presence." (Docket Entry No. 5 at 2). O.S.T. Lounge's argument conflates the two **[*4]** exceptions to the well-pleaded complaint rule. It argues that federal law preempts the State's claims and that resolving the claims requires the court to apply federal law, creating federal-question jurisdiction. The court disagrees.

A disputed federal issue creates federal-question jurisdiction in a case that otherwise raises only state-law claims when: "(1) resolving a federal issue is necessary to resolution of the state-law claim; (2) the federal issue is actually disputed; (3) the federal issue is substantial; and (4) federal jurisdiction will not disturb the balance of federal and state judicial responsibilities." *Singh v. Duane Morris LLP, 538 F.3d 334, 338 (5th Cir. 2008)*. The issue is whether resolving the state-law claims presented in this case requires the court to resolve a substantial or disputed federal issue. O.S.T. Lounge appears to argue that, because the State seeks to: (1) restrain O.S.T.'s right to sell alcohol; (2) restrain O.S.T.'s right to allow others to consume alcohol; and (3) restrain O.S.T.'s right to advertise on the internet, federal statutes are implicated and substantial disputed federal issues must be decided. O.S.T.'s arguments are unpersuasive.

O.S.T. argues that *Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45*, is implicated. **[*5]** *Section 5* states: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." *§ 45(a)(1)*. O.S.T. Lounge argues that the fact that the Federal Trade Commission may regulate interstate commerce to address unfair competition or unfair or deceptive acts or practices preempts state alcohol laws. O.S.T. cites *Liquor Corp. v. Duffy, 479 U.S. 335, 107 S. Ct. 720, 93 L. Ed. 2d 667 (1987)*, and *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, which addressed whether wholesale and retail pricing schemes for the sale and distribution of alcohol were inconsistent with federal ***antitrust law***. By contrast, this case involves a single local establishment allegedly selling alcohol without the proper state licenses. There are no antitrust allegations, no challenges to an unlawful pricing scheme, and no indication that O.S.T. Lounge is engaged in the interstate sale or distribution of alcohol. Nothing implicates the Federal Trade Commission Act.

Second, O.S.T. Lounge argues that the State's attempt to restrain its rights to advertise is "explicitly preempted by the *Commerce Clause*." (Docket Entry No. 5 at 4). O.S.T. Lounge cites to *Capital Cities Cable v. Crisp, 467 U.S. 691, 104 S. Ct. 2694, 81 L. Ed. 2d 580 (1984)*, *Jameson & Co. v. Morgenthau, 307 U.S. 171, 59 S. Ct. 804, 83 L. Ed. 1189 (1939)*, and *Dickerson v. Bailey, 87 F. Supp. 2d 691 (S.D. Tex. 2000)*. In *Crisp,* the Supreme Court addressed an Oklahoma law that banned using out-of-state signals to retransmit cable television **[*6]** advertisements for alcoholic beverages as part of local programming. The Court held that the extensive nature of the FCC regulatory scheme for commercial cable television preempted state and local regulations in the area and that the Oklahoma advertising ban directly conflicted with the federal regulations. *Id. at 704*. The Court also explained that while the Twenty *First Amendment* reserves to the states the power to "regulate the importation and use of intoxicating liquor within their borders," the federal government "plainly retains authority under the *Commerce Clause* to regulate interstate commerce in liquor." *Id. at 712-13*; *see also* *Dickerson, 87 F. Supp. 2d at 693* (addressing whether a Texas statute prohibiting Texans from importing more than three gallons of wine for personal use without a special permit, unless the resident personally accompanied the liquor as it entered the state). This case does not implicate interstate alcohol sales or purchases that would require applying or interpreting federal law.

Finally, O.S.T. Lounge argues that the presumption against preemption does not apply in areas historically regulated by the federal government, such as the regulation of alcohol under the *Federal Alcohol Administration Act*, *27 U.S.C. § 203*. The purpose of that Act is to regulate **[*7]** the interstate distribution, production, and importation of alcohol. *Section 121* of the Federal Alcohol Administration Acts explains:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 121. This section specifically reserves a state's ability to regulate alcohol within its borders and expressly states that federal law does not to preempt state laws regulating intrastate alcohol use, consumption, sale, or storage. *See also* *Craig v. Boren, 429 U.S. 190, 205, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976)*. Texas requires licenses to sell alcohol within the State under the Texas Alcoholic Beverage Code. *Chapter 101 of the Code* provides for injunctive relief against selling alcohol without the proper licenses or permits. An action under that provision neither implicates **[*8]** nor requires the resolution of a substantial question of federal law.

This case presents no federal question. The court lacks subject-matter jurisdiction, making remand proper. This case is remanded to the 11th Judicial District Court of Harris County, Texas.

SIGNED on April 23, 2018, at Houston, Texas.

/s/ Lee H. Rosenthal

Lee H. Rosenthal

Chief United States District Judge

In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.

United States District Court for the Northern District of California

April 25, 2018, Decided; April 25, 2018, Filed

Case Nos. 14-md-02541-CW; 14-cv-02758-CW

Reporter

2018 U.S. Dist. LEXIS 70144 *; 2018-1 Trade Cas. (CCH) P80,361; 2018 WL 1948593

IN RE: NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION. THIS DOCUMENT RELATES TO: ALL ACTIONS

Prior History: *Jenkins v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 311 F.R.D. 532, 2015 U.S. Dist. LEXIS 163878 (N.D. Cal., Dec. 4, 2015)*

Core Terms

procompetitive, athletics, motion to exclude, student-athletes, proposed testimony, benefits, effects, relevant market, reliable, denies, amateurism, facilities, scientific, spending

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For Nicholas Kindler, Plaintiff (4:14-md-02541-CW): Ashley A Bede, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, Wa; Bruce L. Simon, Pearson, Simon & Warshaw, LLP, San Francisco, CA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Craig Ripley Spiegel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; David G. Feher, Winston & Strawn LLP, New York, NY; David L. Greenspan, Winston & Strawn LLP, New York, **[*12]** NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; Jon T. King, Law Offices of Jon T. King, Concord, CA; Joseph A. Litman, Winston and Strawn, New York, NY; Robert B. Carey, Hagens Berman Sobol Shapiro LLP, Phoenix, AZ; Sean D. Meenan, Winston and Strawn, San Francisco, CA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA; William James Newsom, Pearson, Simon & Warshaw, LLP, San Francisco, CA.

For Kendall Gregory-McGhee, Plaintiff (4:14-md-02541-CW): Bethany Caracuzzo, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; David G. Feher, Winston & Strawn LLP, New York, NY; David L. Greenspan, Winston & Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Elizabeth R. Odette, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Elizabeth Cheryl Pritzker, Pritzker Levine LLP, Oakland, CA; Heidi M Silton, Lockridge Grindal Nauen P.L.L.P., **[*13]** Minneapolis, MN; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; Jon T. King, Law Offices of Jon T. King, Concord, CA; Joseph A. Litman, Winston and Strawn, New York, NY; Richard A. Lockridge, Lockridge Grindal Nauen P.L.L.P., Minneapolis, MN; Sean D. Meenan, Winston and Strawn, San Francisco, CA; Shiho Yamamoto, Pritzker Levine LLP, Oakland, CA; W. Joseph Bruckner, Lockridge Grindal Nauen P.L.L.P, Minneapolis, MN; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

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For Nigel Hayes, Alec James, Plaintiffs (4:14-md-02541-CW): David G. Feher, Winston & Strawn LLP, New York, NY; David L. Greenspan, Winston & Strawn LLP, New York, NY; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jennifer Stewart, Winston and Strawn LLP, New York, NY; Joseph A. Litman, Winston and Strawn, New York, NY; Sean D. Meenan, Winston and Strawn, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

For Anfornee Stewart, Plaintiff (4:14-md-02541-CW): Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY.

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For Dalenta Jameral "D.J." Stephens, Plaintiff (4:14-md-02541-CW): Lawrence Timothy Fisher, LEAD ATTORNEY, Bursor & Fisher, P.A., Walnut Creek, CA; Ashley A Bede, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, Wa; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Craig Ripley Spiegel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; David G. Feher, Winston & Strawn LLP, New York, NY; David L. Greenspan, Winston & Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jeff D Friedman, Hagens Berman **[*16]** Sobol Shapiro LLP, Berkeley, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; Joseph A. Litman, Winston and Strawn, New York, NY; Sean D. Meenan, Winston and Strawn, San Francisco, CA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For Justine Hartman, Plaintiff (4:14-md-02541-CW): Elizabeth Cheryl Pritzker, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA; Bethany Caracuzzo, Pritzker Levine LLP, Oakland, CA; David G. Feher, Winston & Strawn LLP, New York, NY; David L. Greenspan, Winston & Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; Jonathan Krasne Levine, Pritzker Levine, LLP, Oakland, CA; Joseph A. Litman, Winston and Strawn, New York, NY; Sean D. Meenan, Winston and Strawn, San Francisco, CA.

For Afure Jemerigbe, Plaintiff (4:14-md-02541-CW): Elizabeth Cheryl Pritzker, LEAD ATTORNEY, Pritzker Levine LLP, Oakland, CA; Ashley A Bede, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, **[*17]** Seattle, Wa; Bethany Caracuzzo, Pritzker Levine LLP, Oakland, CA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; Craig Ripley Spiegel, Hagens Berman Sobol Shapiro LLP, Seattle, WA; David G. Feher, Winston & Strawn LLP, New York, NY; David L. Greenspan, Winston & Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Winston and Strawn, San Francisco, CA; Jeff D Friedman, Hagens Berman Sobol Shapiro LLP, Berkeley, CA; Jeffrey L. Kessler, Winston & Strawn LLP, New York, NY; Jennifer Stewart, Winston and Strawn LLP, New York, NY; Jonathan Krasne Levine, Pritzker Levine, LLP, Oakland, CA; Joseph A. Litman, Winston and Strawn, New York, NY; Sean D. Meenan, Winston and Strawn, San Francisco, CA; Steve W. Berman, PRO HAC VICE, Hagens Berman Sobol Shapiro LLP, Seattle, WA.

For Pacific 12 Conference, Defendant (4:14-md-02541-CW): Bart Harper Williams, Proskauer Rose, Los Angeles, CA; Jacquelyn Nicole Crawley, Proskauer Rose LLP, Los Angeles, CA; Jennifer L. Jones, Proskauer Rose LLP, Los Angeles, CA; Joseph C. O'Keefe, Proskauer Rose LLP, Newark, NJ; Kyle Alexander Casazza, Proskauer Rose LLP, Los Angeles, CA; Lawrence R. Sandak, **[*18]** Proskauer & Rose LLP, Newark, NJ; Manuel Francisco Cachan, Proskauer Rose LLP, Los Angeles, CA; Scott P. Cooper, Proskauer Rose LLP, Los Angeles, CA; Shawn Scott Ledingham Jr., Proskauer Rose LLP, Los Angeles, CA; Wanda L. Ellert, Proskauer Rose LLP, Newark, NJ; William L. Greene, Stinson Leonard Street LLP, 150 S.

For The Big Ten Conference, Inc., Defendant (4:14-md-02541-CW): Christopher John Kelly, LEAD ATTORNEY, Mayer Brown LLP, Palo Alto, CA; Andrew S. Rosenman, Mayer Brown LLP, Chicago, IL; Britt Marie Miller, Mayer Brown LLP, Chicago, IL; Michael Martinez, Mayer Brown LLP, New York, NY; Richard J. Favretto, Mayer Brown LLP, Washington, DC.

For Southeastern Conference, Defendant (4:14-md-02541-CW): Nathan Clifton Chase Jr., LEAD ATTORNEY, Robinson Bradshaw & Hinson, Charlotte, NC; Amanda Rae Pickens, PRO HAC VICE, Robinson Bradshaw Hinson, Charlotte, NC; John A. Boyle, Marino Tortorella & Boyle PC, Chatham, NJ; Kevin Harry Marino, Marino Tortorella &

Boyle PC, Chatham, NJ; Lawrence C Moore III, PRO HAC VICE, Robinson, Bradshaw and Hinson, P.A., Charlotte, NC; Mark J. Seifert, Seifert Law Firm, San Francisco, CA; Pearlynn G. Houck, Robinson Bradshaw Hinson, Charlotte, NC; Robert **[*19]** Walker Fuller III, Robinson Bradshaw Hinson, P.A., Charlotte, NC; Robert Evans Harrington, Robinson Bradshaw Hinson, PA, Charlotte, NC.

For Atlantic Coast Conference, Defendant (4:14-md-02541-CW): Charles Lagrange Coleman III, LEAD ATTORNEY, Holland & Knight LLP, San Francisco, CA; Adanna M Love, San Francisco, CA; Charles Bailey King Jr., Smith Moore Leatherwood LLP, Charlotte, NC; David Erik Albright, Smith Moore Leatherwood LLP, Greensboro, NC; Duvol Thompson, Holland and Knight LLP, New York, NY; James Donald Smeallie, Holland and Knight LLP, Boston, MA; Jonathan P Heyl, Smith Moore Leatherwood LLP, Charlotte, NC; Sean C. Sheely, Holland & Knight LLP, New York, NY.

For The Big Twelve Conference, Inc., Defendant (4:14-md-02541-CW): Wesley Douglas Hurst, LEAD ATTORNEY, Polsinelli LLP, Los Angeles, CA; Amy Dawn Fitts, Kansas City, MO; Caitlin Jemilha Morgan, Polsinelli, PC, Dallas, TX; Leane K Capps, Polsinelli PC, Dallas, Tx; Matthew P. O'Malley, Tompkins McGuire Wachenfeld & Barry LLP, Newark, NJ; Milton Winter, Polsinelli PC, Kansas City, MO.

For National Collegiate Athletic Association, Defendant (4:14-md-02541-CW): Beth Wilkinson, LEAD ATTORNEY, WILKINSON WALSH + ESKOVITZ LLP, Washington, **[*20]** DC; Alexandra M Walsh, WILKINSON WALSH + ESKOVITZ LLP, Washington, DC; Anthony J Dreyer, PRO HAC VICE, Skadden Arps Slate Meagher Flom LLP, New York, NY; Brian L Stekloff, WILKINSON WALSH + ESKOVITZ LLP, Washington, DC; Gregory L. Curtner, Riley Safer Holmes & Cancila LLP, Ann Arbor, MI; Jacob Klein Danziger, PRO HAC VICE, Schiff Hardin LLP, Ann Arbor, MI; Jeffrey A. Mishkin, PRO HAC VICE, Skadden Arps Slate Meagher Flom LLP, New York, NY; Karen Hoffman Lent, PRO HAC VICE, Skadden Arps Slate Meagher Flom LLP, New York, NY; Patrick Maben Hammon, Skadden Arps Slate Meagher Flom, Palo Alto, CA; Rakesh Kilaru, WILKINSON WALSH + ESKOVITZ LLP, Washington, DC; Robert James Wierenga, PRO HAC VICE, Schiff Hardin LLP, Ann Arbor, MI; Sean Eskovitz, Wilkinson Walsh Eskovitz LLP, Los Angeles, CA.

For Conference USA, Defendant (4:14-md-02541-CW): Leane K Capps, LEAD ATTORNEY, Polsinelli PC, Dallas, Tx; Amy Dawn Fitts, Kansas City, MO; Caitlin Jemilha Morgan, Polsinelli, PC, Dallas, TX; Milton Winter, Polsinelli PC, Kansas City, MO.

For American Athletic Conference, Defendant (4:14-md-02541-CW): Benjamin C. Block, LEAD ATTORNEY, Covington and Burling LLP, Washington, DC; Lindsey Catherine Barnhart, **[*21]** Covington Burling LLP, San Francisco, CA; Rebecca Ariel Jacobs, Covington and Burling LLP, San Francisco, CA.

Atlantic Sun Conference Inc, Defendant (4:14-md-02541-CW), Pro se.

For Mid-American Conference, Defendant (4:14-md-02541-CW): Andrew B. Downs, LEAD ATTORNEY, Bullivant Houser Bailey PC, San Francisco, CA; Robert Todd Hunt, LEAD ATTORNEY, Walter Haverfield LLP, Cleveland, OH; Benjamin G. Chojnacki, Walter Haverfield LLP, Cleveland, OH.

For Mountain West Conference, Defendant (4:14-md-02541-CW): Meryl Macklin, LEAD ATTORNEY, Bryan Cave LLP, San Francisco, CA; Richard Young, LEAD ATTORNEY, Bryan Cave LLP, Colorado Springs, CO; Brent Rychener, Bryan Cave LLP, Colorado Springs, CO.

For Sun Belt Conference, Defendant (4:14-md-02541-CW): Mark Aaron Cunningham, LEAD ATTORNEY, Jones Walker LLP, New Orleans, LA.

For Western Athletic Conference, Defendant (4:14-md-02541-CW): Karen Hoffman Lent, LEAD ATTORNEY, Skadden Arps Slate Meagher Flom LLP, New York, NY; Jeffrey A. Mishkin, Skadden Arps Slate Meagher Flom LLP, New York, NY; Patrick Maben Hammon, Skadden Arps Slate Meagher Flom, Palo Alto, CA.

For Lamar Dawson, Movant (4:14-md-02541-CW): Betsy Carol Manifold, Wolf Haldenstein Adler Freeman **[*22]** & Herz, San Diego, CA; Mark Carl Rifkin, Wolf Haldenstein Adler Freeman & Herz LLP, New York, NY.

For Turner Broadcasting System, Inc., Interested Party (4:14-md-02541-CW): Dean Allen Morehous Jr., LEAD ATTORNEY, Troutman Sanders LLP, San Francisco, CA.

For NBCUniversal Media, LLC, Interested Party (4:14-md-02541-CW): Kelli L. Sager, LEAD ATTORNEY, Davis Wright Tremaine LLP, Los Angeles, CA.

For Darrin Duncan, Objector (4:14-md-02541-CW): Caroline Victoria Tucker, TUCKER POLLARD, Irvine, CA.

For Iowa State University, University of Iowa, University of Northern Iowa, Miscellaneous (4:14-md-02541-CW): William Robert Pearson, Iowa Department of Justice, Des Moines, Io.

For ESPN, Inc., ESPN Enterprises, Inc., American Broadcasting Companies, Inc., Intervenors (4:14-md-02541-CW): Evan R. Chesler, LEAD ATTORNEY, Cravath Swaine & Moore LLP, New York, NY; David Kumagai, Cravath, Swaine and Moore LLP, New York, NY; Joe Wesley Earnhardt, Cravath, Swaine and Moore LLP, New York, NY; Joseph Richard Wetzel, King & Spalding, San Francisco, CA.

For Fox Broadcasting Company, Fox Cable Networks, Inc., Fox International Channels (US), Inc., Intervenors (4:14-md-02541-CW): David R. Singer, LEAD ATTORNEY, Jenner **[*23]** & Block, Los Angeles, CA; Richard Lee Stone, LEAD ATTORNEY, Jenner & Block, Los Angeles, CA; Anthony Basich, Jenner & Block, Los Angeles, CA; Jeffrey Aaron Atteberry, Jenner and Block LLP, Los Angeles, CA.

For CBS Broadcasting Inc., Intervenor (4:14-md-02541-CW): Christopher J. Cox, LEAD ATTORNEY, Weil Gotshal & Manges, Redwood Shores, CA; David Ramraj Singh, LEAD ATTORNEY, Weil, Gotshal and Manges LLP, Redwood Shores, CA; LEAD ATTORNEY, Yehudah L Buchweitz, New York, NY.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

ORDER ON MOTIONS TO EXCLUDE PROPOSED EXPERT TESTIMONY

(Dkt. Nos. 704, 807, 809-52)

Now pending are Plaintiffs' motions to exclude the proposed testimony of Dr. James J. Heckman and Dr. Kenneth G. Elzinga, and Defendants' motions to exclude portions of the proposed testimony of Dr. Daniel A. Rascher, Dr. Roger G. Noll and Dr. Edward P. Lazear. For the following reasons, the Court grants Plaintiffs' motion to exclude the opinions of Dr. Elzinga. The Court grants in part and denies in part Plaintiffs' motion to exclude the opinions of Dr. Heckman. The Court denies without prejudice Defendants' motion to exclude portions of the opinions of Drs. Rascher, Noll and Lazear. **[*24]**

BACKGROUND

Plaintiffs are current and former student-athletes in the sports of men's Division I Football Bowl Subdivision (FBS) football and men's and women's Division I basketball. Defendants are the NCAA and eleven conferences that participated, during the relevant period, in FBS football and in men's and women's Division I basketball. Plaintiffs allege that Defendants violated federal ***antitrust law*** by conspiring to impose an artificial ceiling on the scholarships and benefits that student-athletes may receive in return for their elite athletic services. See *15 U.S.C. § 1*. All claims for damages having settled, only claims for injunctive relief remain in this multidistrict litigation.

On March 28, 2018, this Court granted in part and denied in part the parties' cross-motions for summary judgment, in an order that provided additional background. *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., Nos. 14-md-02541-CW, 14-cv-02758-CW, 2018 U.S. Dist. LEXIS 52230, 2018 WL 1524005 (N.D. Cal. Mar. 28, 2018)*. The Court held that Plaintiffs had met their initial burden under a rule of reason analysis to show that Defendants' challenged restraints are agreements that produce significant anticompetitive effects affecting interstate commerce, within the same relevant market defined by this Court **[*25]** in *O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014)*, and affirmed by the Ninth Circuit in *O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015)*.

The Court denied the parties' summary judgment motions as to whether Defendants had met their burden to prove that the challenged restraints serve the asserted procompetitive purposes of integrating academics with athletics and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism, as they did in *O'Bannon. 802 F.3d at 1073* (quoting *7 F. Supp. 3d at 1005*). The Court granted Plaintiffs' motion for summary judgment on Defendants' other proffered procompetitive justifications. The Court denied Defendants' motion for summary judgment on whether two proposed less restrictive alternatives advanced by Plaintiffs would achieve any of Defendants' legitimate objectives in a substantially less restrictive manner. The Court scheduled a bench trial on the questions of procompetitive justifications and less restrictive alternatives.

LEGAL STANDARD

Under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

Rule 702 permits an expert to offer opinion testimony on a subject if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier **[*26]** of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In evaluating whether an expert's opinion testimony will help the trier of fact to understand the evidence or determine a fact in issue, the Court considers whether the testimony fits the facts of the case and is "relevant to the task at hand." See *Daubert, 509 U.S. at 591, 597*. In assessing the relevance or "fit" of expert testimony, "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id. at 591*.

To evaluate the reliability of expert opinion testimony, a court must consider the factors set out in Daubert, which include "whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community." *509 U.S. at 593-94*. "One very significant fact to be considered **[*27]** is whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1317 (9th Cir. 1995)* (on remand). The "test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. The focus "must be solely on principles and methodology, not on the conclusions that they generate." *Daubert, 509 U.S. at 595*.

DISCUSSION

I. Dr. Elzinga

Plaintiffs move to exclude the opinions of Dr. Elzinga regarding the definition of the relevant antitrust market in this matter and Defendants' power within that market. Following this Court's March 28, 2018 summary judgment ruling, the only remaining questions for trial are: (1) whether Defendants have come forward with evidence supporting the two claimed procompetitive effects of the challenged restraints, and (2) whether Plaintiffs can show that any legitimate objectives could be achieved in a substantially less restrictive manner. Defendants do not contend that Dr. Elzinga's testimony is relevant to the availability of less restrictive alternatives. **[*28]**

Dr. Elzinga was asked by defense counsel "to assess whether the economic evidence is consistent with Plaintiffs' monopsony-cartel hypothesis or whether the economic evidence is consistent with an efficient market explanation."

Mar. 21, 2017 Elzinga Rpt. at 5. He concluded that the "relevant market in this case is a multi-sided market for college education in the United States" in which colleges operate as multi-sided platforms that balance their pricing to different constituents in the same way that a magazine must balance its pricing to subscribers and advertisers. Id. at 26. However, in the summary judgment order, the Court adopted the single-sided market definition from O'Bannon, the market for a college education combined with athletics or alternatively the market for the student-athletes' athletic services. Dr. Elzinga's reports and opinions, therefore, address an issue that is not part of this case. Defendants have conceded that both sides' Daubert motions would be moot to the extent that the Court granted summary judgment on any given issue.

Defendants argue that in addition to opining on the definition of the relevant market, Dr. Elzinga reached a "distinct conclusion that the NCAA's **[*29]** amateurism rules are procompetitive," which "does not turn on the adoption of his multi-sided market." Defs. Opp. at 44 n.25 (citing Mar. 21, 2017 Elzinga Rpt. at 7-8); see also Jan. 16, 2018 Hearing Tr. at 74-77. Plaintiffs respond that any proposed testimony by Dr. Elzinga on the issue of procompetitive justifications is dependent on his foreclosed opinions on market definition. The Court agrees. Any testimony Dr. Elzinga gives regarding procompetitive benefits in his hypothetical multi-sided market is not relevant to procompetitive effects in the relevant market. *Daubert, 509 U.S. at 591*.

Defendants contend that Dr. Elzinga also opines that "the NCAA's financial aid rules provide a mechanism for avoiding an inefficient market failure, born of the incentive to free ride on the benefits of amateurism." Mar. 21, 2017 Elzinga Rpt. at 100. Therefore, he states, "The rules limiting play to schools that only allow eligible players on their teams is [sic] merely implementing the efficient solution, in which case the rules are not anticompetitive, they are procompetitive." Id. Dr. Elzinga assumes that there is a procompetitive benefit to compensation restrictions and opines that the NCAA rules are necessary to prevent **[*30]** some schools from obtaining those purported benefits without themselves implementing the necessary restrictions. This opinion does not provide any support for Defendants' argument that the NCAA's current rules restricting student-athlete compensation preserve the popularity of the NCAA's product by promoting its current understanding of amateurism. Defendants do not contend that it supports their argument regarding the integration of academics and athletics.

Instead, this argument relates to an issue separate from the procompetitive justifications to be tried, namely, that college athletics requires that certain uniform rules be followed if its product is to be available. *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. This is why a rule of reason analysis is applied rather than a per se rule of illegality. *O'Bannon, 802 F.3d at 1062*. The questions for trial, however, are not addressed by Dr. Elzinga: whether the current, challenged rules have the two procompetitive benefits remaining at issue in this case, and whether less restrictive alternatives to those rules exist.

Dr. Elzinga's opinions are not relevant to any of the issues remaining for trial and will not assist the Court. The Court grants the motion to exclude his proposed testimony.

II. Dr. Heckman **[*31]**

Plaintiffs move to exclude the testimony of Dr. Heckman, who was asked to evaluate human capital and economic outcomes for student-athletes as compared to comparable individuals who did not engage in collegiate athletics. He concluded that there are substantial benefits to athletics participation. Mar. 21, 2017 Heckman Rpt. at 4-7. Defendants seek to offer Dr. Heckman's testimony on the topic of the procompetitive effects of the challenged restraints. Jan. 16, 2018 Hearing Tr. at 76-77.

Plaintiffs move to exclude Dr. Heckman's testimony for three reasons. First, they argue that, like his testimony in O'Bannon, it does not suggest that student-athletes benefit specifically from the challenged restrictions, and therefore it is not relevant to this case. *7 F. Supp. 3d at 980*. Defendants respond that the disputed issue is not whether college has benefits, but whether student-athletes in particular share in those benefits or whether, instead, Defendants subordinate student-athletes' academic well-being to Defendants' financial gain. This issue is relevant, and the weight of Dr. Heckman's testimony on it is a factual question for trial.

Second, Plaintiffs contend that Dr. Heckman's econometric analysis is not **[*32]** reliable because he does not control for scholarship amounts, he is unable to ascertain which members of the data sets are Division I basketball or FBS football players and he uses data sets that are so old that no class member appears in them. Dr. Heckman's data was drawn from surveys conducted by the United States Department of Education in 1988 and 2002. Plaintiffs have not identified any better data sets on which Dr. Heckman could have relied. Their criticisms of Dr. Heckman's data and methodology relate to the weight of the evidence, not its admissibility.

Finally, Plaintiffs move to exclude two categories of opinions in Dr. Heckman's June 21, 2017 reply report that they contend were not adequately disclosed in his opening report and are unreliable speculation.[1] Dr. Heckman's reply report responds to the May 16, 2017 report of Dr. Noll. Dr. Noll's report, in turn, was submitted in rebuttal to the March 21, 2017 reports of Drs. Elzinga and Heckman.

Plaintiffs' first objection is to Dr. Heckman's conclusion that Dr. Noll does not establish a college labor market monopsony or monopsony effects in such a market. Like Dr. Elzinga's proposed testimony, this conclusion is no longer relevant **[*33]** due to this Court's summary adjudication of the issues of market definition and the anticompetitive effects in the relevant market. Accordingly, the Court grants Plaintiffs' motion to exclude Dr. Heckman's testimony on this topic.

Plaintiffs also move to exclude Dr. Heckman's testimony that Dr. Noll ignores the equilibrium effects of Plaintiffs' proposed rule changes, including adverse effects for some or all class members. Dr. Heckman opines that Dr. Noll erroneously assumes that Plaintiffs' proposed rule changes would not result in other, detrimental changes to aspects of the student-athletes' relationship with the college, such as a loss of mentoring and coaching. This testimony remains sufficiently relevant to Defendants' proffered procompetitive justification that the NCAA's current rules promote the integration of academics and athletics to survive the "fit" prong of the Daubert inquiry. Moreover, it is sufficiently responsive to Dr. Noll's opinions. The Court denies the motion to exclude this proposed testimony.

III. Drs. Rascher, Noll and Lazear

Defendants move to exclude the testimony of Plaintiffs' economics experts Drs. Rascher, Noll and Lazear on three grounds. First, Defendants **[*34]** argue that the testimony of all three of these experts does not "fit" the facts of this case because it would, they say, "contradict the Ninth Circuit's clear holding that the NCAA's financial aid rules serve the procompetitive purposes of integrating academics with athletics and promoting amateurism." Mot. at 54. This argument merely duplicates Defendants' summary judgment motion, which was denied in relevant part. The Court therefore denies it for the reasons explained in the March 28, 2018 order.

Second, Defendants argue that neither Dr. Lazear nor Dr. Noll is a qualified expert in college athletics or the laws and NCAA rules that govern them and that their opinions on those topics should be excluded. Defendants' focus here is not on any opinion set forth in the experts' reports, but on two portions of deposition testimony elicited by Defendants. Dr. Lazear testified to his understanding that ***antitrust law*** reflects an unambiguous societal judgment that when prices or quantities are restricted, the social cost outweighs the social benefit. Lazear Depo. at 176:20-178:24. Dr. Noll testified that that student-athletes' cost of attendance is calculated using the federal guidelines, which **[*35]** were not specifically designed as guidelines for athletic scholarships. Noll Depo. at 90:11-22. Plaintiffs respond that they will not offer expert testimony on legal conclusions. They contend, however, that the Court should withhold any ruling until trial, when specific objections can be addressed in context. Especially because this will be a non-jury trial, the Court denies Defendants' motion to exclude this testimony without prejudice to objection at trial, if necessary.

Third, Defendants contend that the opinions of Drs. Rascher and Lazear are unsupported by econometric or other analysis reflecting a generally accepted methodology. This includes their opinions that spending on coaches, administrators and facilities is currently inflated (supra-competitive) and that, absent the challenged rules, such spending would be reduced and redirected to student-athletes as cash compensation. Dr. Rascher compared

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[1] Dr. Heckman's June 21, 2017 reply report is titled "Rebuttal Report of Professor James J. Heckman." To avoid confusion with the rebuttal reports submitted on May 16, 2017, however, the Court refers to it as a reply report.

colleges' spending on coaching and facilities with that of professional sports teams. He did not compare increases in colleges' spending on athletic facilities with their spending on other facilities. Dr. Lazear admitted that he had not done empirical analysis that there is an overuse **[*36]** of capital or under-utilization of labor in the relevant market, but testified that he had looked at data associated with this market, such as data on the payment of coaches and the building and use of facilities. These objections go to the weight of the evidence at trial, not to its admissibility. The Court denies the motion to exclude the proposed testimony of Plaintiffs' experts.

CONCLUSION

For the reasons set forth above, the Court GRANTS Plaintiffs' motion to exclude the proposed testimony of Dr. Elzinga (Docket No. 807 in Case No. 14-md-02541 and Docket No. 376 in Case No. 14-cv-02758). The Court GRANTS IN PART AND DENIES IN PART Plaintiffs' motion to exclude the proposed testimony of Dr. Heckman (Docket No. 809-52 in Case No. 14-md-02541 and Docket No. 374-52 in Case No. 14-cv-02758). The Court DENIES WITHOUT PREJUDICE Defendants' motion to exclude portions of the proposed testimony of Drs. Rascher, Noll and Lazear (Docket No. 704 in Case No. 14-md-02541 and Docket No. 327 in Case No. 14-cv-02758).

IT IS SO ORDERED.

Dated: April 25, 2018

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

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Helicopter Helmet, LLC v. Gentex Corp.

United States District Court for the District of Delaware

May 1, 2018, Decided; May 1, 2018, Filed

No. 1:17-CV-00497

Reporter
2018 U.S. Dist. LEXIS 72623 *; 2018-1 Trade Cas. (CCH) P80,377; 2018 WL 2023489

HELICOPTER HELMET, LLC, and GOVERNMENT SURPLUS SALES, INC. d/b/a GOVERNMENT SALES, INC., Plaintiffs v. GENTEX CORPORATION, FLIGHT SUITS d/b/a GIBSON & BARNES, and JAMES T. WEGGE, Defendants.

Subsequent History: Affirmed by *Helicopter Helmet, LLC v. Gentex Corp., 2019 U.S. App. LEXIS 22435 (3d Cir. Del., July 29, 2019)*

Prior History: *Gentex Corp. v. Abbott, 978 F. Supp. 2d 391, 2013 U.S. Dist. LEXIS 146662 (M.D. Pa., Oct. 10, 2013)*

Core Terms

helmets, Defendants', helicopter, Handbook, Graphic, manufacturer, advertising, antitrust, unjust enrichment, antitrust claim, misleading, Damaged, venue, personal jurisdiction, motion to dismiss, allegations, defamation, military, drop

Counsel: **[*1]** For Helicopter Helmet, LLC, a Delaware Limited Liability Company, Government Surplus Sales, Inc. d/b/a Government Sales, Inc., Plaintiffs: John Anderson Sensing, LEAD ATTORNEY, Jesse Leon Noa, Potter Anderson & Corroon, LLP, Wilmington, DE.

For Gentex Corporation, a Delaware Corporation, Defendant: Colm F. Connolly, LEAD ATTORNEY, Morgan Lewis & Bockius LLP, Wilmington, DE; Abby L. Sacunas, PRO HAC VICE; Daniel T. Brier, PRO HAC VICE; Donna A. Walsh, PRO HAC VICE; R. Brendan Fee, PRO HAC VICE.

For Flight Suits, a California Corporation, doing business as, Gibson & Barnes, Defendant: Joseph James Bellew, LEAD ATTORNEY, Cozen & O'Connor, Wilmington, DE; Robert W. Hayes, PRO HAC VICE.

For James T. Wegge, an individual, Defendant: Joseph James Bellew, LEAD ATTORNEY, Cozen & O'Connor, Wilmington, DE.

Judges: Matthew W. Brann, United States District Judge.

Opinion by: Matthew W. Brann

Opinion

MEMORANDUM OPINION

Gentex Corporation, Gibson & Barnes, and James T. Wegge filed a motion to dismiss the amended complaint filed by Helicopter Helmet, LLC, and Government Surplus Sales, Inc. For the reasons that follow, those motions are granted.

I. BACKGROUND[1]

A. The Parties

Defendant Gentex Corporation, Plaintiff Helicopter Helmet, LLC **[*2]** ("HHC"), and Plaintiff Government Surplus Sales, Inc. ("GSS"), all manufacture helmets for use by helicopter passengers.[2] Defendant Flight Suits d/b/a Gibson & Barnes ("G&B") is the exclusive distributor of Gentex's helicopter helmets.[3] Defendant James Wegge is G&B's director.[4]

B. G&B's 2013 Advertising Campaign and the White Papers

In 2013, G&B ran an advertisement titled "Is Your Helmet a Dangerous Counterfeit?"[5] The ad stated that "[t]housands of helicopter pilots and crews wear dangerous counterfeit helmets," which "look like real [Gentex] helmets . . . [b]ut are assembled from obsolete, defective, and 20-year-old military-surplus parts."[6] Such helmets, the ad stated, "aren't even tested," and contain parts that "can hurt you in a side impact."[7]

Also in 2013, G&B issued a number of publications on "[t]he [u]se of [o]bsolete and [n]onconforming" parts in helicopter helmets.[8] These documents—styled "White Papers"—noted that certain unidentified "[c]ompanies" were developing their own replacement parts for certain types of helicopter helmets; these replacement parts, however, "did not conform to . . . military specifications."[9] As a result, the White Papers charged, helmets containing **[*3]** these parts were dangerously unsafe.[10] The White Paper on "obsolete" or "nonconforming" earcups, for example, contained a graph showing the results of drop tests performed on a "mil-spec" helmet and on an unidentified "[n]onconforming [h]elmet" ("Drop Test Graph").[11] That White Paper also contained an image showing damage to

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[1] When considering a motion to dismiss for failure to state a claim, a court assumes the truth of all factual allegations made in the complaint. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The material in this section, then, is taken entirely from Plaintiffs' Amended Complaint, ECF No. 29, and is presumed true for present purposes.

[2] ECF No. 29 (Amended Complaint) ¶ 15.

[3] *Id.* ¶ 4.

[4] *Id.* ¶ 5.

[5] Ex. C to ECF No. 29.

[6] *Id.*

[7] *Id.*

[8] Ex E to ECF No. 29.

[9] *See, e.g.*, Ex. E to ECF No. 29 ("The Use of Obsolete and Nonconforming Earcups in Commercial SPH Helicopter Helmets") at 3.

[10] *See, e.g., id.* at 5.

[11] *Id.*

an unidentified helmet with "[n]onconforming" parts after a drop test ("Damaged Helmet Graphic").[12] None of the White Papers mentioned any helicopter helmet manufacturer by name.[13]

C. The Accident Prevention Bulletin and the Aviation Life Support Equipment Handbook

One of these White Papers made its way to the United States Department of the Interior ("DOI").[14] As a result, the DOI's Office of Aviation Services ("OAS"), with the assistance Defendants, issued an Accident Prevention Bulletin ("AP Bulletin").[15] Similar to the White Papers, the AP Bulletin warned of the dangers of helicopter helmets with "outdated components" that fail to meet military specifications, and contained copies of the Drop Test Graph and the Damaged Helmet Graphic.[16] Unlike the White Papers, however, the AP Bulletin mentioned a helicopter helmet manufacturer by name; specifically, **[*4]** it noted that the earcups in some of Gentex's helmets—"original version[s]" of the SPH-4B model—"do not meet current agency standards," and that owners of that helmet should purchase a "conversion kit." The AP Bulletin, though, did not mention any other manufacturer. As a result of the safety issues highlighted in the AP Bulletin, the DOI's Bureau of Land Management ("BLM") awarded G&B a sole source contract for Gentex helmets.[17]

Defendants' relationship with the OAS continued after the issuance of the AP Bulletin. The OAS publishes an Aviation Life Support Equipment Handbook ("2008 ALSE Handbook"), which "regulates all helmets that are purchased for [federal] government agencies."[18] Among other things, the ALSE Handbook notes which helicopter helmets have been approved[19] for use by DOI personnel, specifically identifying several of Gentex's helmets as well as several helmets by other manufacturers.[20] After the publication of the AP Bulletin, Defendants "caused DOI personnel" to draft[21] an updated ALSE Handbook ("2013 ALSE Handbook") that listed only Gentex helmets as "approved," removing all references to non-Gentex helmets.[22]

D. Investigation by the Department of the Interior's Office of [*5] the Inspector General

Although the 2013 ALSE Handbook never made it out of draft form, it was relied upon by the DOI for some helmet contracts.[23] As a result, HHC complained to the DOI's Office of the Inspector General ("OIG").

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12 *Id.*

13 The White Papers talked about the use of such parts in "SPH" helmets. *Id.* Although not identified in the White Papers, Gentex is the manufacturer of such helmets. ECF No. 29 (Amended Complaint) at 4 n.2.

14 ECF No. 29 (Amended Complaint) ¶ 23.

15 *Id.* ¶ 24.

16 Ex. F to ECF No. 29.

17 ECF No. 29 (Amended Complaint) ¶ 28; Ex. G to ECF No. 29.

18 ECF No. 29 (Amended Complaint) ¶ 13.

19 To meet DOI approval, helicopter helmets must either (1) conform to a United States Military standard, (2) be otherwise approved for use in United States Military helicopters, or (3) conform to a American National Standard Institute standard. Ex. A to ECF No. 29 ("ALSE Handbook") at 3.

20 *Id.*

21 ECF No. 29 (Amended Complaint) ¶ 29.

22 Ex. H to ECF No. 29 (2013 ALSE Handbook) at 8-9.

23 ECF No. 29 (Amended Complaint) ¶ 30.

The OIG's summary report on this incident noted that it investigated "allegations that a helicopter helmet company misled the [BLM] to believe that only one type of helicopter helmet, available only through a single vendor, was acceptable for DOI use," as well as "alleg[ations] that the company and other vendors colluded with BLM personnel to draft an update of the [2008 ALSE Handbook] to benefit only two companies . . . ."[24] The summary report, however, found only that the DOI "improperly applied helmet standards from the draft [2013 H]andbook, which was pending approval, rather than the standards listed in the currently[-]approved handbook."[25] It did not contain any finding on the alleged collusion.

As a result of the investigation, BLM cancelled the sole-source contract with G&B and the OAS removed the AP Bulletin from its website.[26] In a letter to the OIG, OAS noted that, in the future, it would "ensure that all data solicited from, or provided by, the aviation **[*6]** industry is vetted for accuracy and free of any advertising rhetoric prior to incorporating the language into publications."[27] The letter also indicated OAS's intention to "publish a list of the helmet models that have met the ALSE [H]andbook standards in a manner that affords frequent updates."[28]

E. Procedural History

Plaintiffs initiated this action on May 1, 2017. Their operative complaint narrates the above allegations and argues that Defendants' actions, which were intended to drive Plaintiffs out of business, violated federal antitrust laws, state defamation and civil conspiracy law, the Delaware Consumer Fraud Act, the *Federal Trade Commission* Act, and the Lanham Act, and unjustly enriched Defendants at Plaintiffs' expense.[29] Defendants have moved to dismiss this complaint for lack of personal jurisdiction, improper venue, and failure to state a claim.[30]

II. DISCUSSION

A. Standard of Review

When considering a motion to dismiss for failure to state a claim upon which relief may be granted,[31] a court assumes the truth of all factual allegations in the plaintiff's complaint and draws all inferences in favor of that party;[32] the court does not, however, assume the truth of any of the complaint's **[*7]** legal conclusions.[33] If a

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[24] Ex. I to ECF No. 29.

[25] *Id.*

[26] Ex. J to ECF No. 29 (OAS Response to Management Advisory of Investigative Results).

[27] *Id.*

[28] *Id.*

[29] ECF No. 29.

[30] ECF Nos. 37 and 39.

[31] *Federal Rule of Civil Procedure 12(b)(6)*.

[32] *Phillips v. County Of Allegheny, 515 F.3d 224, 228 (3rd Cir. 2008)*.

[33] *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. *See also* *Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 (3rd Cir. 2016)*.

complaint's factual allegations, so treated, state a claim that is plausible — *i.e.*, if they allow the court to infer the defendant's liability — the motion is denied; if they fail to do so, the motion is granted.[34]

B. Whether This Court Has Personal Jurisdiction Over G&B and Mr. Wegge

G&B and Mr. Wegge argue that this Court lacks personal jurisdiction over them, and that Plaintiffs' suit should be dismissed on that basis.

Personal jurisdiction takes two forms: general jurisdiction and specific jurisdiction.[35] Plaintiffs do not argue that this Court has general jurisdiction over G&B and Mr. Wegge; consequently, Plaintiffs must show the existence of specific jurisdiction. To do so, Plaintiffs must point to competent evidence in the record.[36]

This Court's exercise of personal jurisdiction is limited only by the *Due Process Clause*.[37] Therefore, Plaintiffs need merely show some "affiliation between [Delaware] and the underlying controversy"—*i.e.*, show that the suit arises out of or relates to G&B and Mr. Wegge's contacts with Delaware.[38]

Plaintiffs have sustained their burden. Their complaint alleges several causes of action based on, *inter alia*, Defendants' alleged creation and dissemination **[*8]** of the White Papers.[39] And they have produced uncontroverted evidence that G&B and Mr. Wegge distributed these White Papers into Delaware.[40] This Court, therefore, has specific personal jurisdiction over G&B and Mr. Wegge.

C. Whether Venue Is Proper in This Court as to Mr. Wegge

Mr. Wegge argues that venue is improper in this Court as to the antitrust claims against him. He observes that the *Clayton Act* allows a plaintiff to sue a defendant "in the district in which the defendant resides or is found,"[41] and notes that he neither resides in, nor can be found in, Delaware.

In federal antitrust cases, however, venue may be established under the Clayton Act *or* under the general venue statute.[42] The general venue statute, in turn, states that an action may be brought in any judicial district "in which a substantial part of the events or omissions giving rise to the claim occurred."[43] And as noted above, Plaintiffs' claim

[34] *Id.*

[35] *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, 137 S.Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017)*.

[36] *Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330, 51 V.I. 1219 (3d Cir. 2009)*.

[37] *Federal Rule of Civil Procedure 4(k)(1)(A)* (indicating that this Court's jurisdiction is determined by Delaware's jurisdictional statutes); *10 Del. C. § 3104(c)* (Delaware's long-arm statute); *Hercules Inc. v. Leu Trust and Banking (Bahamas) Ltd., 611 A.2d 476, 480 (Del. 1992)* (noting that Delaware's long-arm statute is "to be broadly construed to confer jurisdiction to the maximum extent possible under the *Due Process Clause*").

[38] *Bristol-Myers Squibb Co., 137 S.Ct. at 1780-81*.

[39] ECF No. 29 (Amended Complaint) ¶ 22.

[40] ECF No. 50-1 (Affidavit of Ron Abbott) ¶ 5.

[41] *15 U.S.C. § 15(a)*.

[42] *Delong Equip. Co. v. Washington Mills Abrasive Co., 840 F.2d 843, 855 (11th Cir. 1988)*

is partly based on Defendants' dissemination of White Papers into Delaware.[44] Therefore, venue is proper in this Court.

D. Whether There Is a Private Right of Action Under the Federal Trade Commission Act

Gentex, G&B, and Mr. Wegge argue that there is no private right of action under the **[*9]** Federal Trade Commission. In response, Plaintiffs abandon that claim.[45]

E. Whether Plaintiffs Have Stated a Claim for Unjust Enrichment

Gentex, G&B, and Mr. Wegge argue that Plaintiffs have not stated a claim for unjust enrichment because they have not alleged a nexus between their loss and Defendants' gain.

Under Delaware law, unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[46] To plausibly allege their claim for unjust enrichment, then, Plaintiffs must allege some relationship between their impoverishment and Defendants' enrichment.[47]

In their complaint, Plaintiffs allege that unjust enrichment occurred when the BLM awarded a sole-source contract to Defendants, since HHC had previously provided helmets to that agency's Alaska State Office.[48] Plaintiffs do *not* allege, however, that they had any vested right or interest in providing helmets to the BLM—they do not, for example, allege that the BLM breached any contract with them in order to deal with Defendants. This circumstance, therefore, cannot be classified as "the unjust retention of **[*10]** a benefit to the loss of another, or the retention of money or property of another." And Plaintiffs do not identify any other direct "relationship between [Defendants'] enrichment and [Plaintiffs'] impoverishment." Therefore, their unjust enrichment claim will be dismissed.

F. Whether Plaintiffs Have Stated a Claim for Defamation

Gentex, G&B, and Mr. Wegge argue that Plaintiffs have not stated a claim for defamation because none of the allegedly defamatory statements mention any of the Plaintiffs directly.

Under Delaware law, a plaintiff bringing a claim for defamation must allege that the statement at issue "refers to the plaintiff."[49] Here, Plaintiffs point to several of G&B's advertisements that warn of unsafe "counterfeit" helicopter helmets, and to the White Papers which discuss the safety of various "obsolete" and "nonconforming" helicopter helmet parts.[50] None of these publications, however, mention any Plaintiff either directly or obliquely. Plaintiffs

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[43] *28 U.S.C. § 1391(b)(2)*

[44] ECF No. 29 (Amended Complaint) ¶ 22.

[45] ECF No. 42 (Plaintiffs' Opposition to Gentex's Motion to Dismiss) at 2 n.3.

[46] *Schock v. Nash, 732 A.2d 217, 232 (Del. 1999)*.

[47] ***Eastern Savings Bank, FSB v. Cach, LLC, 124 A.3d 585, 592 n.28 (Del. 2015)*** ("In order to show unjust enrichment, there must be (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law.")

[48] ECF No. 29 (Amended Complaint) ¶¶ 28, 119.

[49] *Grubbs v. University of Delaware Police Department, 174 F. Supp. 3d 839, 861 (D. Del. 2016)*.

[50] Exs. D and E to ECF No. 29.

argue that, in light of small number of helicopter helmet manufacturers that supply the national market,[51] G&B's statements must be understood as referring to HHC or GSS. Plaintiffs, however, point to no Delaware legal authority supporting **[*11]** such a "group libel" theory, nor can this Court find any.[52] Even if such authority existed, this Court cannot see how the advertisements or the White Papers could plausibly be understood to refer to HHC or GGS. Therefore, Plaintiffs' defamation claims will be dismissed.

G. Whether Plaintiffs Have Stated a Claim Under the Delaware Consumer Fraud Act

Gentex, G&B, and Mr. Wegge argue that Plaintiffs have not stated a claim under the *Delaware Consumer Fraud Act ("DCFA")* because the allegedly actionable statements identified by Plaintiffs are neither false, misleading, confusing or likely to cause any misunderstanding.

The DCFA creates liability for a host of deceptive trade practices.[53] Plaintiffs claim that Defendants' publication of the Damaged Helmet Graphic violated the DCFA's prohibition on "false or misleading statements of fact" that "disparage[] the goods or services, or business of another."[54] Specifically, Plaintiffs aver that this graphic "was intended to unlawfully influence expectations of what would happen if a consumer did not wear a Gentex helmet . . . [and to] damage the reputation of products produced by HHC, GS[S], and other competitors."[55] As an initial matter, this Court **[*12]** notes that Plaintiffs do not claim that the Damaged Helmet Graphic is false—*i.e.*, Plaintiffs do not claim that the pictured helmet was not actually damaged after a drop test. Instead, Plaintiffs claim that the graphic is misleading because the helmet "in fact passed the impact test required by ALSE standards."[56] This Court, however, fails to see how it would be misleading for an advertiser to fail to point out the positive aspects of its competitors' products. Further, I fail to see how the graphic disparages Plaintiffs' goods, since it does not identify either HHC or GSS as the manufacturer of the helmet. In fact, Plaintiffs' *complaint* doesn't even identify the manufacturer of the pictured helmet, other than to say that it was "non-Gentex."[57] In sum, the Damaged Helmet Graphic does not violate the DCFA.

Plaintiffs also claim that Defendants' reference to the SPH-5 helmet as "Mil-Spec" in the White Papers violated the DCFA's prohibition on trade practices that create a "likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another."[58] Specifically, Plaintiffs aver that this reference causes consumers to believe that **[*13]** the SPH-5 helmet has been somehow approved by the United States Military.[59]

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[51] ECF No. 29 (Amended Complaint) ¶ 15.

[52] *Cf. Provisional Government of Republic of New Afrika v. American Broadcasting Companies, Inc., 609 F. Supp. 104, 108 (D.D.C. 1985)* ("A defamatory statement directed against a group or class does not generally give rise to a cause of action on behalf of its individual members. In order to be actionable by an individual, the publication must contain statements that are reasonably susceptible of application to the individual.")

[53] *6 Del. C. § 2532(a)*.

[54] *Id. § 2532(a)(8)*.

[55] ECF No. 29 (Amended Complaint) ¶ 101.

[56] *Id.* ¶ 27.

[57] *Id.*

[58] *6 Del. C. §2532(a)(3)*

[59] ECF No. 29 (Amended Complaint) ¶ 102.

The White Papers themselves, however, make it obvious that "Mil-Spec" simply means "conform[ing] to the current military specifications."[60]

Plaintiffs' DCFA claims, therefore, will be dismissed.[61]

H. Whether Plaintiffs Have Stated a Claim Under the Lanham Act

Defendants argue that Plaintiffs have not stated a claim under the *Lanham Act* because Plaintiffs have not alleged any false or misleading statements made by Defendants about either Plaintiffs' or Defendants' products.

In order to state a claim for false advertising under the Lanham Act, a plaintiff must, *inter alia*, allege that defendant "made false or misleading statements as to his own product or another's."[62] But as discussed *supra*, none of the statements identified by Plaintiff meet that threshold. Defendants' reference to non-Gentex helmets as "counterfeit," "obsolete," and "nonconforming" cannot be understood as referring to Plaintiffs' products. Defendants' claim that the SPH-5 helmet is "Mil-Spec," for example, means simply that it meets "current military specifications." And the Damaged Helmet Graphic is neither false nor misleading. Plaintiffs' Lanham Act **[*14]** claim, therefore, will be dismissed.

I. Whether Plaintiffs Have Stated an Antitrust Claim

Defendants argue that Plaintiffs have not stated an antitrust claim because Plaintiffs have not alleged an antitrust injury and because Defendants' conduct was immunized by the *Noerr-Pennington* doctrine.

As the United States Court of Appeals for the Third Circuit has noted, "antitrust liability cannot be predicated solely on petitioning to secure government action."[63] Therefore, to the extent that Plaintiffs' antitrust claims are based upon Defendants' alleged attempt to influence action[64] by the OAG and other DOI agencies, Defendants' actions[65] were immunized under the *Noerr-Pennington* doctrine.

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[60] ECF No. 29-1, Ex. E ("The Use of Obsolete and Nonconforming Earcups In Commercial SPH Helicopter Helmets") at 11; ("The Use of Obsolete and Nonconforming Retentions In Commercial SPH Helicopter Helmets") at 11; ("The Use of Obsolete and Nonconforming Shells In Commercial SPH Helicopter Helmets") at 7.

[61] Gentex argues that the heightened pleading standard of *Federal Rule of Civil Procedure 9(b)* applies to claims under the DCFA. Because Plaintiffs have failed to state a claim under the customary, lower pleading standard, it need not—and does not—decide whether *Rule 9(b)* is applicable.

[62] *Pernod Ricard USA, LLC v. Bacardi U.S.A., Inc., 653 F.3d 241, 248 (3d Cir. 2011)*.

[63] *Armstrong Surgical Center, Inc. v. Armstrong County Memorial Hosp., 185 F.3d 154, 158 (3d Cir. 1999)*.

[64] This is true even if the governmental action in question was the purchase of helicopter helmets, because the "Third Circuit does not recognize a commercial exception to the *Noerr-Pennington* [d]octrine." *Asphalt Paving Systems, Inc. v. Asphalt Maintenance Solutions, LLC, 2013 U.S. Dist. LEXIS 46017, 2013 WL 1292200 * 5 (E.D. Pa. March 28, 2013)*.

[65] Plaintiffs argue that Defendants' actions vis-à-vis the OAG and DOI were "a mere sham to cover what [was] actually nothing more than attempt to interfere directly with [Plaintiffs'] business relationships." *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*. The "sham exception" to the *Noerr-Pennington* doctrine only applies, however, when a defendant's "activities are not genuinely aimed at procuring favorable government action at all." *Id.* Because this theory of Plaintiffs' claims rests on Defendants' alleged ability to obtain government action (*e.g.*, the publishing of the AP Bulletin and the 2013 ALSE Handbook, and the government's purchase of helicopter helmets), the sham exception does not apply. *See* Daniel A. Crane, Antitrust 181(2014) ("An anticompetitive scheme that could work only if the defendant is successful in persuading the government to take action favorable to it is, by definition, not a sham.")

To the extent that Plaintiffs' antitrust claims do not rest on that basis—and instead rest solely on Defendants' advertising campaign, including publication of the White Papers—Plaintiffs have failed to allege a sufficient injury. To bring a federal antitrust claim,[66] a plaintiff must allege "the existence of *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flow[] from that which makes defendants' acts unlawful."[67] Federal **[*15]** ***antitrust law***, however, "does not compel your competitor to praise your product or sponsor your work."[68] To the extent that Plaintiffs were harmed by Defendants' apparently successful publicity campaign, the proper response is to create better publicity themselves. ***Antitrust law***, after all, "protect[s] competition, not competitors."[69]

Plaintiffs' antitrust claims, therefore, will be dismissed.[70]

III. CONCLUSION

For the reasons discussed above, all claims in Plaintiffs' Amended Complaint will be dismissed. Because this Court finds that amendment will be futile, the dismissal will be with prejudice. An appropriate Order follows.

BY THE COURT:

/s/ Matthew W. Brann

Matthew W. Brann

United States District Judge

ORDER

AND NOW, this 1st day of May 2018, in accordance with the accompanying Memorandum Opinion, **IT IS HEREBY ORDERED** that:

1. The Motion to Dismiss filed by Defendant Gentex Corporation, ECF No. 37, is **GRANTED WITH PREJUDICE**.

2. The Motion to Dismiss filed by Defendants Flight Suits d/b/a Gibson & Barnes and James T. Wegge, ECF No. 39, is **GRANTED WITH PREJUDICE**.
3. The Clerk of Court is directed to close this case.

BY THE COURT:

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[66] *15 U.S.C. § 15* creates a private right of action for "any person who shall be injured in his business or property by reason of anything forbidden by the antitrust laws"—*i.e.*, for violations of the *Sherman Act*.

[67] *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*; *see also id.* ("[I]njury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny, since it is inimical to the antitrust laws to award damages for losses stemming from continued competition.")

[68] *Santana Products, Inc. v. Bobrick Washroom Equipment, Inc., 401 F.3d 123, 132 (3d Cir. 2005)* (quoting *Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989))*.

[69] *Mathews v. Lancaster General Hosp., 87 F.3d 624, 641 (3d Cir. 1996)*.

[70] Because Plaintiffs' civil conspiracy claim is derivative of Plaintiffs' other claims, and because all other claims have been dismissed, Plaintiffs' civil conspiracy claim will also be dismissed.

/s/ Matthew W. Brann

Matthew W. Brann

United States District **[*16]** Judge

Procurement, LLC v. Ahuja

Superior Court of Connecticut, Judicial District of Fairfield At Bridgeport

May 3, 2018, Decided; May 3, 2018, Filed

FBTCV165031388

Reporter
2018 Conn. Super. LEXIS 900 *

Procurement, LLC v. Nicholas Ahuja, Executor of the Estate of Gurpreet Ahuja et al.

Notice: THIS DECISION IS UNREPORTED AND MAY BE SUBJECT TO FURTHER APPELLATE REVIEW. COUNSEL IS CAUTIONED TO MAKE AN INDEPENDENT DETERMINATION OF THE STATUS OF THIS CASE.

Subsequent History: Affirmed by *Procurement, LLC v. Ahuja, 2020 Conn. App. LEXIS 168 (Conn. App. Ct., June 1, 2020)*

Prior History: *Procurement v. Ahuja, 2018 Conn. Super. LEXIS 4169 (Conn. Super. Ct., May 3, 2018)*

Core Terms

probable cause, defendants', summary judgment, sham, petitioning activity, sham exception, zoning, cases, notice, allegations, immunity, vexatious litigation, antitrust, petitions, two-part, lawsuit, counts, second application, public hearing, superior court, circumstances, merits, motion to intervene, special exception, appellate court, intervene, courts, matter of law, non-petitioning, proceedings

Judges: **[*1]** Steven D. Ecker, Judge.

Opinion by: Steven D. Ecker

Opinion

MEMORANDUM OF DECISION RE #178.00

Procurement, LLC ("Procurement") and Ahuja Holdings, LLC ("Holdings") are competing real estate developers. Procurement alleges in this lawsuit that Holdings and an individual named Gurpreet Ahuja ("Ahuja") engaged in a protracted course of groundless legal proceedings and related wrongful acts intended to cripple plaintiff's ability to proceed with a development project involving the construction of a large child-care center and approximately twenty residential units on High Ridge Road in Stamford, Connecticut ("the Project"). Efforts by Procurement to obtain the necessary zoning approvals from the relevant municipal zoning authorities began almost a decade ago. According to Procurement, those efforts were opposed every step of the way by Ahuja, now deceased,[1] who owned neighboring property. Procurement claims that Ahuja was in fact a "straw" objector acting at the behest of Holdings, an entity controlled by Ahuja's son, Nicholas Ahuja, and her former husband, Ajay Ahuja. This lawsuit alleges that Ahuja's groundless legal obstructionism was motivated by her desire to further her family's business interests rather **[*2]** than any legitimate concerns about zoning or land use.

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[1] Ahuja passed away on December 28, 2016. Her estate has been substituted as a defendant.

Presently before the court is defendants' motion for summary judgment based on the *Noerr-Pennington* doctrine. For the reasons set forth in this memorandum, the motion is granted in defendants' favor on the First through Sixth Counts of the operative complaint. The *Noerr-Pennington* doctrine immunizes defendants from liability for acts undertaken by them in connection with the underlying administrative and judicial zoning-related proceedings, which are the subject of the first six counts. Summary judgment is denied on the Seventh Count of the complaint, however, because that claim relates to defendants' non-petitioning activity directed at Procurement's lenders and tenants, conduct that is not protected under *Noerr-Pennington*.

Background Facts and Proceedings

The current litigation arises out of a series of interrelated administrative and judicial proceedings over the past seven-plus years involving Procurement's High Ridge Road Project. For ease of reference, the court will describe the allegedly wrongful activity at issue using two basic categories. The first includes three distinct, though related, administrative and judicial proceedings, **[*3]** each involving defendants' opposition to a particular zoning application made by plaintiff in connection with its High Ridge Road Project. The second category of alleged wrongdoing involves what Procurement calls defendants' "non-petitioning activity," which relates to defendants' interactions with non-governmental participants in the Project—neighbors, lenders, and actual or prospective tenants. Each of these activities is summarized below.

The "First Application"

The initial round of administrative and judicial proceedings arose out of a set of applications submitted by Procurement to the Stamford Zoning Board (Board) in April 2010. These included an application for special exception approval, and an application for approval of site and architectural plans, each of which related to Procurement's intention to develop a two-story building consisting of a day-care center and nine residential units on the subject property ("First Application"). The Board held hearings on the First Application in December 2010, and voted on January 10, 2011 to deny the application for a special exception. Procurement timely appealed the denial to the superior court.

Ahuja's formal involvement in the First **[*4]** Application did not come until over a year later, on February 22, 2012, when she filed a motion to intervene in the appeal pending in the superior court. The motion described her status as a statutorily aggrieved landowner pursuant to *General Statutes §8-8*, based on the fact that she owned property within 100 feet of the subject property. Ahuja alleged that her participation as an intervenor had become necessary because there was no longer true adversity between plaintiff (Procurement) and defendant (the Board) due to the Board's recent action on a second, modified zoning application made by Procurement, which the Board had approved while the appeal of the decision in the First Application was pending. (The "Second Application" is described in greater detail below.)[2] Ahuja argued that Procurement and the Board were now essentially on the same side, and would settle the appeal unless the court permitted her to intervene in support of the Board's denial of the special exception sought in the First Application.

Ahuja's motion to intervene was denied by the court (Adams, J.), on May 30, 2012. See *Procurement, LLC v. City of Stamford Zoning Board*, No. FST-CV-11-6008292, "Memorandum of Decision Re: Motion to Intervene" (Entry #122.00, "Intervention MOD") [*54 Conn. L. Rptr. 109, 2012 Conn. Super. LEXIS 1380]* **[*5]** . The Intervention MOD weighed the various factors relevant to permissive intervention and determined that a majority of those considerations counseled denial of Ahuja's motion to intervene. The existence of Ahuja's then-pending appeal from the Board's approval of the Second Application (see below at pp. 5-6) gave Judge Adams pause, because it was possible that intervention might not lead to more efficient proceedings in light of that appeal, see Intervention MOD, *2012 Conn. Super. LEXIS 1380 at *4*, but Judge Adams ultimately chose to exercise his discretion to deny intervention. To ensure that Ahuja's interests would be protected, Judge Adams ordered the parties to provide three

[2] The parties have not explained precisely why the Board's approval of the Second Application, which occurred on December 12, 2011, did not render moot the ongoing judicial proceedings relating to the First Application. Whatever the reason, it is clear from the record that a live dispute remained with respect to certain aspects of the First Application even after approval of the Second Application.

weeks' notice to Ahuja in the event of a settlement, which would allow her to participate in any hearing for judicial approval of the settlement under *General Statutes §8-8(n)*. There is no suggestion anywhere in the Intervention MOD, express or implied, that Ahuja's motion to intervene was frivolous, vexatious or otherwise objectively unreasonable.

Ahuja sought appellate review of Judge Adams' intervention order by filing a timely petition for certification pursuant to *General Statutes §8-8(o)* and *Practice Book §81-1*. Certification was *granted* by the Appellate Court on October 24, 2012. **[*6]** A game of litigation chess followed. Procurement (which had opposed Ahuja's motion to intervene) filed a motion in the superior court case to implead Ahuja as a party defendant on May 25, 2013. Ahuja (who had sought to intervene) initially objected to Procurement's motion to implead The Board also objected. Judge Berger granted the motion to implead on August 23, 2013. Ahuja withdrew its appeal in the Appellate Court on October 4, 2013, and the superior court case proceeded on the merits. Ahuja's trial brief, filed on October 15, 2013, adopted the Board's trial brief in its entirety and added less than two pages of additional argument. Judge Berger held a merits hearing on December 6, 2013, and issued a decision on February 14, 2014. See *Procurement, LLC v. City of Stamford Zoning Board*, No. LND-HHD-CV-116035946, Memorandum of Decision 2/14/14 ("Berger MOD 2/14/14") [*55 Conn. L. Rptr. 397, 2014 Conn. Super. LEXIS 353]*. Judge Berger found that the Board's decision denying a special exception was not supported by substantial evidence, and therefore sustained Procurement's appeal in connection with the First Application.

The Second Application

In late July 2011, after the Board's denial of the First Application and while the appeal of that **[*7]** denial was pending in the superior court, Procurement filed a second application for a special permit with the Board. The Second Application sought to develop a day-care center and twenty-two residential units at the subject property, an increase from the nine units proposed in the First Application. A series of five public hearings on the Second Application were held by the Board in the latter part of 2011 (September 26, 2011; October 6, 2011; October 11, 2011; October 26, 2011; and November 10, 2011). The Board voted to approve the Second Application on December 12, 2011.

Ahuja appealed the Board's decision. See *Gurpreet Ahuja v. Zoning Board of the City of Stamford and Procurement, LLC,.*[3] The matter was fully briefed and argued in the superior court. On January 4, 2013, Judge Berger issued a memorandum of decision denying the appeal ("Berger MOD 1/4/13"). Ahuja filed a petition for certification from that decision, which was denied by the Appellate Court on July 24, 2013.

The Third Application

On September 17, 2014, Procurement filed another zoning application, which requested modification of certain conditions imposed by the Board in its approval of the Second Application. More particularly, **[*8]** Procurement sought to increase the number of residential units from seventeen to nineteen units; increase the amount of available parking by three additional spaces; open an entrance exit on Bradley Place without the obligation to install a traffic signal; and change the form of residential ownership from condominiums to apartments. After public hearings, the Board approved the Third Application on November 17, 2014. Ahuja appealed the Board's decision to the superior court on or about December 2, 2014. Procurement moved to dismiss the appeal on the ground that it was not returned to court within the time required by *General Statutes §52-46a*. The motion to dismiss was granted on July 6, 2015. No appeal was taken.

The "Non-Petitioning" Activity

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[3] The appeal was filed in the Judicial District of Stamford, where it was assigned docket number FST-CV12-6012665. It was later transferred to the Land Use Docket, where it was assigned Docket No. LND-HHD-CV12-6035945, *2013 Conn. Super. LEXIS 49*. The appeal in the First Application, discussed above, also had been transferred to the Land Use Docket. Judge Marshall K. Berger, Jr. presided over both appeals, and coordinated their management. By agreement of the parties, the appeal in connection with the Second Application was heard before the appeal of the administrative decision in the First Application. See Berger MOD 2/14/14, *2014 Conn. Super. LEXIS 353 at *4* (describing procedure).

Procurement also alleges that defendants engaged in wrongful conduct outside of the immediate context of the legal proceedings described above. These allegations relate to false or otherwise tortious communications that Procurement claims were made by defendants to various non-governmental individuals or entities with some role in the overall fate of the Project. See Pl. Br. at 13-15. According to Procurement, defendants (1) spread false information about the development **[*9]** plans to neighbors, in an effort to mobilize opposition to the Project, Pl. Br. at 17; (2) contact Procurement's "lending institutions with the goal of controlling the debt that secured Procurement's property," *id.* at 14; and (3) contact or interfere with Procurement's current or prospective tenant relationships, *id.* See Affidavit of Nagi Osta dated January 13, 2017, at ¶¶7-9, 19.

The Pending Lawsuit

This lawsuit was commenced by Procurement in 2016. The operative complaint contains seven counts, all of which relate in some way to defendants' alleged campaign to impede Procurement's Project by wrongful means. See Substituted First Amended Complaint dated February 8, 2017 ("complaint"). Four counts of the complaint are brought solely against Ahuja personally—the First Count, for common-law vexatious litigation; the Second Count, for vexatious litigation under *General Statutes §52-568*, the Third Count, for abuse of process, and the Fourth Count, which alleges that the conduct underlying the first three counts violates the Connecticut Unfair Trade Practices Act, *C.G.S. §42-110g* (CUTPA). Two other counts are directed solely at defendant Holdings (the Fifth Count, for aiding and abetting Ahuja's wrongful conduct as alleged in the first **[*10]** four counts; and the Sixth Count, for a violation of CUTPA). The Seventh Count alleges tortious interference with contractual and business relations against both defendants.

Defendants have moved for summary judgment on all counts. The sole basis for their motion is the *Noerr-Pennington* doctrine, which, as explained below, confers immunity from civil liability for "petitioning activity" protected by the *first amendment*. Broadly speaking, *Noerr-Pennington* immunizes activity undertaken by persons who use the official channels of governmental agencies and courts to advocate their cause, even if that cause consists of nothing more than seeking an outcome adverse to a business competitor and/or favorable to the petitioner's own economic interests. Plaintiff has filed an objection to the motion for summary judgment, and each party has submitted extensive written memoranda and supporting materials. Oral argument was heard on November 27, 2017. In mid-March 2018, at plaintiff's initiative and over defendants' objection, the court allowed the parties to submit supplemental briefs. Argument on the supplemental submissions was heard on March 29, 2018.

Discussion

A. The *Noerr-Pennington* Doctrine and the Sham Exception **[*11]**

The *Noerr-Pennington* doctrine originally developed as a judge-made limitation on the reach of federal statutory antitrust liability. Its origins are described in *Zeller v. Consolini, 59 Conn.App. 545, 758 A.2d 376 (2000)*, the first appellate court decision in Connecticut to apply the doctrine:

> [The doctrine traces its origins] to a trio of federal antitrust cases, *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965)*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)*; and their progeny, collectively referred to as the *Noerr-Pennington* doctrine. In short, the *Noerr-Pennington* doctrine "shields from the Sherman Act [*15 U.S.C. §1 et seq.*] a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers v. Pennington, supra, at 670, 85 S.Ct. 1585*. The United States Supreme Court has reasoned that "it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors." *California Motor Transport Co. v. Trucking Unlimited, supra, at 510-11, 92 S.Ct. 609*.

59 Conn.App. at 550.

Zeller observed that not all anti-competitive conduct automatically qualifies for protection under *Noerr-Pennington*. The principal exception to *Noerr-Pennington* immunity has been carved out for so-called "sham" petitioning activity:

> Although **[*12]** the *Noerr-Pennington* doctrine provides broad coverage to petitioning individuals or groups, its protection is not limitless. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra, 365 U.S. at 144, 81 S.Ct. 523*, the United States Supreme Court, albeit in dictum, established a "sham exception" to the general rule, stating: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* In short, petitioning activity is not protected if such activity is a mere sham or pretense to interfere with no reasonable expectation of obtaining a favorable ruling.

Zeller, supra, 59 Conn.App. at 550-52.

Zeller itself was a suit for tortious interference with a business relationship and vexatious litigation, not for antitrust violations, and it illustrates that the *Noerr-Pennington* doctrine (including the "sham" exception) long ago outgrew the confines of its original domain in federal ***antitrust law***. Over the past fifty years, the doctrine has gained widespread acceptance in a broad range of contexts involving "petitioning activity" (both legislative and adjudicative) **[*13]** far outside of the domain of antitrust. See, e.g., *New W., L.P. v. City of Joliet, 491 F.3d 717, 722 (7th Cir. 2007)* ("*Noerr-Pennington* has been extended beyond the antitrust laws, where it originated, and is today understood as an application of the *first amendment's* speech and petitioning clauses"); *Suburban Restoration Co. v. ACMAT Corp., 700 F.2d 98, 101-02 (2d Cir. 1983)* (observing that *Noerr-Pennington* doctrine safeguards *first amendment* rights, and predicting that Connecticut courts would apply the doctrine to CUTPA and common-law causes of action); Steven Bieszczat, *First Amendment Protection for Unfair Labor Practices*?: *Reexamining the Noerr-Pennington Doctrine*, 2017 U.Ill.L.Rev. 1579, 1595-96 (2017) ("[N]umerous state and federal courts have extended *Noerr-Pennington* immunity to protect petitioning activity from liability under a variety of statutes and common-law claims . . . including suits for defamation, tortious interference with contract and business relations, civil rights violations, and intentional infliction of emotional distress, among others") (footnotes omitted); Aaron R. Gary, *First Amendment Petition Clause Immunity from Tort Suits: In Search of A Consistent Doctrinal Framework*, *33 Idaho L. Rev. 67, 95-97 (1996)* ("Innumerable federal and state courts have concluded that the *Noerr-Pennington* doctrine is rooted in the *First Amendment* right to petition and therefore must be applied to all claims implicating that right, not just **[*14]** to antitrust claims. Accordingly, the doctrine has been applied to claims for tortious interference with contract and with business relations/economic advantage, defamation, violation of civil rights, abuse of process, and intentional infliction of emotional distress") (footnotes omitted).

The *Zeller* case, quoted above, reflects Connecticut's participation in this doctrinal expansion. See *Zeller, supra, 59 Conn.App. at 554* ("The *Noerr-Pennington* doctrine is a well-established body of law applicable to a wide variety of situations involving petitioning activity, including local zoning and other municipality matters. Seventeen years [after the *Suburban Restoration Co. v. ACMAT Corp.* decision, *supra*] we fulfill the Second Circuit's prophecy and adopt the *Noerr-Pennington* doctrine and its accompanying sham exception as the applicable analysis for cases such as this one") (footnote omitted). Although the Connecticut Supreme Court still has not yet had occasion to embrace the doctrine officially,[4] the Appellate Court recently confirmed its commitment to *Noerr-Pennington* in another case involving state tort claims, *Diamond 67, LLC v. Oatis, 167 Conn.App. 659, 686-88, 144 A.3d 1055 (2016)* (applying *Noerr-Pennington* to various tort claims arising out of zoning litigation). In addition, numerous Connecticut **[*15]** trial court decisions (before and after *Zeller*) have applied *Noerr-Pennington* in a wide array of cases arising under Connecticut statutory and common law. See, e.g., *Diamond 67, LLC v. Oatis, No. X03HHDCV126030610S, 2017 Conn. Super. LEXIS 4487, 2017 WL 5056255, at *19-*22 (Conn.Super.Ct., Sept. 18, 2017)* (finding that *Noerr-Pennington* defense shielded defendants from liability for statutory vexatious litigation in connection with underlying zoning litigation); *3Ventres v. Goodspeed Airport, LLC, No. X07CV01402085S, 2008 Conn. Super. LEXIS 1363,*

[4] The Connecticut Supreme Court discussed *Noerr-Pennington* as an accepted antitrust doctrine in *Bridgeport Harbour Place I, LLC v. Ganim, 303 Conn. 205, 219-23, 32 A.3d 296 (2011)*. The discussion was probably *dicta*, but it is reliable *dicta*.

2008 WL 2426790, at *19 (Conn.Super.Ct., May 27, 2008) (granting summary judgment in defendant's favor, on *Noerr-Pennington* grounds, in connection with claims of malicious prosecution and abuse of process), aff'd, 301 Conn. 194, 21 A.3d 709 (2011); Roncari Dev. Co. v. GMG Enterprises, Inc., 45 Conn.Sup. 408, 414, 718 A.2d 1025 (Super.Ct., 1997) [19 Conn. L. Rptr. 237].

B. The Parties' Disagreement Regarding the Sham Exception

The issue in the present case is not whether the *Noerr-Pennington* doctrine applies at all to defendants' activity—both sides agree, at least with respect to defendants' core litigation-related activities in the underlying administrative and judicial proceedings, that defendants were engaged in "petitioning activity" subject to *Noerr-Pennington* analysis.[5] The principal dispute on summary judgment is over the proper application of the sham exception under the circumstances of this case. Defendants contend that the sham exception **[*16]** does not apply, as a matter of law, because their litigation activity was objectively reasonable in each of the three proceedings described earlier in this memorandum. Their position is that because all three legal proceedings were objectively reasonable, the analysis stops there, and they must prevail as a matter of law under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)*, the leading United States Supreme Court case on the sham exception.

Procurement disagrees, and contends that defendants' motivations and intentions must be considered as part of any *Noerr-Pennington* analysis. Its argument is based largely on a line of cases interpreting United States Supreme Court precedent to limit the scope of *Professional Real Estate Investors* to circumstances not present here. Procurement relies on the Supreme Court decision in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, a case decided more than twenty years before *Professional Real Estate Investors*, but understood by some federal courts to provide an alternative "sham" analysis in cases involving "multiple" acts of petitioning activity—which includes the present case, according to Procurement. Procurement insists that because the sham exception described in *California Motor Transport* requires inquiry into defendants' **[*17]** subjective motivations and intentions, this case cannot be resolved by summary judgment.

One would think that the proper analysis under the sham exception to *Noerr-Pennington* would be firmly established and crystal clear by now, after five decades of active adjudication in the federal courts. That does not seem to be the situation. This state of affairs is particularly ironic because the United States Supreme Court unquestionably believed that it *was* settling the issue thirty years ago, once and for all, in *Professional Real Estate Investors, supra.* The *Professional Real Estate Investors* decision began its discussion of the sham exception by noting the then-existing confusion wrought by "inconsistent and contradictory" definitions of the sham exception by various federal appeals courts around the country. *508 U.S. at 55*. *Professional Real Estate Investors* expressly set out to eliminate that confusion by establishing a simple two-part test for determining whether the sham exception applies in any particular case:

> First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If an objective litigant could conclude that the suit is reasonably calculated to elicit a **[*18]** favorable outcome, the suit is immunized under *Noerr*, and an antitrust claim premised on the sham exception must fail. Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation. Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere *directly* with the business relationships of a competitor," *Noerr, supra, 365 U.S., at 144, 81 S.Ct., at 533* (emphasis added), through the "use [of] the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon," *Omni, 499 U.S., at 380, 111 S.Ct., at 1354* (emphasis in original).

Id. at 60-61.

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[5] As noted, plaintiff argues that a portion of defendants' allegedly wrongful conduct involved non-petitioning activity, which is not protected by *Noerr-Pennington*. This argument is addressed separately at pp. 53-57 below.

The two-part test set forth in *Professional Real Estate Investors* exhibits all of the signs of a definitive, fully articulated statement of the sham exception to the *Noerr-Pennington* doctrine, for all occasions. The Court even sought to provide the doctrine with a stable historical pedigree firmly rooted in the common law of torts, which imposed liability for the initiation of wrongful civil proceedings under comparable circumstances:

> The existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation. The notion of probable cause, **[*19]** as understood and applied in the common-law tort of wrongful civil proceedings, requires the plaintiff to prove that the defendant lacked probable cause to institute an unsuccessful civil lawsuit and that the defendant pressed the action for an improper, malicious purpose. [Footnote and citations omitted.] Probable cause to institute civil proceedings requires no more than a "reasonabl[e] belie[f] that there is a chance that [a] claim may be held valid upon adjudication" (internal quotation marks omitted). *Hubbard v. Beatty & Hyde, Inc., 343 Mass. 258, 262, 178 N.E.2d 485, 488 (1961)*; *Restatement (Second) of Torts §675, Comment e*, pp. 454-55 (1977). Because the absence of probable cause is an essential element of the tort, the existence of probable cause is an absolute defense . . . Just as evidence of anticompetitive intent cannot affect the objective prong of *Noerr*'s sham exception, a showing of malice alone will neither entitle the wrongful civil proceedings plaintiff to prevail nor permit the factfinder to infer the absence of probable cause. *Stewart, supra*, 98 U.S., at 194; *Wheeler, supra, 65 U.S. at 551*; 2 C. Addison, Law of Torts §1, ¶853, pp. 67-68 (1876); T. Cooley, *supra*, at *184. When a court has found that an antitrust defendant claiming *Noerr* immunity had probable cause to sue, that finding compels the conclusion that a reasonable litigant in the defendant's position could realistically **[*20]** expect success on the merits of the challenged lawsuit. Under our decision today, therefore, a proper probable cause determination irrefutably demonstrates that an antitrust plaintiff has not proved the objective prong of the sham exception and that the defendant is accordingly entitled to *Noerr* immunity.

Id. at 62-63.[6]

Professional Real Estate Investors appears to settle any doubt about the correct analysis used to determine whether the *Noerr-Pennington* "sham" exception applies in any given case. More particularly, the case clearly establishes the proper relationship between the objective and subjective prongs of the two-part analysis, by holding in unequivocal terms that a defendant's wrongful, anti-competitive motivations are *irrelevant* to the first stage of the test, which asks only "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome . . ." *Id. at 60*. Under *Professional Real Estate Investors*, if probable cause existed, then "the [conduct] is immunized under *Noerr* . . ." *Id.* This basic point reflects defendants' position here: a finding of probable cause based on the first ("objective") step of the analysis means that the *NoemPennington* "sham" **[*21]** analysis is over, and a defendant must prevail, regardless of subjective intent.

Plaintiff disagrees, and contends that *Professional Real Estate Investors* is not the last word on the subject. It points to a line of federal circuit court cases, decided after *Professional Real Estate Investors*, which have limited the applicability of its two-part "sham" exception analysis. See Pl. Br. at 15-16, citing *Hanover 3201 Realty, LLC v. Village Supermarkets, Inc., 806 F.3d 162, (3d Cir. 2015)*; *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27, 728 F.3d 354, 363-64 (4th Cir. 2013)*; *Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 101 (2d Cir. 2000)*; and *USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Constr. Trades Council, AFL-*

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[6] This common-law framework is immediately recognizable to anyone in Connecticut familiar with the law of vexatious litigation. "For purposes of a vexatious suit action, [t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it . . . Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that he has lawful grounds for prosecuting the defendant in the manner complained of . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, good faith belief in the facts alleged and the validity of the claim asserted." *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, 281 Conn. 84, 94-95, 912 A.2d 1019 (2007)* (citations omitted); see *DeLaurentis v. New Haven, 220 Conn. 225, 256, 597 A.2d 807 (1991)*; *Vandersluis v. Weil, 176 Conn. 353, 356, 407 A.2d 982 (1978)*; *Ives v. Bartholomew, 9 Conn. 309, 312 (1832)*; *Sterling v. Adams, 3 Day 411 (1809)* (discussing statutory claim for vexatious suit under precursor to *General Statutes §52-568*).

CIO, 31 F.3d 800, 810-11 (9th Cir. 1994). Plaintiff argues that these cases hold that the *Professional Real Estate Investors* two-part test applies only in cases where the underlying petitioning activity involved a *single* proceeding; where the defendant's petitioning activity involves "a whole series of legal proceedings" or a "pattern of baseless, repetitive claims," then, plaintiff argues, a different "sham" test applies. The "sham" analysis used for petitioning activity involving multiple underlying proceedings, according to plaintiff, is derived from California Motor Transport Co. v. Trucking Unlimited, supra.

The *California Motor Transport* analysis advanced by plaintiff applies a more "holistic" inquiry than the two-part test applicable under *Professional Real Estate Investors* to petitioning activity involving single underlying proceedings. In plaintiff's words:

> The *California* ***[*22]*** *Motor* [*Transport*] pattern test requires the Court to look at whether "the legal filings were made, not out of a genuine interest in redressing grievances, but as part of a pattern or practice of successive filings undertaken essentially for the purposes of harassment." Primetime 24 Joint Venture v. National Broadcasting Co., supra, 219 F.3d at 101. Further, the focus is not whether some of the claims have merit, but whether the legal challenges "are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* "A court should perform a holistic review that may include looking at the defendant's filing success—i.e., win-loss percentage—as circumstantial evidence of the defendant's subjective motivations." *Hanover* 3201 Realty, LLC v. Village Supermarkets, Inc., supra, 806 F.3d at 180. "Courts should also consider other evidence of bad faith as well as the magnitude and nature of the collateral harm imposed by plaintiffs by defendants' petitioning activity (e.g., abuses of the discovery process and interference with access to governmental agencies)." Id. at 181.

Pl. Br. at 15-16.

The court has considered these competing arguments carefully, and rejects plaintiff's position. The court will apply the two-part analysis articulated in *Professional Real Estate* ***[*23]*** *Investors* to determine whether defendants are entitled to summary judgment under *Noerr-Pennington*. Two basic reasons underlie this legal conclusion.

First, assuming that there are in fact two different "sham" exception tests under federal law, plaintiff misapprehends the circumstances that will trigger application of the "holistic" analysis under *California Motor Transport* rather than the two-part *Professional Real Estate Investors* test. Plaintiff argues that *Professional Real Estate Investors* applies only where a "*single*" underlying lawsuit is involved, while *California Motor Transport* applies to petitioning activity involving multiple proceedings. Pl. Br. at 16 (emphasis in plaintiff's brief); *id.*, at 17 (relying on a string-cite to the aforementioned line of cases from the Second, Third, Fourth and Ninth circuits to support contention that "*California Motor* [applies] to a series of sham petitions and *Professional Real Estate* [applies] to a single sham petition"). But this is not an accurate statement of the holding of the cases addressing this issue. To the contrary, there is a very substantial body of case law holding that the *Professional Real Estate Investors* two-part test applies well **[*24]** beyond the "single" case scenario defined by plaintiff.[7] See, e.g., ERBE Elektromedizin GMBH v. Canady Technology, LLC, 629 F.3d 1278, 1291 (Fed.Cir. 2010) ("[T]he three relevant lawsuits ERBE filed to which Canady Technology directs our attention . . . do not implicate a test for 'a whole series of legal proceedings'") (citations omitted); Amarel v. Connell, 102 F.3d 1494, 1519-20 (9th Cir. 1997) (holding that two lawsuits is not a "series" or "pattern" sufficient to trigger the *California Motor Transport* analysis); Polaris Industries, Inc. v. Arctic Cat, Inc., Civil No. 15-4475 (JRT/FLN), 2017 U.S. Dist. LEXIS 47748, 2017 WL 1180426, at *5-*7 (D.Minn. 2017) ("Thus, the Court finds that the three relevant [patent] cases that Polaris filed against Arctic Cat do not involve a 'whole series

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[7] Unfortunately, neither party took advantage of multiple opportunities to brief the specific issue presented here (i.e., whether plaintiff's "holistic" version of the *California Motor Transport* test applies to a case, like the present one, involving more than one but fewer than many underlying proceedings). In other words, neither party brought to the court's attention any of the cases cited in the text immediately following this footnote. This appears to have been a strategic choice, at least on plaintiff's part. The court suggests no impropriety whatsoever—lawyers make comparable strategic decisions all the time. They must, however, live with the consequences when the sleeping dog awakens; at least in this court's view, plaintiff has waived the right to mount a *post hoc* challenge to the court's holding as it relates to the extensive body of case law that plaintiff chose not to brief before the court issued its decision.

of legal proceedings' necessitating application of the *California Motor* [*Transport*] . . . standard"); *In re Flonase Antitrust Litigation, 795 F.Sup.2d 300, 309-10 n.10 (E.D.Pa. 2011)* ("In order to qualify as a "pattern or practice" of successive filings, however, the number of petitions must be voluminous. Here, GSK's conduct consists of, at most, five "petitions" . . . No court has applied the [*California Motor Transport*] test to a "series" of five petitions; indeed, courts have expressly declined to apply the test in cases involving up to nine petitions") (citations omitted);[8] *In re Fresh Del Monte Pineapple, No. 04MD1628(RMB)(MHD), 2007 U.S. Dist. LEXIS 1372, 2007 WL 64189, at *17 (S.D.N.Y. Jan. 4, 2007)*, subsequently aff'd sub nom., *Am. Banana Co. v. J. Bonafede Co., 407 F.App'x 520 (2d Cir. 2010)*.[9]

The court has not located even a single case from any jurisdiction holding that three underlying proceedings—the number involved in the present matter—is enough to trigger *California Motor Transport*. More to the point, the present case does not involve anything like the high-volume petitioning activity involved in *California Motor Transport*, the case that generated the "holistic" analysis which plaintiff urges the court to apply here. The *California Motor Transport* litigation arose due to threats by a consortium of trucking companies to undertake massive, concerted action to institute state and federal proceedings to resist and defeat applications by respondents, a competitor group, to acquire operating rights or to transfer or register those rights. *404 U.S. at 509*. A policy or pattern of massive petitioning activity, in other words, was integral to the anti-competitive conduct at issue, and it would have been entirely impractical (and unnecessary) for a court to consider the merits of each particular petition under those circumstances. Likewise, the Ninth Circuit case relied on by plaintiff, *USS-POSCO, supra*, involved high-volume, coordinated **[*26]** union activities which included twenty-nine lawsuits, *31 F.3d at 811*, as well as computer-generated automatic petitioning contesting all permits issued to non-union contractors, *31 F.3d at 810-11*. The Second Circuit's *Primetime* case, similarly, involved petitioning activity taking the form of "huge volumes of simultaneous [statutorily-authorized "signal strength"] challenges" churned out automatically, without regard to merit, for the specific purpose of imposing overwhelming testing costs on satellite operators. *219 F.3d at 100-01*.

In sum, the federal cases that rely on the *California Motor Transport* analysis involve underlying circumstances nothing like the present lawsuit. The present case involves a small number of underlying proceedings, and the objective reasonableness of each respective proceeding can be analyzed with ease, as both parties have demonstrated in their briefs.[10]

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[8] In *re Flonase* was issued three years before the decision in *Hanover* *3201 Realty, LLC v. Village Supermarkets, Inc., supra*, in which the Third Circuit applied the *California Motor Transport* test in a case involving four underlying legal proceedings.

[9] The court in *In re Fresh Del Monte Pineapple* ***[*25]*** explained its holding this way: Although plaintiffs on this motion target two separate lawsuits [as constituting sham litigation], they do not explicitly invoke this alternative [*California Motor Transport*] test, and with good reason, since it does not seem to apply absent a large volume of repeated, consistently baseless litigation. *See, e.g., Marchon Eyewear, Inc. v. Tura LP, 2002 U.S. Dist. LEXIS 19628, 2002 WL 31253199, at *8 (E.D.N.Y. Sept. 30, 2002)* (counterclaim for sham litigation alleged only two prior lawsuits and the current one, thus distinguishing *Primetime*). See also *Applera Corp. v. MJ Research, Inc., 303 F.Sup.2d 130, 133-34 (D.Conn. 2004)* (explaining context of *Primetime*, as involving "'huge volumes' of legal challenges," referred to as "automatic petitioning") (quoting *Primetime*, [*supra*,] *219 F.3d at 95-96, 101)*."

[10] The court has seen only a single decision, from anywhere in the country, that even remotely lends support to plaintiff's position regarding *California Motor Transport*. See *Hanover* *3201 Realty, LLC v. Village Supermarkets, Inc., supra.* That case provides the slenderest of reeds upon which to base its argument, and collapses quickly upon review. In a 2-1 decision, the *Hanover 3201 Realty, LLC* majority concluded that the "sham" exception to *Noerr-Pennington* should be analyzed under *California Motor Transport* rather than *Professional Real Estate Investors*, despite the fact that the underlying petitioning activity involved only four legal proceedings (consisting of one lawsuit and three administrative challenges). The majority's entire analysis of the point under discussion consists of three sentences:

> Defendants argue as a threshold matter that the four actions they filed against Hanover Realty are too few to even qualify as a pattern or series. We are not convinced. In so concluding, we do not set a minimum number requirement **[*27]** for the applicability of *California Motor* or find that four sham petitions will always support the use of *California Motor*. It is sufficient for our purposes that four petitions were filed against Hanover Realty and it alleges that Defendants filed these sham proceedings at every opportunity to obstruct Hanover Realty from "obtaining all necessary government approvals."

This court does not suggest that *California Motor Transport* has been overruled, or that its less methodical, more "holistic" analysis has been or should be superseded, in every imaginable context, by the two-step test set forth in *Professional Real Estate Investors*. There appear to be certain circumstances that have arisen, particularly in federal litigation, in which the underlying proceedings involve very high-volume filings (especially administrative petitions that can be automatically or mechanically filed in large numbers), leading the reviewing court to conclude that the flexible, multi-factored, more subjective standard described in *California Motor Transport* offers the best means to decide if the petitioning activity is a sham. But not in cases like this one.[11]

There is a second, **[*28]** conceptually-based reason to refuse plaintiff's invitation in this case to apply the "holistic" *California Motor Transport* test rather than the *Professional Real Estate Investors* two-part test. It should be recalled that this litigation involves purely state law causes of action. The *Noerr-Pennington* analysis was developed to safeguard *first amendment* concerns, and it operates to ensure that the antitrust statutes, and comparable statutory and common-law liability rules prohibiting unfair methods of competition, are not enforced in a manner that would infringe on constitutionally-protected petitioning activity. But no court ever has suggested that the precise contours of the sham exception as articulated by the United States Supreme Court are *constitutionally* mandated. In other words, there is no reason to believe that any concerns of a *constitutional* magnitude are implicated in choosing between the "sham" exception as articulated in *California Motor Transport* as opposed to *Professional Real Estate Investors*. One approach may be better than the other in the service of substantive *antitrust* doctrine, but the court is not aware of any *first amendment* values that would be protected by one but not the other of the **[*29]** two "sham exception" tests under consideration. Nor has plaintiff argued otherwise. This means that Connecticut is free to adopt the "sham" exception from either case, or even devise an exception of its own making, in any case involving a state cause of action, so long as the Connecticut rule does not tread on a defendant's constitutional rights.

It follows that even if plaintiff were correct (contrary to the court's holding above) that the *California Motor Transport* analysis would be used to decide the present case in a lawsuit asserting a *federal* cause of action, there is no requirement that Connecticut blindly follow the federal analysis in a case brought only under state law. To put the same point in different terms, the task here is not to predict what the United States Supreme Court would do if it were deciding the present case under the federal antitrust laws. (Pages 13-21 above represent the court's best effort to apply federal precedent to this case and decide the issue under existing *Noerr-Pennington* doctrine.) The question, rather, is what "sham exception" test the *Connecticut* Supreme Court would employ to safeguard *first amendment* values in connection with plaintiff's *state* law claims **[*30]** under the circumstances of this case. This

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Hanover *3201 Realty, supra, 806 F.3d at 181*. Suffice it to say that the dissenting opinion is far more persuasive. *Id. at 196-201* (Greenberg, J., dissenting). Among other things, the dissenting judge notes that "no court of which I am aware has applied [*California Motor Transport*] in circumstances comparable to those here . . ." *Id. at 196*.

[11] One federal court recently questioned whether California Motor Transport should play any role in the Noerr-Pennington "sham" exception analysis, in light of Professional Real Estate Investors. See *Puerto Rico Telephone Co., Inc. v. San Juan Cable, LLC, 874 F.3d 767, 771-72 (1st Cir. 2017)*, petition for cent. docketed, No. 17-1215 (March 1, 2018). In a plurality decision, the opinion containing the judgment of the court expresses the view that the holding in Professional Real Estate Investors is intended to state a categorical rule for the "sham" exception in all Noerr-Pennington cases. "We find ourselves quite skeptical of the notion that a defendant's willingness to file frivolous cases may render it liable for filing a series of only objectively reasonable cases . . . Nor is there any pragmatic reason to presume that [Professional Real Estate Investors'] protections for nonfrivolous petitioning activity disappear merely because the defendant exercises its right to engage in such activity on multiple occasions." Id. A concurring opinion (which is the controlling opinion on this issue for precedential purposes within the First Circuit) agrees that the California Motor Transport "holistic" approach is inapplicable on the facts presented, but argues that California Motor Transport retains a role to play in the appropriate case, at least in the antitrust context. *Id. at 774-77* (Torruella, J., concurring). The Puerto Rico Telephone Co. case is noted here solely to show that the relationship between California Motor Transport and Professional Real Estate Investors has not yet been resolved with finality at the federal level. In retrospect, it appears that the seeds of the disagreement were planted all the way back in Justice Stevens' concurrence in Professional Real Estate Investors. See *Professional Real Estate Investors, 508 U.S. at 67-76* (Stevens, J., concurring). In this respect, it bears mention that notwithstanding his disagreement with "some of the unnecessarily broad dicta in the Court's opinion," Justice Stevens's concurring opinion makes it clear that he joined in the Court's "holding that an objectively reasonable effort to litigate cannot be a sham regardless of subjective intent." *Id. at 67*.

court believes that our high court would apply the two-part "sham exception" analysis articulated in *Professional Real Estate Investors*.

The most compelling reason to believe that our appellate courts would apply the two-part test of *Professional Real Estate Investors* is that it safeguards constitutional concerns using a simple, easy-to-administer legal framework similar to Connecticut common-law doctrine governing wrongful litigation torts of vexatious litigation and malicious prosecution. The first step in the *Professional Real Estate Investors* analysis is similar (though not identical) to the "probable cause" element of the common-law tort doctrine, while the second step bears similarity to the common-law "malice" inquiry. See, e.g., *Bhatia v. Debek, 287 Conn. 397, 405-07, 410-11, 948 A.2d 1009 (2008)*; *Vandersluis v. Weil, supra, 176 Conn. at 356*; *McGann v. Allen, 105 Conn. 177, 186, 134 A. 810 (1926)*.[12]

The similarity between the federal immunity doctrine under *Professional Real Estate Investors* and state wrongful-litigation doctrine **[*31]** is evident in one additional respect. Under both doctrines, a finding in favor of the defendant

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[12] In light of this point, it is fair to ask why *Noerr-Pennington* is needed at all in the context of a vexatious litigation case under Connecticut law. *Noerr-Pennington* was developed in the field of ***antitrust law***, to safeguard *first amendment* "petition clause" rights in contexts where the underlying liability standard, if given unrestrained application, may threaten those rights. But it would appear that the liability standard for vexatious litigation, unlike the liability standard for antitrust violations, *already* provides that same basic protection—a defendant cannot be liable for vexatious litigation unless the underlying litigation activity was undertaken without probable cause and with malice. Because the liability standard covers the same basic ground as the immunity doctrine, it is not immediately apparent what specific purpose is served by the immunity doctrine in this context. The question is not an idle one because the immunity injects an additional layer of complexity into these cases, as the present proceedings illustrate. Nor is it enough to say that under *Zeller v. Consoli*, the *Noerr-Pennington* doctrine applies to lawsuits for common-law vexatious litigation, and this court has no business wondering why. The problem is that a trial court must determine at a doctrinal level precisely what (if anything) *Noerr-Pennington* adds to existing vexatious litigation doctrine in order to adjudicate dispositive motions, requests to charge, and countless other matters that require a very particularized understanding of the interrelationship between the immunity doctrine and the liability standard. We have clues but no definitive answer regarding the precise relationship between the liability standard and the immunity defense. *Zeller v. Consoli* noted that "the *Noerr-Pennington* doctrine is similar to existing law in Connecticut governing the torts of interference with business relations and vexatious litigation," *59 Conn.App. at 554 n.5*, but did not have occasion to delineate the precise nature of that similarity. One other superior court judge has addressed one aspect of this issue, and concluded that the liability standard for vexatious litigation does *not* cover precisely the same ground as the sham exception under *Noerr-Pennington*. See *Diamond 67, LLC v. Oatis, No. X03HHD-CV-126030610, 2017 Conn. Super. LEXIS 4487, 2017 WL 5056255, at *20-*22 (Super.Ct., Sept. 18, 2017) (Moll, J.)*. Plaintiff in *Diamond 67* argued that a finding in plaintiff's favor on its vexatious litigation claim necessarily defeated any *Noerr-Pennington* defense, on the theory that the doctrinal elements of the tort and the immunity are essentially two sides of the same coin. *Id., 2017 Conn. Super. LEXIS 4487, 2017 WL at *22*. Judge Moll disagreed, stating that the argument "ignores entirely the second prong of the *Noerr-Pennington* [sham exception], namely, that the vexatious proceedings concealed an attempt to interfere directly with the business relationship of a competitor." This point is correct in that the second prong of the "sham" exception is formulated in specific terms focusing on competitor injury, while the malice element in vexatious litigation doctrine is phrased in more general terms, asking if the defendant pursued the underlying proceedings "for a purpose other than that of securing the proper adjudication of the claim on which they are based." *Restatement (Second) Torts §676* (1977); *accord* Connecticut Jury Instructions (Civil), Instruction 3.13-6A. ("A person acts with malice when (he/she) acts primarily for an improper purpose—that is, for a purpose other than that of securing the proper adjudication of the claim on which the (action/proceeding) is based.") But it seems plausible that the second prong of the sham exception is nothing more than a specialized application of the common-law malice standard, for use in the antitrust context—the "competitor injury" formulation is taken from *Professional Real Estate Investors*, a Sherman Act case. See *508 U.S. at 60-61*. If that is right, then the precise "competitor injury" formulation applicable in the antitrust context is not itself constitutionally compelled, and the common-law malice standard can be substituted for it without impairing its function. This returns us to the original question: in a vexatious litigation case, what does *Noerr-Pennington* add that is not already covered by the liability standard itself? The issue has not been briefed in the present case, and it does not require resolution here. The beginning of the answer no doubt lies in the fact that the liability standard for vexatious litigation and the immunity standard under *Noerr-Pennington* serve two somewhat different functions; the former protects the societal interest in encouraging citizens to seek redress uninhibited by the fear of retaliatory litigation, whereas the latter protects *first amendment* "right to petition" values. Whether both of these interests can be protected by a single doctrinal safeguard (rather than the double-layered protection of a strict liability standard plus an immunity defense) is a question for another day.

at the probable-cause stage of the analysis *requires* a judgment in defendant's favor *regardless of defendant's subjective intent*. See *Professional Real Estate Investors, supra, 508 U.S. at 57* ("We left unresolved [in *California Motor Transport*] the question presented by this case—whether litigation may be sham merely because a subjective expectation of success does not motivate the litigant. We now answer this question in the negative and hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent"); *id. at 60* ("Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation"); *McGann v. Allen, supra, 105 Conn. at 187* (in malicious prosecution claim under Connecticut law: "If probable cause exists, it is an absolute protection against an action for malicious prosecution, even when malice is proved"); *Vandersluis v. Weil, supra, 176 Conn. at 356* (same in vexation litigation suit); cf. *Restatement (Second (Torts) §669A (1977)* ("Improper Purpose Not Evidence of Lack of Probable Cause").

It is significant in this regard that the leading Connecticut case adopting *Noerr-Pennington* concluded its analysis by holding that summary judgment was properly granted in **[*32]** that case based solely on the trial court's finding that the defendants had probable cause to pursue the underlying litigation. *See* *Zeller v. Consolini, supra, 758 A.2d at 386*. It also is significant that *Zeller* quoted *Professional Real Estate Investors* itself in support of this holding:

> Because we find that the petitioning was not objectively baseless, we need not consider the second prong of the *Noerr-Pennington* sham exception, namely, whether the defendants' actions constituted an attempt to interfere with the plaintiffs through abuse of the petitioning process. "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., supra, 508 U.S. at 60*.

Zeller v. Consolini, supra, 758 A.2d at 386 n.8.[13]

The *Zeller* case, at the very least, lends compelling support to the court's decision to apply the *Professional Real Estate Investors* two-part test in the present case. As noted, *Zeller* applies that test to determine the viability of the *Noerr-Pennington* "sham" exception in a case involving multiple underlying proceedings. Plaintiff points out that *Zeller* also quotes the discussion of the sham exception from *California Motor Transport*, see 758 A2.d at 380-81, but the dual citation only confirms that *California Motor Transport* and *Professional Real Estate Investors* ***[*33]*** are not disharmonious. As explained above, the Supreme Court in *Professional Real Estate Investors* believed that it was simply refining *California Motor Transport* by answering a question left open there. *508 U.S. at 57*. *Zeller* uses *California Motor Transport* to explain the basic idea behind the sham exception, and gives examples of misconduct that may fall under the "sham" exception. The actual doctrinal analysis deployed in *Zeller*, however, is the two-step test of *Professional Real Estate Investors*. We know this with certainty because the court's analysis never gets beyond the first step (probable cause) of the *Professional Real Estate Investors* test, and finds it unnecessary to consider any question of defendants' subjective motivation.

The same point applies to *Diamond 67, LLC v. Oatis, 167 Conn. App. 659, 144 A.3d 1055*, a case also involving a multiplicity of underlying administrative and judicial proceedings. Once again, the Appellate Court apparently was not confronted with an argument that it must "choose" between the two Supreme Court cases, *California Motor Transport* and *Professional Real Estate Investors*. (*Diamond 67*, in fact, does not even cite to *California Motor Transport*.) *Diamond 67* briefly explains the **[*34]** general principle underlying the sham exception using language taken by *Zeller* from *California Motor Transport*, *167 Conn.App. at 688*. But, as in *Zeller*, the Appellate Court in *Diamond 67* makes it very clear that the actual doctrinal test used "to define the sham exception" is the two-part test of Professional Real Estate Investors. *Id. at 687*.[14] This understanding is corroborated by the fact that the trial judge

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[13] The *Zeller* decision also quotes with approval the following statement of the trial court, which the trial judge made after finding that defendants had probable cause to pursue the underlying litigation: "[Defendants'] motives behind these actions are irrelevant to the finding of probable cause." *Id. at 386*.

[14] It warrants mention that *Diamond 67* involved allegations that defendants made misrepresentations of fact to the administrative and judicial tribunals hearing the underlying proceedings. *167 Conn.App. at 688-89* (reviewing allegations that defendants had told the relevant tribunals, falsely, that the project threatened to pollute a source of public drinking water). The

who tried the case on remand scrupulously applied the *Professional Real Estate Investors* two-part test. *See* Diamond 67, LLC v. Oatis, No. X03HHD-CV-126030610, 2017 Conn. Super. LEXIS 4487, 2017 WL 5056255, at *20-*22 (Super.Ct., Sept. 18, 2017) (finding that plaintiff satisfied the first prong but not the second prong of the "sham" exception, and therefore failed to overcome the *Noerr-Pennington* defense).

One final legal point requires discussion before turning to the particular circumstances of this case. In its determined effort to find a place to inject subjective (intent-based) considerations into the analysis, plaintiff insists, especially in its supplemental briefing,[15] that it is inaccurate to characterize as entirely objective the **[*35]** probable-cause determination that functions as the first step of the *Noerr-Pennington* "sham" test. Plaintiff contends that probable cause in this context also has a subjective component, because, in addition to the requirement that the claims asserted by the defendant be objectively reasonable, Connecticut law also requires that defendant's allegations must be made in "good faith," which, plaintiff observes, plainly includes consideration of a party's *subjective* state of mind. See Pl. Amended Supp. Br. at 2 (arguing that as part of the probable cause analysis, "the Court must decipher whether defendants had a bona fide belief in the existence of facts essential under the law to establish that probable cause existed for their actions"). Plaintiff relies on numerous Connecticut cases and other authorities stating, in one way or another, that there is a "good faith" or "actual belief" element to the probable cause inquiry. See, e.g., DeLaurentis v. New Haven, 220 Conn. 225, 256, 597 A.2d 807 (1991) (emphasis added). ("For purposes of a vexatious suit action, [t]he legal idea of probable cause is a *bona fide belief* in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, **[*36]** under the circumstances, in entertaining it . . . Thus, in the context of a vexatious suit action, the defendant lacks probable cause if he lacks a reasonable, *good faith* belief in the facts alleged and the validity of the claim asserted") (citations and internal quotation marks omitted; emphasis added).

Defendants' position is that the probable-cause inquiry is purely objective in nature, under both the first prong of the *Noerr-Pennington* "sham" exception and Connecticut's law of vexatious litigation. With respect to *Noerr-Pennington*, defendants cite the explicit holdings of the leading cases previously discussed in this memorandum, including *Real Estate Investors Professionals* and *Zeller*, each of which speaks unequivocally on the issue: "Only if challenged litigation is [found to be] objectively meritless [in the first stage of the analysis] may a court examine the litigant's subjective motivation [in the second stage of the analysis]." Professional Real Estate Investors, supra, 508 U.S. at 60; Zeller v. Consoli, supra, 59 Conn.App. at 563 n.9 (quoting the foregoing holding from *Professional Real Estate Investors*, and affirming summary judgment for defendant based on the objective reasonableness of claims, without reaching issue of defendants' subjective intentions).[16] As for the probable-cause **[*37]** analysis undertaken in the vexatious litigation context under Connecticut law, defendants' position finds direct support in a leading Supreme

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ultimate precedential value of the *Noerr-Pennington* discussion in *Diamond 67* may be clouded due to the fact that the Appellate Court does not address whether vexatious litigation claims rooted in allegations of fraud or misrepresentation are subject to a specialized version of the "sham" exception used in cases involving fraud. See Scott Filmore, *Defining the Misrepresentation Exception to the Noerr-Pennington Doctrine*, 49 U. Kan. L. Rev. 423 (2001) (discussing federal cases "examining whether misrepresentations to the government are protected by the *Noerr-Pennington* Doctrine or whether such conduct falls into a variant of the sham exception known as the 'misrepresentation exception'"); United States v. Philip Morris USA, Inc., 566 F.3d 1095, 1123, 386 U.S. App. D.C. 49 (D.C. Cir. 2009) ("Defendants' attempt to invoke *Noerr-Pennington* as protection fails because the doctrine does not protect deliberately false or misleading statements"). A similar doctrine, known as the *Walker Process* exception, holds that *Noerr-Pennington* immunity is unavailable to a party who has made intentional misrepresentations to the United States Patent and Trademark Office in the procurement of a patent. See, e.g., S3 Graphics Co. v. ATI Techs. ULC, No. CV 11-1298-LPS, 2014 U.S. Dist. LEXIS 16928, 2014 WL 573358, at *3 (D.Del. Feb. 11, 2014) (explaining rule derived from Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965). The "fraud" exception to *Noerr-Pennington*, a "sham" exception sub-doctrine, is further discussed below at pp. 39-40.

[15] More than three months after argument on the pending motion, plaintiff filed a motion for permission to file supplemental briefing (as amended, Doc. Entry #205.00, dated March 19, 2018). The supplemental brief contends that plaintiff's opposition to summary judgment has been strengthened by the deposition testimony of Nicholas Ahuja taken on March 9, 2018. See Doc. Entry #206.00 (brief and exhibits). This court granted plaintiff leave to file its supplemental brief, over objection.

[16] See also Professional Real Estate Investors, supra, 508 U.S. at 57. ("We . . . hold that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent.")

Court case expressly holding that "[t]he probable cause standard applied to a vexatious litigation action against a litigant is a purely objective one." *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP, supra, 281 Conn. at 98* ("[T]he probable cause standard applied to a vexatious litigation action against a litigant is a purely objective one"); see also *Rockwell v. Rockwell, 178 Conn.App. 373, 390, 175 A.3d 1249 (2017)* (same); *Hebrew Home & Hosp., Inc. v. Brewer, 92 Conn.App. 762, 768, 886 A.2d 1248 (2005)*.

The confusion is understandable, but the conflict is a false one. It dissolves once we make two important distinctions. The first distinction, under Connecticut vexatious litigation law, is between a probable-cause inquiry focused on the *factual* allegations in the underlying proceedings and a probable-cause inquiry focused on the *legal* basis for the underlying claims. A subjective inquiry is required as part of the probable-cause inquiry in vexatious litigation cases to the extent that a plaintiff contends that the defendant falsified or misrepresented the *factual* basis for claims in the underlying proceedings. But plaintiff is incorrect when it seeks to characterize this as a "subjective" inquiry into a defendant's intentions or motivations *per se*, because **[*38]** it is not that. The inquiry is not concerned with questions of intent or motivation; it examines the state of defendant's *knowledge*, that is, it asks what facts defendant knew, or should defendant have known, at the time the allegations were made. The objective inquiry then examines whether a reasonable person would conclude that those facts establish probable cause under applicable law. See generally Kenneth Rosenthal, *Vexatious Litigation in Connecticut: Malicious Prosecution of Civil Actions, Probable Cause, and Lawyer Liability*, 84 Conn. B.J. 255, 262-66 (2010) (explaining distinction between "factual tenability" of underlying claim, which involves subjective inquiry into what defendant knew or should have known when allegations were made, versus "legal tenability" of underlying claim, which is an objective inquiry).[17] See also 3 *Restatement (Second) Torts §675, comment d* (1977) (for purposes of the probable cause analysis applicable to wrongful civil proceedings, stating that a person "cannot have a reasonable belief in the existence of facts on which proceedings are based if he knows that the alleged facts are not true and his claim is based on false testimony . . .")[18]

The second distinction overlooked by plaintiff **[*39]** is the difference between the specific probable cause inquiry conducted under the first step of the *Noerr-Pennington* "sham" test, on the one hand, and the probable cause inquiry under *state* vexatious litigation doctrine. As discussed in the preceding paragraph, plaintiff's argument that the court must consider the "subjective" component of the probable-cause inquiry is based on plaintiff's understanding of *Connecticut* law defining probable cause in the context of vexatious litigation cases. Although the *Noerr-Pennington* cases sometimes describe the probable cause test under federal and state law as "equivalents," *Diamond 67, LLC v. Oatis, supra, No. X03HHD-CV-126030610, 2017 Conn. Super. LEXIS 4487, 2017 WL 5056255, at *21* (citing cases), this description is only accurate, strictly speaking, with reference to the *objective* prong of the vexatious litigation analysis, because the first (probable cause) step of the *Noerr-Pennington* sham exception has no "subjective" component. This is not to say that *Noerr-Pennington* immunity is available to parties whose petitioning activity includes making knowingly false misrepresentations of material fact in the underlying proceedings. See n.14 above. But that particular type of misconduct does not disqualify the petitioner **[*40]** from *Noerr-Pennington* immunity under the "probable cause" component of the sham exception. Instead, the *Noerr-Pennington* cases have established a separate "fraud exception" analysis for cases involving claims of factual misrepresentation. See above n.14, and below at pp. 39-40. It is a mistake to conflate the analysis under the *Noerr-*

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[17] The Rosenthal article very ably untangles the two strands of the probable cause doctrine using extensive citation to Connecticut Supreme Court precedent to illustrate the point. Even the *Falls Church* decision, which emphasizes the "purely objective" nature of the probable cause inquiry in Connecticut, acknowledges the critical distinction between the state of defendant's *knowledge* (i.e., the facts he or she knows when making the underlying legal claims), and the defendant's subjective *intentions* or *motivations*. See *281 Conn. at 99*. Only the latter are irrelevant to the probable cause inquiry. *Id.*; cf. *Devenpeck v. Alford, 543 U.S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004)* ("Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause") (citations omitted).

[18] Each of the two aspects of the probable cause inquiry—the requirement of legal tenability and factual tenability—are part of the standard formulation of the Connecticut doctrine: "The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a man of ordinary caution, prudence and judgment, under the circumstances, in entertaining it." *Wall v. Toomey, 52 Conn. 35, 36 (1884)*.

Pennington fraud exception with the "probable cause" analysis under Connecticut law. Plaintiff's analysis is flawed by this mistake.

C. Application of *Noerr-Pennington* to the Circumstances of this Case

For purposes of the present motion, the question on summary judgment is whether a reasonable juror could conclude, on this record, that the sham exception to the *Noerr-Pennington* doctrine applies to defendants' conduct. The summary judgment standard itself is well-settled. See *Practice Book §17-49*; see, e.g., *Grenier v. Commissioner of Transportation, 306 Conn. 523, 534-35, 51 A.3d 367 (2012)*; *Windsor Financial Savings & Loan Ass'n v. Reliable Mechanical Contractors, LLC, 175 Conn.App. 651, 658-59, 168 A.3d 586 (2017)*.[19] A slight nuance is added to the summary judgment analysis with respect to the first part of the sham exception (the so-called "objective" prong), because this probable cause determination ultimately presents a question of law. A recent Appellate Court decision summarizes the relevant case law:

> [There is an] ample body of Connecticut precedent holding that the existence **[*41]** of probable cause is a question of law to be decided by the court. See, e.g., *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, 281 Conn. 84, 94, 912 A.2d 1019 (2007)* ("the existence of probable cause is an absolute protection . . . and what facts, and whether particular facts, constitute probable cause is always a question of law" [internal quotation marks omitted]); *Brodrib v. Doberstein, 107 Conn. 294, 296, 140 A. 483 (1928)* (existence of probable cause "is always a question of law"); *Giannamore v. Shevchuk, 108 Conn.App. 303, 312, 947 A.2d 1012 (2008)* ("[t]he issue of probable cause . . . ultimately presents a question of law that must be determined by the court"). For that reason, the appellate courts of this state have upheld judgments rendered in favor of defendants in vexatious litigation actions in which the court rendered summary judgment as a matter of law; see *Lichaj v. Sconyers, 163 Conn. App. 419, 428-29, 137 A.3d 26 (2016)*; *Hebrew Home & Hospital, Inc. v. Brewer, 92 Conn.App. 762, 773, 886 A.2d 1248 (2005)*; as well as cases in which the court bifurcated the issue of probable cause, conducted an evidentiary hearing, and then concluded that probable cause existed. See *Falls Church Group, Ltd. v. Tyler, Cooper & Alcorn, LLP, supra, at 90-92*.

Rockwell v. Rockwell, 178 Conn.App. 373, 388-89, 175 A.3d 1249 (2017); see also *Rieffel v. Johnston-Foote, 165 Conn.App. 391, 396-97, 139 A.3d 729 (2016)*; *Charlotte Hungerford Hosp. v. Creed, 144 Conn.App. 100, 116, 72 A.3d 1175, 1185 (2013)* ("Whether there is probable cause in a given case is a question of law, upon which our scope of review is plenary"); *Byrne v. Burke, 112 Conn.App. 262, 275, 962 A.2d 825 (2009)*.[20]

Although the existence of probable cause presents a question of law, the issue can be decided on summary judgment only if there is no disputed issue with respect to any of the underlying facts material to the probable cause determination. **[*42]** See, e.g., *DeLaurentis v. City of New Haven, supra, 220 Conn. at 252-53* ("Whether the facts are sufficient to establish the lack of probable cause is a question ultimately to be determined by the court, but when the facts themselves are disputed, the court may submit the issue of probable cause in the first instance to a jury as a mixed question of fact and law. *Cosgrove Development Co. v. Cafferty, 179 Conn. 670, 671, 427 A.2d 841 (1980)*; see 3 *Restatement (Second), Torts §681B* [1977]").

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[19] Defendants, as the moving parties, bear the burden to demonstrate that they are entitled to judgment as a matter of law. See *Ramirez v. Health Net of N.E., Inc., 285 Conn. 1, 10-11, 938 A.2d 576 (2008)* ("it is the movant who has the burden of showing the nonexistence of any issue of fact"). Plaintiff at trial bears the burden of proving that the sham exception applies to the petitioning activity at issue. *Professional Real Estate Investors, supra, 508 U.S. at 61*.

[20] The reason for the rule has been explained in various ways. See *Armco, Inc. v. S. Rock, Inc., 778 F.2d 1134, 1137 (5th Cir. 1985)* ("[W]ere probable cause left to the jury the rights of defendants might not be sufficiently safeguarded and the bringing of complaints would be discouraged . . . [T]he general rule is that suits for malicious prosecution are viewed with disfavor and are to be carefully guarded against . . . [M]alicious prosecution cases present situations difficult for the jury to distinguish. There is a constant interplay between the original lawsuit and the malicious prosecution suit . . . This difficulty coupled with the reluctance of the courts to have potential plaintiffs feel a chilling effect from a possible counter lawsuit sheds some light upon the reason for the development of this rule") (citation omitted).

The court's probable cause analysis under the "sham" exception to *Noerr-Pennington* will proceed in two parts. First, the court will examine the issue as it relates to each of the underlying legal proceedings involving plaintiff's three zoning applications. See above at pp. 3-6 (describing the administrative and judicial components of the three underlying zoning applications). Second, because plaintiff has argued that some of the alleged misconduct occurred outside the framework of actual proceedings (what plaintiff calls "non-petitioning conduct"), the court will analyze that contention separately.

1. Petitioning Activity

The First Application

The challenged conduct in connection with the First Application involves Ahuja's motion to intervene in the appeal filed by plaintiff after its initial application was denied by the Board. Ahuja moved to intervene in the superior **[*43]** court; the motion was denied; she sought certification to appeal the denial with the Appellate Court; certification was granted; after first opposing intervention, Procurement changed course and moved to join Ahuja as a party; after first opposing the motion, Ahuja withdrew her appeal in the Appellate Court and participated in the superior court proceedings; the trial court then reversed the Board's decision (i.e., ruled against the Board and Ahuja).

It bears emphasis that Procurement was the *losing* party at the administrative level in the first proceeding, and Ahuja sought to intervene in the superior court appeal on behalf of the *prevailing* party, the Board. It follows that the *merits* of Ahuja's position opposing Procurement's appeal, which essentially mirrored the Board's own litigation position, could hardly be considered objectively unreasonable under these circumstances—Ahuja was supporting the prevailing party at the time. Perhaps for this reason, Procurement's probable cause argument does not challenge Ahuja's legal claims regarding the underlying merits, but instead focuses on her activity in connection with the intervention itself. Plaintiff primarily argues that the petition **[*44]** to intervene contains numerous false allegations of fact regarding the Board's intention to settle the zoning dispute with Procurement. See Pl. Br. at 9, 17-18, 20; Pl. Supplemental Br. at 4, 6.

Applying the first prong of the *Noerr-Pennington* "sham" analysis, the court finds that Ahuja's petitioning activity in connection with the First Application was objectively reasonable as a matter of law. Intervention was sought primarily based on the fact that Procurement and the Board might enter into a global settlement of their zoning dispute. See Motion to Intervene at ¶11; Intervention MOD, *2012 Conn. Super. LEXIS 1380 at *1-2* ("In support of her motion to intervene Ahuja contends that unless she is made a party to this [action], she will be vulnerable to a settlement reached between Procurement and the Zoning Board . . ."). In opposing intervention, Procurement evidently did not challenge Ahuja's standing. See Intervention MOD, *2012 Conn. Super. LEXIS 1380 at *2*. It also acknowledged that it was, in fact, engaged in serious settlement discussions with the Board. *2012 Conn. Super. LEXIS 1380 at *2*. Its opposition to intervention was based on the contention that the Board itself adequately represented Ahuja's interests, and to allow intervention would allow her to have veto power over the proposed settlement. The trial court **[*45]** considered the factors weighing for and against intervention, and concluded that the motion should be denied. Judge Adams observed that if Procurement and the Board ultimately were able to settle the matter, Ahuja would have an opportunity to object at the hearing mandated under *General Statutes §8-8(n)*.[21] *2012 Conn. Super. LEXIS 1380 at *4*.

Procurement does not appear to contend that Ahuja's motion to intervene was legally untenable. Nor could such an argument credibly be maintained. Certainly nothing in the Intervention MOD suggests that Judge Adams considered the motion to be frivolous in any respect. To the contrary, it appears that Judge Adams viewed Ahuja's position as reasonable, though ultimately unpersuasive, and he exercised his discretion to deny intervention only after due consideration of the relevant legal factors under *Horton v. Meskill, 187 Conn. 187, 197, 445 A.2d 579 (1982)*. See Intervention MOD, *2012 Conn. Super. LEXIS 1380 at *2*. The trial court understood that individual objectors will sometimes seek to intervene as parties in zoning appeals when it appears that the municipal zoning authority and

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[21] *General Statutes §8-8(n)* provides that no settlement of a zoning appeal is effective unless and until a hearing is held and the settlement is approved by the court.

developer, once at odds, had reached a settlement. See *id. at 3-4* (citing other superior court cases). Such efforts usually are unsuccessful—but not always. See, e.g., *Walker v. Branford Planning & Zoning Comm'n, No. CV-10-6009763S, 2010 WL 4276686, at *5 (Conn.Super.Ct. Sept. 28, 2010) [50 Conn. L. Rptr. 654, 2010 Conn. Super. LEXIS 2486]* (granting intervention **[*46]** in zoning appeal after considering possibility of settlement between principal parties); *One Hundred Nine N., LLC v. New Milford Planning Comm'n, No. DBD-CV-06-4006246S, 2008 WL 2168994, at *4 (Conn.Super.Ct. May 6, 2008) [45 Conn. L. Rptr. 510, 2008 Conn. Super. LEXIS 1146]* (permitting intervention in zoning appeal despite prospect of settlement between principal parties).

A further indication of the potential legal viability of Ahuja's position is found in the fact that the Appellate Court *granted* certification to review Judge Adams' ruling. This action necessarily means that at least two members of the Appellate Court found Ahuja's argument worthy of appellate consideration. See *General Statutes §8-8(o)*. Frivolous claims ordinarily do not earn certification. The Appellate Court's interest in this matter substantiates the conclusion that Ahuja's petition to intervene was not doomed to fail from the outset. In point of fact, plaintiff has not cited any appellate authority demonstrating, or even hinting, that a reasonable person under the circumstances would have believed that Ahuja's motion to intervene had no realistic chance of success.

Procurement's fact-based claims fare no better. It argues that Ahuja's petition to intervene contained various factual misrepresentations that would remove any basis for probable **[*47]** cause. Procurement claims that a reasonable factfinder could conclude, on this record, that Ahuja herself was not even aware at the time of filing that her lawyer had filed the petition to intervene (filed on February 22, 2012), and, more particularly, that she was not aware personally of certain factual representations made in the motion until months after the motion was filed.[22] It contends that a factfinder could reasonably conclude that Ahuja lacked probable cause because she had no personal knowledge of the facts alleged in the motion to intervene filed under her name. Procurement does *not* contend that the material factual allegations in Ahuja's petition to intervene were themselves false. To the contrary, it is undisputed that Procurement *was* in settlement negotiations with the Board at the time. See Intervention MOD, *2012 Conn. Super. LEXIS 1380 at *2*. Plaintiff's argument is that Ahuja herself was ignorant of the underlying facts; the petition was prepared and submitted by her lawyer in collaboration with Ahuja's son and/or ex-husband, who were acting on behalf of defendant Holdings, which was the "real" party in interest. Plaintiff contends that Ahuja was a "straw" intervenor, used by her son and ex-husband to establish statutory **[*48]** aggrievement based on her ownership of property within 100 feet of the High Ridge Road Project. See *General Statutes §8-8(a)(1)*.

Plaintiff's theory regarding Ahuja's factual ignorance does not provide a legal basis for defeating *Noerr-Pennington* immunity. It is true that the immunity is lost if a petitioner intentionally makes material misrepresentations of fact to the government. See n.14 above (discussing "fraud" exception). But under that doctrine, it is not enough that the factual allegations are made by a petitioning party who speaks without knowing whether or not the allegations are true; to lose *Noerr-Pennington* immunity under the so-called fraud exception, there must have been a deliberate and material misrepresentation of fact. See *Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d 834, 842-43 (7th Cir. 2011)* ("a misrepresentation renders an adjudicative proceeding a sham only if the misrepresentation (1) was intentionally made, with knowledge of its falsity; and (2) was material, in the sense that it actually altered the outcome of the proceeding"); *United States v. Philip Morris USA, Inc., supra, 566 F.3d at 1123* ("Defendants' attempt to invoke *Noerr-Pennington* as protection fails because the doctrine does not protect deliberately false or misleading statements"); *Kottle v. Northwest Kidney Centers, 146 F.3d 1056, 1060 (9th Cir. 1998)* ("litigation can be deemed a sham if a party's knowing fraud upon, or its **[*49]** intentional misrepresentations to, the court deprive the litigation of its legitimacy") (inner quotation marks and citation omitted); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1267, 310 U.S. App. D.C. 409 (D.C. Cir. 1995)* ("[N]either the *Noerr-Pennington* doctrine nor the *First Amendment* more generally protects petitions predicated on *fraud* or *deliberate* misrepresentation") (emphasis added; describing the holding in *Whelan v. Abell, 48 F.3d 1247, 310 U.S. App. D.C. 396 (D.C. Cir. 1995))*; *Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 580-81 (6th Cir. 1986)*; *St. Joseph's Hospital, Inc. v. Hospital Corp. of America, 795 F.2d 948, 955 (11th Cir. 1986)*; *Ottensmeyer v.*

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[22] Procurement focuses primarily on the allegations in the intervention motion about the potential settlement of the zoning dispute by the Board and Procurement, and the potential legal effects of such a settlement. See Pl. Br. at 8-9.

Chesapeake & Potomac Tel. Co. of Md., 756 F.2d 986, 994 (4th Cir. 1985); Bath Petroleum Storage, Inc. v. Mkt. Hub Partners, L.P., 129 F.Sup.2d 578, 593 (W.D.N.Y.), aff'd *229 F.3d 1135 (2d Cir. 2000)*.

As a matter of law, plaintiff cannot prevail under *Noerr-Pennington* on its theory regarding Ahuja's alleged ignorance of the facts contained in her petition to intervene, because no reasonable factfinder could conclude, on this record, that Ahuja deliberately made any false representation of material fact to the court in connection with her efforts to intervene in the First Application.[23]

Procurement's claim that Ahuja acted as a "straw" for her son and ex-husband is also unavailing. Procurement's evidence at most would support the view that Ahuja's opposition to the project primarily was motivated by family loyalty rather than any particularized knowledge of the facts or deep conviction regarding the merits. Her activity is immunized because the claims contained in her motion were supported by probable cause under the *Noerr-Pennington* **[*50]** "sham" exception; the fact that her son and/or husband were pursuing their own interests by petitioning through her does not deprive any of the defendants of *Noerr-Pennington* immunity. See Baltimore Scrap Corp. v. David J. Joseph Co., 237 F.3d 394, 400-01 (4th Cir. 2001) (*Noerr-Pennington* protects even non-parties whose petitioning activity is carried out through "straw petitioners); Liberty Lake Investments, Inc. v. Magnuson, 12 F.3d 155, 157-59 (9th Cir. 1993); Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1273 (6th Cir. 1989).

The Second Application

On December 12, 2011, while the first appeal was pending, plaintiff's second application for a special permit and architectural/site plan approval was approved by the Board. See above at pp. 5-6. Ahuja appealed to the superior court pursuant to General Statutes §8-8. The principal ground for her appeal was that the Board lacked subject matter jurisdiction to act because Procurement failed to comply with the notice requirements for public hearings as required under the Stamford City Charter ("Charter").[24] The notice argument was based on the fact that the Board did not publish notice regarding two of the four public hearings held in connection with the second application. The undisputed facts were described by the trial court:

> The Board published notice in the *Stamford Advocate* on September 14, 2011 and September 21, 2011 for a public hearing to be held on September 26, 2011. The Board **[*51]** was unable to complete the hearing on that date and continued the hearing to October 6, 2011. Due to the large number of citizens who still wished to speak that evening, the Board continued the hearing to October 24, 2011; yet on that evening, the hearing was abruptly closed to overcrowding. The Board [then] . . . caused notice to be published notice in the *Stamford Advocate* on October 28, 2011 and November 4, 2011 for a public hearing on November 10, 2011.

Ahuja contended on appeal primarily[25] that the failure to publish public notice with regard to two of the "continuation" hearings (October 6, 2011 and October 24, 2011) violated the relevant provisions of the Stanford

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[23] The court need not decide whether plaintiff's "ignorance" theory would be sufficient to establish that Ahuja lacked probable cause for purposes of satisfying the *liability* standard for vexatious litigation in Connecticut. The issue here is whether defendant is entitled to summary judgment on its *Noerr-Pennington defense*, and so the only question is whether, on this record, that doctrine immunizes defendants as a matter of law.

[24] The parties appear to agree that the notice requirements for zoning matters in Stamford are governed by the Charter. See Berger MOD 1/4/13, 2013 Conn. Super. LEXIS 49 at *3 ("Unlike most zoning commissions . . . planning and zoning in Stamford are governed by 26 Spec. Laws 1228, No. 619, hereinafter referred to as the Stanford Charter (1953, rather than by the General Statutes").

[25] Ahuja also attacked the sufficiency of the notices on the ground that Procurement amended its application shortly before the last hearing date, which, according to Ahuja, rendered the prior notices "misleading" and obligated the Board to publish a new notice reflecting the change. The court has reviewed the parties' respective briefs submitted to the trial court on these subsidiary issues, reviewed the key cases, and has read Judge Berger's decision as it relates to these issues. In this court's view, although Ahuja's subsidiary legal claims on this point did not prevail, the arguments unquestionably were supported by probable cause as a matter of law.

Charter, §C6-40-11 and §C6-40-12. Section C6-40-11, entitled "Notice of Public Hearings," provides in pertinent part as follows:

> Notice of each public hearing held with respect to amendments of the Zoning Regulations and Map or applications for approval of site and architectural plans and/or requested uses shall be given by publishing in an official newspaper the time, place and purpose of such hearing . . . Said notice shall be published at least twice, the first not more than fifteen nor less than ten days before such **[*52]** hearing, the last not less than two days before such hearing . . .

Section §C6-40-12, entitled "Hearings," states:

> If more than one public hearing is considered by the Zoning Board to be necessary or advisable, additional hearings may be held upon due notice, as herein above set forth, provided no more than ninety days shall elapse between the first and last hearing on any one petition, unless the petitioner agrees in writing to an extension of such period.

The "notice" issue was fully briefed in the trial court, and Judge Berger issued a written decision resolving the issue in favor of the Board. See Berger MOD 1/4/13, *2013 Conn. Super. LEXIS 49 at *3*. Judge Berger's MOD is thoughtful, and his conclusions are supported by another superior court in a different case involving the same charter provisions. *Id.* at 5-6 (citing Judge Adams' decision in *Carberry v. Zoning Board of Appeals*). Judge Berger's reasoning regarding the notice issue distinguished between new hearings and the "continuation" hearings occurring on October 6, 2011 and October 24, 2011, and concluded that a separate notice is not required in the latter context. The court mostly emphasized the impracticality of Ahuja's position, and suggested that adopting **[*53]** Ahuja's construction of the governing charter provisions might make it impossible for the Board to comply with the statutory timing requirements set forth in *General Statutes §8-7d(a)*. See Berger MOD 1/4/13, *2013 Conn. Super. LEXIS 49 at *3* & n.4.[26]

This court finds that Ahuja's legal claims regarding notice were supported by probable cause. The argument lost, and perhaps it should have lost, but it was by no means groundless. To the contrary, the text of the relevant charter provisions provided Ahuja with a solid foundation to contend that a new notice was required for *every* public hearing, "continuation" or otherwise. Section C6-40-11 of the Charter contains the basic requirement that the Board give notice of a public hearing to be held on certain types of zoning applications. Section C6-40-12 goes on to provide specifically for the situation where a matter before the Board requires more than one hearing: "If more than one public hearing is considered by the Zoning Board to be necessary or advisable, *additional hearings may be held upon due notice, as herein above set forth* . . ." (emphasis added). Ahuja's argument—that the literal text of §C6-40-12 requires notice of any and all "additional hearing[s]" held in connection with an application—posits **[*54]** a very plausible construction of the charter provision. The text of §C6-40-12 does not limit its application to "new" or "separate" hearings, or otherwise create a category of "continuation" hearings exempt from the notice requirement. The provision's literal terms would seem to include *any* "additional" hearing, and its context would appear to contemplate precisely the situation confronted in connection with the Second Application, when the first public hearing was insufficient to complete the Board's full consideration of the zoning matter at issue.

Judge Berger's decision rests on his unstated but clearly discernible view that it would be unworkable to read the charter provision literally to require a newly published notice every time a zoning hearing is continued. See Berger MOD 1/4/13, *2013 Conn. Super. LEXIS 49 at *6* & n.4. The court's construction to avoid such a result is proper, of course, see *Town of Wallingford v. Werbiski, 274 Conn. 483, 491-92, 877 A.2d 749 (2005)*; *State v. Brown, 242 Conn. 389, 402-04, 699 A.2d 943 (1997)*—at the end of the day, practical considerations may require the literal

[26] Procurement also argues that Ahuja's notice argument was meritless because she had actual notice of the hearings at issue and her son appeared at the hearings on her behalf, thereby waiving any right to claim defective notice. See Pl. Br. at 7-8. Judge Berger noted this point in a footnote to his decision, see Berger MOD 1/4/13, *2013 Conn. Super. LEXIS 49 at *3 n.7*, but did not rest his decision on a finding of waiver. Moreover, "failure to give newspaper notice [to the general public] is a subject matter jurisdictional defect," and cannot be waived. *Lauer v. Zoning Commission, 220 Conn. 455, 461-62, 600 A.2d 310 (1991)*. Whether or not Procurement's "actual notice"/waiver argument would ultimately prevail, it certainly does not render Ahuja's appeal frivolous. Nothing in Judge Berger's MOD suggests otherwise.

terms of a statute or ordinance to yield to practical necessity. But under our rules of construction, which accord strong preference to the literal meaning of the text, no one fairly can say that Ahuja's literal reading of the text was unreasonable. **[*55]** At worst, Ahuja's argument proved unworkable for logistical reasons. Again it should be pointed out that the trial court's MOD never suggested that Ahuja's argument was frivolous or unreasonable.

The Third Application

The Third Application was submitted by Procurement to modify certain conditions that the Board had placed on the development project in its previous decisions. These modifications, among other things, sought to increase the number of units approved to nineteen units; increase the amount of available parking by three additional spaces; open an entrance exit on Bradley Place without the obligation to install a traffic signal; and change the form of ownership from condominiums to apartments. It is clear from the record of the underlying administrative proceeding, which this court has reviewed,[27] that there was some amount of neighborhood opposition to the Third Application. The thrust of this opposition was that the conditions attached by the Board to its prior approval of the Project in December 2011 (as part of the Second Application) was based on a compromise reached by Procurement with opponents of the Project; the neighbors claimed that Procurement's Third Application reneged **[*56]** on important components of that prior agreement by seeking modifications that would, among other things, increase the number of residential units from seventeen to nineteen and change the form of residential ownership from condominium to rental units. See Board Meeting Minutes 11/10/14, at pp. 4-5.

In a 4-1 split decision, the Board voted to approve the Third Application on November 17, 2014, effective November 21, 2014. It appears from the court's review of the Return of Record that the majority failed to provide any reasons for its approval. See Board Meeting Minutes 11/17/14, at 9. The record reveals only that during the Board's brief deliberations, Stamford's Associate Planner read aloud to the Board from the text of Condition #2 to the Board's prior approval of the special exception (Second Application) dated 12/12/11. *Id.* Condition 2 stated that the Project's "residential development shall be limited to a total of seventeen units to be in condominium form of ownership." The meeting minutes reflect that the Board members were polled, and the majority indicated that they "were okay with adding the two additional units." *Id.* The Board did not explain why **[*57]** the modification was "okay."

Ahuja appealed the Board's decision to the superior court by complaint dated December 2, 2014, with a return date January 6, 2015. The appeal claimed, among other things, that there was not "substantial evidence" in the record to support the Board's approval of the special exception under §19-3.2 of the Stamford Zoning Regulations. Procurement moved to dismiss the appeal on the ground that it was not returned to court within the time required by *General Statutes §52-46a*.[28] The motion to dismiss was granted on July 6, 2015. No appeal was taken from that disposition.

The court finds that Ahuja had probable cause to appeal from the Third Application, because her legal claims in that appeal were objectively reasonable as a matter of law under the first step of the *Professional Real Estate Investors/Zeller* analysis. Any appeal of this nature faces an uphill battle under the "substantial evidence" standard. But appeals of this type, many with far less substance, are standard fare in Connecticut courts, and it is this court's considered view is that Ahuja's appeal, although probably not a winner, showed above-average merit. A reasonable litigant in Ahuja's position realistically may have expected **[*58]** success on the merits of her appeal from the Third Application.

Procurement's application sought modifications to the conditions that had been attached to the earlier approval of the proposal to develop the subject property. The Project, as modified, consisted of two buildings housing nineteen residential units, eighty-five parking spaces, and construction and operation of a large day-care center. The issue before the Board was whether the application met the standards set forth in §19-3.2 of the Stamford Zoning Regulations. Plaintiff argues, without any elaboration or specificity, that summary judgment cannot be granted in Ahuja's favor because there was "substantial evidence" to support the Board's decision to grant the special

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[27] See *Ahuja v. Zoning Board et al.*, No. FST-15-6024272, Return of Record (Entries 41-#106.00-109).

[28] The complaint was not returned to court until January 4, 2015.

exception. See Pl. Br. at 10, 19. The issue is not so simple. While the "substantial evidence" rule certainly weighs in favor of upholding the Board's decision, and prohibits a court from substituting its judgment for that of the Board, the standard of review is not toothless. See *Martland v. Zoning Comm'n, 114 Conn.App. 655, 663, 971 A.2d 53 (2009)* ("The evidence supporting the decision of a zoning board must be substantial . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the **[*59]** decision of the board"). Indeed, as Procurement itself learned when it prevailed in its own appeal from the Board's denial of the First Application, the "substantial evidence" standard hardly spells automatic defeat for the plaintiff in zoning appeals. See Berger MOD 2/14/14. To be sure, it is probably more difficult to obtain reversal of the approval of a special exception than to successfully challenge the denial of a special exception. Ultimately each case will rise or fall on its own merits. See generally 9A Robert A. Fuller, *Connecticut Land Use Law and Practice* §33.4 (Special Permits and Special Exceptions) (4th ed. 2015). But this court's extensive review of cases in this area leads it to conclude that Ahuja had probable cause to appeal from the Board's approval of the Third Application.

We do not know what a reviewing court would have done on this particular appeal because the case was dismissed on procedural grounds.[29] But this court's review of the underlying record leads to the firm conviction that a court considering the merits reasonably might have concluded that substantial evidence did not support the Board's decision to grant the special exception sought in the Third Application. **[*60]** It is unlikely, but a reversal might have been obtained based upon a court's view of the evidence in light of the five relevant categories to be taken into account under §19-3.2 of the Stamford Zoning Regulations. More likely is the possibility that a superior court would have been particularly concerned that the Board originally saw fit, in December 2011, to place express conditions on its approval of the special exception by allowing a maximum of seventeen residential units, but then, in 2014, changed that limitation to permit the developer to increase the number of units to nineteen without justifying the modification, and without explaining what circumstance leading to the original limitation had changed.[30]

A reviewing court's concern in this regard might have been magnified by the suggestion in the record, voiced by more than a few neighbors, that Procurement's Third Application sought modifications to conditions that previously had been agreed upon as part of a compromise deal. Whatever the ultimate *legal* significance of this allegation, at the very least it provides the appeal with sufficient equitable traction to get a court's attention. In any event, the issue here is not who ultimately **[*61]** would have prevailed on appeal; it is whether an objective litigant would consider the appeal to have had any realistic chance of success. The answer is yes.

Procurement also argues that summary judgment cannot be granted because Ahuja has failed to submit an affidavit or other evidence rebutting allegations of wrongdoing contained in paragraphs 10, 29, and 30 of the complaint. Procurement focuses in particular on paragraph 29, which alleges in pertinent part that "counsel representing the Defendants indicated that his clients were aware that they could only succeed at delaying the Project and did not have any chance for succeeding on the merits of the underlying appeals . . ." See Pl. Br. at 5-6, 14; Pl. Supplemental Br. at 6. Procurement's argument relies for legal support on a fragmentary quotation from a Supreme Court case stating that "the nonmoving party may rest on mere allegations or denials contained in [its] pleadings" to defeat summary judgment when a moving party fails to show that there are no genuine issues of material fact. Pl. Br. at 14 (quoting *Romprey v. Safeco Ins. Co., 310 Conn. 304, 320-21, 77 A.3d 726 (2013))*.

This argument misapprehends governing summary judgment doctrine. The general rule is the opposite of that promoted by Procurement: **[*62]** the non-moving party may not rely on the mere allegations contained in its pleadings to defeat summary judgment:

> We have repeatedly held that "(i)n order to oppose successfully a motion for summary judgment, the opposing party must recite facts in accordance with Practice Book §300 (now §381) which contradict those offered by the

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[29] No claim is made that Ahuja's procedural default, which resulted from her late return of process to court, itself established a lack of probable cause.

[30] It is not clear what evidence in 2014 suddenly made the Board majority "okay" with a 10% increase in a maximum set just a few years before. There may be an answer to this question, of course, but the Board did not identify it, and plaintiff's brief to this court does not identify it.

> moving party." *Dorazio v. M.B. Foster Electric Co., 157 Conn. 226, 229, 253 A.2d 22 (1968)*; *McColl v. Pataky, 160 Conn. 457, 460, 280 A.2d 146 (1971)*; *Dowling v. Kielak, 160 Conn. 14, 17, 273 A.2d 716 (1970)*; *Loubet v. Loubet, 155 Conn. 695, 696, 230 A.2d 552 (1967)*; see also *James & Hazard, Civil Procedure* (2d Ed. 1977) pp. 149-50. A party seeking to resist summary judgment may not rely on underlying pleadings containing only general denials, or upon the pleadings of someone not a party to the motion for summary judgment to establish the existence of a "genuine issue" as to a material fact. *Plouffe v. New York, N.H. & H.R. Co., 160 Conn. 482, 490, 280 A.2d 359 (1971)*; *United Oil Co. v. Urban Redevelopment Commission, 158 Conn. 364, 378-79, 260 A.2d 596 (1969)*; see also *Boyce v. Merchants Fire Insurance Co., 204 F.Sup. 311, 314 (D.Conn. 1962)*, aff'd, per curiam, *308 F.2d 806 (2d Cir. 1962)*.

Citizens Nat. Bank v. Hubney, 182 Conn. 310, 312-13, 438 A.2d 430 (1980); accord *Squeo v. Norwalk Hosp. Ass'n, 316 Conn. 558, 597-98, 113 A.3d 932 (2015)* ("Accordingly, they could not continue to rely on their pleadings to defeat the defendants' motion for summary judgment but, instead, were obliged to submit affidavits or other documentary evidence in support of their claims. See *Practice Book §17-45*. This they failed to do").

It appears that Procurement intends to invoke the exception to this general rule, which applies in circumstances where the moving party has failed to meet its threshold burden to negate each claim set forth in the complaint—or, in a motion **[*63]** seeking summary judgment on the moving party's special defense, as here, to establish an evidentiary basis supporting the defense. The exception is usually explained as follows:

> An important exception exists, however, to the general rule that a party opposing summary judgment must provide evidentiary support for its opposition, and that exception has been articulated in our jurisprudence with less frequency than has the general rule. On a motion by [the] defendant for summary judgment, the burden is on [the] defendant to negate each claim as framed by the complaint . . . It necessarily follows that it is only [o]nce [the] defendant's burden in establishing his entitlement to summary judgment is met [that] the burden shifts to [the] plaintiff to show that a genuine issue of fact exists justifying a trial . . . Accordingly, [w]hen documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue.

Rockwell v. Quintner, 96 Conn.App. 221, 227-30, 899 A.2d 738 (citations and internal quotation marks omitted), cert. denied, *280 Conn. 917, 908 A.2d 538 (2006)*; see *Squeo, supra, 316 Conn. at 594-96*.

Procurement's argument fails to distinguish between *claims* ***[*64]*** in a pleading and *evidentiary* allegations contained in that pleading. A party seeking summary judgment is not required to submit affidavits or other materials disputing each and every evidentiary allegation contained in the non-moving party's pleadings. The summary judgment submissions, rather, must establish a basis to find in the movant's favor on each and every essential element of the claim or defense upon which summary judgment is sought. See, e.g., *Mott v. Wal-Mart Stores East, LP, 139 Conn.App. 618, 626-27, 57 A.3d 391 (2012)* (defendant failed to establish lack of notice of premises defect). Here, defendants have submitted summary judgment materials which, if left unrebutted by Procurement, establish grounds for their *Noerr-Pennington* defense as a matter of law. More specifically, defendants have established that they were engaged in petitioning activity that an objective litigant could conclude was reasonably calculated to elicit a favorable outcome. On the basis of these summary judgment materials, and in the absence of evidence submitted by plaintiff giving rise to a disputed issue of material fact regarding an element of the defense, the court has determined that defendants are entitled to summary judgment as a matter of law under the *Noerr-Pennington* ***[*65]*** doctrine. If Procurement wanted to defeat summary judgment based on any particular facts alleged in its complaint—for example, the allegation that defendants made an admission, through counsel, that would give rise to a triable question as to whether their petitioning activity was supported by probable cause—then Procurement was obligated to submit an affidavit or other evidentiary material providing an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. See, e.g., *Doe v. Town of West Hartford, 328 Conn. 172, 191-97, 177 A.3d 1128 (2018)*. That was not done here.

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The foregoing findings and conclusions bear upon all counts of the complaint in which plaintiff seeks to impose liability based on defendants' petitioning activity in connection with the First, Second or Third Application. This is so because *Noerr-Pennington*, as it has been developed by the courts, is not limited in application to some causes of action but not others. Its application is not determined by the legal claim being asserted, but by the nature of the underlying activity giving rise to that claim—if the activity is protected by the *first amendment's* Petition Clause, then the *Noerr-Pennington* doctrine applies. As discussed, the doctrine has been applied beyond the antitrust context **[*66]** to claims of vexatious litigation, abuse of process, interference with contractual relations, abuse of process, and CUTPA violations, among others. In other words, *Noerr-Pennington* is a defense to each of plaintiff's claims aimed at petitioning activity.

Based on the foregoing analysis, the court grants summary judgment in defendants' favor on the First, Second, Third, Fourth, Fifth, and Sixth Counts, which are the counts seeking damages arising from the defendants' participation in one or more of the three underlying administrative and/or judicial proceedings described herein. It appears to the court that this ruling covers the entirety of these six counts.[31] Defendants' petitioning activity is protected under *Noerr-Pennington*, and the sham exception is inapplicable here as a matter of law. No common-law or statutory liability may be imposed on defendants for that activity under the circumstances.

2. Non-Petitioning Activity

This leaves what Procurement labels as "non-petitioning activity," which it contends is not entitled to *Noerr-Pennington* immunity. Procurement contends that such conduct was not directed at influencing governmental action, but instead involved false or otherwise tortious **[*67]** communications made by defendants to non-governmental actors—neighbors living near the Project, Procurement's lenders, and Procurement's actual or prospective tenants. See Pl. Br. at 13-15. Plaintiff's briefs do not describe the non-petitioning activity at great length, but it evidently included efforts by defendants to (1) spread false information about the project to neighbors, in an effort to mobilize opposition to the project, Pl. Br. at 17; (2) contact Procurement's "lending institutions with the goal of controlling the debt that secured Procurement's property," *id.* at 14; and (3) contact or interfere with Procurement's current or prospective tenant relationships, *id.* See Affidavit of Nagi Osta dated January 13, 2017, at ¶¶7-9, 19.

To the court's knowledge, neither party has addressed whether the allegations of non-petitioning activity, taken alone, would establish the basis for a viable claim under any of the first six counts of the complaint. See n.31 above. It appears to the court that only the Seventh Count (relating to defendants' activities directed at Procurement's tenants and lenders) purports to state a claim independent of defendants' petitioning activity. *Id.* In the interest **[*68]** of completeness, the following discussion will address all of the non-petitioning activity contained in plaintiff's allegations.

Procurement is incorrect to label as "non-petitioning activity" the efforts by defendants to foment public opposition to the Project among neighbors. The case law makes it clear that *Noerr-Pennington* protection extends beyond a petitioners' direct communications with the government. "A publicity campaign directed at the general public, seeking legislation or executive action, enjoys antitrust immunity [under *Noerr-Pennington*] . . ." *Mercatus Group, LLC v. Lake Forest Hospital, supra, 641 F.3d at 844*, citing *Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499-500, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988))*; see, e.g., *Sosa v. DIRECTV, Inc., 437 F.3d 923, 934 (9th Cir. 2006)* (recognizing that "not only petitions sent directly to the court in the course of litigation, but also 'conduct incidental to the prosecution of the suit' is protected by the *Noerr-Pennington* doctrine") (citation omitted); *Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 160 (3d Cir. 1988)* ("Thus, we hold that as a matter of law, defendants' actions in calling Brownsville's violations to the attention of state and federal authorities and eliciting public interest [in public informational campaign] cannot serve as the basis of tort liability"); *Rubloff Dev. Grp., Inc. v. SuperValu, Inc., 863 F.Sup.2d 732, 741-42 (N.D.Ill. 2012)*.

[31] There are limited allegations incorporated in the first six counts regarding what plaintiff labels "non-petitioning activity," see below at pp. 53-57, but the court is under the impression that those allegations are intended to establish defendants' motive and intentions underlying the petitioning activity. Only the Seventh Count seeks damages allegedly caused by the non-petitioning activity.

It should not be surprising that efforts to mobilize public opinion in support of petitioning activity warrant *first amendment* protection. With **[*69]** this point in mind, it becomes clear that *Noerr-Pennington* immunity is not avoided or overcome by allegations that defendants "commenced a campaign to delay, thwart and prevent the Project from ever opening," Nagi Affidavit at ¶7, or "distribut[ed] notices to residents in the surrounding area regarding the second [zoning] application with the hope they would attend the public hearings and oppose the application," *id.* at ¶9(a), or "generated a website to oppose the Project, and to distribute fliers to oppose the Project [sic]," *id.* at ¶9(c).

There is one aspect of defendants' alleged publicity campaign that possibly could come within the "fraud" exception to *Noerr-Pennington*. See n.14 and pp. 39-40 above. Procurement alleges that defendants attempted to create neighborhood opposition to the Project in part by initiating and spreading the false rumor "that the Project would involve low-income and *section 8* housing . . ." *Id.* at ¶¶8, 9(b). Procurement submitted an exhibit to its summary judgment opposition demonstrating that this alleged falsehood ultimately made its way into the administrative record before the Board, in the form of email communications from neighbors (not defendants themselves) **[*70]** to Norman Cole, Stamford's Director of Planning and Zoning. See Exhibits 2 and 3 to Pl. Brief. These emails, not exceeding two in number, expressed opposition to the Project based on their respective author's concerns about "low-income housing." Defendants did not submit any rebuttal evidence relating to these emails.

It is uncertain whether these allegations give rise to a triable issue here. The fraud exception to *Noerr-Pennington* requires evidence that defendants intentionally made false statements of material fact to the government. See n.14 and pp. 39-40 above. On the existing record, it is not clear to the court that a jury reasonably could infer that defendants were responsible for promulgating the information about "low-income housing" that filtered into the administrative record. Nor is it clear that the statement about "low-income housing," even if attributable to defendants, is a statement of "fact" that could support a finding of fraud. Although the phrase "low-income housing" may be a term of art with an objective meaning in certain circles, to many members of the public it is a subjective and relative term, which can mean different things to different people. Neither party **[*71]** has briefed the meaning or accuracy of the term as used here. The court is doubtful that defendant's use of that term to describe the Project, even if established, could trigger the *Noerr-Pennington* fraud exception.

Use of the term "*Section 8*" to describe plaintiff's housing is different, because it is a statement of fact describing housing subsidized pursuant to *Section 8 of the Housing Act of 1937*, as amended, *42 U.S.C. §1437f*. One email included in the record, from a neighbor opposing the Project, mentions "section eight housing." Even here, it is questionable if the reference is sufficient to trigger the fraud exception, because it is unclear whether the reference is specific to the Project itself, or, rather, part of the author's broader lament about what he seems to consider the downward trajectory of the City of Stamford more generally: "When is this going to stop! I see the affordable/ *section 8* housing going on everywhere in Stamford. We are becoming Bridgeport!"[32]

As noted, there are numerous obstacles that plaintiff would need to surmount before proceeding to trial on the basis of their alleged activities involving neighbors. Uncertainties include whether the "low-income" statement is a statement of fact capable of triggering **[*72]** the fraud exception, whether the *Section 8* statement made part of the administrative record referred to the Project or was a broader criticism of Stamford, whether either of those statements were "material" within the meaning of the *Noerr-Pennington* fraud exception, and whether the defendants are legally responsible for either of these statements making their way into the administrative record. These issues need not be resolved, however, because plaintiff does not appear to rely on the neighbor-related activity as an independent basis of liability. In other words, no claim has been made that the First through Sixth Counts present triable issues based solely on defendants' alleged statements to neighbors.

Turning to defendants' alleged communications with Procurement's lenders and tenants, actual or prospective, this conduct cannot fairly be considered petitioning activity at all, because the activity was not aimed directly or indirectly at influencing governmental action. The claim is that defendants attempted to purchase plaintiff's secured debt,

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[32] It also is uncertain whether this particular aspect of defendants' activities caused any harm to Procurement. Neither party has briefed the issue, presumably because defendants did not seek summary judgment on that ground.

presumably to cause plaintiff some kind of commercial difficulty after becoming its mortgagee, and also attempted to lure away actual or prospective **[*73]** tenants. This conduct does not come within the scope of the *Noerr-Pennington* doctrine.[33] See *Weldon v. MTAG Servs., LLC, No. 3:16-CV-783 (JCH), 2017 U.S. Dist. LEXIS 27660, 2017 WL 776648, at *16 (D.Conn. Feb. 28, 2017)* (finding that certain allegation were not covered by *Noerr-Pennington* because they relate "not to defendants' actual institution of lawsuits, but to their allegedly unlawful purchase of liens").

Conclusion

Defendants' motion for summary judgment is granted on the First through Sixth Counts. The motion is denied on the Seventh Count.

It is so ordered.

By the Court

Steven D. Ecker, Judge

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[33] Whether or not these particular activities were tortious, or otherwise actionable, and whether or not they caused any damages to Procurement, are not issues raised in the pending motion for summary judgment, and the court expresses no opinion on those questions.

[Caldwell Wholesale Co., L.L.C. v. R.J. Reynolds Tobacco Co.](#)

United States District Court for the Western District of Louisiana, Shreveport Division

May 11, 2018, Decided; May 11, 2018, Filed

CIVIL ACTION NO. 17-0200

Reporter
2018 U.S. Dist. LEXIS 81080 *

CALDWELL WHOLESALE COMPANY, L.L.C. VERSUS R.J. REYNOLDS TOBACCO COMPANY

Subsequent History: Affirmed by *Caldwell Wholesale Co., L.L.C. v. R J Reynolds Tobacco Co., 2019 U.S. App. LEXIS 20764 (5th Cir. La., July 10, 2019)*

Prior History: *Caldwell Wholesale Co., LLC v. R. J. Reynolds Tobacco Co., 2017 U.S. Dist. LEXIS 15855 (W.D. La., Feb. 2, 2017)*

Core Terms

buydown, wholesalers, products, peremption, customers, courts, tortious interference, motion to dismiss, purchaser, consumers, invoices, alleges, sales, business competitor, cause of action, continuing tort, reimbursement, prescription, prescribed, terminated, retailers, right of action, acquisition, pleadings, contends, purposes, unfair, tobacco product, district court, cigarettes

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Complaints, Requirements for Complaint**

Fed. R. Civ. P. 8(a)(2) governs the requirements for pleadings that state a claim for relief, requiring that a pleading contain a short and plain statement of the claim showing that the pleader is entitled to relief. The standard for the adequacy of complaints under *Fed. R. Civ. P. 8(a)(2)* is now a plausibility standard found in Bell Atlantic Corp. v. Twombly, and its progeny. Under this standard, factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true even if doubtful in fact. If a pleading only contains labels and conclusions and a formulaic recitation of the elements of a cause of action, the pleading does not meet the standards of *Fed. R. Civ. P. 8(a)(2)*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[] **Motions to Dismiss, Failure to State Claim**

Fed. R. Civ. P. 12(b)(6) allows parties to seek dismissal of a party's pleading for failure to state a claim upon which relief may be granted. In deciding a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss, a court generally may not go outside the pleadings. However, a court may also rely upon documents incorporated into the complaint by reference and matters of which a court may take judicial notice in deciding a motion to dismiss. Additionally, courts must accept all allegations in a complaint as true. However, courts do not have to accept legal conclusions as facts. Courts considering a motion to dismiss under *Fed. R. Civ. P. 12(b)(6)* are only obligated to allow those complaints that are facially plausible under the Iqbal and Twombly standard to survive such a motion. If the complaint does not meet this standard, it can be dismissed for failure to state a claim upon which relief can be granted. Such a dismissal ends the case at the point of minimum expenditure of time and money by the parties and the court.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Governments > Legislation > Statute of Limitations > Time Limitations

Evidence > Burdens of Proof

HN3[] **Motions to Dismiss, Failure to State Claim**

A *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim is the proper procedural device to raise a statute of limitations defense. A motion to dismiss may be granted on the basis of prescription if the untimeliness appears from the face of the complaint. If a plaintiff's claims are prescribed on the face of the petition, plaintiff has the burden of proving the claims are not prescribed.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN4[] **Deceptive & Unfair Trade Practices, State Regulation**

In the Louisiana Unfair Trade Practices and Consumer Protection Law, the legislature has declared it to be unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. *La. Rev. Stat. Ann. § 51:1405*. Because of the broad sweep of this language, Louisiana courts determine what is a LUTPA violation on a case-by-case basis.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Evidence > Burdens of Proof > Allocation

HN5[] **Deceptive & Unfair Trade Practices, State Regulation**

In order to prove a violation of the Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA), a person must show: (1) an unfair or deceptive trade practice declared unlawful; (2) that impacts a consumer, business competitor or other person to whom the statute grants a private right of action; (3) which has caused ascertainable loss. In establishing a LUTPA claim, a plaintiff must show that the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious. Consequently, the range of prohibited practices under LUTPA is extremely narrow, as LUTPA prohibits only fraud, misrepresentation, and similar conduct, and not mere negligence. Moreover, conduct that offends established public policy and is unethical is not necessarily a violation under LUTPA. Only egregious actions involving elements of fraud, misrepresentation, deception, or other unethical conduct will be sanctioned based on LUTPA.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

HN6[] Deceptive & Unfair Trade Practices, State Regulation

The Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA) statute states that any person who suffers any ascertainable loss as a result of the use or employment by another person of an unlawful unfair or deceptive method, act, or practice may bring an action. *La. Rev. Stat. Ann. § 51:1409*.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] Deceptive & Unfair Trade Practices, State Regulation

A one-year limitations period applies to private actions brought under Louisiana Unfair Trade Practices and Consumer Protection Law (LUTPA). *La. Rev. Stat. Ann. § 51:1409(E)*. A private action under Louisiana Unfair Trade Practices and Consumer Protection Law shall be prescribed by one year running from the time of the act which gave rise to the right of action. The time for filing a private cause of action under LUTPA is peremptive in nature rather than prescriptive. The limitation period for LUTPA claims is peremptive. Throughout Louisiana courts, peremption means that a claim cannot be suspended or interrupted.

Torts > ... > Statute of Limitations > Begins to Run > Continuing Violations

HN8[] Begins to Run, Continuing Violations

A continuing tort is one where the operating cause of injury is a continuous one and gives rise to successive damages. In other words, the continuing tort doctrine only applies when continuous conduct causes continuing damages. When damaging conduct continues, prescription runs from the date of the last harmful act.

Evidence > Burdens of Proof > Allocation

Governments > Legislation > Statute of Limitations > Time Limitations

HN9[] Burdens of Proof, Allocation

If a plaintiff's claims are prescribed on the face of the petition, plaintiff has the burden of proving the claims are not prescribed.

Evidence > Burdens of Proof > Allocation

Torts > Business Torts > Commercial Interference > Business Relationships

Evidence > Burdens of Proof > Preponderance of Evidence

HN10[] Burdens of Proof, Allocation

Louisiana courts recognize a cause of action for tortious interference with business relations. Nonetheless, Louisiana courts view this cause of action with disfavor. The cause of action for tortious interference with business is derived from *La. Civ. Code Ann. art. 2315* and is based on the principle that the right to influence someone not to enter into business transactions with others is not absolute. In Louisiana, business operators are protected from malicious and wanton interference. However, Louisiana law permits interference designed to protect legitimate interests of the actor. A plaintiff bringing a claim for tortious interference with business must ultimately show by a preponderance of the evidence that the defendant improperly influenced others not to deal with the plaintiff. Significantly, it is not enough to allege that a defendant's actions affected plaintiff's business interests; the plaintiff must allege that the defendant actually prevented the plaintiff from dealing with a third party.

Governments > Legislation > Statute of Limitations > Time Limitations

HN11[] **Statute of Limitations, Time Limitations**

Because a cause of action for tortious interference with business is delictual, the applicable prescriptive period is one year. *La. Civ. Code Ann. art. 3492* provides that delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained.

Counsel: [*1] For Caldwell Wholesale Co L L C, Plaintiff: Kyle M Keegan, LEAD ATTORNEY, Keegan DeNicola et al, Baton Rouge, LA; Joseph Brian Juban, Keegan DeNicola et al, Baton Rouge, LA.

Judges: S. MAURICE HICKS, JR., CHIEF UNITED STATES DISTRICT JUDGE. MAGISTRATE JUDGE HORNSBY.

Opinion by: S. MAURICE HICKS, JR.

Opinion

MEMORANDUM RULING

Before this Court is a Motion to Dismiss (Record Document 17) filed by Defendant, R.J. Reynolds Tobacco Company ("RJR"). RJR seeks dismissal of the state law *Louisiana Unfair Trade Practices Act ("LUTPA")* and tortious interference with business claims lodged against it by Caldwell Wholesale Company, L.L.C. ("Caldwell"). RJR seeks dismissal on the grounds that Caldwell lacks standing to bring a LUTPA claim, both the LUTPA and the tortious interference with business claims are perempted/prescribed, and Caldwell has failed to allege facts that would entitle it to relief as to both claims. Caldwell opposes the Motion to Dismiss, rebutting each of RJR's defenses. See Record Document 21. For the reasons set forth below, the Motion to Dismiss is **GRANTED**.

I. BACKGROUND

Caldwell is a wholesale distributor servicing retail customers in the States of Louisiana, Texas, and Arkansas that has been in business **[*2]** since 1953. See Record Document 5 at ¶ 5, Amended Complaint. Caldwell purchased cigarettes and other tobacco products directly from RJR, for resale to Caldwell's retail customers, from 1959 until December 2004. Id. at ¶ 6. Like other tobacco manufacturers, RJR offers reimbursement payments known as "buydowns" to retailers selling RJR products. Id. at ¶ 13. All "reporting" wholesalers, including Caldwell, report all of their sales of tobacco products to Management Science Associations, Inc. ("MSA"). Id. at ¶ 14. The sales data of wholesalers who are "on direct" with RJR is reported by MSA to RJR. Based on that sales information, RJR then issues buydown reimbursement payments to retailers that have purchased RJR products. Id. at ¶ 15. The eligibility of a wholesaler's invoices to retailers for these buydown payments is critical to a wholesaler's ability to price its products at a competitive level in the market, as the amount of the buydown typically exceeds the profit margin that a wholesaler makes on the sale of tobacco products on a per unit basis. Id. at ¶16.

In January 2003, Smith Wholesale Company, Inc., a Tennessee wholesale distributor, filed suit against RJR in the United States **[*3]** District Court for the Eastern District of Tennessee seeking injunctive relief and asserting violations of ***antitrust law*** based on RJR's allegedly discriminatory pricing policies (the "Smith Litigation"). Id. at ¶ 7. Ten months later, in November 2003, Caldwell joined the Smith Litigation as one of the twenty wholesaler plaintiffs asserting price discrimination and other antitrust claims against RJR. See id. at ¶ 8.

Caldwell alleges that RJR terminated Caldwell's status as a direct purchaser in December 2004 in retaliation for Caldwell's participation in the Smith Litigation. See id. at ¶ 10. To support its theory, Caldwell contends that RJR's decision to terminate Caldwell was based on the misperception that Caldwell's President, Ken Caldwell, played a role in organizing the Smith Litigation and encouraging the participation of other wholesalers. See id. at ¶ 11. This allegation is based on Ken Caldwell serving as President of the American Wholesale Marketers Association ("AWMA"), just prior to the commencement of the Smith Litigation. See id. at ¶ 9. However, Caldwell asserts that Ken Caldwell's tenure as President of the AWMA concluded before the Smith Litigation was instituted, by **[*4]** other wholesalers, and more than a year before Caldwell joined the suit. See id. at ¶ 12.

Once Caldwell lost its direct purchaser status with RJR, RJR refused to sell its products directly to Caldwell. See id. at ¶ 10. Therefore, Caldwell was forced to purchase RJR products from an intermediary to resell them to Caldwell's retailer-customers, who must stock RJR products to satisfy consumer demand. See id. Furthermore, when RJR terminated Caldwell's direct status in December 2004, it also stopped honoring Caldwell invoices for buydown purposes. See id. at ¶ 17. In other words, since December 2004 RJR has declined to pay buydowns to retailers for any RJR products purchased from Caldwell. See id. However, Caldwell contends that a wholesale distributor does not have to be on direct-buying status with RJR to have its invoices honored for buydown purposes. See id. at ¶ 18. Caldwell alleges that although RJR refuses to reimburse anyone for products purchased from Caldwell, RJR issues buydown reimbursements for RJR products sold by many other wholesalers who, like Caldwell, are not on direct-buying status. See id.

From the time RJR terminated its direct buying contract with Caldwell in 2004 **[*5]** until now, several events have taken place in the tobacco industry that have adversely impacted Caldwell's business. In May 2006, RJR's parent company, Reynolds American, Inc., acquired Conwood, the maker of Grizzly brand moist snuff. Id. at ¶ 19. At that time, Grizzly was Caldwell's best-selling brand of moist snuff. Id. at ¶ 20. As a result of the Conwood acquisition, purchases of Grizzly moist snuff, and all other Conwood products, from Caldwell were no longer eligible for buydowns as of May 2006. Id. at ¶ 21.

In order to remedy this negative impact, in February 2011, Caldwell approached RJR to ask whether RJR would consider again honoring Caldwell invoices for buydown purposes, since the loss of business resulting from RJR's refusal to honor Caldwell's invoices for buydowns was beginning to threaten the viability of Caldwell's business. See id. at 22. Caldwell did not ask RJR to restore its direct purchasing status. Id. at ¶ 23. Caldwell's request was only that RJR accept Caldwell invoices for purposes of buydown payments to retailers, as RJR does with respect to other, similarly-situated non-direct wholesalers. See id. Caldwell representatives met with RJR representative, Stan Rogers ("Rogers"), **[*6]** to discuss Caldwell's request. Id. at ¶ 24. After that meeting, in conjunction with RJR's evaluation of the request, Caldwell provided customer sales information requested by RJR. Id. at ¶ 25. Caldwell also authorized MSA to release Caldwell's proprietary sales information to RJR. Id. at ¶ 26. RJR subsequently denied Caldwell's request to honor Caldwell invoices for buydown purposes by letter dated June 7, 2011. Id. at ¶ 27. The only stated reason for RJR's decision was that "distribution of R. J. Reynolds tobacco products would not be improved by putting [Caldwell] on the Data Reporting Program." Id.

Approximately three and a half years later, Caldwell made another essentially identical request, again asking RJR to consider honoring Caldwell invoices for buydown purposes, as it had done for forty-five years until 2004. Id. at 28. On June 18, 2014, Caldwell representatives met with RJR representatives, Kecalf Bailey ("Bailey"), to discuss this second request. Id. at 29. After the meeting, Caldwell again provided RJR with customer sales information requested by RJR and authorized MSA to release Caldwell's sales information to RJR. Id. at ¶ 30. RJR subsequently denied Caldwell's second request to buydown **[*7]** RJR products sold by Caldwell by letter dated October 3, 2014. Id. at ¶ 31. That letter was substantively identical to the 2011 denial letter, stating only that "distribution of R. J. Reynolds tobacco products would not be improved by putting [Caldwell] on the Data Reporting

Program." Id. At that time, Caldwell alleges that nothing was different about Caldwell's ability to distribute RJR products with benefit of the buydown as compared to the forty-five years in which RJR did honor Caldwell's invoices for buydowns. See id.

Further, Caldwell contends that part of the motivation for its second request to RJR was the pending acquisition of Lorillard, Inc. by RJR's parent company, Reynolds American, Inc. See id. at ¶ 32. Reynolds American, Inc.'s acquisition of Lorillard, Inc. was completed in June 2015. Id. at ¶ 33. Lorillard, Inc. was the manufacturer of Newport brand cigarettes and Newport is Caldwell's second best-selling brand of cigarettes, accounting for approximately fifteen percent (15%) of Caldwell's cigarette sales as of June 2015. See id. at ¶ 34. As a result of the Lorillard acquisition, Newport cigarettes, and all other Lorillard products, purchased from Caldwell were no longer **[*8]** eligible for buydowns as of June 2015. See id. at ¶ 35.

In the tobacco industry, for the sake of efficiency and convenience, retailer-customers prefer to purchase the products they sell to consumers from a single wholesaler or as few wholesalers as possible. See id. at ¶ 37. Therefore, RJR's refusal to buydown products sold by Caldwell forces many Caldwell customers to obtain RJR products from another wholesaler since they cannot feasibly forego buydowns at the expense of their profit margins. See id. at ¶ 38. By forcing Caldwell customers to use multiple wholesalers or suffer diminished profit margins, RJR has raised a substantial impediment to Caldwell's ability to retain customers. See id. at ¶ 39. As a result of RJR's conduct, Caldwell alleges that it has lost the entire business of certain customers who have switched to another full-service wholesaler for all of their purchases. See id. at ¶ 40. But for the conduct of RJR, these customers would have remained with Caldwell. See id. at ¶ 41. Furthermore, Caldwell alleges that as a result of RJR's conduct, Caldwell has also lost a portion of the business of certain customers, who now purchase RJR products from other wholesalers. **[*9]** See id. at ¶ 42. But for the conduct of RJR, these customers would purchase RJR products from Caldwell. See id. at ¶ 43. Lastly, Caldwell contends that RJR's conduct has substantially impeded Caldwell's efforts to acquire new customers. See id. at ¶ 44. Customers that would have purchased some or all of their products from Caldwell but for the conduct of RJR have taken their business elsewhere to the substantial detriment of Caldwell. See id. at ¶ 45. These lost sales and business opportunities have continued to occur, on an ongoing basis, since December 2004, when RJR initially took Caldwell off direct and stopped buying down RJR products purchased from Caldwell, to the present, but have reached a point since the Lorillard acquisition that has caused Caldwell to conclude it cannot indefinitely sustain its business as the lost customers and lost business continue to increase. See id. at ¶ 46.

II. LAW AND ANALYSIS

A. Pleading Standards and the *Rule 12(b)(6)* Standard.

HN1[] *Rule 8(a)(2) of the Federal Rules of Civil Procedure* governs the requirements for pleadings that state a claim for relief, requiring that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The standard for the adequacy of complaints **[*10]** under *Rule 8(a)(2)* is now a "plausibility" standard found in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, and its progeny. Under this standard, "factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id. at 555-556, 127 S. Ct. at 1965*. If a pleading only contains "labels and conclusions" and "a formulaic recitation of the elements of a cause of action," the pleading does not meet the standards of *Rule 8(a)(2)*. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)* (citation omitted).

HN2[] *Federal Rule of Civil Procedure 12(b)(6)* allows parties to seek dismissal of a party's pleading for failure to state a claim upon which relief may be granted. In deciding a *Rule 12(b)(6)* motion to dismiss, a court generally "may not go outside the pleadings." *Colle v. Brazos Cty., Tex., 981 F.2d 237, 243 (5th Cir. 1993)*. However, a court may also rely upon "documents incorporated into the complaint by reference and matters of which a court may take judicial notice" in deciding a motion to dismiss. *Dorsey v. Portfolio Equities, Inc., 540 F.3d 333, 338 (5th Cir. 2008)*.

Additionally, courts must accept all allegations in a complaint as true. See *Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949*. However, courts do not have to accept legal conclusions as facts. See id. Courts considering a motion to dismiss under *Rule 12(b)(6)* are only obligated to allow those complaints that are facially plausible under the Iqbal and Twombly standard to survive such a motion. See **[*11]** *id. at 678-679, 129 S. Ct. at 1949*. If the complaint does not meet this standard, it can be dismissed for failure to state a claim upon which relief can be granted. See id. Such a dismissal ends the case "at the point of minimum expenditure of time and money by the parties and the court." *Twombly, 550 U.S. at 558, 127 S. Ct. at 1966*.

Furthermore, ***HN3***[] a *Rule 12(b)(6)* motion to dismiss for failure to state a claim is the proper procedural device to raise a statute of limitations defense. See *Bowers v. Nicholson, 271 F. App'x 446, 449 (5th Cir. 2008)*. A "motion to dismiss may be granted on the basis of prescription if the untimeliness appears from the face of the complaint." *Potier v. JBS Liberty Sec., Inc., Civil Action No. 6:13-cv-00789, 2014 U.S. Dist. LEXIS 151271, at *6 (W.D. La. Sep. 29, 2014)*. If a "plaintiff's claims are prescribed on the face of the petition, plaintiff has the burden of proving the claims are not prescribed." *Sims v. Am. Ins. Co., 2012-0204 (La. 10/16/12), 101 So. 3d 1, 4*.

B. LUTPA.

Caldwell's second claim is brought under LUTPA. See *La. Rev. Stat. § 51:1409(A)*. Because there are multiple issues to decide as to Caldwell's LUTPA claim, the Court will analyze it first. ***HN4***[] In LUTPA, the legislature declared it to be unlawful to engage in "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." *La. Rev. Stat. § 51:1405*. "Because of the broad sweep of this language, 'Louisiana courts determine what is a LUTPA violation on a case-by-case **[*12]** basis.'" *Quality Envtl. Processes, Inc. v. I.P. Petroleum Co., Inc., 2013-1582 (La. 5/7/14), 144 So.3d 1011, 1025* (quoting Keith E. Andrews, Comment, Louisiana Unfair Trade Practices Act: Broad Language and Generous Remedies Supplemented by a Confusing Body of Case Law, 41 Loy. L. Rev. 759, 762 (1996)).

HN5[] In order to prove a violation of LUTPA, Caldwell must show: "(1) an unfair or deceptive trade practice declared unlawful; (2) that impacts a consumer, business competitor or other person to whom the statute grants a private right of action; (3) which has caused ascertainable loss." *Rockwell Automation, Inc . v. Montgomery, Civil Action No. 17-415, 2017 U.S. Dist. LEXIS 80820, at *5-6 (W.D. La. May 24, 2017)* (citation omitted). This court has consistently held that in establishing a LUTPA claim, a plaintiff must show that "the alleged conduct offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious." *Cheramie Services, Inc. v. Shell Deepwater Prod., 09-1633 (La. 4/23/10), 35 So.3d 1053, 1059*. Consequently, "the range of prohibited practices under LUTPA is extremely narrow," as LUTPA prohibits only fraud, misrepresentation, and similar conduct, and not mere negligence. *35 So.3d at 1059*. Moreover, conduct that offends established public policy and is unethical is not necessarily a violation under LUTPA. See, e.g., *35 So.3d at 1060* ("[O]nly egregious actions involving elements of fraud, misrepresentation, deception, or other unethical conduct will be sanctioned based on LUTPA.").

RJR argues that Caldwell lacks **[*13]** standing because admittedly Caldwell is not a direct consumer or business competitor of RJR, Caldwell's action is time-barred, and Caldwell has failed to allege facts that would entitled it to relief. The Court will first address whether Caldwell has standing to assert a LUTPA claim.

i. Standing.

RJR argues that a private right of action under LUTPA is limited to direct consumers or to business competitors of the defendant. Therefore, RJR contends that because Caldwell is neither a direct consumer nor a business competitor of RJR, Caldwell lacks standing to assert a LUTPA claim. To support this argument, RJR cites to a case decided by this Court. See *Baba Lodging, LLC v. Wyndham Worldwide Operations, Inc., Civil Action No. 10-1750, 2012 U.S. Dist. LEXIS 36891, at *1 (W.D. La. Mar. 19, 2012)*. In Baba, one of the issues before the Court was whether LUTPA provided a private right of action to plaintiffs other than direct consumers and business competitors.

See id. The plaintiff argued that the Louisiana Supreme Court, in *Cheramie Servs., Inc. v. Shell Deepwater Prod., Inc., 2009-1633 (La. 4/23/10), 35 So.3d 1053*, expanded LUTPA to allow any person to bring a claim, not just direct consumers or business competitors. See *id. at *9*. In Cheramie, the Louisiana Supreme Court noted that ***HN6***[] the LUTPA statute states that *"[a]ny person* who suffers any ascertainable loss . . . as a result of the use or employment by another person of an **[*14]** [unlawful] unfair or deceptive method, act, or practice . . . may bring an action." *La. Rev. Stat. § 51:1409* (emphasis added); see *35 So. 3d at 1056*. Thus, the court in Cheramie rejected any holding that limited standing to only direct consumers and business competitors clarifying that the statutory language allows anyone harmed by prohibited unfair or deceptive practices to file a private right of action. See *id. 1058*.

However, this Court correctly noted that Cheramie was non-binding precedent because the portion of the opinion addressing LUTPA had only three out of the seven justices in agreement. *Baba, 2012 U.S. Dist. LEXIS 36891, at *10*. Thus, Cheramie did not represent a holding by the majority of the Louisiana Supreme Court. Rather, it is only a plurality, which does not have a binding effect on Louisiana state courts or this Court. See *id. at *10*. Accordingly, the Court held that in the absence of a majority opinion of the Louisiana Supreme Court definitively interpreting standing under LUTPA, the Court followed the binding Fifth Circuit holding in *Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp., 292 F.3d 471, 480 (5th Cir. 2002)*, and dismissed the plaintiff's claims under LUTPA for lack of standing. *Id. at *11*.

In the present action, the Court agrees that it is not required to follow *Cheramie*. However, the Court now finds that its previous decision based on pre-Cheramie **[*15]** Fifth Circuit precedent regarding standing ignored the "bedrock principles of *Erie v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*, which require a federal court sitting in diversity to apply the law of the state as declared by its legislature or the state's highest court." *Burgers v. Bickford, Civil Action No. 12-2009, 2014 U.S. Dist. LEXIS 117323, at *7 (E.D. La. Aug. 22, 2014)*. "Thus, for a federal court the proper inquiry is not whether Cheramie is controlling authority in light of its plurality status but rather how the decision factors into the Erie 'guess' that this Court must make when applying state law. In the realm of *Erie*, Cheramie is not irrelevant even if the state's lower courts would consider it non-binding." *Id. at *7*.

Caldwell correctly points out that following Cheramie, Louisiana appellate courts, and a number of federal district courts, have followed the plurality opinion and found that private parties have a right of action under the LUTPA. See *Jones v. Americas Ins. Co., 2016-0904 (La. Ct. App. 1st Cir. 8/16/17), 226 So.3d 537, 544*; *Bogues v. Louisiana Energy Consultants, Inc., 46,434 (La. Ct. App. 2nd Cir. 8/10/11), 71 So.3d 1128, 1132*; *J. A. Davis Properties, LLC v. Martin Operating P'ship, LP, 2017-449 (La. Ct. App. 3rd Cir. 6/21/17), 224 So.3d 39, 43*; *Prime Ins. Co. v. Imperial Fire & Cas. Ins. Co., 2014-0323 (La. Ct. App. 4th Cir. 10/1/14), 151 So.3d 670, 678*; *Hurricane Fence Co., Inc. v. Jensen Metal Products, Inc., 12-956 (La. Ct. App. 5th Cir. 5/23/13), 119 So.3d 683, 688*; *Rockwell Automation, Inc. v. Montgomery, Civil Action No. 17-415, 2017 U.S. Dist. LEXIS 80820, at *7 (W.D. La. May 24, 2017)*; *Swoboda v. Manders, Civil Action No. 14-19-EWD, 2016 U.S. Dist. LEXIS 53377, at *18 (M.D. La. Apr. 21, 2016)*; *Max Access, Inc. v. Gee Cee Co. of LA, Civil Action No. 15-1728, 2016 U.S. Dist. LEXIS 14166, at *13 (E.D. La. Feb. 5, 2016)*. Accordingly, while Cheramie may not be binding **[*16]** upon this Court, it is instructive to the issue of standing. In light of *Cheramie*, as well as the decisions of Louisiana appellate courts and the federal district courts decisions following same, the Court finds that Caldwell has standing to assert a claim under the LUTPA.

ii. Peremption.

HN7[] A one-year limitations period applies to private actions brought under LUTPA. See *La. Rev Stat. § 51:1409(E)* (private action under LUTPA "shall be prescribed by one year running from the time of the . . . act which gave rise to th[e] right of action"). However, the Louisiana Supreme Court has not yet ruled as to whether *La. Rev. Stat. § 51:1409(E)* implicates peremption or prescription. Nonetheless, a court within this district as well as other federal district courts and state appellate courts have determined that the time for filing a private cause of action under LUTPA is peremptive in nature rather than prescriptive. See *Jones v. Herlin, Civil Action No. 12-1978, 2013 U.S. Dist. LEXIS 133037, at *23 (W.D. La. Sep. 17, 2013)*; *Max Access, Inc. v. Gee Cee Co. of LA, Civil Action No.*

*15-1728, 2016 U.S. Dist. LEXIS 14166, at *16 (E.D. La. Feb. 5, 2016)*; *Morris v. Sears, Roebuck & Co., 99-2772 (La. Ct. App. 4th Cir. 05/31/00), 765 So. 2d 419, 422*. Therefore, this Court holds that the limitation period for LUTPA claims is peremptive. Throughout Louisiana courts, peremption means that a claim cannot be suspended or interrupted. See *Glod v. Baker, 2004-1483 (La. Ct. App. 3rd Cir. 3/23/05), 899 So. 2d 642, 649*, writ denied, *2005-1574 (La. 1/13/06), 920 So. 2d 238* ("[T]he third circuit has made a jurisprudential commitment to a strict definition of peremption embodied **[*17]** in the Civil Code and manifested in its consistent decisions barring use of the continuing violation doctrine to suspend peremption."). However, the Fifth Circuit has found that there are certain situations where the presence of a continuing violation of LUTPA extends the time period a party can bring a claim under LUTPA, i.e., a claim under LUTPA can be suspended. See *Tubos de Acero de Mexico, S.A. v. Am. Int'l Inv. Corp., 292 F.3d 471, 482 (5th Cir. 2002)*. The Court need not address whether the continuing tort doctrine applies to suspend the running of peremption because the Court finds that the continuing tort doctrine does not apply in the present case as discussed *infra*.

In the present action, RJR argues that the "act" at issue here is RJR's alleged termination of Caldwell's status as a direct purchaser in December 2004. See Record Document 17-1 at 10, RJR's Memorandum in Support of Motion to Dismiss. As Caldwell did not file this action until January 2017, RJR contends Caldwell's claim is too late and thus must be dismissed. See id. Caldwell argues that RJR's "continuing" and "ongoing" decision to deny buydown reimbursement payments while providing them to competing wholesalers, who lack a direct purchasing relationship with RJR, is the operating cause that injures **[*18]** Caldwell rather than RJR's decision in 2004 to terminate Caldwell's status as a direct purchaser. See Record Document 21 at 6, Caldwell's Memorandum in Opposition to RJR's Motion to Dismiss (emphasis added). By pleading that RJR's decision was "continuing" and "ongoing," Caldwell has invoked the continuing tort doctrine in an attempt to prevent its claims from being time-barred.

HN8[] "[A] continuing tort [is] one 'where the operating cause of injury is a continuous one and gives rise to successive damages.'" *Miller v. ConAgra, Inc., 2008-0021 (La. 9/8/08), 991 So.2d 445, 456* (citation omitted). In other words, "the continuing tort doctrine only applies when continuous conduct causes continuing damages." *Risin v. D.N.C. Investments, L.L.C., 2005-0415 (La. Ct. App. 4th Cir. 12/7/05), 921 So.2d 133, 136*. "When . . . damaging conduct continues, prescription runs from the date of the last harmful act." *S. Cent. Bell Tel. Co. v. Texaco, Inc., 418 So.2d 531, 532 (La.1982)*.

In the present action, the Court finds that RJR's alleged conduct was not continuous. Rather, RJR's actions, without determining whether Caldwell pleaded sufficient facts to establish a LUTPA violation, were separate actions entitled to their own respective time periods. The specific conduct alleged in the complaint was when RJR terminated the direct purchaser contract in 2004, rejected Caldwell's request for **[*19]** buydown status in 2011, and again in 2014. Caldwell requests this Court to consider the time period between 2004 to present in order to survive the present Motion to Dismiss where RJR refused to issue buydown payments. By pleading that RJR's decision was a "continuing" and "ongoing" decision to deny buydown reimbursement payments while providing them to competing wholesalers, who lack a direct purchasing relationship with RJR, Caldwell argues that this "ongoing" and "continuing" decision was the operating cause that injured Caldwell. However, the Court is not persuaded by Caldwell's argument that the continuing tort doctrine applies to the present case. Caldwell has only pleaded certain, separate events, separated by several years, where RJR directly refused to provide buydown reimbursement payments to Caldwell. The October 3, 2014 refusal is significant in that Caldwell pleads no other communication or action between the respective parties after that date. Accordingly, the Court finds the decision by RJR on October 3, 2014 was a separate act that triggered the running of the peremptive period. The fact that Caldwell continued to suffer ill effects because of the October 3, 2014 decision **[*20]** does not bring the continuing tort doctrine into play. Furthermore, the acquisition of Lorillard in 2015 has no effect of the Court's decision and even if it did, this transaction was completed over a year before Caldwell initiated the present action. This lawsuit was filed on January 1, 2017, more than one year from RJR rejecting Caldwell's second request. Additionally, Caldwell has failed to meet its burden of showing that its LUTPA claim is not perempted because Caldwell's Complaint not only is lacking continuous factual allegations of LUTPA violations, but Caldwell also fails to cite any case law that supports its assertion that its LUTPA claim is not perempted. *Sims v. Am. Ins. Co., 2012-0204 (La. 10/16/12), 101 So. 3d 1, 4* ***HN9***[] (If a "plaintiff's claims are prescribed on the face of the petition, plaintiff has the burden of proving the claims are not prescribed."). Accordingly, the Court finds that Caldwell's LUTPA claim is perempted, and the Court **GRANTS** RJR's Motion to Dismiss with respect to this claim.

Because the Court decided Caldwell's LUTPA claim on peremption grounds, the Court need not address the merits of Caldwell's LUTPA claim.

C. Tortious Interference with Business Relations.

HN10[] "Louisiana courts . . . recognize[ ] a cause of action for **[*21]** tortious interference with business relations." *Bogues v. Louisiana Energy Consultants, Inc., 46,434 (La. Ct. App. 2nd Cir. 8/10/11), 71 So.3d 1128, 1134* (citations omitted). Nonetheless, Louisiana courts view this cause of action with disfavor. *Mt. States Pipe & Supply Co. v. City of New Rds., Civil Action No. 12-2146, 2013 U.S. Dist. LEXIS 87446, at *7-8 (E.D. La. June 21, 2013)* ("Louisiana jurisprudence . . . has viewed this cause of action with disfavor."). The cause of action for tortious interference with business is derived from *La. Civ. Code art. 2315* and is based on the principle that the right to influence someone not to enter into business transactions with others is not absolute. See *id. at 1134* (citations omitted). In Louisiana, business operators are protected from "malicious and wanton interference." See id. However, Louisiana law permits interference designed to protect legitimate interests of the actor. See id. "A plaintiff bringing a claim for tortious interference with business must ultimately show 'by a preponderance of the evidence that the defendant improperly influenced others not to deal with the plaintiff.'" *Id. at 1135* (citation omitted). "Significantly, it is not enough to allege that a defendant's actions affected plaintiff's business interests; the plaintiff must allege that the defendant actually prevented the plaintiff from dealing with a third party." *Id. at 1135*.

HN11[] Because a cause of action for **[*22]** tortious interference with business is delictual, the applicable prescriptive period is one year. See *La. Civ. Code art. 3492* ("Delictual actions are subject to a liberative prescription of one year. This prescription commences to run from the day injury or damage is sustained."). The Court adopts the analysis as to Caldwell's LUTPA claim for Caldwell's tortious interference claim. Based on the Court's analysis *supra*, Caldwell's tortious interference with business claim is also time-barred. Accordingly, the Court **GRANTS** RJR's Motion to Dismiss with respect to this claim.

III. CONCLUSION

Based on the foregoing analysis, the Court holds that Caldwell's LUTPA claim is perempted and Caldwell's tortious interference with business claim is prescribed on the face of the pleadings. Accordingly,

IT IS ORDERED that the Motion to Dismiss (Record Document 17) filed by RJR be and is hereby **GRANTED**, and all claims against RJR are **DISMISSED WITH PREJUDICE**.

A Judgment consistent with the terms of the instant Memorandum Riling shall issue herewith.

THUS DONE AND SIGNED, in Shreveport, Louisiana, on this 11th day of May, 2018.

/s/ S. Maurice Hicks, Jr.

S. MAURICE HICKS, JR., CHIEF JUDGE

UNITED STATES DISTRICT COURT

Chamber of Commerce of the United States v. City of Seattle

United States Court of Appeals for the Ninth Circuit

February 5, 2018, Argued and Submitted, Seattle, Washington; May 11, 2018, Filed

No. 17-35640

Reporter

890 F.3d 769 *; 2018 U.S. App. LEXIS 12337 **; 211 L.R.R.M. 3041; 168 Lab. Cas. (CCH) P11,089; 2018-1 Trade Cas. (CCH) P80,374; 2018 WL 2169057

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; RASIER, LLC, Plaintiffs-Appellants, v. CITY OF SEATTLE; SEATTLE DEPARTMENT OF FINANCE AND ADMINISTRATIVE SERVICES; FRED PODESTA, in his official capacity as Director, Finance and Administrative Services, City of Seattle, Defendants-Appellees.

Subsequent History: As Corrected May 18, 2018.

Later proceeding at *Chamber of Commerce of the United States v. City of Seattle, 2018 U.S. App. LEXIS 19395 (9th Cir. Wash., July 13, 2018)*

Motion granted by *Chamber of Commerce of the United States v. City of Seattle, 2018 U.S. App. LEXIS 22855 (9th Cir. Wash., Aug. 16, 2018)*

Rehearing denied by, Rehearing, en banc, denied by *Chamber of Commerce of the United States v. City of Seattle, 2018 U.S. App. LEXIS 26156 (9th Cir. Wash., Sept. 14, 2018)*

Motion granted by *Chamber of Commerce of the United States v. City of Seattle, 2019 U.S. Dist. LEXIS 93355 (W.D. Wash., June 4, 2019)*

Prior History: [1]** Appeal from the United States District Court for the Western District of Washington. D.C. No. 2:17-cv-00370-RSL. Robert S. Lasnik, District Judge, Presiding.

Chamber of Commerce of the United States v. City of Seattle, 274 F. Supp. 3d 1155, 2017 U.S. Dist. LEXIS 120884 (W.D. Wash., Aug. 1, 2017)

Core Terms

drivers, Ordinance, preemption, immunity, for-hire, regulation, state-action, coordinator, independent contractor, hire, municipalities, employees, preempted, transit service, authorization, supervision, ride-referral, price-fixing, entity, private party, clear-articulation, transportation, ride, anti trust law, state policy, active-supervision, anticompetitive, foreseeable, displace, anticompetitive conduct

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN1[] **Collective Bargaining & Labor Relations, Bargaining Units**

The Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (Ordinance) was the first municipal ordinance of its kind in the United States, and authorizes a collective-bargaining process between "driver coordinators"—like Uber Technologies (Uber), Lyft, Inc. (Lyft), and Eastside for Hire, Inc. (Eastside)—and independent contractors who work as for-hire drivers. The Ordinance permits independent-contractor drivers, represented by an entity denominated an "exclusive driver representative," and driver coordinators to agree on the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers. Seattle, Wash., Municipal Code § 6.310.735(H)(1).

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN2[] **Collective Bargaining & Labor Relations, Bargaining Units**

On December 14, 2015, the Seattle City Council adopted Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (Ordinance). The stated purpose of the Ordinance is to allow taxicab, transportation network company, and for-hire vehicle drivers (for-hire drivers) to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work, in order to better ensure that for-hire drivers can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner. Seattle, Wash., Ordinance 124968, pmbl.

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN3[] **Collective Bargaining & Labor Relations, Bargaining Units**

The Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (Ordinance) requires "driver coordinators" to bargain collectively with for-hire drivers. Seattle, Wash., Ordinance 124968, *§ 1(I)*. A "driver coordinator" is defined as an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public. Seattle, Wash., Municipal Code § 6.310.110. The Ordinance applies only to drivers who contract with a driver coordinator other than in the context of an employer-employee relationship—in other words, the Ordinance applies only to independent contractors. Seattle, Wash., Municipal Code § 6.310.735(D).

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN4[] **Collective Bargaining & Labor Relations, Bargaining Units**

The collective-bargaining process begins with the election of a "qualified driver representative," or QDR. Seattle, Wash., Municipal Code §§ 6.310.110, 6.310.735(C). An entity seeking to represent for-hire drivers operating within Seattle first submits a request to the Director of Finance and Administrative Services (the Director) for approval to be a QDR. Seattle, Wash., Municipal Code § 6.310.735(C). Once approved by the City, the QDR must notify the driver coordinator of its intent to represent the driver coordinator's for-hire drivers. Seattle, Wash., Municipal Code § 6.310.735(C)(2).Upon receiving proper notice from the QDR, the driver coordinator must provide the QDR with the names, addresses, email addresses, and phone numbers of all "qualifying drivers." Seattle, Wash., Municipal Code § 6.310.735(D). This disclosure requirement applies only to driver coordinators that have hired, contracted with, partnered with, or maintained a contractual relationship or partnership with, 50 or more for hire drivers in the 30 days prior to the commencement date set by the Director. Seattle, Wash., Municipal Code § 6.310.735(D).

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN5[] Collective Bargaining & Labor Relations, Bargaining Units

The qualified driver representative (QDR) contacts qualifying drivers to solicit their interest in being represented by the QDR. Seattle, Wash., Municipal Code § 6.310.735(E). Within 120 days of receiving the qualifying drivers' contact information, the QDR submits to the Director of Finance and Administrative Services (the Director) statements of interest from qualifying drivers indicating that they wish to be represented by the QDR in collective-bargaining negotiations with the driver coordinator. Seattle, Wash., Municipal Code § 6.310.735(F)(1). If a majority of qualifying drivers consent to representation by the QDR, the Director certifies the QDR as the "exclusive driver representative" (EDR) for all for-hire drivers for that particular driver coordinator. Seattle, Wash., Municipal Code § 6.310.735(F)(2).

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

HN6[] Collective Bargaining & Labor Relations, Bargaining Units

Once the Director of Finance and Administrative Services (the Director) certifies the "exclusive driver representative" (EDR), the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers; minimum hours of work, conditions of work, and applicable rules. Seattle, Wash., Municipal Code § 6.310.735(H)(1).

Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Units

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN7[] Collective Bargaining & Labor Relations, Bargaining Units

If an agreement is reached, the driver coordinator and the "exclusive driver representative" (EDR) submit the written agreement to the Director of Finance and Administrative Services (the Director). Seattle, Wash., Municipal Code § 6.310.735(H)(2). The Director reviews the agreement for compliance with the Ordinance and Chapter 6.310 of the Seattle Municipal Code, which governs taxicabs and for-hire vehicles. Seattle, Wash., Municipal Code § 6.310.735(H)(2). In conducting this review, the Director is to ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advances the public policy goals set forth in Chapter 6.310 and in the Ordinance. Seattle, Wash., Municipal Code § 6.310.735(H)(2). The Director's review is not limited to the parties' submissions or the terms of the proposed agreement. Seattle, Wash., Municipal Code § 6.310.735(H)(2). Rather, the Director may gather and consider additional evidence, conduct public hearings, and request information from the EDR and the driver coordinator. Seattle, Wash., Municipal Code § 6.310.735(H)(2).

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN8[] Arbitrators, Authority

The agreement becomes final and binding on all parties if the Director of Finance and Administrative Services (the Director) finds the agreement compliant. Seattle, Wash., Municipal Code § 6.310.735(H)(2)(a). The agreement does not take effect until the Director makes such an affirmative determination. Seattle, Wash., Municipal Code § 6.310.735(H)(2)(c). If the Director finds the agreement noncompliant, the Director remands it to the parties with a written explanation of the agreement's failures, and may offer recommendations for remedying the agreement's inadequacies. Seattle, Wash., Municipal Code § 6.310.735(H)(2)(b). If the driver coordinator and the "exclusive driver representative" (EDR) do not reach an agreement, either party must submit to interest arbitration upon the request of the other, in accordance with the procedures and criteria specified in the Ordinance. Seattle, Wash., Municipal Code § 6.310.735(I). The interest arbitrator must propose an agreement compliant with Chapter 6.310 and in line with the City's public policy goals. Seattle, Wash., Municipal Code § 6.310.735(I)(2). The term of an agreement proposed by the interest arbitrator may not exceed two years. Seattle, Wash., Municipal Code § 6.310.735(I)(2).

Labor & Employment Law > ... > Labor Arbitration > Arbitrators > Authority

Labor & Employment Law > Collective Bargaining & Labor Relations > Enforcement of Bargaining Agreements

HN9[] Arbitrators, Authority

The interest arbitrator submits the proposed agreement to the Director of Finance and Administrative Services (the Director), who reviews the agreement for compliance with the Ordinance and Chapter 6.310, in the same manner the Director reviews an agreement proposed by the parties. Seattle, Wash., Municipal Code § 6.310.735(I)(3).The parties may discuss additional terms and propose amendments to an approved agreement. Seattle, Wash., Municipal Code § 6.310.735(J). The parties must submit any proposed amendments to the Director for approval. Seattle, Wash., Municipal Code § 6.310.735(J). The Director has the authority to withdraw approval of an agreement during its term, if the Director finds that the agreement no longer complies with the Ordinance or furthers the City's public policy goals. Seattle, Wash., Municipal Code § 6.310.735(J)(1).

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN10[] Standards of Review, De Novo Review

Appellate courts review the district court's grant of a motion to dismiss de novo.

Antitrust & Trade Law > Sherman Act > Scope

Constitutional Law > Supremacy Clause > Federal Preemption

HN11[] Antitrust & Trade Law, Sherman Act

In determining whether the *Sherman Act* preempts a state or local law pursuant to the *Supremacy Clause*, courts apply the principles of conflict preemption. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state or local regulatory schemes.

Antitrust & Trade Law > Sherman Act > Scope

Constitutional Law > Supremacy Clause > Federal Preemption

HN12[] **Antitrust & Trade Law, Sherman Act**

A state or local law, when considered in the abstract, may be condemned under the antitrust laws, and thus preempted, only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *section 1 of the Sherman Act*, *15 U.S.C.S. § 1*, when the conduct contemplated by the statute is in all cases a per se violation. However, if the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Unlike the categorical analysis under the per se rule of illegality, analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws. In short, the ordinance may be preempted facially by federal ***antitrust law*** if it authorizes a per se violation of *section 1 of the Sherman Act*, but not if it must be analyzed under the rule of reason.

Antitrust & Trade Law > Sherman Act > Scope

HN13[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce. *15 U.S.C.S. § 1*. Chief among such illegal arrangements are price-fixing agreements: Under the *Sherman Act* a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se. Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful. Put simply, "collusion" among competitors is the supreme evil of antitrust.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN14[] **Exemptions & Immunities, Parker State Action Doctrine**

The state-action immunity doctrine derives from Parker v. Brown. Because nothing in the language of the *Sherman Act* or in its history suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints as an act of government. Under certain circumstances, immunity has been extended from federal antitrust laws to nonstate actors carrying out the State's regulatory program.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN15[] **Parker State Action Doctrine, Local Governments & Private Parties**

State-action immunity is the exception rather than the rule. Indeed, the Supreme Court has stressed that it is "disfavored": Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication. In line with its "preference" against stateaction immunity, the Supreme Court recognizes stateaction immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own. The Supreme Court's narrow take on state-action immunity is all the more exacting when a non-state actor invokes the protective umbrella of Parker immunity: Closer analysis is required when the activity at issue is not directly that of' the State itself, but rather is carried out by others pursuant to state authorization.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN16[] **Parker State Action Doctrine, Local Governments & Private Parties**

There is a two-part test to determine whether the anticompetitive acts of private parties are entitled to immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the State. Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under Parker does not apply to them directly. As such, immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. Local governmental entities, unlike private parties, are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own selfinterest under the guise of implementing state policies. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

Antitrust & Trade Law > Sherman Act > Scope

HN17[] **Antitrust & Trade Law, Sherman Act**

The clear-articulation test is met if the anticompetitive effect was the foreseeable result of what the State authorized. To pass the "clear articulation" test, a state legislature need not expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. A court's inquiry with respect to the clear-articulation test is a precise one. The relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the *Sherman Act*. The state's authorization must be plain and clear: The relevant statutory provisions must plainly show that the state legislature contemplated the sort of activity that is challenged, which occurs where they confer express authority to take action that foreseeably will result in anticompetitive effects. The state, in its sovereign capacity, must clearly intend to displace competition in a particular field with a regulatory structure in the relevant market.

Antitrust & Trade Law > Sherman Act > Scope

HN18[] **Antitrust & Trade Law, Sherman Act**

Once a court determines that there is express state authorization, the court then turns to the concept of foreseeability, which is to be used in deciding the reach of antitrust immunity that stems from an already authorized monopoly, price regulation, or other disruption in economic competition. A foreseeable result cannot circumvent the requirement that there be express authorization in the first place: A foreseeable result cannot create state authorization itself, but must itself stem from express authorization, which is the necessary predicate for the foreseeability test. Courts must be careful not to apply the concept of foreseeability from the clear-articulation test too loosely.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN19[] Parker State Action Doctrine, Local Governments & Private Parties

A State may not confer antitrust immunity on private persons by fiat, and a State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful. Rather, it must first meet the requirements that a state may displace competition with active state supervision only if the displacement is both intended by the State and implemented in its specific details. Courts may not defer to private pricefixing arrangements under the general auspices of state law, but instead must ensure that the preconditions for immunity from federal law, such as actual state involvement, are met. After all, immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Sherman Act > Scope

HN20[] Parker State Action Doctrine, Local Governments & Private Parties

The plain language of the statute centers on the provision of privately operated for hire transportation services, *Wash. Rev. Code § 46.72.001*, not the contractual payment arrangements between for-hire drivers and driver coordinators for use of the latter's smartphone apps or ridereferral services. Although driver coordinators like Uber and Lyft contract with providers of transportation services, they do not fulfill the requests for transportation services—the drivers do. Nothing in the statute evinces a clearly articulated state policy to displace competition in the market for ride-referral service fees charged by companies like Uber, Lyft, and Eastside. In other words, although the statute addresses the provision of transportation services, it is silent on the issue of compensation contracts between forhire drivers and driver coordinators. To read into the plain text of the statute implicit state authorization and intent to displace competition with respect to for-hire drivers' compensation would be to apply the clear-articulation test "too loosely."

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN21[] Parker State Action Doctrine, Local Governments & Private Parties

Wash. Rev. Code § 46.72.160, which focuses on the regulation of for-hire vehicle services, provides that cities may license, control, and regulate all for hire vehicles operating within their respective jurisdictions. *Wash. Rev. Code § 46.72.160*. Each enumerated example of regulatory power in *Wash. Rev. Code § 46.72.160* plainly indicates legislative concern with the provision of vehicular services: The power to regulate includes:(1) Regulating entry into the business of providing for hire vehicle transportation services; (2) Requiring a license to be purchased as a condition of operating a for hire vehicle and the right to revoke, cancel, or refuse to reissue a license for failure to comply with regulatory requirements; (3) Controlling the rates charged for providing for hire vehicle transportation service and the manner in which rates are calculated and collected; (4) Regulating the routes and operations of for hire vehicles, including restricting access to airports; (5) Establishing safety and equipment requirements; and (6) Any other requirements adopted to ensure safe and reliable for hire vehicle transportation service. *Wash. Rev. Code § 46.72.160*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN22[] Parker State Action Doctrine, Local Governments & Private Parties

The enumerated powers refer specifically to for-hire vehicles, which by definition are vehicles used for the transportation of passengers for compensation. *Wash. Rev. Code § 46.72.010(1)*. None of the powers confer upon the City the authority to regulate the fees Uber, Lyft, and Eastside charge in exchange for use of their smartphone apps or ride-referral services. Even the power to regulate the rates charged for providing for hire vehicle transportation service—the closest analog to the challenged Ordinance provision—speaks to rates charged to passengers in exchange for the provision of transportation services, not the fees Uber and Lyft charge to drivers for use of their apps. And the sixth enumerated power—a residual power—addresses for hire vehicle transportation services, not ride-referral service fees.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN23[] Exemptions & Immunities, Parker State Action Doctrine

Regulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN24[] Exemptions & Immunities, Parker State Action Doctrine

The active supervision requirement demands that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Because entities purporting to act under state authority might diverge from the State's considered definition of the public good and the resulting asymmetry between a state policy and its implementation can invite private self-dealing, the active-supervision requirement seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN25[] Parker State Action Doctrine, Local Governments & Private Parties

Active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party. However, where state or municipal regulation by a private party is involved, active state supervision must be shown, even where a clearly articulated state policy exists.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN26[] Parker State Action Doctrine, Local Governments & Private Parties

The distinction between states and municipalities is of crucial importance for purposes of state-action immunity, and the two entities cannot be treated interchangeably.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN27[] **Collective Bargaining & Labor Relations, Federal Preemption**

Machinists preemption forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended be unregulated because left to be controlled by the free play of economic forces. Machinists preemption stems from the premise that Congress struck a balance of protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN28[] **Collective Bargaining & Labor Relations, Federal Preemption**

Garmon preemption is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the integrated scheme of regulation established by the *National Labor Relations Act (NLRA)*, *29 U.S.C.S. §§ 151-169*. To this end, Garmon pre-emption forbids States to regulate activity that the *NLRA* protects, prohibits, or arguably protects or prohibits.

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN29[] **Collective Bargaining & Labor Relations, Federal Preemption**

It is a precondition for Garmon pre-emption that the conduct at issue be arguably protected or prohibited. This precondition is not satisfied by a conclusory assertion of pre-emption. If the word arguably is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the National Labor Relations Board could legally decide in his favor. In other words, a party asserting pre-emption must advance an interpretation of the *National Labor Relations Act (NLRA)*, *29 U.S.C.S. §§ 151-169*, that is not plainly contrary to its language and that has not been authoritatively rejected' by the courts or the Board. Next, the party must put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation. In short, a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act.

Syllabus

SUMMARY[**]

Antitrust / Labor Law

The panel affirmed in part and reversed in part the district court's dismissal of an action challenging, on federal antitrust and labor law grounds, a Seattle ordinance authorizing a collective-bargaining process between "driver

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

coordinators"—like Uber Technologies; Lyft, Inc.; and Eastside for Hire, Inc. —and independent contractors who work as for-hire drivers.

The ordinance permits independent-contractor drivers, represented by an entity denominated an "exclusive driver representative," and driver coordinators to agree on the "nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers."

The panel reversed the district court's dismissal of claims that the ordinance violates, and is preempted by, *§ 1* of the Sherman Antitrust Act because the ordinance sanctions price-fixing of ride-referral service fees by private cartels of independent-contractor drivers. The panel held that the state-action immunity doctrine did not exempt the ordinance from preemption by the **[**2]** *Sherman Act* because the State of Washington had not clearly articulated and affirmatively expressed a state policy authorizing private parties to price-fix the fees that for-hire drivers pay to companies like Uber or Lyft in exchange for ride-referral services. In addition, the active-supervision requirement for state-action immunity applied, and was not met.

The panel affirmed the district court's dismissal of claims that the ordinance was preempted by the *National Labor Relations Act* under either *Machinists* or *Garmon* preemption.

The panel remanded the case for further proceedings.

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Judges: Before: MILAN D. SMITH, JR. and MARY H. MURGUIA, Circuit Judges, and EDUARDO C. ROBRENO,[*] District Judge. Opinion by Judge Milan D. Smith, Jr.

Opinion by: Milan D. Smith

Opinion

[*775] M. SMITH, Circuit Judge:

On December 14, 2015, the Seattle City Council enacted into law Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers (Ordinance).[1] ***HN1***[] The Ordinance was the first municipal ordinance of its kind in the United States, and authorizes a collective-bargaining process between "driver coordinators"—like Uber Technologies (Uber), Lyft, Inc. (Lyft), and Eastside for Hire, Inc. (Eastside)—and independent contractors who work as for-hire drivers. The Ordinance permits independent-contractor drivers, represented by an entity denominated an "exclusive driver representative," and driver coordinators to agree on the "nature and amount of payments to be made by, or withheld from, the driver coordinator to or by the drivers." Seattle, Wash., Municipal Code *§ 6.310.735(H)(1)*. This provision of the Ordinance is the crux of this case.

Acting on behalf of its members Uber, Lyft, and Eastside, Plaintiff-Appellant the Chamber of Commerce of **[**7]** the United States of America, together with Plaintiff-Appellant Rasier, LLC, a subsidiary of Uber (collectively, the Chamber), sued Defendants-Appellees the City of Seattle, the Seattle Department of Finance and Administrative Services (the Department), and the Department's Director, Fred Podesta (collectively, the City), challenging the Ordinance on federal antitrust and labor law grounds. First, the Chamber asserts that the Ordinance violates, and is preempted by, *section 1 of the Sherman Antitrust Act*, *15 U.S.C. § 1*, because the Ordinance sanctions price-fixing

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[*] The Honorable Eduardo C. Robreno, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[1] The Ordinance amended *section 6.310.110* of the Seattle Municipal Code, and added *section 6.310.735* to the Code. *See* Seattle, Wash., Municipal Code *§§ 6.310.110*, *6.310.735*.

of ride-referral service fees by private cartels of independent-contractor drivers. Second, the Chamber claims that the Ordinance is **[*776]** preempted by the *National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169*, under *Machinists* and *Garmon* preemption.

The district court dismissed the case, holding that the state-action immunity doctrine exempts the Ordinance from preemption by the *Sherman Act*, and that the *NLRA* does not preempt the Ordinance. The Chamber appealed both holdings.

We have jurisdiction over this appeal pursuant to *28 U.S.C. § 1291*. We reverse the district court's dismissal of the Chamber's federal antitrust claims, and remand the federal antitrust claims to the district **[**8]** court for further proceedings. We also affirm the district court's dismissal of the Chamber's *NLRA* preemption claims.

FACTUAL AND PROCEDURAL BACKGROUND

A. Ride-Referral Companies

Eastside is the largest dispatcher of taxicab and for-hire vehicles in the Pacific Northwest. Eastside provides licensed taxicab and for-hire vehicle drivers with dispatch, advertising, payment processing, and other administrative services, in exchange for a weekly fee, payable by drivers to Eastside. Relying on advertising and a preexisting client base, Eastside generates transportation requests from passengers, who call, text-message, or email Eastside to request a ride. Eastside then refers ride requests to drivers through a mobile data terminal. If a passenger uses a credit card to pay a driver, Eastside processes the transaction and remits the payment to the driver. The drivers who pay for Eastside's services are independent contractors—Eastside does not dictate how the drivers operate their transportation businesses. For example, some drivers own licensed vehicles, whereas others lease them.

Uber and Lyft, founded in 2009 and 2012, respectively, have ushered ride-referral services into the digital age. Uber **[**9]** and Lyft have developed proprietary smartphone applications (apps) that enable an online platform, or digital marketplace, for ride-referral services, often referred to as "ridesharing" services. After downloading the Uber or Lyft app onto their smartphones, riders request rides through the app, which transmits ride requests to available drivers nearby. Drivers are free to accept or ignore a ride request. If a driver accepts a ride request, he or she is matched electronically with the rider, and then proceeds to the rider's location and fulfills the ride request. If a driver ignores a ride request, the digital platform transmits the request to another nearby driver. Drivers may cancel a ride request, even after initially accepting it, at any point prior to the commencement of the ride. Riders, too, may decide whether or not to accept a ride from any of the drivers contacted through the app. After a ride is completed, riders pay drivers via the Uber or Lyft app, using a payment method, such as a credit card, placed on file with Uber or Lyft.

Uber and Lyft's business models have facilitated the rise of the so-called "gig economy." In order to receive ride requests through the apps, drivers **[**10]** contract with, and pay a technology licensing fee to, Uber or Lyft. These licensing fees are a percentage of riders' paid fares: Uber and Lyft subtract their technology licensing fees from riders' payments, and remit the remainder to drivers. Drivers' contractual agreements with either Uber or Lyft are not exclusive—in fact, many drivers use several ridesharing apps and even operate multiple apps simultaneously. Drivers may use the Uber and Lyft apps for however long and whenever they wish, if they wish to use them at all.

[*777] B. The Ordinance

HN2[] On December 14, 2015, the Seattle City Council adopted Ordinance 124968. The stated purpose of the Ordinance is to "allow[] taxicab, transportation network company, and for-hire vehicle drivers ('for-hire drivers') to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work," in order to "better ensure that [for-hire drivers] can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner." Seattle, Wash., Ordinance 124968, pmbl.

HN3[] The Ordinance requires "driver coordinators" to bargain collectively with for-hire drivers. *Id.* § 1(I). A "driver coordinator" is defined as **[**11]** "an entity that hires, contracts with, or partners with for-hire drivers for the purpose of assisting them with, or facilitating them in, providing for-hire services to the public." Seattle, Wash., Municipal Code *§ 6.310.110*. The Ordinance applies only to drivers who contract with a driver coordinator "other than in the context of an employer-employee relationship"—in other words, the Ordinance applies only to independent contractors. *Id.* *§ 6.310.735(D)*.

HN4[] The collective-bargaining process begins with the election of a "qualified driver representative," or QDR. *Id.* *§§ 6.310.110*, *6.310.735(C)*. An entity seeking to represent for-hire drivers operating within Seattle first submits a request to the Director of Finance and Administrative Services (the Director) for approval to be a QDR. *Id.* *§ 6.310.735(C)*. Once approved by the City, the QDR must notify the driver coordinator of its intent to represent the driver coordinator's for-hire drivers. *Id.* *§ 6.310.735(C)(2)*.

Upon receiving proper notice from the QDR, the driver coordinator must provide the QDR with the names, addresses, email addresses, and phone numbers of all "qualifying drivers."[2] *Id.* *§ 6.310.735(D)*. This disclosure requirement applies only to driver coordinators that have "hired, contracted with, partnered with, or maintained a **[**12]** contractual relationship or partnership with, 50 or more forhire drivers in the 30 days prior to the commencement date" set by the Director. *Id.*

HN5[] The QDR then contacts the qualifying drivers to solicit their interest in being represented by the QDR. *Id.* *§ 6.310.735(E)*. Within 120 days of receiving the qualifying drivers' contact information, the QDR submits to the Director statements of interest from qualifying drivers indicating that they wish to be represented by the QDR in collective-bargaining negotiations with the driver coordinator. *Id.* *§ 6.310.735(F)(1)*. If a majority of qualifying drivers consent to representation by the QDR, the Director certifies the QDR as the "exclusive driver representative" (EDR) for all for-hire drivers for that particular driver coordinator.[3] *Id.* *§ 6.310.735(F)(2)*.

HN6[] Once the Director certifies the EDR,

> the driver coordinator and the EDR shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director **[*778]** including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the driver coordinator will conduct criminal background checks of all prospective drivers; *the nature and amount of payments to* ***[**13]*** *be made by, or withheld from, the driver coordinator to or by the drivers*; minimum hours of work, conditions of work, and applicable rules.

Id. *§ 6.310.735(H)(1)* (emphasis added).

HN7[] If an agreement is reached, the driver coordinator and the EDR submit the written agreement to the Director. *Id.* *§ 6.310.735(H)(2)*. The Director reviews the agreement for compliance with the Ordinance and *Chapter 6.310 of the Seattle Municipal Code*, which governs taxicabs and for-hire vehicles. *Id.* In conducting this review, the Director is to "ensure that the substance of the agreement promotes the provision of safe, reliable, and economical for-hire transportation services and otherwise advance[s] the public policy goals set forth in Chapter 6.310 and in the [Ordinance]." *Id.*

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[2] To be a qualifying driver, a for-hire driver must have "dr[iven] at least 52 trips originating or ending within the Seattle city limits for a particular Driver Coordinator during any three-month period in the 12 months preceding the commencement date." Seattle, Wash., Qualifying Driver and Lists of Qualifying Drivers, Rule FHDR-1.

[3] If more than one QDR is able to demonstrate that a majority of qualifying drivers wish to be represented by that QDR, the Director will designate the QDR with the largest number of statements of interest to be the EDR. *Seattle, Wash., Municipal Code § 6.310.735(F)(2)*.

The Director's review is not limited to the parties' submissions or the terms of the proposed agreement. *Id.* Rather, the Director may gather and consider additional evidence, conduct public hearings, and request information from the EDR and the driver coordinator. *Id.*

HN8[] The agreement becomes final and binding on all parties if the Director finds the agreement compliant. *Id. § 6.310.735(H)(2)(a)*. The agreement does not take effect until the Director makes such an affirmative determination. ***[**14]*** *Id. § 6.310.735(H)(2)(c)*. If the Director finds the agreement noncompliant, the Director remands it to the parties with a written explanation of the agreement's failures, and may offer recommendations for remedying the agreement's inadequacies. *Id. § 6.310.735(H)(2)(b)*.

If the driver coordinator and the EDR do not reach an agreement, "either party must submit to interest arbitration upon the request of the other," in accordance with the procedures and criteria specified in the Ordinance. *Id. § 6.310.735(I)*. The interest arbitrator must propose an agreement compliant with Chapter 6.310 and in line with the City's public policy goals. *Id. § 6.310.735(I)(2)*. The term of an agreement proposed by the interest arbitrator may not exceed two years. *Id.*

HN9[] The interest arbitrator submits the proposed agreement to the Director, who reviews the agreement for compliance with the Ordinance and Chapter 6.310, in the same manner the Director reviews an agreement proposed by the parties. *Id. § 6.310.735(I)(3)*.

The parties may discuss additional terms and propose amendments to an approved agreement. *Id. § 6.310.735(J)*. The parties must submit any proposed amendments to the Director for approval. *Id.* The Director has the authority to withdraw approval of an agreement during its term, if the Director finds **[**15]** that the agreement no longer complies with the Ordinance or furthers the City's public policy goals. *Id. § 6.310.735(J)(1)*.

C. Procedural History

The Ordinance took effect on January 22, 2016.

The Chamber first filed suit challenging the Ordinance as preempted by the *Sherman Act* and the *NLRA* on March 3, 2016, but its suit was dismissed as unripe, because no entity had yet applied for QDR certification. *See Chamber of Commerce of the U.S. v. City of Seattle, No. C16-0322RSL, 2016 U.S. Dist. LEXIS 122723, 2016 WL 4595981, at *2, *4 (W.D. Wash. Aug. 9, 2016)*.

[*779] Subsequently, the Director designated Teamsters Local 117 (Local 117) as a QDR on March 3, 2017. On March 7, 2017, Local 117 notified Uber, Lyft, Eastside, and nine other driver coordinators of its intent to serve as the EDR of all qualifying drivers who contract with those companies, and requested the qualifying drivers' contact information.

On March 9, 2017, the Chamber filed suit again, seeking a declaration that the Ordinance is unenforceable and a preliminary injunction enjoining the City from enforcing the Ordinance.[4] Relevant to the present appeal,[5] the Chamber asserted two federal antitrust claims—a violation claim and a preemption claim. Specifically, the Chamber claimed that the City violated *section 1* of the Sherman Act by enacting **[**16]** and enforcing the Ordinance, and that the Ordinance conflicts with, and is preempted by, the *Sherman Act*. The Chamber also asserted two federal

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[4] The Chamber filed an Amended Complaint adding Rasier as a coplaintiff on April 11, 2017. The Amended Complaint, which is otherwise largely identical in substance to the original Complaint, is the operative complaint in this case.

[5] The Chamber also asserted claims for violation of its members' federal rights under *42 U.S.C. § 1983*, municipal action unauthorized by Washington law, violation of the *Washington Consumer Protection Act*, and violation of the *Washington Public Records Act*. These claims are not addressed on appeal, because the Chamber did not raise them in its opening brief. *See Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1137 n.13 (9th Cir. 2012)* (stating that issues not raised in an opening brief are waived).

labor preemption claims, challenging the Ordinance as preempted by the *NLRA* under *Machinists* and *Garmon* preemption.

On March 21, 2017, the City filed a motion to dismiss. On April 4, 2017, before ruling on the City's motion to dismiss, the district court granted the Chamber's motion for a preliminary injunction.[6]

Although the district court granted the Chamber's motion for a preliminary injunction, it also granted the City's motion to dismiss on August 1, 2017, concluding that the state-action immunity doctrine exempted the Ordinance from preemption by the *Sherman Act*,[7] and that the Ordinance was not preempted by the *NLRA*. The district court entered judgment on August 4, 2017. The Chamber timely appealed on August 9, 2017.

On August 28, 2017, the Chamber filed an emergency motion for an injunction pending appeal in this court. The City opposed the motion. On September 8, 2017, we granted the Chamber's emergency motion and enjoined enforcement of the Ordinance pending this appeal.

STANDARD OF REVIEW

HN10[] We review the district court's grant of a motion **[**17]** to dismiss de novo. *Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079, 1082 (9th Cir. 2010)*.

ANALYSIS

I. State-Action Immunity Does Not Protect the Ordinance from Preemption by *Section 1* of the Sherman Act.

We turn first to the Chamber's federal antitrust claims, and hold that the **[*780]** Ordinance does not meet the requirements for state-action immunity.[8]

A. Preemption

HN11[] In determining whether the *Sherman Act* preempts a state or local law pursuant to the *Supremacy Clause*, we apply the principles of conflict preemption. "As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state [or local] regulatory schemes." *Rice v. Norman Williams Co., 458 U.S. 654, 659, 102 S. Ct. 3294, 73 L. Ed. 2d 1042 (1982)*.

HN12[] A state or local law, "when considered in the abstract, may be condemned under the antitrust laws," and thus preempted, "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply

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[6] The City appealed from the district court's order granting the Chamber's motion for a preliminary injunction in Case No. 17-35371. The City's appeal was voluntarily dismissed on September 6, 2017.

[7] The district court dismissed both of the Chamber's federal antitrust claims on the basis of state-action immunity. Because the district court did not rule on the merits of the Chamber's antitrust violation claim, we do not address the merits of that claim here.

[8] Ordinarily, we would discuss first the threshold question of whether the Ordinance, which regulates labor relations between for-hire drivers and driver coordinators, is preempted wholly by federal labor law.

However, for purposes of this opinion, we discuss the Chamber's labor preemption claims last. The Chamber's *NLRA* preemption claims, in contrast to the Chamber's challenge to the district court's holding regarding state-action immunity, lack merit, and do not warrant reversal of the district court's order. As is evident from the Chamber's briefing and presentation at oral argument, the Chamber's federal antitrust claims, rather than its federal labor law claims, are the core of its appeal.

with the statute." *Id. at 661*. "Such condemnation will follow under *[section] 1* of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation." *Id.* However, "[i]f the activity addressed by the statute does not fall into that category, and therefore must be analyzed **[**18]** under the rule of reason, the statute cannot be condemned in the abstract." *Id.* Unlike the categorical analysis under the per se rule of illegality, "[a]nalysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws." *Id.* In short, the Ordinance may be preempted facially by federal ***antitrust law*** if it authorizes a per se violation of *section 1* of the Sherman Act, but not if it must be analyzed under the rule of reason.

HN13[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." *15 U.S.C. § 1*. Chief among such illegal arrangements are price-fixing agreements: "Under the *Sherman Act* a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*. "Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful." **[**19]** *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *see* *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 986 (9th Cir. 2000)* ("Foremost in the category of per se violations is horizontal price-fixing among competitors."). Put simply, "collusion" among competitors is "the supreme evil of antitrust." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*.

Here, the district court assumed, without deciding, "that collusion between independent **[*781]** economic actors to set the prices they will accept for their services in the market is a per se antitrust violation." On appeal, the City acknowledges that it "did not challenge the Chamber's contention that collective negotiations regarding topics such as payments to drivers could, absent *Parker* immunity, constitute per se antitrust violations." Because the district court dismissed the Chamber's federal antitrust claims solely on the basis of state-action immunity, we limit our analysis to that issue. We accept, without reaching the merits of the question, that the Ordinance authorizes a per se antitrust violation. The parties may address on remand which mode of antitrust analysis—the per se rule of illegality or the rule of reason—applies.

B. The Requirements for State-Action Immunity

HN14[] The state-action immunity doctrine derives from *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In *Parker*, the Supreme Court held that "because 'nothing in the language of the *Sherman Act* **[**20]** . . . or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 224, 133 S. Ct. 1003, 185 L. Ed. 2d 43 (2013)* (quoting *Parker, 317 U.S. at 350, 352)*. Following *Parker*, the Supreme Court has, "under certain circumstances," extended immunity from federal antitrust laws to "nonstate actors carrying out the State's regulatory program." *Id. at 224-25*.[9]

HN15[] State-action immunity is the exception rather than the rule. Indeed, the Supreme Court has stressed that it is "disfavored": "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" *Id. at 225* (quoting *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992))*; *see* *id. at 236* (reiterating "the principle that 'stateaction immunity is disfavored'" (quoting *Ticor Title, 504 U.S. at 636*)). In line with its "preference" against stateaction immunity, the Supreme Court "recognize[s] stateaction immunity only when

[9] The City's argument that the presumption against preemption applies here is misplaced. State-action immunity is a defense to preemption. *See, e.g.,* *Phoebe Putney, 568 U.S. at 235* (referring to *Parker* immunity as a "state-action defense to price-fixing claims"). The City did not argue below that the Ordinance does not authorize a per se violation of *section 1* of the Sherman Act. Accordingly, there is no challenge regarding the issue of whether preemption should or could apply. The only question is whether the *defense* to preemption applies.

it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *Id. at 225* (quoting *Ticor Title, 504 U.S. at 635*). The Supreme Court's narrow take on state-action **[**21]** immunity is all the more exacting when a non-state actor invokes the protective umbrella of *Parker* immunity: "'[C]loser analysis is required when the activity at issue is not directly that of' the State itself, but rather 'is carried out by others pursuant to state authorization.'" *Id.* (quoting *Hoover v. Ronwin, 466 U.S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984))*.

HN16[] The Supreme Court uses a two-part test, sometimes referred to as the *Midcal* test, to "determin[e] whether the anticompetitive acts of private parties are entitled **[*782]** to immunity." *Id.* First, "the challenged restraint [must] be one clearly articulated and affirmatively expressed as state policy," and second, "the policy [must] be actively supervised by the State." *Id.* (quoting *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980))*.

"Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly." *Id.* As such, "immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *Id. at 226* (quoting *Cmty. Commc'ns Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982))*. Local governmental entities, "unlike private parties, . . . are not subject to the 'active state supervision requirement' because they have less **[**22]** of an incentive to pursue their own selfinterest under the guise of implementing state policies." *Id.* (quoting *Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985))*. "Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists." *Hallie, 471 U.S. at 46 n.10*.

i. The Clear-Articulation Test

We conclude that the anticompetitive restraint challenged in this case fails the first prong of the *Midcal* test. The State of Washington has not "clearly articulated and affirmatively expressed" a state policy authorizing private parties to price-fix the fees for-hire drivers pay to companies like Uber or Lyft in exchange for ride-referral services.

HN17[] The clear-articulation test is met "if the anticompetitive effect was the 'foreseeable result' of what the State authorized." *Phoebe Putney, 568 U.S. at 226-27* (quoting *Hallie, 471 U.S. at 42*). "'[T]o pass the "clear articulation" test,' a state legislature need not 'expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects.'" *Id. at 226* (alteration in original) (quoting *Hallie, 471 U.S. at 43*). To illustrate, the Supreme Court concluded in *City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*, that "the clear-articulation test was satisfied because the suppression of competition in **[**23]** the billboard market was the foreseeable result of a state statute authorizing municipalities to adopt zoning ordinances regulating the construction of buildings and other structures." *Phoebe Putney, 568 U.S. at 227*.

Our inquiry with respect to the clear-articulation test is a precise one. "[T]he relevant question is whether the regulatory structure which has been adopted by the state has *specifically authorized the conduct* alleged to violate the *Sherman Act*." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co., 99 F.3d 937, 942 (9th Cir. 1996)* (emphasis added). The state's authorization must be plain and clear: The relevant statutory provisions must "'plainly show' that the [state] legislature *contemplated* the sort of activity that is challenged," which occurs where they "confer 'express authority to take action that *foreseeably* will result in anticompetitive effects.'" *Hass v. Or. State Bar, 883 F.2d 1453, 1457 (9th Cir. 1989)* (first emphasis added) (quoting *Hallie, 471 U.S. at 43-44*). The state, in its sovereign capacity, must "clearly intend[] to displace **[*783]** competition in a particular field with a regulatory structure . . . in the relevant market." *S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*.

HN18[] Once we determine that there is express state authorization, we then turn to the concept of foreseeability, which "is to be used in deciding the *reach* of antitrust immunity that stems from an *already authorized* monopoly, price regulation, **[**24]** or other disruption in economic competition." *Shames, 626 F.3d at 1084* (second emphasis added). A foreseeable result cannot circumvent the requirement that there be express authorization in the first place: "[A] foreseeable result cannot *create* state authorization itself," but must itself stem from express authorization, which is "the necessary predicate for the Supreme Court's foreseeability test." *Id.* (quoting *Columbia Steel Casting Co. v. Portland Gen. Elec. Co., 111 F.3d 1427, 1444 (9th Cir. 1997))*. We must be careful not to "appl[y] the concept of 'foreseeability' from [the] clear-articulation test too loosely." *Phoebe Putney, 568 U.S. at 229*.

Applying these principles to the Ordinance, we conclude that the clear-articulation requirement has not been satisfied. The state statutes relied upon by the City Council in enacting the Ordinance—*Revised Code of Washington sections 46.72.001*, *46.72.160*, *81.72.200*, and *81.72.210*—do not "plainly show" that the Washington legislature "contemplated" allowing for-hire drivers to price-fix their compensation. Nor is such an anticompetitive result foreseeable.

We examine the state statutes in turn. First, *Revised Code of Washington section 46.72.001* provides:

> The legislature finds and declares that privately operated for hire transportation service is a vital part of the transportation system within the state. Consequently, the safety, reliability, and stability of privately operated for hire transportation **[**25]** services are matters of statewide importance. The regulation of privately operated for hire transportation services is thus an essential governmental function. Therefore, it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws.

Id.[10]

That the Washington state legislature "inten[ded] . . . to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws," *id.*, is insufficient to bring the Ordinance within the protective ambit of state-action immunity. We are mindful of the Supreme Court's instruction that ***HN19***[🡅] "a State may not confer antitrust immunity on private persons by fiat," *Ticor Title, 504 U.S. at 633*, and that a "State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful," *Hallie, 471 U.S. at 39*. Rather, it must first meet the *Midcal* requirements: A state "may displace competition with active state supervision [only] if the displacement is both intended by the State and implemented in its specific details."[11] **[*784]** *Ticor Title, 504 U.S. at 633*. We may not "defer[]to private pricefixing arrangements under the general auspices of state law," **[**26]** but instead must ensure that the "precondition[s] for immunity from federal law," such as "[a]ctual state involvement," are met. *Id.* After all, "[i]mmunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Id.*

HN20[🡅] The plain language of the statute centers on the provision of "privately operated for hire transportation services," *Wash. Rev. Code § 46.72.001*, not the contractual payment arrangements between for-hire drivers and driver coordinators for use of the latter's smartphone apps or ridereferral services. Although driver coordinators like Uber and Lyft contract with providers of transportation services, they do not fulfill the requests for transportation services—the drivers do. Nothing in the statute evinces a clearly articulated state policy to displace competition in the market for ride-referral service fees charged by companies like Uber, Lyft, and Eastside. In other words,

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10 We will not separately analyze *Revised Code of Washington section 81.72.200*, which uses substantially similar language as *section 46.72.001*.

11 The City cites *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*, for the proposition that "a specific, detailed legislative authorization" is not required. *Id. at 415* (plurality opinion). However, in the same decision, the Supreme Court stated that "an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found 'from the authority given a governmental entity to operate *in a particular area*, that the legislature *contemplated the kind of action complained of*.'" *Id.* (emphases added) (quoting *City of Lafayette v. La. Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976))*. As explained above, the City has not shown that the Washington legislature contemplated the kind of anticompetitive restraint established by the Ordinance.

although the statute addresses the provision of transportation services, it is silent on the issue of compensation contracts between forhire drivers and driver coordinators. To read into the plain **[**27]** text of the statute *implicit* state authorization and intent to displace competition with respect to for-hire drivers' compensation would be to apply the clear-articulation test "too loosely." *Phoebe Putney, 568 U.S. at 229*.

HN21[] *Revised Code of Washington section 46.72.160* also lends no support to the City's position. The statute, which focuses on the regulation of for-hire vehicle services, provides that "[c]ities . . . may license, control, and regulate all for hire *vehicles* operating within their respective jurisdictions." *Wash. Rev. Code § 46.72.160* (emphasis added). Each enumerated example of regulatory power in *section 46.72.160* plainly indicates legislative concern with the provision of vehicular services:

The power to regulate includes:

(1) Regulating entry into the business of providing for hire vehicle transportation services;

(2) Requiring a license to be purchased as a condition of *operating a for hire vehicle* and the right to revoke, cancel, or refuse to reissue a license for failure to comply with regulatory requirements;

(3) Controlling the rates charged for *providing for hire vehicle transportation service* and the manner in which rates are calculated and collected;

(4) Regulating the *routes and operations of for hire vehicles*, including restricting access to airports;

(5) Establishing safety **[**28]** and equipment requirements; and

(6) Any other requirements adopted to ensure safe and reliable *for hire vehicle transportation service*.

Id. (emphases added).[12] ***HN22***[] These enumerated powers refer specifically to for-hire vehicles, which by definition are "vehicles used for the transportation of passengers for **[*785]** compensation." *Wash. Rev. Code § 46.72.010(1)*. None of the powers confer upon the City the authority to regulate the fees Uber, Lyft, and Eastside charge in exchange for use of their smartphone apps or ride-referral services. Even the power to regulate "the rates charged for providing for hire vehicle transportation service"—the closest analog to the challenged Ordinance provision—speaks to rates charged to passengers in exchange for the *provision* of transportation services, not the fees Uber and Lyft charge to drivers for use of their apps. And the sixth enumerated power—a residual power—addresses "for hire vehicle transportation service[s]," not ride-referral service fees.

Our case law also forecloses the City's broad reading of the Washington statutes. In *Medic Air Corp. v. Air Ambulance Authority*, we distinguished between the market for air ambulance *services* and the market for *dispatching* air ambulances in the course **[**29]** of applying the clear-articulation test. *843 F.2d 1187, 1189-90 (9th Cir. 1988)*. We held that "a county board of health had clearly intended to displace competition by establishing a monopoly in the market of dispatching air ambulances in the county, and that state action immunity therefore shielded this monopoly." *Shames, 626 F.3d at 1084* (citing *Medic Air, 843 F.2d at 1189*). However, we declined to extend the scope of that immunity, holding that "this immunity did *not* reach anticompetitive conduct in the ambulance *service* market, because this was 'not a "necessary or reasonable consequence" of the decision to establish an exclusive *dispatcher*.'" *Id.* (quoting *Medic Air, 843 F.2d at 1189*). Here, too, there is a critical distinction between transportation services by for-hire drivers and ride-referral services by companies like Uber and Lyft. We cannot collapse the market for ride-referral services into the market for transportation services without colliding with our case law.

Furthermore, the Supreme Court has discouraged extending state-action immunity indiscriminately, in line with the "principle that 'state-action immunity is disfavored.'" *Phoebe Putney, 568 U.S. at 236* (quoting *Ticor Title, 504 U.S. at 636*). ***HN23***[] "[R]egulation of an industry, and even the authorization of discrete forms of anticompetitive

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[12] We will not separately analyze *Revised Code of Washington section 81.72.210*, which uses substantially similar language as *section 46.72.160*.

conduct pursuant to a regulatory structure, does **[**30]** not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related." *Id. at 235*. To illustrate, the Supreme Court held in *Phoebe Putney* that a state law vesting a local governmental entity with general corporate powers and allowing it to acquire hospitals "d[id] not clearly articulate and affirmatively express a state policy empowering the [entity] to make acquisitions of existing hospitals that w[ould] substantially lessen competition." *Id. at 228*.

The Supreme Court has consistently demonstrated reluctance to careen beyond the bounds of state authorization in its application of the clear-articulation test. We must follow suit. In *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*, the Supreme Court "rejected a state-action defense to price-fixing claims where a state bar adopted a compulsory minimum fee schedule. Although the State heavily regulated the practice of law, [the Supreme Court] found no evidence that it had adopted a policy to displace price competition among lawyers." *Phoebe Putney, 568 U.S. at 235* (citing *Goldfarb, 421 U.S. at 788-92*). Here, although the State of Washington authorized municipalities to regulate the for-hire transportation services industry at large, the statutes do **[*786]** not indicate that the state adopted a policy authorizing **[**31]** for-hire drivers to fix the rates Uber and Lyft charge for use of their ride-referral apps.

Similarly, in *Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*, the Supreme Court "concluded that a state commission's regulation of rates for electricity charged by a public utility did not confer state-action immunity for a claim that the utility's free distribution of light bulbs restrained trade in the light-bulb market." *Phoebe Putney, 568 U.S. at 235* (citing *Cantor, 428 U.S. at 596*); *see* *Cantor, 428 U.S. at 584* (observing that "[t]he statute creating the Commission contains no direct reference to light bulbs"). The regulation of rates in one area—i.e., the regulation of rates charged to passengers for transportation services—does not confer the shield of state-action immunity onto anticompetitive conduct in a related market—i.e., price-fixing the fees for-hire drivers pay to Uber and Lyft in order to use their digital platforms.

In cases in which the Supreme Court found the clear-articulation test to be satisfied, the initial state authorization clearly contemplated and plainly encompassed the challenged anticompetitive conduct.[13] For example, in *Omni*, "where the respondents alleged that the city had used its zoning power to protect an incumbent billboard provider against competition, [the Supreme Court] found **[**32]** that the clear-articulation test was easily satisfied," as the suppression of competition in the billboard market stemmed clearly and directly from state statutes delegating authority to cities to adopt zoning ordinances regulating buildings and other structures. *Phoebe Putney, 568 U.S. at 230*. Indeed, the Court explained that "'[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition' and that a zoning ordinance regulating the size, location, and spacing of billboards 'necessarily protects existing billboards against some competition from newcomers.'" *Id.* (alteration in original) (quoting *Omni, 499 U.S. at 373*). Unlike the zoning statutes in *Omni*, which authorized the regulation of buildings and structures, the Washington statutes in this case authorize regulation of the provision of transportation services to passengers—they do not encompass regulation of the payment contracts between for-hire drivers and ride-referral services.

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[13] The City's selective reading of the Supreme Court's decision in *N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015)*, does not buttress its position. The Supreme Court observed only that the clear-articulation test, on its own, is insufficient to justify state-action immunity:

> The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear **[**33]** articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated.

Id. at 1112. In so stating, the Supreme Court made a noncontroversial point: The fact that a state may have clearly articulated a policy, and thus satisfied the first *Midcal* requirement, does not answer key questions about the implementation of the policy—questions which are addressed by the second *Midcal* requirement of active state supervision.

Similarly, in *Southern Motor Carriers*, the Supreme Court concluded that the clear-articulation test was readily satisfied where four state public service commissions decided to permit collective ratemaking **[*787]** by common carriers for intrastate transportation of general commodities. *471 U.S. at 62-66*. Three of the four states had "statutes that explicitly permit collective ratemaking by common carriers," the exact anticompetitive conduct in the precise market at issue. *Id. at 63*. Mississippi, the fourth state, had a statute authorizing the state public service commission not only to regulate common carriers, but also to "prescribe 'just and reasonable' rates for the intrastate transportation of general commodities." *Id.* (quoting *Miss. Code § 77-7-221*). Although Mississippi's statute did not flesh out "[t]he details of the inherently anticompetitive rate-setting process," the statute expressly indicated the state's intention to displace market competition in rate-setting for intrastate transportation **[**34]** of general commodities, the very market at issue. *Id. at 64*. The present case is clearly distinguishable from *Southern Motor Carriers*. Here, there is no state statute expressly authorizing private parties to price-fix the fees forhire drivers pay for use of Uber, Lyft, and Eastside's ridereferral services.

Tellingly, Uber and Lyft did not exist when the Washington statutes were enacted.[14] The very concept of digital ridesharing services was probably well beyond the imaginations of lawmakers two to three decades ago, much less foreseeable. But the fact that technology has advanced leaps and bounds beyond the contemplation of the state legislature is not, on its own, the dispositive factor in our holding today. Digital platforms like Uber and Lyft have become "highly interconnected with modern economic and social life," *Fields v. Twitter, Inc., 881 F.3d 739, 749 (9th Cir. 2018)*, and present novel challenges and contexts for regulation. Nevertheless, it is not our role to make policy judgments properly left to the Washington state legislature. Instead, we must tread carefully in the area of state-action immunity, lest "a broad interpretation of the doctrine . . . inadvertently extend immunity to anticompetitive activity which the states did not intend to **[**35]** sanction," or "a broad application of the doctrine . . . impede states' freedom by threatening to hold them accountable for private activity they do not condone 'whenever they enter the realm of economic regulation.'" *Cost Mgmt. Servs., 99 F.3d at 941* (quoting *Ticor Title, 504 U.S. at 635-36*).

Applying governing law, we hold that the clear-articulation requirement for state-action immunity is not satisfied in this case.

ii. The Active-Supervision Requirement

We next hold that the Ordinance does not meet the active-supervision requirement for *Parker* immunity.

HN24[] "The active supervision requirement demands . . . 'that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *N.C. State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1112, 191 L. Ed. 2d 35 (2015)* (quoting *Patrick v. Burget, 486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988))*. Because "[e]ntities purporting to act under state authority might diverge from the State's considered definition of the public good" and "[t]he resulting asymmetry between a state policy and its **[*788]** implementation can invite private self-dealing," the active-supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity." *Id.*

As a threshold matter, we first clarify that the active-supervision **[**36]** requirement applies to this case. It is settled law that***HN25***[] "active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party." *Hallie, 471 U.S. at 47*. However, where, as here, "state or municipal regulation by a private party is involved, . . . active state supervision must be shown, even where a clearly articulated state policy exists." *Id. at 46 n.10* (citing *S. Motor Carriers, 471 U.S. at 62*).

Southern Motor Carriers is illustrative. That case involved a collective ratemaking scenario similar to the one authorized by the Ordinance in the present case. In *Southern Motor Carriers*, four states permitted private rate

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[14] *Revised Code of Washington sections 46.72.001* and *46.72.160* were enacted in 1996. *Revised Code of Washington sections 81.72.200* and *81.72.210* were enacted in 1984.

bureaus, composed of common carriers, to submit rate proposals to their respective state public service commissions for approval or rejection. *See* 471 U.S. at 50-52. The states authorized, but did not compel, the common carriers to agree on the rate proposals prior to submission to the state agency. *See id.* A proposed rate could become effective in two circumstances—if the state agency took no action within a specified period of time, or, if a hearing was scheduled, only after affirmative agency approval. *See id.* Although the state public service commissions "ha[d] and exercise[d] **[**37]** ultimate authority and control over all intrastate rates," *id. at 51*, the requirement of active state supervision still applied, due to the involvement of the private rate bureaus and common carriers in the ratemaking process, *see* *id. at 66*.[15] Likewise here, private parties—for-hire drivers and driver coordinators—are permitted to set rates collectively and submit them to the Director for approval. Accordingly, the active-supervision requirement applies.

The involvement of private parties in municipal regulation renders this case ineligible for the municipality exception outlined in *Hallie*: "*Hallie* explained that '[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals.'" *Dental Examiners, 135 S. Ct. at 1112* (alteration in original) (quoting *Hallie, 471 U.S. at 47*); *see* *Phoebe Putney, 568 U.S. at 226* (noting that the municipality exception is designed to "preserve[] to the States their freedom . . . to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to **[**38]** disrupt the Nation's free-market goals" (quoting *City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 415-16, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (plurality opinion)). In contrast, this case presents a scenario in which the City authorizes collective price-fixing by private parties, which the Director evaluates and ratifies. The amount of discretion **[*789]** the Ordinance confers upon private actors is far from trivial.[16]

Having decided that the active-supervision requirement applies to this case, we turn to examine whether it is met. Clearly, it is not. It is undisputed that the State of Washington plays no role in supervising or enforcing the terms of the City's Ordinance.

The City cites no controlling authority to support its argument that the Supreme Court uses the word "State" simply "as shorthand for the State and all its agents, including municipalities." The Supreme Court has stated repeatedly that active supervision must be "by the State itself." *Midcal, 445 U.S. at 105*; *see* *Dental Examiners, 135 S. Ct. at 1110* (stating that the policy must be "actively supervised by the State" (quoting *Phoebe Putney, 568 U.S. at 224*)), *1112* (explaining that active-supervision "requir[es] the State to review and approve interstitial policies made by the entity claiming immunity"); *Ticor Title, 504 U.S. at 633* ("[T]he policy must be actively supervised by the State itself." (quoting *Midcal, 445 U.S. at 105*)); *Patrick, 486 U.S. at 101* ("[T]he **[**39]** active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.").

We take it as a given that the Supreme Court means what it states. In *Hallie*, the Supreme Court stated that "[w]here state or municipal regulation by a private party is involved, however, active state supervision must be

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[15] The Supreme Court found that "[t]he second prong of the *Midcal* test [was] met, for the Government ha[d] conceded that the relevant States, through their agencies, actively supervise[d] the conduct of private parties." *S. Motor Carriers, 471 U.S. at 66*.

[16] "A regulation is a unilateral restraint when '[n]o further action is necessary by the private parties because the anticompetitive nature of [the] restraint is complete upon enactment.'" ***Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health, 654 F.3d 919, 927 (9th Cir. 2011)*** (alterations in original) (quoting ***Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 890 (9th Cir. 2008))***. There, "no degree of discretion [is] delegated to private actors." *Id.* (quoting ***Costco, 522 F.3d at 890***). In contrast, "[t]he 'hallmark' of a hybrid restraint is the '*delegation* of discretion to private actors.'" *Id.* (quoting ***Costco, 522 F.3d at 898 n.20***). "The key distinction is that the regulation leaves a gap in the restraint of trade for private parties to fill at their discretion." *Id.*

Here, the anticompetitive restraint turns on the discretion of private actors, as the EDR and the driver coordinator agree on set prices, which they subsequently submit to the Director for review. We have held a similar anticompetitive restraint was a hybrid restraint: Where "the regulation[] . . . ha[d] the effect of delegating to private parties the discretion to set the posted price to be held," it was "an anticompetitive arrangement they could not achieve legally by explicit agreement." ***Id. at 930***.

shown."[17] *471 U.S. at 46 n.10*. In the first clause, the Supreme Court used "state or municipal," thus drawing a disjunctive difference between the two words. In the second clause, it used only "state." It is highly improbable that the Supreme Court chose to distinguish between states and municipalities in the beginning of the sentence, only to conflate the two in the latter part of the sentence.

Moreover, the City's interpretation of the Supreme Court's use of "State" collapses the specific distinction the Supreme Court has drawn between cities, which are not sovereign entities, and states, which are. Sovereign capacity matters. Indeed, the very origins of *Parker* immunity stem from respect for the states' sovereign capacity to regulate their economies. *Phoebe Putney, 568 U.S. at 224*; **[*790]** *see Dental Examiners, 135 S. Ct. at 1112* (noting that the active-supervision requirement serves to "determin[e] whether anticompetitive **[**40]** policies and conduct are indeed the action of a State in its sovereign capacity"). A "substate governmental entity" is simply not equivalent to a state: "Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly." *Phoebe Putney, 568 U.S. at 225*. Unlike a state, a municipality may invoke the protective cloak of *Parker* immunity under "the narrow exception *Hallie* identified" not because it is sovereign, but because there is "little or no danger that it is involved in a private price-fixing arrangement"; the fact that "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market"; and the "substantially reduc[ed] . . . risk that [a municipality] would pursue private interests while regulating any single field." *Dental Examiners, 135 S. Ct. at 1112-13* (quoting *Hallie, 471 U.S. at 47*). All of the reasons justifying the *Hallie* exception are eviscerated by the involvement of private parties in this case.

In concluding that the active-supervision requirement is not satisfied in this case, we do not disturb *Hallie*'s well-settled rule that municipal actors need not meet the active-supervision requirement. *See Hallie, 471 U.S. at 47*. Rather, **[**41]** following *Hallie*, we hold that in this case, in which private actors exercise substantial discretion in setting the terms of municipal regulation, "active state supervision must be shown." *Id. at 46 n.10*. Because ***HN26***[] the distinction between states and municipalities is of crucial importance for purposes of state-action immunity, we reject the City's invitation to treat the two entities interchangeably.[18]

II. The Ordinance Is Not Preempted by the *National Labor Relations Act*.

We next hold that the Ordinance is not preempted by the *NLRA* under either *Machinists* or *Garmon* preemption.

"Although the *NLRA* itself contains no express pre-emption provision, [the Supreme Court] ha[s] held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy." *Chamber of Commerce of the U.S. v. Brown, 554 U.S. 60, 65, 128 S. Ct. 2408, 171 L. Ed. 2d 264 (2008)*. Both are forms of implied preemption: The first is *Machinists* preemption, named after the Court's decision in *Lodge 76, International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132, 96 S. Ct. 2548, 49 L. Ed. 2d 396 (1976)*. ***HN27***[] *Machinists* preemption "forbids both the National Labor Relations Board (NLRB) and States to regulate conduct that Congress intended 'be unregulated because left "to be controlled by the free play of economic forces."'" *Chamber of Commerce, 554 U.S. at 65* (quoting *Machinists, 427 U.S. at 140*). *Machinists* preemption stems from "the premise that '"Congress struck a balance of **[**42]** protection, prohibition, and laissez-faire in respect to union organization, collective bargaining, and labor disputes."'" *Id.* (quoting *Machinists, 427 U.S. at 140 n.4*).

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[17] The City's citation to *Tom Hudson & Associates, Inc. v. City of Chula Vista, 746 F.2d 1370 (9th Cir. 1984)*, does not persuade us otherwise. The case pre-dates *Hallie*, and the question of whether municipal supervision could satisfy the active-supervision requirement was not at issue. *See id. at 1374*.

[18] Because we conclude that the State of Washington, rather than the City, must carry out the active-supervision requirement, we do not reach the Chamber's alternative argument that even if municipal supervision could satisfy the active-supervision requirement, the supervision is "insufficiently active."

The second is *Garmon* preemption, named after the Court's decision in **[*791]** *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959)*. ***HN28***[] *Garmon* preemption "is intended to preclude state interference with the National Labor Relations Board's interpretation and active enforcement of the 'integrated scheme of regulation' established by the *NLRA*." *Chamber of Commerce, 554 U.S. at 65* (quoting *Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 613, 106 S. Ct. 1395, 89 L. Ed. 2d 616 (1986))*. "To this end, *Garmon* pre-emption forbids States to 'regulate activity that the *NLRA* protects, prohibits, or arguably protects or prohibits.'" *Id.* (quoting *Wis. Dep't. of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282, 286, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986))*.

A. *Machinists* Preemption

The Chamber first contends that the Ordinance is preempted by the *NLRA* under a theory of *Machinists* preemption because the Ordinance regulates economic activity that Congress intended to remain unregulated and left to the forces of the free market. The Chamber argues that Congress's choice to exclude independent contractors from the *NLRA's* definition of "employee" in *29 U.S.C. § 152(3)* implicitly preempts local labor regulation of independent contractors. We disagree.

We begin by recounting briefly the history of the *NLRA's* definition of "employee." In 1935, Congress defined "employee" in the *NLRA* as follows: **[**43]**

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

National Labor Relations Act, Pub. L. No. 198, § 2, 49 Stat. 449, 450 (1935) (amended 1947).

About a decade later, the Supreme Court decided *NLRB v. Hearst Publications, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944)*, in which it held that "[w]hether . . . the term 'employee' includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation." *NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968)* (second alteration in original) (quoting *Hearst, 322 U.S. at 124*). In effect, the *Hearst* Court held that "the standard" for determining whether a particular worker was an employee within meaning of the *NLRA* was not one based exclusively on common-law agency principles, but rather "was one of economic and policy considerations within the labor **[**44]** field." *Id.* Applying this new standard, the Supreme Court concluded that although newsboys were independent contractors, they were employees within the meaning of the *NLRA*. *See* *Hearst, 322 U.S. at 131-32*.

The Supreme Court's ruling in *Hearst* triggered swift congressional condemnation. *See* *United Ins., 390 U.S. at 256*. In 1947, Congress enacted the *Labor Management Relations Act*, also known as the *Taft-Hartley Act*. Relevant to this case, the *Taft-Hartley Act* amended the definition of "employee" in the *NLRA* by specifically excluding independent contractors, as well as supervisors and individuals subject to the *Railway Labor Act*. *See Labor-Management Relations Act, ch. 120, sec. 101, § 2(3), 61 Stat. 136, 137-38 (1947)*. **[*792]** The new definition of "employee," which is still operative today, provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in **[**45]** the domestic service of any family or person at his home, or any individual employed by his parent or spouse, *or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an*

> *employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined*.

Id. (emphasis added); *see* 29 U.S.C. § 152(3).

As the Supreme Court subsequently observed: "The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act." *United Ins., 390 U.S. at 256*. The legislative history of the amendment corroborates this observation. The House Report for the amendment explained:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of [*NLRB v. Hearst Publications, 322 U.S. 111, 64 S. Ct. 851, 88 L. Ed. 1170 (1944)*], the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying **[**46]** upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees". [sic] The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". [sic] "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board **[**47]** to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, **[*793]** the bill excludes "independent contractors" from the definition of "employee". [sic]

H.R. Rep. No. 80-245, at 18 (1947).

Citing the House Report, the Chamber asserts that Congress excluded independent contractors from the *NLRA's* definition of "employee" in order to leave independent-contractor arrangements to the free play of economic forces, rather than subject to collective bargaining, federal or local. However, the portion of the House Report the Chamber relies upon actually refers to *supervisors*, not independent contractors. *See id.* at 16-17 (noting that *supervisors* have "abandoned the 'collective security' of the rank and file voluntarily, because they believed the opportunities thus opened to them to be more valuable to them than such 'security'").

The House Report's discussion of the exclusion of independent contractors shows that Congress intended to effect a return **[**48]** to the status quo, rather than preempt state or local regulation of independent contractors. Congress added the exclusion in order to reject the Supreme Court's erroneous "new" construction of "employee" and to return to the common-law definition of "employee" that was in place nine years earlier, before *Hearst. Id.* at 18. While the Chamber makes much of Congress's exclusion of independent contractors from the definition of "employee," the legislative history does not support the Chamber's claim.

Furthermore, the fact that a group of workers is excluded from the definition of "employee" in *§ 152(3)*, without more, does not compel a finding of *Machinists* preemption. As the Chamber acknowledges, *§ 152(2)-(3)* excludes agricultural laborers, domestic workers, and public employees, all of which have been subject to state regulation. *E.g., Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 181, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007)* ("The *National Labor Relations Act* leaves States free to regulate their labor relationships with their public employees."); *Greene v. Dayton, 806 F.3d 1146, 1149 (8th Cir. 2015)* ("Although Congress exempted domestic service workers from the

NLRA, Congress did not demonstrate an intent to shield these workers from all regulation."). Indeed, we concluded with respect to the exclusion of agricultural laborers from § 152(3):

> [W]here, as here, Congress has **[**49]** chosen not to create a national labor policy in a particular field, the states remain free to legislate as they see fit, and may apply their own views of proper public policy to the collective bargaining process insofar as it is subject to their jurisdiction. We find nothing in the National Labor Relations Act to suggest that Congress intended to preempt such state action by legislating for the entire field. Indeed, we draw precisely the opposite inference from Congress's exclusion of agricultural employees from the Act.

United Farm Workers of Am. v. Ariz. Agric. Emp't Relations Bd., 669 F.2d 1249, 1257 (9th Cir. 1982). We find no reason to treat independent contractors differently than these other excluded categories of workers.

Finally, the Chamber's reliance on Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653, 94 S. Ct. 2023, 40 L. Ed. 2d 443 (1974), is misplaced. In *Beasley*, the Supreme Court considered whether the exclusion of supervisors from the NLRA's definition of "employee," which "freed employers to discharge supervisors without violating the [NLRA's] restraints against discharges on account of labor union membership," "also freed the employer from liability in damages to the discharged supervisors" under a state law "that provide[d] such an action for employees discharged **[*794]** for union membership." Id. at 654-55. The Supreme Court held that section 14(a) of the NLRA contained an express statement **[**50]** of preemption that precluded employers from treating supervisors as employees.[19] Id. at 657-62. In so holding, the Supreme Court did not rely on any theory of implicit preemption. Needless to say, there is no analogous express statement of preemption like section 14(a) for independent contractors.

The Supreme Court also concluded in *Beasley* that the legislative history behind the supervisor exclusion "compels the conclusion that Congress' dominant purpose in amending [NLRA sections] 2(3) and 2(11), and enacting [NLRA section] 14(a) was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests." Id. at 661-62. These legislative concerns do not apply to independent contractors. In sum, Beasley is inapposite and lends no support for the Chamber's claim.

Neither case law nor legislative history supports the **[**51]** Chamber's argument that Congress's choice to exclude supervisors from the definition of "employee" in § 152(3), on its own, has implicit preemptive effect. We thus reject the Chamber's claim that the Ordinance is preempted under a theory of *Machinists* preemption.

B. *Garmon* Preemption

Lastly, the Chamber argues that the Ordinance is preempted by the NLRA under a theory of *Garmon* preemption because the Ordinance "requires local officials and state courts to decide whether for-hire drivers are employees under the NLRA," a determination which the Chamber contends is within the exclusive jurisdiction of the NLRB. We find this argument unpersuasive.

To start, the Ordinance expressly disclaims any such determination:

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[19] Section 14(a) of the NLRA, 29 U.S.C. § 164(a), contains an express statement of preemption:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

Id.

> No provision of this ordinance shall be construed as . . . providing any determination regarding the legal status of taxicab, transportation network company, and for-hire vehicle drivers as employees or independent contractors. The provisions of this ordinance do not apply to drivers who are employees under *29 U.S.C. § 152(3)*.

Seattle, Wash., Ordinance 124968 § 6.

Moreover, the Chamber fails to meet the threshold requirement for a *Garmon* preemption claim. ***HN29***[] It is a "precondition for [*Garmon*] pre-emption[] that the **[**52]** conduct [at issue] be 'arguably' protected or prohibited." *Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380, 394, 106 S. Ct. 1904, 90 L. Ed. 2d 389 (1986)*. This precondition "is not satisfied by a conclusory assertion of pre-emption." *Id.* "If the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor." *Id. at 395*. In other words, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' **[*795]** by the courts or the Board." *Id.* (quoting *Marine Eng'rs Beneficial Ass'n v. Interlake S.S. Co., 370 U.S. 173, 184, 82 S. Ct. 1237, 8 L. Ed. 2d 418 (1962))*. Next, the party must "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Id.* In short, "a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act." *Id. at 398*.

The facts of *Davis* are illustrative. In *Davis*, there was a dispute over whether an individual was a supervisor—in which case there would be no preemption—or an employee—in which case there would be preemption, and the NLRB, rather than the state court, would have proper jurisdiction over the matter. *Id. at 394*. The union in that **[**53]** case "point[ed] to no evidence in support of its assertion that [the individual] was arguably an employee." *Id. at 398*. "Its sole submission [was] that [the individual] was arguably an employee because the Board ha[d] not decided that he was a supervisor." *Id. at 396*. This was insufficient to meet the union's "burden of showing at least an arguable case before the jurisdiction of a state court w[ould] be ousted." *Id.*

Like the union in *Davis*, the Chamber, without citing any authority, asserts that "there is no need for the Chamber to take a position on the employment status of for-hire drivers, and there is no need for the Chamber to provide any supporting evidence." Instead, the Chamber lists, without elaboration, ongoing matters pending before the NLRB on the question of whether drivers who use ride-referral services are employees. As the party asserting preemption, the Chamber has not met its burden to show at least an arguable case that the drivers at issue are covered by the *NLRA*. Practically speaking, the question of whether drivers who contract with Uber and Lyft are employees or independent contractors may well be a "live issue" in other judicial and administrative proceedings involving different **[**54]** parties, claims, and law. But that does not absolve the Chamber from complying with our case law regarding *Garmon* preemption.

The Chamber asserts the alternative argument that, "[a]t a minimum, the Ordinance is preempted under *Garmon* until the NLRB conclusively determines whether the for-hire drivers who use Uber, Lyft, and Eastside are employees or independent contractors." This argument, too, is futile. As the Supreme Court stated in *Davis*, "Nothing in *Garmon* suggests that an arguable case for pre-emption is made out simply because the Board has not decided the general issue one way or the other." *Id. at 397*.

The Chamber has not made any showing or set forth any evidence showing that the for-hire drivers covered by the Ordinance are arguably employees subject to the *NLRA*. We thus hold that the Ordinance is not preempted under the Chamber's theory of *Garmon* preemption.

CONCLUSION

For the foregoing reasons, we reverse the district court's dismissal of the Chamber's federal antitrust claims, and remand the federal antitrust claims to the district court for further proceedings. We also affirm the district court's dismissal of the Chamber's *NLRA* preemption claims.

The parties shall bear their own costs **[**55]** on appeal.

AFFIRMED IN PART, REVERSED IN PART, REMANDED.

Reibstein v. Rmd Group Llc E-File

Superior Court of California, County of San Diego

May 11, 2018, Decided

37-2017-00049274-CU-BT-CTL

Reporter

2018 Cal. Super. LEXIS 54760 *

Reibstein v. RMD Group LLC [E-File]

Core Terms

cause of action, gratuity, tips, suggestions, contends, servers, unfair, demurrer, prong, alleged violation, business practice, restitution, customer, alleges

Counsel: **[*1]** ROBERT G LOEWY, counsel, present for Plaintiff(s).

Christopher S. Morris, specially appearing for counsel Jacob A. Gillick, present for Defendant(s).

Judges: John S. Meyer.

Opinion by: John S. Meyer

Opinion

MINUTE ORDER

The Court hears oral argument and confirms the tentative ruling as follows:

Defendant RMD Group, LLC brings this demurrer to plaintiff's complaint.

In ruling on a demurrer, the Court assumes that the complaint's properly pleaded material factual allegations are true and will give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. The Court does not, however, assume the truth of contentions, deductions, or conclusions of fact or law. *Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6*; *Moore v. Regents of University of California (1990) 51 Cal.3d 120, 125*.

Defendant makes a number of challenges that extend to many, if not all, causes of action.

The alleged business practice is defendant including miscalculated gratuity suggestions on bills presented for split checks. Defendant contends this is not a "business practice," but rather a mistake or accident.

A practice generally means "the 'habitual doing of certain things, the doing of an act more than once' ... [or] '[r]epeated or customary action, habitual performance; a succession of acts of similar kind; habit, custom ...'" **[*2]** *Wilson v. Stearns (1954) 123 Cal.App.2d 472, 479*. Based on the allegations in the complaint, this was a practice.

Defendant contends that tips are gifts from the customer to the server. "A tip is not intended for the proprietor of a restaurant. It is a gratuity, i.e., 'a free gift, a present.'" *Herbert's Laurel-Ventura v. Laurel Ventura Holding Corp. (1943) 58 Cal.App.2d 684, 694*.

On the other hand, "a tip is connected directly with the service and its quality. He who tips thereby expresses not his own self-conceit, but his gratification with the service by compensating the servant over and above the regular remuneration for the service." *Roberts v. C.I.R. (9th Cir. 1949) 176 F.2d 221, 224*.

The essential characteristic of a gift is the absence of consideration. *Id., at 223*. Arguably, consideration is present when a tip is given: consideration for the services provided by the server.

Defendant contends that the tips belong to the employee, thus defendant has not benefited from the overtipping.

Plaintiff contends that "this scheme has unquestionably benefitted the company. In effect, it allows RMD to pay its staff an extra $20-$40 per shift, without raising menu prices and without cutting into the company's profits. It also provides RMD a strategic advantage over its competitors, allowing it to attract the best serving talent, while ostensibly keeping menu prices low." [Oppo., 2:5-10] **[*3]**

This appears to be a factual dispute that cannot be resolved on demurrer.

Defendant asserts that plaintiff is seeking restitution from the wrong defendant. "Plaintiff is seeking restitution from the wrong defendant In reality, restaurant received no benefit from gratuity..." [Moving, 9:26-28] Defendant suggests that the server is the only one who can provide restitution.

Restitution is defined as "compelling a UCL defendant to return money obtained through an unfair business practice to thow persons in interest from whom the property was taken, that is, to persons who had ownership interest in the property or those claiming through that person." *Korea Supply co. v. Lockheed Martin Corp. (2003) 29 Cal.4th 1134, 1144-45*.

Plaintiff likens the facts here with *Matoff v. Brinker Restaurant Corp. (C.D. Cal. 2006) 439 F.Supp.2d 1035*, where the restaurant required servers to share tips with bartenders. Here, plaintiff is claiming that defendant caused the overcharge and then gave the excess money to the servers. These are credit card transactions, so the money from the credit card would go the defendant, who in turn would pay the servers. "If Defendant unlawfully misappropriated Plaintiff's tips, Plaintiff may seek restitution even if Defendant directed the misappropriated funds to the bartenders." *Id., at 1038*.

Defendant contends that the complaint **[*4]** acknowledges that defendant has stopped the practice of putting suggested gratuities on their bills, thus there is nothing to enjoin. However, the complaint actually alleges that there has only been a representation that the practice has stopped.

The first cause of action alleges violation of *Bus. &Prof. §17500*, false/misleading statements in advertising.

B&P §17500 makes it unlawful for any person with intent to dispose of property or to perform services to make any statement concerning that property or those services which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

Defendant contends that plaintiff has not alleged a connection between the intent to dispose of property or to perform services and the gratuity suggestions.

At the time the alleged statement was made (the suggested gratuities on the bill), food and drink had already been consumed and services performed. There is no allegation that defendant provided the suggested gratuities with the intent to dispose of property or to perform services. There are insufficient facts alleged to constitute this cause of action.

The second cause of action alleges violation of the CLRA. **[*5]** It prohibits "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or that results in the sale or lease of goods or services to any consumer" in certain manners. Civ.C. *§1770(a)*

The alleged business practice is including miscalculated gratuity suggestions on bills presented for split checks. Although that practice may have resulted in the overpayment of tips, it did not result or intend to result in the sale of goods or services. There are insufficient facts alleged to constitute this cause of action.

The third cause of action alleges violation of the unlawful prong of *Bus.&Prof. §17200*. This cause of action is dependent on the first two causes of action. Thus, it fails to state sufficient facts to constitute a cause of action.

The fourth cause of action alleges violation of the unfair prong of Bus.&Prof. §17200.

To show a business practice is unfair, the plaintiff must show "the conduct is tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an ***antitrust law***, or violates the policy or spirit of an ***antitrust law***." *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 613*.

Plaintiff alleges that it was unfair to fail to correct the miscalculations or to **[*6]** conceal the fact that the gratuity suggestions were false. This is insufficient to support the "unfair" allegation.

In opposition, plaintiff contends that the alleged practice violates the spirit of the antitrust laws, giving defendant an unfair advantage over competitors in recruitment and retention of servers, and by allowing defendant to keep menu prices lower. This is not, however, alleged in the complaint.

The fifth cause of action alleges violation of the fraudulent prong of *Bus.&Prof. §17200*.

"The fraud prong of the UCL may be shown if members of the public are ""likely to be deceived."" (*Buller v. Sutter Health (2008) 160 Cal.App.4th 981, 986, 74 Cal.Rptr.3d 47*.) However, "'[a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.'" (*Id. at p. 987, 74 Cal.Rptr.3d 47*.) Additionally, the UCL "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." (*In re Tobacco II Cases (2009) 46 Cal.4th 298, 326, 93 Cal.Rptr.3d 559, 207 P.3d 20*.) In other words, the plaintiff "must allege he or she was motivated to act or refrain from action based on the truth or falsity of a defendant's statement, not merely on the fact it was made." (*Kwikset Corp. v. Superior Court (2011) 51 Cal.4th 310, 327, fn. 10, 120 Cal.Rptr.3d 741, 246 P.3d 877*.). *Graham v. Bank of America, N.A. (2014) 226 Cal.App.4th 594, 613-614*

There are sufficient facts alleged to constitute this cause of action. The alleged fraudulent practice is including miscalculated gratuity **[*7]** suggestions on the bill. It is alleged that the purpose of including the suggestions are for the benefit of customers, so they do not have to take out their calculators or figure out the math. Whether a reasonable customer would notice the suggestions were excessive is a factual issue. It may not be unreasonable for a customer to assume those figures are correct, especially if the rest of the bill is correct. Plaintiff alleges she relied on the suggested gratuity calculations and was deceived into paying more than she intended.

The sixth cause of action is for breach of the implied covenant of good faith and fair dealing. Plaintiff advises in a footnote that plaintiff is not proceeding on this cause of action.

The seventh cause of action is for reformation of contract.

"When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." Civ.C. §3399.

The contract **[*8]** is not identified in the complaint, thus there are insufficient facts alleged to constitute the cause of action.

THEREFORE, the demurrer to the first, second, third, fourth and seventh causes of action is **SUSTAINED WITH LEAVE TO AMEND**. The demurrer to the fifth cause of action is **OVERRULED**. The demurrer to the sixth cause of action is **SUSTAINED WITHOUT LEAVE TO AMEND**.

Plaintiff shall file and serve her First Amended Complaint no later than May 25, 2018.

IT IS SO ORDERED.

/S/[John S. Meyer]

Judge John S. Meyer

Smith v. McPharlin

United States District Court for the Eastern District of Michigan, Southern Division

May 11, 2018, Decided; May 11, 2018, Filed

Case No. 2:17-CV-13392

Reporter

2018 U.S. Dist. LEXIS 151043 *

RAY SMITH, AMERICANS FOR REFORM, BARRET KISH, FERZELL ARCHIE, RUSH HOLMES, Plaintiffs v. PATRICK M. MCPHARLIN, DIRECTOR OF INSURANCE AND FINANCIAL SERVICES; INTEGON NATIONAL INSURANCE COMPANY; THE HANOVER INSURANCE COMPANY; ALLSTATE VEHICLE AND PROPERTY INSURANCE COMPANY; PROGRESSIVE CASUALTY INSURANCE COMPANY; AMERICAN AUTOMOBILE INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY; AMERICAN ALTERNATIVE INSURANCE CORPORATION; NATIONAL GENERAL INSURANCE COMPANY; TRANSAMERICA CASUALTY INSURANCE COMPANY; FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY; AUTOOWNERS INSURANCE COMPANY; USAA CASUALTY INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, Defendants.

Subsequent History: Adopted by, Dismissed by, in part, Dismissed without prejudice by, in part, Objection overruled by *Smith v. McParhlin, 2018 U.S. Dist. LEXIS 150727 (E.D. Mich., Sept. 5, 2018)*

Prior History: *Smith v. McPharlin, 2018 U.S. Dist. LEXIS 33971 (E.D. Mich., Mar. 2, 2018)*

Core Terms

Plaintiffs', no-fault, Michigan, motion to dismiss, insurance policy, allegations, state actor, Progressive, rates, regulation, Sherman Act, insurers, entity, qualified immunity, insurance business, constitutional claim, antitrust claim, McCarran-Ferguson Act, insurance company, auto insurance, monopolize, antitrust, monopoly, federal court, pleadings, violates, parties, argues, cases, status conference

Counsel: **[*1]** Ray Smith, Plaintiff, Pro se, Detroit, MI.

Americans for Reform, Plaintiff, Pro se, Detroit, MI.

Barret Kish, Plaintiff, Pro se, Detroit, MI.

Ferzell Archie, Plaintiff, Pro se, Detroit, MI.

Rush Holmes, Plaintiff, Pro se.

For Patrick M. McPharlin, Director of Insurance and Financial Services, Defendant: Aaron W. Levin, MI Department of Attorney General, Lansing, MI; Mary Elizabeth Lippitt, Michigan Attorney General, Lansing, MI.

For The Hanover Insurance Company, Auto Owners Insurance Company, Defendants: Lori M. McAllister, Dykema Gossett, Lansing, MI.

For Progressive Casualty Insurance Company, Defendant: Martin T. Wymer, Baker & Hostetler, Cleveland, OH.

For The American Insurance Company, Defendant: Adam A. Fadly, Osipov Bigelman, Southfield, MI.

For American Alternative Insurance Corporation, Defendant: George P. Apostolides, Saul Ewing Arnstein & Lehr LLP, Chicago, IL.

For Farm Bureau Mutual Insurance Company of Michigan, Defendant: Curtis R. Hadley, Willingham & Cote, East Lansing, MI.

For State Farm Mutual Automobile Insurance Company, Defendant: Gregory L. Curtner, Matthew P. Kennison, Riley Safer Holmes & Cancila LLP, Ann Arbor, MI.

For USAA Casualty Insurance Company, Defendant: Kaveh **[*2]** Kashef, Clark Hill, Birmingham, MI; Michael R. Griffie, Butzel Long, Detroit, MI.

Judges: Anthony P. Patti, UNITED STATES MAGISTRATE JUDGE. District Judge Mark A. Goldsmith.

Opinion by: Anthony P. Patti

Opinion

REPORT AND RECOMMENDATION TO GRANT: (1) PATRICK McPHARLIN'S MOTION TO DISMISS (DE 43), (2) THE INSURANCE DEFENDANTS' JOINT MOTION TO DISMISS (DE 45), AND (3) DEFENDANT PROGRESSIVE CASUALTY INSURANCE COMPANY'S MOTION TO DISMISS (DE 46)

I. RECOMMENDATION: The Court should grant Patrick McPharlin's, the Joint Insurance Defendants', and Progressive Casualty Insurance Company's motions to dismiss (DEs 43, 45, 46) and dismiss this action with prejudice as to Plaintiffs Ray Smith and Barret Kish and without prejudice as to putative Plaintiffs Ferzell Archie, Rush Holmes and Americans for Reform.

II. REPORT

A. Plaintiffs' Complaint

On October 17, 2017, Plaintiffs Ray Smith, Barret Kish, Americans for Reform, Ferzell Archie, and Rush Holmes purportedly filed the instant lawsuit. (DE 1.) However, the complaint was only signed by Ray Smith and Barret Kish, both proceeding *in pro per*, and Smith and Kish are the only plaintiffs who have appeared in this matter. (*Id.*)[1] Plaintiffs' complaint alleges generally that automobile **[*3]** insurance rates under Michigan's No-Fault Act are unfair and discriminatory. Specifically, Plaintiffs allege that the use of "non driving factors to determine no fault auto insurance rates and premiums" violates their right to due process, equal protection under the *Fourteenth Amendment to the United States Constitution*, and federal ***antitrust law***. (DE 1 at 5.) Plaintiffs seek "injunctive relief, declaratory relief, and punitive damages in the amount of $810,000,000.00 dollars in back payments to policy holders[.]" (*Id.* at 6.) In sum, these four individual plaintiffs (only two of whom have ever signed a pleading or appeared in Court) and a loose, non-corporate entity — none of whom or which are lawyers — purport to represent a class of auto policy holders.

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[1] Plaintiffs' Complaint (DE 1 at Pg ID 1-7, 28-30) attaches a document Plaintiffs title their "Civil Action Brief." (DE 1 at Pg ID 8-27.) The Court entered an Order on March 20, 2018 striking the "Civil Action Brief" addendum for the reasons stated on the record during the March 15, 2018 hearing, including that the "brief" does not conform to the requirements of a pleading and/or motion as required by *Fed. R. Civ. P. 7* and *8*, and *E.D. Mich. LR 7.1*. (DE 83 at 7.) As the Court further discussed in its March 20, 2018 Order (DE 83), neither Archie nor Holmes signed the complaint, or any other document filed in this case, and neither appeared at the March 15, 2018 status conference and motion hearing, although Plaintiff Ray Smith stated he informed both individuals of the hearing and the Court had ordered them to appear, albeit with service problems discussed *infra*. Plaintiffs Ray Smith and Barret Kish are not licensed attorneys and are appearing *in pro per*, and thus, as discussed more fully *infra*, neither plaintiff can represent Archie, Holmes, or "Americans for Reform."

B. The Instant Motions to Dismiss

1. Defendants' Motions to Dismiss

a. Defendant McPharlin's motion (DE 43)

Defendant Patrick McPharlin, the Director of the Department of Insurance and Financial Services (DIFS), filed his motion to dismiss on December 15, 2017. (DE 43.) Director McPharlin asserts that Plaintiffs' claims against him, whether in his official or personal capacities, are barred by *Eleventh Amendment* or qualified immunity. He further argues that Plaintiffs do not have standing to pursue **[*4]** their claims, and that they cannot bring a claim on behalf of Americans for Reform. He also asserts that Plaintiffs have failed to show that he violated the *Equal Protection Clause* or the *Due Process Clause*, and that their *Commerce Clause* claim based on the business of insurance is barred by the *McCarran-Ferguson Act*. Finally, Director McPharlin argues that Plaintiffs' antitrust claim is barred pursuant to *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

b. The Insurance Defendants' joint motion (DE 45)

The Insurance Defendants[2] filed their joint motion to dismiss on December 15, 2017. (DE 45.) The Insurance Defendants argue that Plaintiffs lack standing to bring any claims asserted in the complaint. They further assert that Plaintiffs' claims fail because none of the Insurance Defendants is a state actor as required for Plaintiffs' constitutional claims. Finally, the Insurance Defendants contend that Plaintiffs' purported antitrust claim is barred by the McCarran-Ferguson Act, the filed-rate doctrine, Plaintiffs' failure to exhaust their administrative remedies, and for failure to state a claim.

c. Defendant Progressive Casualty's motion (DE 46)

Defendant Progressive Casualty Insurance Company ("Progressive Casualty") also filed a separate motion to dismiss. (DE 46.) Progressive Casualty **[*5]** argues that Plaintiffs' complaint fails to state a claim upon which relief can be granted because Progressive Casualty does not write personal automobile insurance in the State of Michigan, and that it therefore could not have engaged in any of the challenged practices or caused any of Plaintiffs' alleged injuries.

2. Plaintiffs' Joint Response Brief (DE 69)

On February 8, 2018, Plaintiffs Smith and Kish filed a response brief opposing Defendants' motions to dismiss. (DE 69.) Plaintiffs argue that they "have standing to bring their constitutional claims in Federal District Court on grounds that they were denied due process and equal protection under the law when defendants failed to provide them with an affordable method to purchase nofault auto insurance essential to operating a motor vehicle." (*Id.* at 5.) They assert that the Defendants all use the same rate-making scheme to set excessive, discriminatory no-fault insurance rates "for Detroit residents who are predominantly African American[s] living in poverty." (*Id.* at 2.) Plaintiffs argue that they "and other Detroit motorists are unable to register their motor vehicles required by law to drive to work, hospital visits and take care of daily needs **[*6]** due to the excessive discriminatory insurance rates." (*Id.*) They

[2] Defendants state that the "Insurance Defendants" include: The American Insurance Company, American Automobile Insurance Company, The Hanover Insurance Company, Progressive Casualty Insurance Company, American Alternative Insurance Corporation, Farm Bureau Mutual Insurance Company of Michigan, State Farm Mutual Automobile Insurance Company, Auto-Owners Insurance Company, Liberty Mutual Insurance Company, and USAA Casualty Insurance Company. (DE 45 at 4.)

contend that Defendants' failure to offer Plaintiffs an alternative method to purchase fair, equitable and affordable liability-only insurance policies violates the Due Process and *Equal Protection Clauses*. They further claim that their due process rights are violated by the seizure of vehicles during traffic stops for not providing proof of no-fault insurance, although it is unclear how any of the named defendants are liable for making traffic stops or seizure of vehicles.

Plaintiffs argue that Director McPharlin is not entitled to qualified immunity because his actions gave "insurance companies the approval to execute discriminatory rate-setting practices absent free market participation" and he "knew before approving the 7-day insurance policy rate-setting scheme, [that it] was unconstitutional." Relying on *Shavers v. Attorney General of Michigan, 402 Mich. 554, 267 N.W.2d 72 (1978)* ("*Shavers I*") and *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1984)*, Plaintiffs also contend that the Insurance Defendants can be deemed "state actors" for purposes of their constitutional claims because they are regulated by the Director to conduct the business of insurance and are working together with government officials to implement the no-fault insurance requirements.. Plaintiffs **[*7]** further argue that because insurers collect premiums, which include a provision for assessments the insurers pay to the Michigan Catastrophic Claims Association (MCCA), they are state actors. Finally, Plaintiffs assert that their antitrust claim is not barred by the McCarran-Ferguson Act because they are not making a claim for Congress to regulate the business of insurance, but rather a claim that the Director's action to license only one insurance company (L.A. Insurance) to issue a 7-day insurance policy is a "pure monopoly." Plaintiffs did not respond to Progressive Casualty's motion to dismiss.

3. Defendants' Reply Briefs

a. Director McPharlin's reply (DE 70)

On February 21, 2018, Director McPharlin filed a reply brief in support of his motion to dismiss. (DE 70.) Director McPharlin argues that Plaintiffs' response suffers from several procedural defects, including that it was more than three weeks late, it remains unclear who the Plaintiffs are, and that Plaintiffs raise many new issues in their response (i.e., a *§1983* claim) that were not asserted in their complaint. Director McPharlin further argues that Plaintiffs have failed to meet their burden to show that he is not entitled to **[*8]** qualified immunity, and that their response misstates both antitrust and insurance law. He asserts that "[u]ltimately, Plaintiffs complain of policy issues and their remedy lies with the legislative rather than the judicial branch of our government."

b. Insurance Defendants' reply (DE 72)

On February 22, 2018, the Insurance Defendants filed their reply brief in support of their motion to dismiss. (DE 72.) The Insurance Defendants argue that Plaintiffs continue to fail to demonstrate standing to pursue their claims because their pleadings do not state whether they are purchasers of no-fault insurance policies. They also contend that Plaintiffs' constitutional claims fail because they cannot establish that the Insurance Defendants are state actors. The Insurance Defendants rely upon *American Manufacturers Mutual Insurance Company v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)*, for the principle that "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action," and argue that Plaintiffs offer no support for their other contentions. Finally, the Insurance Defendants reiterate that Plaintiffs failed to properly plead a *Sherman Act* antitrust claim and that even if that claim had been properly pleaded, it would be barred by the McCarran-Ferguson **[*9]** Act, the filed-rate doctrine, and Plaintiffs' failure to exhaust administrative remedies.

C. March 15, 2018 Motion Hearing and Status Conference

On February 6, 2018, the Court entered a notice of motion hearing, scheduling Defendants' motions to dismiss and Plaintiffs' two then-pending motions to amend the complaint (see DEs 51, 63, after which a third was filed as DE 74) for hearing on March 15, 2018 at 10:00 am. (DE 67.) The Court also entered a notice to appear for a status conference for the same date and time. (DE 68.) In a March 2, 2018 Order denying Plaintiffs Smith and Kish's motions to adjourn the status conference and hearing, the Court stated: "**The parties are reminded that all named plaintiffs are required to appear in person at the March 15th status conference, as none of them have counsel**." (DE 78 at 5 (emphasis in original).) The Court also stayed the case pending the March 15, 2018 hearing and status conference. (DE 78 at 3-5.)

On March 15, 2018, Plaintiffs Ray Smith and Barret Kish and counsel for Defendants, Lori McAllister, Aaron Levin, Mary Elizabeth Lippett, Adam Fadly, Amy Lynn Piccola, Kaveh Kashef, Matthew P. Kennison, Gregory L. Curtner, Michael K. Farrell, and **[*10]** John Yeager, appeared. The Court held a status conference on the record with the parties regarding Plaintiffs' complaint, the identity and status of the Plaintiffs, and ruled from the bench on Plaintiffs' motions for leave to amend the complaint. The Court also entertained oral argument on Defendants' motions to dismiss, which the Court then took under advisement. The Court subsequently entered an Order: (1) directing Plaintiffs Smith and Kish to provide proper contact information for putative plaintiffs; (2) striking the "civil action brief" attached to Plaintiffs' complaint; (3) denying Plaintiffs' motions to amend the complaint without prejudice; (4) voluntarily dismissing Defendant Transamerica without prejudice; and (5) otherwise staying the case pending final decision on Defendants' motions to dismiss. (DE 83.)

D. Standards

Defendants' motions are brought pursuant to *Fed. R. Civ. P. 12(b)(1)* and *(b)(6)*.

1. *Rule 12(b)(1)*

"When subject matter jurisdiction is challenged under *Rule 12(b)(1)*, the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Madison-Hughes v. Shalala, 80 F.3d 1121, 1130 (6th Cir. 1996)*. In reviewing a motion under *Rule 12(b)(1)*, the "court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free **[*11]** to supplement the record by affidavits." *Nichols v. Muskingum Coll., 318 F.3d 674, 677 (6th Cir. 2003)*. When faced with a challenge to subject matter jurisdiction, "a court must address that issue before all others." *Cain v. Redbox Automated Retail, LLC, 981 F.Supp.2d 674, 681 (E.D. Mich. 2013)* (collecting cases).

Motions under *Rule 12(b)(1)* fall into two categories: "facial attacks and factual attacks." *United States v. Ritchie, 15 F.3d 592, 598 (6th Cir. 1994)*. A facial attack challenges "the sufficiency of the pleading itself," and the "court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party." *Id.* (citing *Scheuer v. Rhodes, 416 U.S. 232, 235-37, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974))*. A factual attack does not challenge the sufficiency of the allegations, but is a "challenge to the factual existence of subject matter jurisdiction," to which "no presumptive truthfulness applies to the factual allegations, and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear a case." *Id.* (internal citation omitted).

2. *Rule 12(b)(6)*

When deciding a motion to dismiss under *Rule 12(b)(6)*, the Court must "construe the complaint in the light most favorable to plaintiff and accept all allegations as true." *Keys v. Humana, Inc., 684 F.3d 605, 608 (6th Cir. 2012)*. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (internal quotation omitted); **[*12]** *see also* *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (concluding that a plausible claim need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action"). Facial plausibility is established "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 556 U.S. at 678*. "The plausibility of an inference depends on a host of considerations, including common sense and the strength of competing explanations for the defendant's conduct." *16630 Southfield Ltd., P'Ship v. Flagstar Bank, F.S.B., 727 F.3d 502, 503 (6th Cir. 2013)*.

3. *Pro Se* Pleadings

The Court holds *pro se* complaints to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)*. However, even in pleadings drafted by *pro se* parties, "'courts should not have to guess at the nature of the claim asserted.'" *Frengler v. Gen. Motors, 482 F. App'x 975, 976-77 (6th Cir. 2012)* (quoting *Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989)*). Moreover, "courts may not rewrite a complaint to include claims that were never presented . . . nor may courts construct the Plaintiff's legal arguments for him. Neither may the Court 'conjure up unpled allegations[.]'" *Rogers v. Detroit Police Dep't, 595 F. Supp. 2d 757, 766 (E.D. Mich. 2009)* (Ludington, J., adopting report and recommendation of Binder, M.J.).[3]

E. Discussion

1. The purported claims of Plaintiffs Rush [*13] Holmes, Ferzell Archie and Americans for Reform should be dismissed without prejudice

Only Plaintiffs Smith and Kish signed the complaint in this action, as *pro se* litigants, in an attempt to bring this case on behalf of putative plaintiffs Ferzell Archie, Rush Holmes and an entity named "Americans for Reform" (hereinafter AFR) (DE 1 at 6, 25), as well as "other potential plaintiffs" and "those who may want to get involved in the suit." (DE 88 at 28-29.) Similarly, only Smith and Kish signed Plaintiffs' response to Defendants' motions to dismiss, again purportedly "on behalf of the plaintiffs," including Ferzell Archie, Rush Holmes and AFR. (DE 69 at 26, 28.) And, only Smith and Kish appeared at the March 15, 2018 motion hearing and status conference, although all named plaintiffs were required to appear in person, and Smith acknowledged in Court that both Archie and Holmes had notice of the hearing, were informed that they were ordered to appear, and indicated they were going to appear at the hearing; but they did not. (DE 88 at 6-7.)[4]

At the March 15, 2018 hearing, Smith and Kish independently confirmed that they are not licensed attorneys and that they are **[*14]** the only Plaintiffs who have signed the complaint (or any other pleading or document filed in this matter). (DE 88 at 6, 27-28.) Smith further explained at the hearing that AFR is not a corporation, partnership, limited partnership, professional corporation, limited liability company, or any other type of entity, and it does not have officers, directors or members, but instead described it as a "collection of individuals," an "activist group," a "discussion forum," "an idea," "a work in progress," and as a "collective idea," and acknowledged that he

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[3] *See also, Evans v. Mercedes Benz Fin. Servs., LLC, No. 11-11450, 2011 U.S. Dist. LEXIS 79404, 2011 WL 2936198, at *2 (E.D. Mich. July 21, 2011)* (Cohn, J.) ("Even excusing plaintiff's failure to follow *Rules 8(a)(2)* and *10(b)*, a *pro se* plaintiff must comply with basic pleading requirements, including *Rule 12(b)(6)*.").

[4] Further, there have been significant issues with service on the putative Plaintiffs at the address(es) they have provided. The orders, notices, and certificates of service sent to putative Plaintiffs AFR, Archie and Holmes, and even Kish, have been repeatedly "returned as undeliverable." (*See, e.g.*, DEs 9-12, 22, 49, 50, 52, 54, 55, 59-62, 66, 73.) Smith explained at the status conference that the address listed on the docket for putative Plaintiffs AFR, Kish, Archie and Holmes was *his* "office address"—so that all mailing would go *through him*—but that these Plaintiffs did not reside at that address. (DE 88 at 10-12.) Plaintiffs Smith and Kish were then ordered by the Court to file a notice providing the correct: (1) addresses; (2) phone numbers; and (3) email addresses for putative Plaintiffs Ferzell Archie and Rush Holmes. (DE 83.) Plaintiff Smith initially filed a document titled "motion for change of address," seeking to change the address "for *all* plaintiffs[,]" yet again, to one address—19638 Fenelon Street, Detroit, MI 48234. (DE 82 (emphasis added).) The Court explained that this "motion" does not satisfy the Court's order, and Plaintiff Smith subsequently filed a document listing the requested contact information for himself, Kish, and Archie, and only a telephone number, but no mailing address, for Holmes. (DE 83 at 7; DE 87.)

owned/administered the website for AFR, americansforreform.org. (*Id.* at 15-19, 22-23.) As Smith further explained at the hearing:

> Americans for Reform was set up as an idea to bring people together. There is what I would call a work in progress. At some point in time, we would look to organize it as an entity to actually have enrolled members and move forward. At this point in time, it was just an idea to collectively bring people together to stand up for injustices anywhere and everywhere.

(*Id.* at 22-23.)

Parties in federal court "may plead and conduct their own cases personally or by counsel...." *28 U.S.C. § 1654*. The statute "does not permit plaintiffs to appear *pro se* where interests **[*15]** other than their own are at stake." *Shepherd v. Wellman, 313 F.3d 963, 970 (6th Cir. 2002)*. *Federal Rule of Civil Procedure 11* provides that "[e]very pleading . . . must be signed . . . by a party personally if the party is unrepresented." *Fed. R. Civ. P. 11(a)*; *see also* *Arnold v. Heyns, No. 13-CV-14137, 2014 U.S. Dist. LEXIS 173243, 2014 WL 7184546, at *5 (E.D. Mich. Dec. 16, 2014)* (warning the *pro se* plaintiffs that filing a pleading without each plaintiffs' personal signature "would be a violation of *Rule 11* and could result in sanctions, including monetary sanctions, an unfavorable ruling on the motion or pleading at issue, or even dismissal of their claims."). The reason for such prohibition is to "'protect[] the rights of those before the court' by preventing ill-equipped laypersons from squandering the rights of the party he purports to represent." *Zanecki v. Health All. Plan of Detroit, 576 F. App'x 594, 595 (6th Cir 2014)* (quoting *Myers v. Loudon Cnty. Pub. Sch., 418 F.3d 395, 400 (4th Cir. 2005))*. Further, "[i]t has been the law for the better part of two centuries ... that a corporation may appear in federal courts only through licensed counsel." *Rowland v. California Men's Colony, Unit II Men's Advisory Council, 506 U.S. 194, 202, 113 S. Ct. 716, 121 L. Ed. 2d 656 (1993)* (citations omitted); *see also* *United States v. 9.19 Acres of Land, More or Less, in Marquette Cty., Mich., 416 F.2d 1244, 1245 (6th Cir. 1969)* ("[A] corporation cannot appear otherwise than through an attorney."). This rationale applies not only to corporations, but to all artificial entities. *Rowland, 506 U.S. at 202* (all artificial entities, such as corporations, partnerships, *or associations*, may only appear in federal court through a licensed attorney); *see also* *T.C. Bible Inst. v. City of Westland, No. 04-60224, 2005 U.S. Dist. LEXIS 51290, 2005 WL 2417634, at *3 (E.D. Mich. Sept. 30, 2005)* ("It is well settled law that a non-natural **[*16]** person, i.e., an 'artificial entity,' may not appear in the courts of the United States other than through an attorney.").

Accordingly, it was improper for Plaintiffs Smith and Kish, without counsel, to bring this action on behalf of Archie, Holmes and AFR, or any other person or entity. As explained above, neither Archie nor Holmes have signed the complaint or any other pleading in this matter and neither individual appeared before the Court, and neither Archie, Holmes nor AFR are represented by counsel. Accordingly, Ferzell Archie, Rush Holmes and Americans for Reform should be dismissed without prejudice as parties to this litigation.

2. Plaintiffs have failed to demonstrate that they have standing to pursue their claims

All Defendants argue that Plaintiffs' complaint should be dismissed because they have failed to allege facts demonstrating their standing to bring any of their claims. (DE 43 at 25-27; DE 45 at 20-23.) Defendants state that there is no allegation of any injury to these Plaintiffs, much less an actual or concrete injury. Plaintiffs respond that they have standing because they "have suffered an injury that requires them to purchase a no-fault auto insurance policy from **[*17]** the defendants but the defendants failed to procure them with an alternative method to a fair, equitable, affordable and reasonable no-fault policy." (DE 69 at 5.)

The requirements for standing are derived from Article III of the United States Constitution, which limits the jurisdiction of federal courts to justiciable cases and controversies. *Hollingsworth v. Perry, 570 U.S. 693, 704, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013)* (citing *U.S. Const. art. III, § 2*); *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 37, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)* ("No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies."). An essential feature of this requirement "is that any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth, 570 U.S. at 704*. The doctrine of standing ensures that a federal court's exercise of power is not "gratuitous" or "inconsistent" with the limitations imposed by Article III. *See*

Simon, 426 U.S. at 38. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond v. Charles, 476 U.S. 54, 62, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)*. Plaintiffs bear the burden of establishing standing. *Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*.

A plaintiff must satisfy three requirements to establish Article III standing: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, **[*18]** and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016)*. As this case is at the pleading stage, Plaintiffs "must clearly allege facts demonstrating each element." *Id.*

An injury in fact for purposes of Article III standing is defined as "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo, 136 S. Ct. at 1548*. The particularization component is necessary to establish an injury in fact and requires that the plaintiff be affected "in a *personal* and *individual* way." *Id.* (emphasis added, collecting cases). The injury must also be concrete, i.e. "de facto," meaning that it actually exists. *Id.*

Plaintiffs broadly assert in their response brief that they "have standing to bring their constitutional claims in Federal District Court" because they "have suffered an injury that requires them to purchase a no-fault auto insurance policy from the defendants but the defendants failed to procure them with an alternative method to a fair, equitable, affordable and reasonable no-fault policy." (DE 69 at 5.)

Here, Plaintiffs' complaint does not clearly allege facts that Plaintiffs Smith and Kish suffered any particularized **[*19]** and concrete injuries as a result of the no-fault insurance policies offered by insurance companies, such that they were affected "in a personal and individual way." *See* *Spokeo, 136 S. Ct. at 1548*. There is no allegation in the complaint that Plaintiffs Smith and Kish are policy holders of nofault policies issued by the Defendants, that they were overcharged for any no-fault policies issued by the Defendants, or even that they are drivers in Michigan. Instead, as the Insurance Defendants state, "Plaintiffs merely plead a *philosophical* stance that insurance rates in Michigan," and in particular for Detroit residents, are too high. (DE 45 at 22.) But Plaintiffs Smith and Kish fail to allege facts that they themselves suffered any concrete injury as a result of the allegedly wrongful conduct in this case.

Plaintiffs' vague and generalized assertions of possible injuries are simply insufficient under *Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)*, to meet their burden to demonstrate standing to bring this lawsuit. Defendants' motions to dismiss should be granted, and Plaintiffs' complaint should be dismissed in its entirety for lack of standing.

3. The Insurance Defendants are not "state actors" subject to constitutional claims

The Insurance Defendants also argue **[*20]** that, in addition to lacking standing, Plaintiffs' constitutional claims against them for alleged violations of due process and equal protection fail because the Insurance Defendants are not "state actors." (DE 45 at 23-25.)[5] Plaintiffs contend in response that the Insurance Defendants are state actors because they are "subjected to heavy state regulation to issue fair, equitable and affordable rates" and that there is "a sufficiently close nexus" between the State and the Insurance Defendants in setting rates that the actions of the Defendants may be treated as that of the State itself. (DE 69 at 12-15.)

A plaintiff alleging the violation of a right secured by the federal Constitution or laws must show that the deprivation was committed by a person acting under color of state law. *West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L.*

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[5] The Insurance Defendants and Director McPharlin also discuss a *Commerce Clause* claim in their motions. (DE 43 at 31; DE 45 at 9.) However, Plaintiffs' Complaint (DE 1 at Pg ID 1-7, 28-30) does not contain any allegation regarding the *Commerce Clause*. Allegations regarding the *Commerce Clause* only appeared in Plaintiffs' "civil action brief" attached to their complaint, which has been stricken. (DE 83 at 7.)

Ed. 2d 40 (1988). In order for a private party's conduct to be under color of state law, it must be "fairly attributable to the State." *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982)*. There must be "a sufficiently close nexus between the State and the challenged action of [the defendant] so that the action of the latter may be fairly treated as that of the State itself." *Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir. 1991)* (citing *Jackson v. Metro. Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974))*.

The Insurance Defendants here are private insurance companies, and Plaintiffs allege no **[*21]** facts that would demonstrate that their conduct in offering no-fault insurance policies in the State of Michigan should be deemed to be state action. Plaintiffs contend that the State's regulation of the no-fault insurance providers renders them state actors, relying on *Shavers I , supra*, and *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-51, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)*. The constitutionality of the *Michigan No-Fault Act* was originally challenged in *Shavers I*, where the Court found that the mechanism for determining rates was constitutionally deficient, but could be cured through legislation or administrative rules defining when a rate is "excessive, inadequate or unfairly discriminatory." *Shavers I, 402 Mich. at 602-03*. The Michigan Legislature subsequently adopted the *Essential Insurance Act*, which, in turn, cured this deficiency and created the current regulatory scheme governing ratemaking for auto and home insurance. *MCL §§ 500.2101-.2138*. The Michigan Supreme Court then approved this legislative response in *Shavers v. Attorney General of Michigan, 412 Mich. 1105, 315 N.W.2d 130 (1982)* (*Shavers II*), noting that there were no further constitutional challenges pending.

Although the Michigan Supreme Court in *Shavers I* found the insurance companies in that case to be state actors under the Michigan and United States Constitutions because "insurance companies are the instruments through which the Legislature **[*22]** carries out a scheme of general welfare," *Shavers I, 402 Mich. at 597*, the United States Supreme Court has afterward "consistently held that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the *Fourteenth Amendment*.'" *American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 52, 119 S. Ct. 977, 143 L. Ed. 2d 130 (1999)* (quoting *Jackson, 419 U.S. at 350*); *see also* *Rendell-Baker v. Kohn, 457 U.S. 830, 102 S. Ct. 2764, 73 L. Ed. 2d 418, (1982)* (holding private school's personnel decisions not attributable to the state, despite "extensive regulation of the school generally"); *Blum v. Yaretsky, 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534 (1982)* (refusing to hold New York State responsible for nursing home's patient transfer decision, "although it is apparent that nursing homes in New York are extensively regulated"); *Adams v. Vandemark, 855 F.2d 312 (6th Cir. 1988)* (holding private not-for-profit corporation was not a state actor, even though subject to state and federal regulation). Further, in *Jackson v. Metropolitan Edison Co., 419 U.S. 345, 358, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974)*, upon which Plaintiffs expressly rely, the Supreme Court refused to find state action in the electric company's decision to terminate service, notwithstanding that it was "a heavily regulated utility with at least something of a governmentally protected monopoly," because that "is not sufficient to connect the State ... with respondent's action so as to make the latter's conduct attributable to the State for purposes of the *Fourteenth Amendment*." The Sixth Circuit has explained that **[*23]** "it is now well-established that state regulation, even when extensive, is not sufficient to justify a finding of a close nexus between the state and the regulated entity." *Lansing v. City of Memphis, 202 F.3d 821, 830 (6th Cir. 2000)* (citations omitted).

Thus, the Insurance Defendants "will not be held to constitutional standards unless 'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" *Sullivan, 526 U.S. at 52* (quoting *Jackson, 419 U.S. at 350*). "Whether such a 'close nexus' exists ... depends on whether the State 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Id.* (citations omitted). Plaintiffs here have failed to make this showing. While the Insurance Defendants are regulated by the State, such regulation alone is not enough to turn them into state actors, and Plaintiffs have failed to plead or otherwise show that the Insurance Defendants' provision of no-fault insurance and setting of rates has been significantly encouraged or coerced by the State or that the Insurance Defendants' actions are ones traditionally reserved to the State **[*24]** such that their actions should be attributed to the State. As the Supreme Court explained in *Sullivan*, "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action." *Id.* (citations omitted).[6] The Insurance Defendants also cite to settled case law consistently holding that private insurers are not state actors, even though subject to state regulation. (DE 45 at 25-25, citing *State Farm Mut. Auto. Ins. Co. v. Physiomatrix, Inc., No. 12-11500, 2013 U.S. Dist. LEXIS 18501, 2013 WL 509284, at *20-21 (E.D. Mich. Feb. 12, 2013)* (dismissing federal civil rights claims, holding State Farm was not state actor because it adjudicated some claims assigned to it through Michigan's No Fault statutory mechanism); *Guinn v. Farmers Ins. Co., 563 F. App'x 653, 654-55 (10th Cir. 2014)* (dismissing constitutional claims against Farmers Insurance, holding it was not state actor simply because it provided auto insurance in a state requiring drivers to carry such insurance); *Williams v. Progressive Ins. Co., No. 4:16-CV-01214 JAR, 2017 U.S. Dist. LEXIS 44938, 2017 WL 1155894, at *2 (E.D. Mo. Mar. 28, 2017)* (dismissing constitutional claims because "it is well established that private insurers are not state actors for purposes of a *Section 1983* claim."); *Anderson v. State Farm Fire & Cas., 2010 U.S. Dist. LEXIS 25712, 2010 WL 1009740, at *3 (S.D. Ala. Feb. 19, 2010)* (dismissing *§ 1983* claims because, "[i]n general, private insurers . . . are not state actors and are not subject to suit under *§ 1983*.").) *See also* *Jackson v. IDS Prop. & Cas. Ins. Co., No. 1:14-cv-524, 2014 U.S. Dist. LEXIS 81375, 2014 WL 2711973 (W.D. Mich. June 16, 2014)* ("Plaintiff's complaint contains **[*25]** no allegation of facts that would remotely suggest that the defendant insurance company acted under color of state law when it denied her no-fault benefits."); *Hayes v. Allstate Ins. Co., 95 F.Supp.2d 832, 836 (W.D. Tenn. 2000)* ("It is clear that Allstate is not acting under color of state law, and that it cannot be considered a government actor merely because it does business in a heavily regulated industry.").

Because Plaintiffs' complaint fails to allege any facts which would justify treating the Insurance Defendants as state actors, all constitutional claims alleged against these defendants should be dismissed with prejudice.

4. Plaintiffs' constitutional claims against Director McPharlin are barred by sovereign immunity and/or qualified immunity

a. *Eleventh Amendment* immunity

Director McPharlin argues that Plaintiffs' claims against him in his official capacity are barred by the *Eleventh Amendment*. Plaintiffs do not address this argument in their response.

The *Eleventh Amendment* bars suits in federal court against state officers acting in their official capacity. *Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*. This is because a suit against a state employee in his official capacity is tantamount to a suit against the state itself and must be dismissed based on *Eleventh Amendment* immunity. *See* *U.S. ex rel. Diop v. Wayne Cty. Cmty. Coll. Dist., 242 F. Supp.2d 497, 515 (E.D. Mich. 2003)* (citing *Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985))*.

Initially, as Director McPharlin accurately states in his **[*26]** motion, he is not named anywhere in the Complaint except the caption, and there are no specific allegations levied against him. Accordingly Plaintiffs' complaint against Director McPharlin should be dismissed on this basis because "[w]here a complaint alleges no specific act or conduct on the part of the defendant and the complaint is silent as to the defendant except for his name appearing in the caption, the complaint is properly dismissed, even under the liberal construction to be given pro se complaints." *Potter v. Clark, 497 F.2d 1206, 1207 (7th Cir. 1974)* (citation omitted); *Webb v. Caruso, No. 1:06-cv-3, 2006 U.S. Dist. LEXIS 8658, 2006 WL 416261, at *4 (W.D. Mich. Feb. 22, 2006)* (same).

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[6] Further, Plaintiffs offer no factual support for the contention raised in their response brief (but not in their complaint) that the Insurance Defendants' payment into the Michigan Catastrophic Claims Association (MCCA) constitutes state action. The MCCA is a nonprofit association of private insurers that, by statute, is required to assess premiums on its member insurers to fund its reimbursement obligations and operating expenses for claims which exceed a designated amount. *MCL § 500.3104(7)(d)*. The Michigan Supreme Court has recognized that the MCCA is not a state agency, *see* *League Gen. Ins. Co. v. Michigan Catastrophic Claims Ass'n, 435 Mich. 338, 458 N.W.2d 632, 638 (Mich. 1990)*, and Plaintiffs have failed to show how Defendants' payment into this fund renders them state actors.

To the extent Director McPharlin is arguably included as one of "the defendants," as stated in the complaint, and Plaintiffs seek to assert a claim against him solely because he is the Director of the DIFS, presumably in his role regulating the rates set by insurance companies, such claims would necessarily involve Director McPharlin acting within the scope of his duties and would be shielded by sovereign immunity. *See* Will, 491 U.S. at 71. Accordingly, Plaintiffs' claims against Director McPharlin — all of which would appear to be alleged against him in his official capacity (if any) — should be dismissed with prejudice.

b. Qualified immunity [*27]

Director McPharlin also argues that to the extent Plaintiffs' claims are asserted against him in his personal capacity, they are barred by qualified immunity. (DE 43 at 21-24.) Plaintiffs respond that the Director knowingly allowed non-party L.A. Insurance to have a monopoly on 7-day insurance policies, which "clearly violates the no-fault act statutory requirements," and thus he is not entitled to qualified immunity. (DE 69 at 17-18.)

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (internal citation and quotation omitted). The Court conducts a two-step analysis in assessing qualified immunity. First, the Court determines whether "the violation of a constitutional right has occurred" and second, whether the "constitutional right at issue was clearly established at the time of defendant's alleged misconduct." Grawey v. Drury, 567 F.3d 302, 309 (6th Cir. 2009). While the better approach in resolving cases in which qualified immunity is raised is to "determine first whether the plaintiff has alleged a deprivation of a constitutional right at **[*28]** all," before moving onto step two, this order of analysis is not mandatory. County of Sacramento v. Lewis, 523 U.S. 833, 842 n.5, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998); Pearson, 555 U.S. at 236 (holding that courts analyzing claims of qualified immunity are not required to first determine whether the facts shown by plaintiff demonstrate a constitutional violation before determining whether the right was clearly established). A constitutional violation is clearly established where there is "on-point, controlling authority or a 'robust consensus of cases of persuasive authority.'" Ortega v. U.S. Immigration & Customs Enforcement, 737 F.3d 435, 439 (6th Cir. 2013) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)).

Plaintiffs' complaint is devoid of any allegations that Director McPharlin violated their constitutional rights, and it should be dismissed on that basis. At best, the Complaint generally alleges "violation of federal rights of a protected class of citizens," who are seemingly no-fault insurance policy holders, but Plaintiffs fail to allege to which protected class they belong or provide any facts supporting their assertion that "the punishment for not having no-fault insurance violates due process of law." (*See* DE 1 at 6.) Further, Plaintiffs have failed to meet their burden to show that Director McPharlin violated a "clearly established right" when enforcing the No-Fault Insurance Act. As he **[*29]** states in his motion, he is following the Insurance Code, as required, and Plaintiffs have failed to show otherwise. Soon after the passage of the No-Fault Act, the Michigan Supreme Court issued an order determining that no-fault insurance is constitutional, *see* Shavers II, 412 Mich. at 1105 , and it has subsequently held that it is not unfairly discriminatory for insurers to base insurance rates on credit scores, age, income, territory, and other factors, provided the rating plan "'reflects reasonably anticipated reductions in losses and expenses' and is uniformly applied to all of the insurer's insureds." Insurance Inst. of Mich. v. Comm'r, Fin. & Ins. Servs., Dep't of Labor & Econ. Growth, 486 Mich. 370, 400-01, 785 N.W.2d 67 (2010).

Plaintiffs' unsupported assertion, raised for the first time in their response brief, that Director McPharlin somehow allows non-party L.A. Insurance to have a monopoly on a 7-day insurance policy, fails to defeat Director McPharlin's qualified immunity defense. Plaintiffs have not alleged that any other insurer has sought but been denied the ability to offer similar 7-day policies, or that L.A Insurance Company's 7-day policy is the only available alternative to no-fault insurance policy obtained through "ordinary methods," and fails to demonstrate how this violates a clearly established right.

Accordingly, **[*30]** Director McPharlin is protected by qualified immunity and Plaintiffs' claims against him in his personal capacity, if any, should be dismissed with prejudice.

5. Plaintiffs' antitrust claims should be dismissed

First, although not argued by the parties, the Court notes that the complaint fails to identify the "antitrust laws" Plaintiffs allege to have been violated, and thus fails to comply with *Fed. R. Civ. P. 8(a)(2)*, which requires a "short and plain statement of the claim showing that the pleader is entitled to relief[.]" Defendants nevertheless make a reasonable assumption and address this claim as an alleged violation of the Sherman Act, and in Plaintiffs' response brief, they also broadly refer to *Section 1 of the Sherman Act*. To the extent Plaintiffs assert a claim under that section, it fails for the reasons set forth below.

a. Plaintiffs' antitrust claims against Director McPharlin are barred by *Parker v. Brown*

Director McPharlin argues that Plaintiffs' vague allegations that he engaged in price fixing, price discrimination and monopolization in violation of the "Antitrust Act," in his role as Director of the Department of Insurance and Financial Services, should be dismissed because such claims against the **[*31]** State are barred by *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315* (1943.) Plaintiffs fail to specifically respond to these arguments, but instead contend that the State, through Director McPharlin, somehow allows L.A. Insurance to have a monopoly on 7-day insurance policies. (DE 69 at 18-20.)

The Sherman Act *Section 1* makes illegal "[e]very contract, combination ... or conspiracy in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. *Section 2* makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." *15 U.S.C. § 2*. However, as the Supreme Court recognized in *Parker v. Brown, 317 U.S. 341, 351, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, "[t]he Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by the state. The Act is applicable to 'persons' including corporations[.]" The "state action" doctrine described in *Parker* was explained further in *Hoover v. Ronwin, 466 U.S. 558, 567-69, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*, where the Court explained that "[t]hus, under the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the State, ... and *ipso facto* are exempt from the operation of the antitrust laws."

Because Director McPharlin is **[*32]** directed by the Michigan Legislature, through the Insurance Code, to regulate the business of insurance in Michigan, he is exempt from liability under the Sherman Act pursuant to *Parker. See Michigan Paytel Joint Venture v. City of Detroit, 287 F.3d 527, 534 (6th Cir. 2002)* (explaining that the Supreme Court held in *Parker* that states as sovereigns are exempt from antitrust liability under the Sherman Act). As cited by the Director, the Michigan Legislature has determined that "an insurer may use factors ... for insurance if the plan ... reflects reasonably anticipated reductions or increases in losses or expenses." *MCL 500.2110a*; *see also MCL 500.2403(1)(c)*; *MCL 500.2603(1)(c)* ("[R]ating plans may measure any differences among risks that may have a probable effect upon losses or expenses...."); *Insurance Inst. of Michigan, 486 Mich. at 400* (holding the Insurance Code allows insurers to consider credit scores when determining premium discounts). Accordingly, Plaintiffs' antitrust claims against Director McPharlin should be dismissed.

b. Plaintiffs' claims against the Insurance Defendants are pre-empted by the McCarran-Ferguson Act

The Insurance Defendants argue that the *McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq.*, expressly bars a federal action against them under the antitrust statutes where the activity at issue is part of the "business of insurance" and does not constitute **[*33]** an act of boycott, coercion or intimidation. (DE 45 at 25-29, citing *15 U.S.C. § 1012(b)*). Defendants contend that because auto insurance is extensively regulated by the State of Michigan, and because setting auto insurance rates clearly constitutes the "business of insurance," the McCarran-

Ferguson Act bars Plaintiffs' federal antitrust claims. Plaintiffs respond that their antitrust claim is not a claim for Congress to regulate the business of insurance, but instead it suggests that the Insurance Defendants are attempting to monopolize 7-day nofault insurance policies and restraining competition. (DE 69 at 18-20.)

In *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979)*, the Supreme Court noted that in enacting the McCarran-Ferguson Act, "the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id. at 221*. The Supreme Court has developed a three-part test for determining whether particular conduct constitutes the "business of insurance" within the meaning of McCarran-Ferguson:

1. whether the practice has the effect of transferring or spreading a policyholder's risk;

2. whether the practice is an integral part of the policy relationship between the insurer and **[*34]** the insured; and

3. whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129, 102 S. Ct. 3002, 73 L. Ed. 2d 647 (1982) (citing *Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 99 S. Ct. 1067, 59 L. Ed. 2d 261 (1979))*. Plaintiffs' contention in their complaint — that the use of "non-driving factors" to determine auto insurance rates and premiums violates federal law and causes excessive rates — thus easily satisfies these criteria. *See* *SEC v. National Sec., Inc., 393 U.S. 453, 460, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)* ("Certainly the fixing of rates is part of [the business of insurance]."). As the Sixth Circuit has concluded, rate-making is a key part of insurance regulation and cooperative rate-making is therefore exempt from antitrust laws. *See* *Katz v. Fid. Nat'l Title Ins. Co., 685 F.3d 588, 593-94 (6th Cir. 2002)* ("Because title-insurance rate-setting spreads some risk, and is a foundational piece of the policy relationship between the insurer and the insured, and has no application outside the context of insurance, it is clearly part of the business of insurance, within the meaning of *Pireno*."). Other federal courts have similarly concluded that rate-setting for insurance constitutes the "business of insurance" for purposes of the McCarran-Ferguson Act. *See, e.g.,* *Slagle v. ITT Hartford, 102 F.3d 494, 498 (11th Cir. 1996)* ("conclud[ing] that appellees' alleged rate-fixing conduct is the 'business of insurance'"); *Royal Drug Co., 440 U.S. at 224, n.32* ("It is clear from the legislative history [of the McCarran-Ferguson Act] that the **[*35]** fixing of rates is the 'business of insurance.'"); *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield, 883 F.2d 1101, 1108 (1st Cir. 1990)* (the marketing and pricing of insurance policies is the business of insurance).

Plaintiffs' allegation, raised for the first time in their response brief, that the State is attempting to monopolize the 7-day no-fault insurance policies and restraining competition by only granting non-party L.A. Insurance Company a license to issue a 7-day insurance policy, does not involve the Insurance Defendants and thus fails to assert a claim against them. But, in any event, such a claim would also be barred by the McCarran-Ferguson Act. *See* *SEC v. National Sec., Inc., 393 U.S. 453, 460, 89 S. Ct. 564, 21 L. Ed. 2d 668 (1969)* (noting "[t]he selling and advertising of policies" are part of the "business of insurance" under the McCarran-Ferguson Act); *Ocean State Physicians, 883 F.2d at 1108* ("The exemption offered to state-regulated insurance activities by the McCarran-Ferguson Act would be thin indeed if it were deemed to cover the content of policies, but not the marketing and pricing activities which necessarily accompany these policies.").

"In short, the McCarran-Ferguson act, which restores to the states the exclusive power to regulate the insurance industry except where Congress specifically acts to supplant that authority, bars the Plaintiffs from challenging the **[*36]** alleged conduct as a violation of the federal antitrust laws." *Bristol Hotel Mgmt. Corp. v. Aetna Cas. & Sur. Co., 20 F.Supp.2d 1345, 1349 (S.D. Fla. 1998)*. Accordingly, Plaintiffs' antitrust claims against the Insurance Defendants should be dismissed.

c. Plaintiffs' complaint fails to state a claim for violation of the Sherman Act

The Insurance Defendants also argue that Plaintiffs' complaint fails to state the basic elements of an antitrust violation, because they have not alleged an injury, and have not pleaded facts sufficient to show an agreement between the Insurance Defendants or any kind of monopoly. (DE 45 at 29-32.) Plaintiffs suggest that "discovery will reveal evidence of an agreement with the director and the defendants to place restraints on commerce by monopolizing a 7-day price-fixing no-fault insurance scheme marketed to motorist [sic] without any competition in the market place who are unable to secure no-fault insurance through ordinary methods." (DE 69 at 18.)

In order to state a cause of action under *Section 1* of the Sherman Act, "the plaintiff must establish that the defendants contracted, combined or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within relevant product and geographic markets, that the objects **[*37]** of and conduct pursuant to that contract or conspiracy were illegal and that the plaintiff was injured as a proximate result...." *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 805 (6th Cir. 1988)*; *see also* *White and White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 504 (6th Cir. 1983)* (explaining that the essential elements of a violation of *Section 1* of the Sherman Act are: (1) a contract, combination or conspiracy; (2) affecting interstate commerce; (3) which imposes an "unreasonable" restraint of trade). *Section 2* of the Sherman Act has two elements: "(1) possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*; *Re/Max Intern. Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)*. Monopoly power is "'the power to control prices or exclude competition,'" which may ordinarily "be inferred from the predominant share of the market." *Grinnell, 384 U.S. at 571* (noting that cases in which the Court previously found monopoly power involved defendants possessing over two-thirds, 80%, or 90% of the relevant market).

Plaintiffs' complaint lacks any allegations of a contract, combination or conspiracy, or any other agreement among and between the Defendants within the meaning of *Section 1* of the Sherman Act, which resulted in an unreasonable restraint on trade. Plaintiffs **[*38]** only broadly and conclusorily claim that "[t]he defendants['] actions to fix no-fault auto insurance rates using price fixing restraints, price discrimination and monopolization violates [the] antitrust act." (DE 1 at 5.) However, Plaintiffs assert no allegations identifying which of the Defendants allegedly conspired, how they did so, or any other facts in support of an agreement violative of the Sherman Act. The Supreme Court has made it clear that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *See* *Twombly, 550 U.S. at 556* ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."). There can be no liability under *Section 1* of the Sherman Act in the absence of a conspiracy, agreement, or other concerted action by separate entities to restrain trade. *See* *Total Benefits Planning Agency Inc. v. Anthem Blue Cross & Blue Shield, 630 F.Supp.2d 842, 851 (S.D. Ohio 2007)* (finding plaintiffs' allegations that "the Anthem Defendants and the other Defendants had agreement and common understanding regarding price to be charged" insufficient to survive a motion to dismiss). In addition, the allegations asserted **[*39]** for the first time in Plaintiffs' response brief, regarding non-party L.A. Insurance and 7-day insurance policies, fails to state a claim for Sherman Act violations by the Insurance Defendants.

Further absent from the complaint are facts or allegations sufficient to support a claim under *Section 2* of the Sherman Act, to the extent Plaintiffs seek to assert one. Other than the conclusory use of the term "monopolization," Plaintiffs have not alleged any facts showing a predominant market share by any of the defendants, fail to define the relevant market adequately, and thus have failed to state a claim under *Section 2* of the Sherman Act. *See* *Grinnell, 384 U.S. at 571*.

Both the United States Supreme Court and the Sixth Circuit have stressed the importance of insisting on specificity in antitrust pleadings to avoid exposing defendants to potentially massive factual discovery costs. *See* *Twombly, 550 U.S. at 558* ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive"); *Foundation for Interior Design Educ. Research v. Savannah Coll. of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001)* ("While the pleading standard under the federal rules is very liberal ... 'the price of entry [into the federal courts on a private antitrust claim], even to discovery, **[*40]** is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome.'") (quoting *DM Research, Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 55*

(1st Cir. 1999)). Plaintiffs' allegations in their complaint are wholly insufficient to plead a claim for a Sherman Act violation and that claim should be dismissed.[7]

6. Defendant Progressive Casualty should be dismissed

Defendant Progressive Casualty filed a separate motion to dismiss in which it asserts that Plaintiffs' claims against it fail for a separate reason: it has not written personal automobile insurance policies in Michigan in at least fifteen years and thus cannot be liable for the allegations in Plaintiffs' complaint. (DE 46.) Plaintiffs wholly failed to respond to this motion in their response brief.

The Court takes judicial notice of Michigan's DIFS publication of "Companies that are Licensed and Filed to Insure Personal Automobiles and/or Miscellaneous Vehicles in Michigan 4-17-18," http://www.michigan.gov/documents/cis_ofis_apa_list_25522_7.pdf, and notes that Progressive Casualty is not identified as a company licensed to write personal automobile insurance in Michigan. *See* *Fed. R. Evid. 201(b)(2)* (court may take judicial notice of facts that "can be accurately **[*41]** and readily determined from sources whose accuracy cannot reasonably be questioned"); *New England Health Care Employees Pension Fund v. Ernst & Young, LLP, 336 F.3d 495, 501 (6th Cir. 2003)* ("A court that is ruling on a *Rule 12(b)(6)* motion may consider materials in addition to the complaint if such materials are public records or are otherwise appropriate for the taking of judicial notice."); *Hebshi v. United States, 12 F.Supp.3d 1036, 1043 (E.D. Mich. 2014)* ("In ruling on a motion to dismiss, the Court may consider the complaint as well as (1) documents that are referenced in the plaintiff's complaint or that are central to plaintiff's claims, (2) matters of which a court may take judicial notice, and (3) documents that are a matter of public record."); *Overall v. Ascension, 23 F.Supp.3d 816, 824-25 (E.D. Mich. 2014)* ("The Court may take judicial notice of public documents and government documents because their sources 'cannot reasonably be questioned.'"). Because Plaintiffs' complaint challenges Michigan no-fault automobile insurance policies, and Defendant Progressive Casualty's unopposed motion states that Progressive Casualty has not been involved in writing personal automobile insurance policies in Michigan for at least fifteen years, Plaintiffs' claims against Progressive Casualty fail, and their claims against Progressive Casualty should be dismissed for this reason as well.

F. Conclusion

For the reasons set forth above, **[*42]** the Court should grant Defendants' respective motions to dismiss (DEs 43, 45, 46) and **DISMISS** putative Plaintiffs Ferzell Archie, Rush Holmes and Americans for Reform **without prejudice**, and **DISMISS** Plaintiffs Ray Smith's and Barret Kish's claims in this matter **with prejudice**.

III. PROCEDURE ON OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in *Federal Rule of Civil Procedure 72(b)(2)* and *Local Rule 72.1(d)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1981)*. Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sullivan, 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v.*

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[7] The Insurance Defendants also present compelling arguments that Plaintiffs' antitrust claims are barred by the filed-rate doctrine and should be dismissed for failure to exhaust available administrative remedies. (DE 45 at 25-29, 32-36.) However, because I conclude that Plaintiffs have failed to demonstrate they have standing to pursue their claims, their antitrust claims are barred by the McCarran-Ferguson Act, and that their complaint fails to state an antitrust claim, the Court need not address these additional arguments.

Detroit Federation of Teachers, Local 231, etc., 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to *Local Rule 72.1(d)(2)*, any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No. 2," *etc.* Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. *Fed. R. Civ. P. 72(b)(2)*; E.D. Mich *LR 72.1(d)*. The response **[*43]** must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to Objection No. 2," *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

Dated: May 11, 2018

/s/ Anthony P. Patti

Anthony P. Patti

UNITED STATES MAGISTRATE JUDGE

Authenticom, Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig.)

United States District Court for the Northern District of Illinois, Eastern Division

May 14, 2018, Decided; May 14, 2018, Filed

Case No. 18 CV 864

Reporter
313 F. Supp. 3d 931 *; 2018 U.S. Dist. LEXIS 80937 **; 2018-1 Trade Cas. (CCH) P80,383; 2018 WL 2193236

IN RE: DEALER MANAGEMENT SYSTEMS ANTITRUST LITIGATION. This Document Applies to: Authenticom, Inc. v. CDK Global, LLC, Case No. 18 CV 868

Subsequent History: Motion granted by *In re Dealer Mgmt. Sys. Antitrust Litig., 2018 U.S. Dist. LEXIS 242163, 2018 WL 11260473 (N.D. Ill., Aug. 14, 2018)*

Motion denied by *In re Dealer Mgmt. Sys. Antitrust Litig., 2018 U.S. Dist. LEXIS 242130, 2018 WL 11260509 (N.D. Ill., Aug. 21, 2018)*

Later proceeding at *In re Dealer Mgmt. Sys. Antitrust Litig., 2018 U.S. Dist. LEXIS 242140 (N.D. Ill., Aug. 21, 2018)*

Motion denied by *Dealer Mgmt. Sys. Antitrust Litig. v. CDK Global, 2018 U.S. Dist. LEXIS 214398 (N.D. Ill., Oct. 22, 2018)*

Motion granted by, in part, Motion denied by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 2018 U.S. Dist. LEXIS 197044, 2018 WL 6047082 (N.D. Ill., Nov. 19, 2018)*

Motion granted by, in part, Motion denied by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 2018 U.S. Dist. LEXIS 197042 (N.D. Ill., Nov. 19, 2018)*

Motion granted by, Motion denied by *In re Dealer Mgmt. Sys. Antitrust Litig., 2018 U.S. Dist. LEXIS 206588, 2018 WL 6413199 (N.D. Ill., Dec. 6, 2018)*

Motion granted by, Objection overruled by *In re Dealer Mgmt. Sys. Antitrust Litig., 2019 U.S. Dist. LEXIS 115900, 2019 WL 11583407 (N.D. Ill., Jan. 17, 2019)*

Dismissed by, in part, Motion denied by, in part *Authenticom, Inc. v. CDK Global, Inc. (In re Dealer Mgmt. Sys. Antitrust Litig.), 362 F. Supp. 3d 558, 2019 U.S. Dist. LEXIS 12155, 2019 WL 331673 (N.D. Ill., Jan. 25, 2019)*

Motion denied by *In re Dealer Mgmt. Sys. Antitrust Litig., 362 F. Supp. 3d 477, 2019 U.S. Dist. LEXIS 12148, 2019 WL 330472 (N.D. Ill., Jan. 25, 2019)*

Motion granted by, in part, Motion denied by, in part, Dismissed by, in part *Cox Auto., Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig.), 360 F. Supp. 3d 788, 2019 U.S. Dist. LEXIS 12147, 2019 WL 331257 (N.D. Ill., Jan. 25, 2019)*

Motion granted by, Motion denied by, Dismissed by, in part, Motion denied by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., MDL 2817, 362 F. Supp. 3d 510, 2019 U.S. Dist. LEXIS 12157 (N.D. Ill., Jan. 25, 2019)*

Motion denied by, Stay denied by *In re Dealer Mgmt. Sys. Antitrust Litig., 2019 U.S. Dist. LEXIS 139516, 2019 WL 3884036 (N.D. Ill., Aug. 16, 2019)*

Motion denied by, in part, Motion denied by, in part, Without prejudice *In re Dealer Mgmt. Sys. Antitrust Litig., 2019 U.S. Dist. LEXIS 208207, 2019 WL 6498081 (N.D. Ill., Dec. 3, 2019)*

Motion denied by, Without prejudice, Stay granted by, Motion granted by, Stay granted by *i3 Brands, Inc. v. CDK Global, LLC (In re Dealer Mgmt. Sys. Antitrust Litig., MDL 2817), 2020 U.S. Dist. LEXIS 29052, 2020 WL 832365 (N.D. Ill., Feb. 20, 2020)*

Motion granted by, in part, Motion denied by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 2020 U.S. Dist. LEXIS 246422, 2020 WL 7865915 (N.D. Ill., Mar. 30, 2020)*

Motion granted by, in part, Motion denied by, in part, Motion denied by, Without prejudice, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 335 F.R.D. 510, 2020 U.S. Dist. LEXIS 99767, 2020 WL 3050280 (N.D. Ill., June 8, 2020)*

Motion granted by, in part, Motion denied by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 2020 U.S. Dist. LEXIS 246554, 2020 WL 7865912 (N.D. Ill., June 29, 2020)*

Motion granted by, in part, Motion denied by, in part *In re Dealer Mgmt. Sys. Antitrust Litig., 581 F. Supp. 3d 1029, 2022 U.S. Dist. LEXIS 11261, 2022 WL 199274 (N.D. Ill., Jan. 21, 2022)*

Summary judgment granted by *In re Dealer Mgmt. Sys. Antitrust Litig., MDL 2817, 2023 U.S. Dist. LEXIS 113273 (N.D. Ill., June 29, 2023)*

Summary judgment granted by *In re Dealer Mgmt. Sys. Antitrust Litig., 2023 U.S. Dist. LEXIS 113280 (N.D. Ill., June 29, 2023)*

Prior History: *In re Dealer Mgmt. Sys. Antitrust Litig., 291 F. Supp. 3d 1367, 2018 U.S. Dist. LEXIS 17074, 2018 WL 671499 (J.P.M.L., Feb. 1, 2018)*

Core Terms

dealers, vendors, Defendants', allegations, antitrust, integration, block, third-party, customers, prices, pleads, data-integration, competitors, contracts, aftermarket, motion to dismiss, anticompetitive, anti trust law, authorization, purchaser, consumers, courts, costs, third party, accessing, providers, dealerships, licenses, Sherman Act, conspiracy

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN1[] **Motions to Dismiss, Failure to State Claim**

A motion to dismiss pursuant to *Fed. R. Civ. P. 12(b)(6)* challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted. Under *Fed. R. Civ. P. 8(a)(2)*, a complaint must include a short and plain statement of the claim showing that the pleader is entitled to relief. *Fed. R. Civ. P. 8(a)(2)*. To survive a

Rule 12(b)(6) challenge, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Courts accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff's favor. After excising the allegations not entitled to the presumption of truth, courts determine whether the remaining factual allegations plausibly suggest an entitlement to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Motion Practice > Opposing Memoranda

HN2[] Motions to Dismiss, Failure to State Claim

In addition to well-pleaded facts, a court ruling on a motion to dismiss can rely on the complaint itself, documents attached to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice. Further, although a complaint may not be amended by the briefs in opposition to a motion to dismiss, courts may consider additional facts set forth in a brief opposing dismissal so long as those facts are consistent with the pleadings. Materials or elaborations in appellants' brief opposing dismissal may be considered, so long as those materials or elaborations are consistent with the pleadings. A court may consider additional facts set forth in the plaintiff's brief opposing dismissal, so long as those additional facts are consistent with the pleadings. To the extent that an exhibit attached to or referenced by the complaint contradicts the complaint's allegations, the exhibit takes precedence.

Antitrust & Trade Law > Sherman Act > Defenses

HN3[] Sherman Act, Defenses

A plaintiff's wrongdoing is not a defense to an antitrust suit. The in pari delicto doctrine, a common-law defense that curbs or bars recovery where the claimant is also at fault for his or her injury, is not to be recognized as a defense to an antitrust action. Proof of the plaintiff's unrelated unlawful conduct is not a valid in pari delicto defense to an antitrust charge. The common-law form of the in pari delicto defense is not available to defendants in antitrust lawsuits.

Antitrust & Trade Law > Sherman Act > Defenses

HN4[] Sherman Act, Defenses

A wrongful act committed against one who violates the antitrust laws must not become a shield in the violator's hands against operation of the antitrust laws. This is particularly true when the defendant has other remedies available to him or her.

Antitrust & Trade Law > Sherman Act > Scope

HN5[] Antitrust & Trade Law, Sherman Act

Section 1 of the Sherman Act declares illegal every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C.S. § 1.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Types of Evidence > Circumstantial Evidence

HN6[] Sherman Act, Claims

To state a Section 1 of the Sherman Act, 15 U.S.C.S. § 1, claim, a plaintiff must plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (meaning, an agreement), (2) a resulting unreasonable restraint of trade in a relevant market, and (3) an accompanying injury. Plausibly pleading the first element, an agreement, requires enough factual matter (taken as true) to suggest that an agreement was made, that is, enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Plaintiffs can do this in one of two ways, by pleading either direct or circumstantial evidence of an illegal agreement. Direct evidence of an agreement is explicit and requires no inferences to establish the proposition or conclusion being asserted. Simply, direct evidence constitutes a "smoking gun." Circumstantial evidence, in contrast, is facts from which the existence of such an agreement can be inferred. Mere allegations of "parallel conduct," without more, do not tend to exclude the possibility of independent action, and are therefore insufficient.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN7[] Sherman Act, Claims

The second element of a Section 1 of the Sherman Act, 15 U.S.C.S. § 1, claim, an unreasonable restraint, hinges on whether the alleged violation is per se unreasonable or is, instead, subject to the rule of reason. Per se violations, those with which courts have "considerable experience" and inevitably result in a finding of anticompetitive effect, are presumed to be unreasonable restraints on trade. An unreasonable restrain is conclusively presumed once the first element is proved in per se cases. Rule-of-reason violations, however, require that a plaintiff plead "anticompetitive effects," and that the injury complained of be of a type that the antitrust laws were designed to guard against, and further that the antitrust violation be the direct cause of the plaintiff's injury. Rule of reason ultimately requires the factfinder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. The rule-of-reason inquiry requires, at the motion to dismiss stage, that the plaintiff identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market.

Antitrust & Trade Law > Sherman Act > Claims

HN8[] Sherman Act, Claims

Alleging the third element of a Section 1 of the Sherman Act, 15 U.S.C.S. § 1, claim, antitrust injury, requires pleading an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Evidence > Types of Evidence > Circumstantial Evidence

HN9[] **Conspiracy to Monopolize, Elements**

Admissions by employees of the conspirators are textbook examples of adequate direct-evidence allegations. An admission by an insider constitutes direct evidence of agreement.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN10[] **Per Se Rule & Rule of Reason, Per Se Violations**

Joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle merit per se treatment.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN11[] **Motions to Dismiss, Failure to State Claim**

A court ruling on a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible. Instead, the court abdicates probability weighing, assumes that all the well-pleaded allegations in the complaint are true (even if doubtful in fact), and decides whether the totality of those allegations "suggest that an agreement was made.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

HN12[] **Sherman Act, Claims**

A plaintiff must present evidence showing that defendants had a rational economic motive to conspire and evidence that tends to exclude the possibility of independent conduct to survive summary judgment. However, the bars are not set at the pleading stage. Courts must be careful not to import the summary-judgment standard into the motion-to-dismiss stage. Although articulation of the pleading standard for *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, cases draws from summary judgment jurisprudence, the standards applicable to *Fed. R. Civ. P. 12(b)(6)* and *56* motions remain distinct.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints

HN13[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A competitor cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually benefit competitors by making supracompetitive pricing more attractive.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN14[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

When a horizontal merger, price fixing, market division, or similar collaboration among competitors substantially reduces competition, consumers suffer while existing rivals benefit.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN15[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

An exclusive dealing contract obliges a firm to obtain its inputs from a single source. The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement. Courts, however, often approve of exclusive dealing because of its "procompetitive benefits." These benefits include increasing allocative efficiency, reducing adverse selection and moral hazard barriers to deals, and preventing free-riding. Because of those recognized procompetitive effects, exclusive dealing must be analyzed under the Rule of Reason. Under that standard, exclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue. The plaintiff must prove that the arrangement is likely to keep at least one significant competitor of the defendant from doing business in a relevant market, and he or she must prove that the probable (not certain) effect of the exclusion will be to raise prices above and therefore reduce output below.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN16[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Courts "routinely rely" on Section 3 of the Clayton Act cases in assessing exclusive dealing under *Section 1* of the Sherman Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN17[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

When a purchaser requires only a single product, it makes no sense to label as an exclusive dealing agreement the decision to purchase that product from one supplier rather than another.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN18[] **Motions to Dismiss, Failure to State Claim**

When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his or her cause of action. It is not the court's role to make the parties' arguments for them.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

HN19[] **Sherman Act, Claims**

The question of whether the alleged exclusive dealing arrangements foreclosed a substantial share of the line of commerce is a merits question not proper for the pleading stage.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN20[] **Market Definition, Relevant Market**

Courts should dismiss antitrust claims based on a market argument only when it is certain that the alleged relevant market clearly does not encompass all interchangeable substitute products.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN21[] **Reviewability of Lower Court Decisions, Preservation for Review**

Perfunctory and undeveloped legal arguments are waived, as are arguments unsupported by legal authority.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN22[] **Tying Arrangements, Sherman Act Violations**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Such an arrangement also violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market. Tying can violate *Section 1* when the seller has 'market power' in the market for the tying product. The essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN23[] **Tying Arrangements, Sherman Act Violations**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, also forbids "negative" ties. Although courts rarely encounter such claims, a negative tie occurs when the customer promises not to take the tied product from the defendant's competitor. Negative ties are arrangements conditioning the sale of one product on an agreement not to purchase a second product from competing suppliers. Although "rarely encountered," a tying arrangement is fully satisfied when the defendant's customer promises not to take the tied product from the defendant's rival.

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Tying Arrangements

HN24[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act is aimed at substance rather than form. Formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. The court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record. ***Antitrust law*** consistently prioritizes substance over form. When it comes to tying, ***antitrust law***'s substantive and "core concern" is that the practice prevents goods from competing directly for consumer choice on their merits. In other words, tying presents a risk of anticompetitive "leverage," the "special ability" of a supplier with market power to force a purchaser to do something that he would not do in a competitive market.

Antitrust & Trade Law > Sherman Act > Claims

HN25[] **Sherman Act, Claims**

To plead such a claim under Section 2 of the Sherman Act for monopolization, a plaintiff must allege (1) that the defendant "possessed monopoly power" in an antitrust market, and (2) that the defendant willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN26[] **Market Definition, Relevant Market**

In rare circumstances, a single brand of a product or service can constitute a relevant market for antitrust purposes.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN27[] **Market Definition, Relevant Market**

In a market for complex durable goods, customers may face significant information and switching costs in attempting to change equipment manufacturers, and "lifecycle pricing" is difficult for consumers to calculate when initially purchasing equipment.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN28[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Firms with market power cannot deal in complimentary products in ways that take advantage of customers' sunken costs by moving to claim all of the repair work for itself.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN29[] **Actual Monopolization, Anticompetitive & Predatory Practices**

The law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue, but the law prohibits an antitrust claimant from resting on market power that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Anticompetitive & Predatory Practices

HN30[] **Actual Monopolization, Anticompetitive & Predatory Practices**

An "aftermarket policy change" is not the sine qua non of a claim. Rather, there are more general concerns about customers that unknowingly and involuntarily sign on for the defendant's aftermarket power. Included in that group are those unable to undertake lifecycle-cost analyses (at least at some, reasonable level) before purchasing the primary product because the requisite information is difficult, some of it impossible, to acquire at the time of purchase. Competition among manufacturers fully protects buyers who accurately calculate life-cycle costs, but where customers cannot do so, a supplier-defendant can charge supracompetitive prices in the aftermarket.

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN31[] **Market Definition, Relevant Market**

Market imperfections can keep economic theories about how consumers will act from mirroring reality.

Antitrust & Trade Law > Sherman Act > Scope

HN32[] **Antitrust & Trade Law, Sherman Act**

Where a defendant has engaged in unlawful restraint of trade that would independently violate *Section 1* of the Sherman Antitrust Act, *15 U.S.C.S. § 1*, it also violates Section 2 if it acquires or maintains a monopoly by means of that restraint of trade.

Antitrust & Trade Law > Sherman Act > Remedies

HN33[] **Sherman Act, Remedies**

In no event will there be an enforced duty to deal. If the alleged agreement violates the Sherman Act, the proper remedy is to set the offending agreement aside. If the alleged ties (if later pleaded plausibly) do the same, the proper remedy would be to enjoin the tie.

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > Forum & Place

HN34[] Choice of Law, Forum & Place

In an MDL, a court must apply the choice-of-law rules of the transferor forum.

Torts > ... > Contracts > Intentional Interference > Elements

HN35[] Intentional Interference, Elements

Under Wisconsin law, tortious interference with contractual relations has five elements: (1) the plaintiff had a contract or prospective contractual relationship with a third party, (2) the defendant interfered with the relationship, (3) the interference was intentional, (4) a causal connection exists between the interference and the damages, and (5) the defendant was not justified or privileged to interfere.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Torts > ... > Contracts > Intentional Interference > Defenses

HN36[] Motions to Dismiss, Failure to State Claim

A party may be justified or privileged to interfere if it is asserting "in good faith a legally protected interest. That exception does not extend to otherwise illegal acts. Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an inference that the defendant acted without inappropriate motive improper. This may be true, for example, of conduct that is in violation of antitrust provisions or is in restraint of trade. The issue is a factual one inappropriate for resolution on a motion to dismiss.

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Judges: Hon. Amy J. St. Eve, United States District Judge.

Opinion by: AMY J. ST. EVE

Opinion

[*937] **MEMORANDUM [**9] OPINION AND ORDER**

AMY J. ST. EVE, District Court Judge:

Plaintiff Authenticom, Inc., a data-integration firm, sued Defendants CDK Global, LLC and The Reynolds and Reynolds Company, the premier purveyors of dealer management systems, for violating *Sections 1* and *2 of the Sherman Act* and committing tortious interference. Both Defendants filed respective motions to dismiss pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. (R. 53, R. 56.) For the reasons explained below, the Court grants in part and denies in part Defendants' motions.

PROCEDURAL HISTORY

Authenticom filed this lawsuit on May 1, 2017, in the Western District of Wisconsin. With its Complaint, Authenticom filed an emergency motion for a preliminary injunction. The motion sought to enjoin Defendants' allegedly anticompetitive practices which, as explained below, allegedly prevented Authenticom from accessing Defendants' respective dealer management systems ("DMS"), a necessary part of Authenticom's data-integration business. Authenticom claimed that those practices effectively excluded it from the market and, as a result, were "on the verge of putting [it] out of business." (Case No. 18-cv-868, R. 5.) Over the next three months, the parties submitted voluminous exhibits and **[**10]** declarations, and the district court held a two-and-a-half-day hearing in early July 2017.

On July 14, 2017, the district court granted Authenticom's motion for a preliminary injunction. It ruled that Authenticom had demonstrated a "moderate" likelihood of success on its *Section 1* claims (it did not address the *Section 2* claims), and that Authenticom had no adequate remedy at law as evidence suggested Defendants' conduct could force it to shutter its business. *See* *Authenticom, Inc. v. CDK Glob., LLC, No. 17-CV-318-JDP, 2017 U.S. Dist. LEXIS 109409, 2017 WL 3017048 (W.D. Wis. July 14, 2017)*, *vacated*, *874 F.3d 1019 (7th Cir. 2017)*. Weighing the harms, the court granted Authenticom's motion, and after some further briefing, entered a preliminary injunction against each Defendant on July 28, 2017. *See also* *Authenticom, Inc. v. CDK Glob., LLC, No. 17-CV-318-JDP, 2017 U.S. Dist. LEXIS 185566, 2017 WL 3206943 (W.D. Wis. July 28, 2017)*, *vacated*, *874 F.3d 1019 (7th Cir. 2017)*. Those preliminary injunctions forced, among other things, Defendants to allow Authenticom access to their DMSs.

Defendants appealed, and the Seventh Circuit vacated the preliminary injunctions and remanded the case. The Seventh Circuit held that whatever the merits of Authenticom's *Section 1* claims, the injunctions' forced sharing of Defendants' DMSs ran afoul of the bedrock principle that firms generally have no duty to deal with competitors. *Authenticom, Inc. v. CDK Glob., LLC, 874 F.3d 1019, 1021 (7th Cir. 2017)* (citing **[**11]** *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, *Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009))*. It reasoned that "[t]he proper remedy for a *section 1* violation based on an agreement to restrain trade is to set the offending agreement aside," not force the alleged violators to deal with the complainant. *Id. at 1026*. The Seventh Circuit, however, "urge[d]" the district court to do what it could to expedite resolution of the matter based on Authenticom's representations of financial distress. *Id. at 1021*.

By the time the Seventh Circuit issued its decision, software vendors and automobile dealers had filed a handful of potential **[*938]** tag-along lawsuits across the country against Defendants. The day after the Seventh Circuit's decision, Defendants filed a motion for transfer and consolidation of those cases (and ones later filed) with the Judicial Panel on Multidistrict Litigation ("JPML"). The JPML granted that motion and transferred the cases to this Court for consolidated pretrial proceedings. (R. 1.) Meanwhile, the district court presiding over *Authenticom* had granted Defendants' motion for a partial stay of discovery given the pending MDL.

In the midst of the preliminary-injunction and appellate proceedings, the parties briefed Defendants' *Rule 12(b)(6)* motions to dismiss. Those motions are now before **[**12]** the Court.

LEGAL STANDARDS

I. Rule 12(b)(6) and the Plausibility Standard

HN1[] "A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." Camasta v. Jos. A. Bank Clothiers, Inc., 761 F.3d 732, 736 (7th Cir. 2014); *see also* Hill v. Serv. Emp. Int'l Union, 850 F.3d 861, 863 (7th Cir. 2017). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a Rule 12(b)(6) challenge, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Mann v. Vogel, 707 F.3d 872, 877 (7th Cir. 2013). Courts, of course, accept all well-pleaded facts as true and draw reasonable inferences in the plaintiff's favor. *See, e.g.,* Forgue v. City of Chicago, 873 F.3d 962, 966 (7th Cir. 2017). After "excising the allegations not entitled to the presumption" of truth, courts "determine whether the remaining factual allegations plausibly suggest an entitlement to relief." McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011).

II. The Materials Upon Which the Court Relies on a Rule 12(b)(6) Motion

HN2[] In addition to well-pleaded facts, "a court ruling on a motion to dismiss can rely on the complaint itself, documents attached **[**13]** to the complaint, documents that are critical to the complaint and referred to in it, and information that is subject to proper judicial notice." Olson v. Bemis Co., 800 F.3d 296, 305 (7th Cir. 2015); *see also, e.g.,* Geinosky v. City of Chicago, 675 F.3d 743, 745 n. 1 (7th Cir. 2012). Further, although a "complaint may not be amended by the briefs in opposition to a motion to dismiss," Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 348 (7th Cir. 2012), courts may "consider additional facts set forth in" a brief opposing dismissal "so long as those facts are consistent with the pleadings," Phillips v. Prudential Ins. Co. of Am., 714 F.3d 1017, 1019-20 (7th Cir. 2013) (quoting Geinosky, 675 F.3d at 745 n. 1); *see also, e.g.,* Jones v. Sparta Cmty. Hosp., 716 F. App'x 547 (7th Cir. 2018) ("because [plaintiff-appellant] now elaborates on the factual allegations in his amended complaint, and his elaborations are consistent with the pleadings, we consider that information in our review"); Heng v. Heavner, Beyers & Mihlar, LLC, 849 F.3d 348, 354 (7th Cir. 2017) ("Materials **[*939]** or elaborations in appellants' brief opposing dismissal may be considered, so long as those materials or elaborations are consistent with the pleadings."); Martin v. Cook Cnty., Ill., No. 17 C 2330, 2018 U.S. Dist. LEXIS 69360, 2018 WL 1942654, at *1 (N.D. Ill. Apr. 25, 2018) (a court may consider "additional facts set forth in [plaintiff's] brief opposing dismissal, so long as those additional facts are consistent with the pleadings."). "To the extent that an exhibit attached to or referenced by the complaint contradicts the complaint's allegations, the exhibit takes precedence." Phillips, 714 F.3d at 1020.

BACKGROUND

I. DMSs, Data Integration, and Auto Dealers

This case concerns the **[**14]** data services and businesses upon which auto dealers rely in conducting their operations.[1] Two purported markets in that space are of principal relevance here: the DMS market and the data-integration market.

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[1] In its opposition, Authenticom cites many facts adduced by the parties at the preliminary-injunction hearing. The Court generally finds that those facts do not add anything material to the Complaint, but credits them *only* to the extent that they are relevant and actually consistent with the Complaint's allegations. *See* Phillips, 714 F.3d at 1020; *see also, e.g.,* Sorrentino v. Godinez, No. 12 C 6757, 2013 U.S. Dist. LEXIS 142962, 2013 WL 5497244, at *4 (N.D. Ill. Oct. 3, 2013), *aff'd as modified*, 777

A. The DMS Market

DMS software is the "central nervous system" of a dealership. (Compl. ¶ 28.) It is essentially enterprise software designed specifically for dealers, and a DMS manages "virtually every aspect of a dealer's business." (*Id.*) Specifically, DMS software handles information regarding sales, financing, part and vehicle inventory, repair and service, accounting, payroll, human resources, marketing, and still more. In addition to some management functionalities, a DMS is a database in which dealers effectively house this critical information and data. A dealer has only one DMS provider at a time; it would be "functionally impossible" for a dealer to try to use more than one. A DMS provider licenses its software to a dealer through a written contract generally lasting between five to seven years. The Complaint defines the DMS market as providers that sell DMS software to dealers in the United States. (*Id.* ¶ 32.)

CDK and Reynolds **[**15]** "dominate" the DMS market. (*Id.* ¶ 33.) Viewed by dealer-customers, they together control approximately 75 percent of the market. CDK has approximately 45 percent of it, and Reynolds has approximately 30 percent. Viewed by the number of vehicles sold, their collective control increases to approximately 90 percent.

As alleged duopolists, CDK and Reynolds enjoy a profitable business. They each, for example, earn approximately 40 percent profit margin. Their customers, the dealers, are also unable to freely switch between DMS providers. In addition to the contract lengths, "it is enormously difficult and disruptive for a dealer to switch DMS" given the costs of transferring data, retraining employees, and reconfiguring systems. (*Id.* ¶ 40.) Adding to those "logistical nightmares," the Complaint claims that CDK and Reynolds "punish" dealers that try to change DMS **[*940]** providers through lawsuits and by restricting third-party access to the dealers' DMS-stored data. In part for those reasons, the average DMS-dealer relationship lasts more than 20 years. (*Id.* ¶ 44.)

B. The Data-Integration Market

Critical as it is, a dealer's DMS is not the only data service upon which it relies. Many dealers use third-party **[**16]** application providers—or vendors—for service and management applications. These applications help a dealership, for example, track vehicle inventory, customer information, service and repair appointments, and recalls. Most dealerships have ten or more vendors.

To make their applications, vendors require access to dealerships' data—which is stored on DMSs. A vendor that provides an application organizing vehicle registration and titling must be able to obtain purchaser, vehicle, and financing information from a dealer's DMS. Some vendors, further, must be able to input data into a DMS. For example, an application that handles customer information must be able to "push" sales information into the DMS when a dealership sells a car from the lot. The Complaint does not estimate how many vendors exist, but it asserts that both CDK and Reynolds offer application services. CDK and Reynolds both, for example, offer relationship-management applications, and they jointly operate a provider of electronic-vehicle registration and titling.

Vendors, however, do not access the DMSs directly. Instead, data integrators—like Authenticom—provide this service to vendors. Data integrators "specialize in extracting **[**17]** dealers' data from DMS databases, aggregating that data and putting it into a standard format, and then delivering to vendors the specific data required for their applications." (*Id.* ¶ 54.) To pull the needed data from the DMS, data integrators generally receive authorization from dealerships. In many cases, including Authenticom's, dealers set up separate login credentials for the integrators so that they can access the DMSs. Once in, data integrators "data scrape" or "screen scrape" the DMS, an automatic process that pulls relevant data. Although dealers generally choose whether to authorize integrators'

F.3d 410 (7th Cir. 2015) (not crediting "new facts" that were inconsistent with pleadings); *Jones v. Chicago Bd. of Educ., No. 11 C 8326, 2013 U.S. Dist. LEXIS 51321, 2013 WL 1499001, at *2 (N.D. Ill. Apr. 10, 2013)* (not crediting "new allegations" that formed new bases for proposed relief). The Court also considers the CDK-Reynolds agreements at issue, as they are central to the Complaint. *See, e.g.*, *Brownmark Films, LLC v. Comedy Partners, 682 F.3d 687, 690 (7th Cir. 2012)*.

access to the DMSs, they do not directly pay integrators. Vendors, as the customers receiving the integrators' data output, make the payments.

Dealers "own" their data in the DMSs. The Complaint quotes a Reynolds spokesperson as having stated, "The data belongs to the dealers. We all agree on that." (*Id.* ¶ 65.) CDK, likewise, has stated publicly that it "has always understood that dealerships own their data and enjoy having choices on how best to share and utilize the data with others." (*Id.* ¶ 66.) Both CDK's and Reynolds's websites make similar claims. Similarly, the Complaint cites **[**18]** a number of statements by CDK representatives (though not Reynolds representatives) making clear that dealers can permit third-party access to their DMS-stored data, at least before 2015. To take just one example, Matt Parsons, CDK's vice president of sales, stated in 2007, "We're not going to limit the ability of a dealer to give an ID to someone else to, in essence, dial into their system. That is the dealer's right. We have no right to tell them they can't do that." (*Id.* ¶ 70.)

The Complaint defines the data-integration market as comprised of providers of integration services in the United States. According to the Complaint, there used to be "numerous" data integrators. Today, only CDK, Reynolds, and Authenticom remain.

Steve Cottrell founded Authenticom in 2002. Authenticom's feature product is **[*941]** DealerVault, which gives dealerships "state-of-the-art control over how their data is pulled and shared." (*Id.* ¶ 78.) In addition to pulling data from DMSs, Authenticom has begun, in limited fashion, "pushing" data as well, which benefits vendors and dealers in that it expands the services provided. Before accessing a dealer's DMS, Authenticom secures the dealer's—though not the DMS provider's—express **[**19]** authorization. The Complaint also highlights that Authenticom has never incurred a data breach and that its tools and practices are secure. As to pricing, Authenticom generally charges approximately $25 for a first data set, and $50 for two or more. The average price Authenticom charges a vendor is between $30 and 40 per month for one dealership.

CDK and Reynolds also offer integration services. CDK, for its part, owns the two largest data integrators in the market—Digital Motorworks and IntegraLink. It also offers a product that permits direct access to CDK DMSs, called the 3PA program. Digital Motorworks and IntegraLink function like Authenticom; they obtain login credentials for a DMS from the dealer, then extract and format the data. Indeed, Digital Motorworks and IntegraLink formerly pulled data from Reynolds DMS for vendors. Reynolds did not begin to block CDK "and others" from doing so until 2009. (*See id.* ¶ 91.) After Reynolds began to block Digital Motorworks and IntegraLink—that is, prevent them from accessing Reynolds DMSs—CDK devised the "SMART-R" solution, which permitted its integrators to continue to access Reynolds DMSs. As a result, CDK (through Digital Motorworks and **[**20]** IntegraLink) continued to access Reynolds DMSs on behalf of its vendor clients, again at least until 2015.

Unlike Digital Motorworks and IntegraLink, 3PA, also known as "Third Party Access," allows access to CDK DMSs only. CDK's 3PA formerly offered three "levels": one supplied vendors with login credentials for the dealership's system, another allowed third parties "subscriber access" that the dealer controlled, and a third permitted real-time access to CDK DMSs. That, too, changed after the alleged anticompetitive agreements of 2015, when CDK revised 3PA to prohibit dealer control over third-party access to CDK DMSs. CDK represented that the change was the result of its "SecurityFirst" initiative, which ended up increasing charges to vendors to approximately $250 to $300 per connection—almost triple what it charged before the 2015 revision, and far more than the $25 to $50 per connection that Authenticom charges. Today, CDK has taken the position that 3PA is the "only approved method for accessing" CDK DMSs. (*Id.* ¶ 101.) CDK considers all other access "unauthorized," and it forbids vendors from obtaining data on a CDK DMS from any integrator other than 3PA.

Reynolds does not offer **[**21]** integration services to access other providers' DMS software, but it does offer the Reynolds Certified Interface Program ("RCI"). RCI is an "equivalent" to CDK's 3PA, and it is the only Reynolds-authorized method by which vendors can access Reynolds DMSs. (*Id.* ¶¶ 102-103.) Like with CDK and 3PA, Reynolds contractually restricts both dealers and vendors from using integrators other than RCI to access Reynolds DMSs. Reynolds's RCI pricing is not publicly available, but the Complaint represents that it is "even steeper" than CDK's 3PA pricing. (*Id.* ¶ 104.)

The Complaint describes other integrators that, though once successful, have been forced out of business as a result of Reynolds's prohibition and CDK's more-recent prohibition on third-party access to their respective DMSs. Those prohibitions, **[*942]** while having the purported effect of excluding data integrators from the data-integration market generally, also allow CDK and Reynolds (through 3PA and RCI, respectively) to dominate their single-brand aftermarkets. The Complaint alleges that such aftermarkets are cognizable in this case, because when dealers purchase a DMS, they are "locked in" to that purchase through high switching and information **[**22]** costs. (*Id.* ¶ 112.) A vendor who wants to work with both CDK and Reynolds dealers must purchase both 3PA and RCI services. In turn, Defendants can, and do, charge supracompetitive pricing for their respective integration services.

C. CDK and Reynolds Pre-2015 Treatment of Data Integrators and Third-Party Access

Initially, and for over a decade, all DMS providers—CDK and Reynolds included—permitted dealers the right to authorize third-party access to the DMSs. That industry-wide agreement began to erode in 2007, when Reynolds announced that it would start blocking data integrators from Reynolds DMSs. Since then, Reynolds has considered third-party, unauthorized scraping of its DMSs as "hostile access." As a result of this policy change, Reynolds began disabling Authenticom's credentials in 2009 by imposing "challenge questions" and "captcha" (entry requests to enter random or blurred text), which identify non-human users. In 2013, Reynolds began disabling Authenticom's credentials en masse.

CDK, on the other hand, countenanced third-party access for far longer. Indeed, CDK touted its open architecture. Its CEO, for example, publicly stated, "We're not going to prohibit" integrators' access **[**23]** "or get in the way of that. . . I think we've stated pretty emphatically, we really believe the dealer owns the data. I don't know how you can ever make the opinion that the data is yours to govern and to preclude others from having access to it." (*Id.* ¶ 6.) In 2015, however, CDK came to echo Reynolds's disapproval of third-party access.

II. CDK and Reynolds's Alleged Conspiracies

The Complaint alleges that in February 2015, CDK and Reynolds "entered into an agreement to eliminate competition in the Dealer Data-integration market and the single-brand after markets." (*Id.* ¶ 117.) Essentially, these agreements took two forms—written agreements, signed in early 2015, and a general understanding. The alleged purpose of Defendants' agreements was twofold: first, to protect vendors from siphoning any part of their DMS market duopoly by offering services that could compete with DMS software, and second, to protect CDK and Reynold's data-integration businesses and aftermarket single-brand monopolies.

A. The February 2015 Agreements

Effective February 18, 2015, CDK and Reynolds entered into a Data Exchange Agreement (the "DEA").[2] The DEA purportedly served as a wind-down arrangement, in which CDK **[**24]** agreed to eventually restrict (during a term that could last up to five years) its integrators—Digital Motorworks and IntegraLink—from accessing Reynolds DMSs. (*See* R. 54, Ex. 1 § 4.0.) As a part of that wind-down arrangement, CDK agreed to "cooperate" in efforts to have Digital Motorworks's and **[*943]** IntegraLink's vendor-clients join RCI. (*Id.* § 4.1.) The wind-down arrangement also featured Section 4.5, titled a "Prohibition on Knowledge Transfer and DMS Access," which stated:

> Each of Reynolds and CDK further covenants and agrees not to sell, transfer, or assign to any affiliate or third party any technology, business process, or other such knowledge regarding integration with the other party's DMS or take any other step to assist any person that it reasonably believes to have plans to access or integrate with the other party's DMS without the other party's written consent. For the avoidance of doubt, this Section 4.5 is not intended as a "covenant not to compete," but rather as a contractual restriction of access and

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[2] The Complaint misattributes several quotes to and provisions of the DEA. The Court reviews and credits what the agreement actually says, [Phillips, 714 F.3d at 1020](), as do both parties in their briefs.

attempted access intended to protect the operational data security integrity of Reynolds DMS and CDK DMS and protection of intellectual property.

(*Id.* § 4.5.) According to Authenticom, this arrangement constituted **[**25]** an agreement to divide the market: Reynolds would not access, or aid the access of, CDK DMSs without CDK's permission,[3] and CDK would not access, or aid the access of, Reynolds DMSs without Reynolds's permission. Section 4.5's terms do not expire. (*Id; id.* § 6.1.) The parties also entered into two, contemporaneously executed, reciprocal agreements.

In the "3PA Agreement," Reynolds's vendor applications received five years' of free data integration using 3PA to access CDK DMSs. (*See* 54, Ex. 2; R. 54 at 8; 56 at 11.) In the "Reynolds Interface Agreement" (collectively, with the DEA and 3PA Agreement, the "2015 Agreements"), CDK agreed to enlist seven of its vendor applications in the RCI program to access Reynolds DMSs. (*See* 54, Ex. 3; R. 54 at 8; R. 56 at 11.) By way of both agreements, Defendants, in their capacity as application providers (though only for seven of CDK's applications[4]), agreed not to use other integrators when extracting data from the other's DMSs. Specifically, Reynolds agreed that it would not "otherwise access, retrieve, license, or otherwise transfer any data from or to a CDK System (including, without limitation, pursuant to any 'hostile interface') for itself or any other entity," **[**26]** nor contract with a third-party to access CDK DMSs. (R. 54, Ex. 2 § 1(e).) CDK likewise agreed to a provision titled "Non-Approved Access," which prohibited it from obtaining "[a]ny direct or indirect access of the Reynolds System for the benefit" of the applications "by CDK or an agent acting on behalf of CDK other than with Reynolds' prior written consent." (R. 54, Ex. 3 § 1.8.)

B. The General Agreement to Oust Authenticom

In addition to a market-division agreement, the Complaint alleges that Defendants reached a broader agreement to expel Authenticom and other third parties from the data-integration market. Defendants have allegedly conveyed this agreement to Authenticom. On April 3, 2016, Dan McCray, CDK's Vice President of Product Management, approached Mr. Cottrell at an industry convention. Mr. McCray led Mr. Cottrell off the convention floor and to a secluded area. There, he told Mr. Cottrell that CDK and Reynolds had agreed to "lock you and the other third **[*944]** parties out." (Compl. ¶ 180.) Regarding an offer CDK had made to acquire Authenticom's business for approximately $15 million, Mr. McCray asserted that the offer was relatively low because Authenticom's "book of Reynolds business **[**27]** is worthless to us because of the agreement between CDK and Reynolds." (*Id.*) Mr. McCray then threatened: "I wanted to look you in the eye and let you know man to man, I have been mandated by our new CEO to seek you out and destroy your business on our systems." (*Id.*) Regarding CDK-dealer contracts prohibiting third-party access, Mr. McCray stated further, "we will enforce our contract with the dealers and sue them if needed to keep you out of our systems." He concluded, "For god's sake . . . you have built a great little business, get something for it before it is destroyed otherwise I will f***ing destroy it." (*Id.*) Steve French, CDK's Senior Director of Client and Data Services and former Reynolds employee, delivered a similar (albeit more tempered) explanation of the supposed CDK-Reynolds agreement to a vendor. In attempting to move a vendor over to the 3PA program, Mr. French stated that he was working with Reynolds to lock out third-party integrators like Authenticom. (*Id.* ¶ 183.)

Reynolds's executives have delivered the same message to Authenticom. In May 2015, Robert Schaefer, Reynolds's Director of Data Services and the person in charge of the RCI program, told Mr. Cottrell **[**28]** during a phone conversation that CDK and Reynolds had an agreement to support each other's 3PA and RCI programs, and therefore block integration competitors like Authenticom. Mr. Schaefer shared with Mr. Cottrell that Bob Brockman, Reynolds's Owner, Chairman, and CEO, was "adamant" about blocking independent data integrators. (*Id.* ¶ 181.)

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[3] There are no allegations (or facts cited) that such access was possible at the time, however, as Reynolds was not engaged in integration of other providers' DMSs.

[4] CDK makes much of this point (*e.g.*, R. 54 at 8), but does not assert, nor provide judicially noticeable facts showing, what portion of CDK's application business these seven applications constituted.

The Complaint cites examples of Defendants carrying out these shared threats. Reynolds unsuccessfully proposed a wind-down agreement with Authenticom, and CDK began blocking Authenticom from their DMSs. In August 2016, for example, CDK disabled Authenticom's credentials at thousands of dealerships. After doing so, CDK sent a letter to all dealers whose vendors use Authenticom. The message said that the dealers must join the 3PA program to avoid business "disruption." (*Id.* ¶ 201.) Reynolds has delivered similar messages. (*Id.* ¶ 202.)

III. CDK and Reynolds's Alleged Vertical Restraints

In addition to those agreements between competitors, the Complaint claims that Defendants have entered into anticompetitive agreements with their vendors and dealers.[5]

A. Vendor Agreements

CDK requires that any vendor using 3PA for any of its dealer-customers on a CDK DMS **[**29]** must agree to use 3PA exclusively for all of its of its dealer-customers on CDK DMSs. The penalty for failing to comply with this exclusive arrangement is termination of the agreement (and thus access to dealer data stored on CDK DMSs). The terms of these exclusivity clauses purportedly "last forever," according to the Complaint. Reynolds has similar terms in its vendor contracts. Likewise, in its RCI contracts, Reynolds requires that **[*945]** the vendor agree not to use any "Non-Approved Access" to Reynolds DMSs. These terms last as long as the agreement is in effect, which generally constitutes three years plus any one-year renewals.

CDK and Reynolds also both include "price secrecy" provisions in their vendor contracts. These provisions prevent vendors from sharing with dealers information about how much Defendants charge for data access. The CDK 3PA contract, for example, states that vendors "shall not include any interface fee, DMS access fee or any other similar fee related to the use of the CDK Interface System in any of its invoices to its customers or otherwise include any direct or indirect indication to its customer (in its invoices or otherwise) of the fees charged by CDK hereunder." **[**30]** (*Id.* ¶ 167.) Reynolds's RCI contracts contain a similar provision binding the vendors from sharing pricing information with their customers, the dealers.

B. Dealer Agreements

As for the contracts with dealers, both Defendants purportedly require that dealers agree that they will not provide access to the DMS to anyone other than the DMS provider for data-integration purposes. CDK's standard DMS contract, for example, contains a clause stating: "Client is not authorized to cause or permit any third party software to access the CDK Dealer Management System," and "Client shall not allow access to [the CDK DMS] by any third parties except parties otherwise permitted," which includes the dealer's "employees and agents." (*Id.* ¶ 151.) According to the Complaint, CDK used to take the position that its contracts permitted integrators to access CDK DMSs—as demonstrated by its self-touted open architecture—but it now takes the opposite stance. CDK's contract provisions last for the contract's five-year duration. Reynolds has similar provisions in its standard DMS contracts. Those contracts bar dealers from "provid[ing] access to the [Reynolds DMS] . . . to any third party." (*Id.* ¶ 152.) Reynolds's **[**31]** restriction clauses, too, last for the contract's duration, which is generally five to seven years.

CDK and Reynolds, respectively, enforce these contract provisions by disabling thirdparty user credentials (like those upon which Authenticom relies) to access their DMSs. When one dealer complained to CDK, CDK cited in response the authorization provisions of its standard contract. Reynolds, further, has filed lawsuits against data

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[5] The Complaint is unclear as to whether these agreements were horizontal as well as vertical; that is, it is unclear whether Defendants allegedly agreed with one another to have exclusive-dealing and tying arrangements with their respective vendors and dealers. Authenticom's opposition brief clarifies that it pursues these theories as vertical in nature. (*See* R. 59 at 14-15, 26-34.)

integrators for tortiously interfering with their dealer contracts by accessing (presumably with dealer authorization) Reynolds DMSs.

IV. Alleged Competitive Harm

The Complaint claims that Defendants' conduct has harmed the markets in essentially two ways: one, it has allowed Defendants to increase the prices they charge for their integration services, and two, it has reduced consumer choice and output.

A. Price Increase

As noted, Authenticom generally charges $25 for one data feed and $50 for two to seven. As such, Authenticom customers generally pay between $30 to $40 dollars for services per month. Authenticom also charges $75 dollars for "bi-directional access" to dealer data. These prices are comparable to those charged by most other data integrators. One, **[**32]** for example, charges $40 per connection and $70 per connection for bi-directional access. CDK and Reynolds, on the other hand, charge much higher prices for integration. One vendor used to pay an integrator a rate of $45 to $55 per month; it now pays Reynolds and CDK between $300 to $866 per month. CDK used to charge $70 per **[*946]** connection, for example, but since 2015, now charges upwards of $300. Likewise, post-2015, Reynolds continues to raise prices for integration services. Defendants, moreover, charge substantial upfront fees. It costs "at least" $30,000 to join the 3PA and RCI programs, and the setup fees for such services are approximately $300.

B. Reduced Consumer Choice and Output

Defendants' conduct has also reduced output in the data-integration market and downstream markets, the Complaint claims. Dealerships and vendors prefer Authenticom because of its higher-quality services and better prices, but Defendants' contracts with dealers and vendors—and the general exclusion of Authenticom and other integrators from the market—effectively require both to use (indirectly and directly) Defendants' integration products. Defendants' higher prices also hinder the third-party application **[**33]** market. One vendor, for example, closed one of its application products because of Reynolds's high integration fees. Another expressed concerns about going out of business because it could not afford Defendants' integration costs.

ANALYSIS[6]

Authenticom brings five counts—four based on alleged violations of the Sherman Act, one based on state tort law. Defendants have moved to dismiss all counts. The Court addresses them in turn.

I. Antitrust Claims (Counts One Through Four)

Counts One through Four of the Complaint entail claims under both *Sections 1* and *2* of the Sherman Act, based on several anticompetition theories. Defendants challenge each of those claims as insufficiently pleaded, but also argue that Authenticom's claims fail for threshold reasons concerning antitrust defenses and injury.

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[6] The Court is presently ruling only on the motions to dismiss the as-filed, as-briefed *Authenticom* Complaint. To the extent later-filed complaints entail varying allegations and theories, later decisions will account for them. Further, the Court notes that the preliminary injunction opinion does not dictate the conclusions of this motion to dismiss ruling, as the *Authenticom* district court indicated. (*See* Case No. 18-cv-868, R. 209.)

A. The Computer Fraud and Abuse Act and Other Cyber-Security Laws

Defendants argue that Authenticom's Sherman Act claims fail at the start because they seek to vindicate an illegal trade through an antitrust lawsuit. Defendants contend, specifically, that the Complaint affirmatively pleads Authenticom's violations of the *Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030 et seq.*, the *Wisconsin Cyber Crimes Act ("WCCA"), Wis. Stat. § 943.70* **[**34]** , and other cyber-security laws. The CFAA, for example, imposes criminal liability on anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any protected computer." *18 U.S.C. § 1030(a)(2)(C)*. Defendants argue that the Complaint makes clear that Authenticom did just that by accessing DMSs (protected computers) and pulling data without authorization (from Defendants). Having admitted as much, Defendants submit, Authenticom cannot now seek refuge under the Sherman Act. The Court disagrees.

Courts have generally held that ***HN3***[] a plaintiff's wrongdoing is not a defense to an antitrust suit. The Supreme Court decided in *Perma Life Mufflers, Inc. v. Int'l* ***[*947]*** *Parts Corp., 392 U.S. 134, 140, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)* (plurality), that the in pari delicto doctrine—a common-law defense that curbs or bars recovery where the claimant is also at fault for her injury—"is not to be recognized as a defense to an antitrust action." As the Seventh Circuit later put it, "[p]roof of the plaintiff's unrelated unlawful conduct is not a valid in pari delicto defense to an antitrust charge." *Pinto Trucking Serv., Inc. v. Motor Dispatch, Inc., 649 F.2d 530, 534 n. 5 (7th Cir. 1981)*; *see also* *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 830 F.2d 716, 720 (7th Cir. 1987)* ("Strictly speaking, the common-law form of the [in pari delicto] defense is not available to defendants in antitrust lawsuits."); **[**35]** *see also* Phillip E. Areeda, Herbert Hovenkamp, ***ANTITRUST LAW***: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 361 (3rd and 4th eds. 2010-2017). *Memorex Corp. v. Int'l Bus. Machs. Corp., 555 F.2d 1379 (9th Cir. 1977)*, is also illustrative. In that case, the Ninth Circuit held that a plaintiff's alleged theft of a defendant's trade secrets did not prevent that plaintiff from bringing an antitrust suit. The plaintiff, Memorex Corporation, had sued the defendant, IBM, for violating the antitrust laws. *Memorex, 555 F.2d at 1380*. IBM responded by asserting that the only reason Memorex even existed in the relevant market was because it had stolen IBM's trade secrets. *Id.* The district court struck that defense, and the Ninth Circuit affirmed. It held: ***HN4***[] "A wrongful act committed against one who violates the antitrust laws must not become a shield in the violator's hands against operation of the antitrust laws. This is particularly true when the defendant has other remedies available to him." *Id. at 1382*.

Under that law, Authenticom's purported wrongdoing is of no matter at this stage. Defendants may have claims against Authenticom under the CFAA and related state laws—indeed, *Authenticom*'s docket and defense counsel's representations in court suggest that they may bring such claims—but **[**36]** those claims do not foreclose Authenticom's Sherman Act claims. *See id.* Both things can be true: Defendants may be able to state valid cyber-security claims against Authenticom *and* Authenticom may be able to state valid antitrust claims against Defendants.

Defendants, however, contend that Authenticom's purported wrongdoing does not provide a defense for Defendants inasmuch as it deprives Authenticom of a claim, and more specifically, of antitrust injury. That overstates the law. Defendants rely heavily on, for example, *Maltz v. Sax, 134 F.2d 2, 5 (7th Cir. 1943)*. In that case, Seventh Circuit held that the manufacturer of gambling "punchboards" could not bring an antitrust suit because gambling was illegal under federal law. *Maltz, 134 F.2d at 5*. As the court summarized: "He had no legal rights to protect. Therefore defendants could not invade them." *Id.* Likewise, in *In re Canadian Imp. Antitrust Litig., 470 F.3d 785, 791 (8th Cir. 2006)*, the Eighth Circuit held that consumers could not bring an antitrust claim based on drug manufacturers' restrictions on importing prescription drugs from Canada because doing so would violate federal law. "The absence of competition from Canadian sources in the domestic prescription drug market . . . is caused by the federal statutory and regulatory scheme adopted by the United States **[**37]** government, not by the conduct of the defendants," the court reasoned in holding that consumers lacked antitrust injury. *Canadian Imp., 470 F.3d at 791*. Defendants' other cases stand for the same proposition—that a plaintiff whose desired trade is illegal independent of the defendants' complained-of conduct lacks antitrust injury. *See* *Bubis v. Blanton, 885 F.2d 317, 320* ***[*948]*** *(6th Cir. 1989)* (plaintiff lacked standing to challenge alleged collusion in denial of a liquor license because the plaintiff's "interest in [the store] at the time of the attempted transfer of the liquor license was unlawful"); [Realnetworks, Inc. v. DVD Copy Control Ass'n, Inc., No. C 08-4548 MHP, 2010 U.S. Dist. LEXIS 1433, 2010 WL 145098, at *6 (N.D. Cal. Jan. 8, 2010)] (plaintiff lacked antitrust injury because its product manufacturing had "almost certainly" violated the law); [Modesto Irrigation Dist. v. Pac. Gas & Elec. Co., 309 F. Supp. 2d 1156, 1170 (N.D. Cal. 2004)] (plaintiff lacked antitrust injury because its conduct was "unlawful by its own terms"); [Pearl Music Co. v. Recording Indus. Ass'n of Am., Inc., 460 F. Supp. 1060, 1068 (C.D. Cal. 1978)] (because plaintiff's business was "totally illegal" in 49 states, it lacked "standing or capacity" to bring antitrust suit).

In this case, unlike in those cases, Authenticom's as-alleged practices are not illegal independent of Defendants' challenged conduct. *Accord* *Linea Internacional de Credito, S.A. v. W. Union Fin. Servs., Inc., No. 03 C 6736, 2004 U.S. Dist. LEXIS 10854, 2004 WL 1336302, at *3 (N.D. Ill. June 14, 2004)* (distinguishing *Maltz*, stating "[i]t is not clear from the complaint that plaintiff's business **[**38]** is inseparably connected with gambling or that its services could only be used in furtherance of gambling"); *Monarch Marking Sys., Inc. v. Duncan Parking Meter Maint. Co., No. 82 C 2599, 1988 U.S. Dist. LEXIS 2041, 1988 WL 23830, at *1 (N.D. Ill. Mar. 8, 1988)* (granting reconsideration of dismissal of antitrust claim because there was some "*possibility*" that part of claimant's business was legal and therefore it could establish cognizable injury) (emphasis in original). The Complaint alleges that Defendants' anticompetitive conduct blocked or foreclosed Authenticom from the data-integration market. That is, the Complaint claims that Authenticom lacks authorization or access to Defendants' DMSs (which is necessary to compete in the data-integration market, given Defendants' upstream duopoly) *because of* Defendants' anticompetitive conduct—and it is that conduct which Authenticom challenges as illegal.[7]

Defendants argue that simply because user authorization—or rather the lack thereof—is what makes Authenticom's conduct a potential crime does not distinguish this from cases like *Maltz* and *Canadian Import*. They submit that many property crimes turn on owner approval. While that may be true, it is beside the point. Even assuming, without deciding, that the CFAA prohibits Authenticom from accessing DMSs without Defendants' authorization, **[**39]** Defendants are not free to withhold such approval pursuant to illegal arrangements. *See, e.g.,* *Primetime 24 Joint Venture v. Nat'l Broad., Co., 219 F.3d 92, 99, 103 (2d Cir. 2000)* (although a law permitted networks and stations to withhold their licenses, plaintiff adequately stated a *Section 1* claim by alleging that they had colluded to do so); *see also* *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws"); *accord* *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 n. 38, 105 S. Ct. 2847, 86* ***[*949]*** *L. Ed. 2d 467 (1985)* ("In considering the competitive effect of [a firm's] refusal to deal or cooperate . . . it is not irrelevant to note that similar conduct carried out by the concerted action of three independent rivals with a similar share of the market would constitute a *per se* violation of *§ 1* of the Sherman Act.").

In any event, Defendants also overstate the extent to which the Complaint demonstrates Authenticom's lack of "authorization." According to the Complaint, CDK had long permitted, indeed encouraged, third-party integration on its DMS. *See Facebook, Inc. v. Power Ventures, Inc., 844 F.3d 1058, 1069 (9th Cir. 2016)*, *cert. denied*, *138 S. Ct. 313, 199 L. Ed. 2d 206 (2017)* ("Because Power had *implied* authorization to access Facebook's computers, it did not, at first, violate the statute.") (emphasis added). In light of that well-pleaded history, the Court cannot determine as a matter of law that Authenticom **[**40]** lacked authorization to access CDK DMSs before 2015. Although Reynolds presents a different case, "authorization" here is "a factual matter" and "not properly before the Court based on the pleadings alone, and thus a precise delineation of whether the events in question may or may not be covered under the statute is premature." *Weingand v. Harland Fin. Sols., Inc., No. C-11-3109 EMC, 2012 U.S. Dist. LEXIS 123160, 2012 WL 3763640, at *2 (N.D. Cal. Aug. 29, 2012)*. Authenticom has therefore not pleaded itself out of antitrust injury at this stage.

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[7] None of this comes close to saying that CDK and Reynolds, respectively, have independent antitrust duties to allow Authenticom and other integrators authorization and access. Rather, the question of this case is whether Defendants' refusal to grant such authorization and access, and more specifically their attendant blocking, was the result not of a unilateral refusal to deal, but of illegal conspiracies and anticompetitive arrangements (like tying or exclusive dealing) recognized by the antitrust laws.

B. Authenticom's *Section 1* Claims

Turning to Authenticom's *Section 1* claims, the Complaint alleges both horizontal agreements (between Defendants) and vertical agreements (between each Defendant and its dealers and vendors). *Section 1* ***HN5***[] of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ." *15 U.S.C. § 1*. ***HN6***[] To state a *Section 1* claim, a plaintiff must plead facts plausibly suggesting: (1) a contract, combination, or conspiracy (meaning, an agreement); (2) a resulting unreasonable restraint of trade in a relevant market; and (3) an accompanying injury. *Agnew, 683 F.3d at 335*.

Plausibly pleading the first element, an agreement, **[**41]** requires "enough factual matter (taken as true) to suggest that an agreement was made"—that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly, 550 U.S. at 556*. Plaintiffs can do this in one of two ways, by pleading either direct or circumstantial evidence of an illegal agreement. *E.g., In re Text Messaging Antitrust Litig., 630 F.3d 622, 629 (7th Cir. 2010)*. Direct evidence of an agreement "is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Dairy Farmers of Am., Inc., Cheese Antitrust Litig., 60 F. Supp. 3d 914, 950 (N.D. Ill. 2014)* (quoting *In re Baby Food Antitrust Litig., 166 F.3d 112, 118 (3d Cir. 1999)*). Simply, direct evidence constitutes a "smoking gun." *Omnicare, Inc. v. UnitedHealth Grp., Inc., 629 F.3d 697, 706 (7th Cir. 2011)*; *accord In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 654 (7th Cir. 2002)* ("an admission by the defendants that they agreed to fix their prices is all the proof a plaintiff needs"). Circumstantial evidence, in contrast, is facts "from which the existence of such an agreement can be inferred." *High Fructose Corn Syrup, 295 F.3d at 654*. Mere allegations of "parallel conduct," without more, do not "tend[ ] to exclude the possibility of independent action," and are therefore insufficient. *Twombly, 550 U.S. at 554*.

[*950] ***HN7***[] The second element, an unreasonable restraint, hinges on whether the alleged violation is per se unreasonable or is, instead, subject to the rule of reason.[8] *See In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827, 864 (N.D. Ill. 2010)* (citing *Denny's Marina v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)*). Per se violations—those with which courts have "considerable experience" and "inevitably result[ ] in a finding **[**42]** of anticompetitive effect"—are presumed to be unreasonable restraints on trade. *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Adver. Ass'n. Inc., 672 F.2d 1280, 1284 (7th Cir. 1982)*; *see also, e.g., Omnicare, 629 F.3d at 706* (an unreasonable restrain is "conclusively presumed once the first [element] is proved" in per se cases). Rule-of-reason violations, however, require that a plaintiff plead "anticompetitive effects," and "that the injury complained of be of a type that the antitrust laws were designed to guard against, and further that the antitrust violation be the direct cause of plaintiff's injury." *Havoco of Am., Ltd. v. Shell Oil Co., 626 F.2d 549, 556 (7th Cir. 1980)*; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)* (rule of reason ultimately requires "the factfinder [to] weigh[ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"); *see also, e.g., Watkins v. Smith, No. 12 CIV. 4635 DLC, 2012 U.S. Dist. LEXIS 165762, 2012 WL 5868395, at *7 (S.D.N.Y. Nov. 19, 2012)* ("The rule-of-reason inquiry requires, at the motion to dismiss stage, that the plaintiff identify the relevant market affected by the challenged conduct and allege an actual adverse effect on competition in the identified market.").

HN8[] Alleging the third element, antitrust injury, requires pleading an "injury of the type the antitrust laws were intended to prevent and that flows **[**43]** from that which makes the defendants' acts unlawful." *Southwest Suburban Bd. of Realtors, Inc. v. Beverly Area Planning Ass'n, 830 F.2d 1374, 1377 (7th Cir. 1987)*; *accord United States ex rel. Blaum v. Triad Isotopes, Inc., 104 F. Supp. 3d 901, 924 (N.D. Ill. 2015)*.

1. Horizontal Conspiracy Between Defendants (Count One)

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[8] Neither party suggests that the quick-look analysis is applicable to any of Authenticom's claims at this stage.

Count One of the Complaint claims a conspiracy between CDK and Reynolds, competitors in both the DMS market and the data-integration market. Two related agreements, essentially, comprise the alleged conspiracy: first, the Complaint alleges that Defendants agreed to drive Authenticom and other third-party integrators out of the data-integration market by blocking access to the dealers' DMS-stored data, and second, the Complaint claims that Defendants agreed to allocate their respective DMS single-brand aftermarkets through the 2015 Agreements.

a. The Alleged Agreement to Block Authenticom's Access to Dealer Data

The Complaint adequately alleges an agreement to drive Authenticom out of the market. It claims that in May 2015, just three months after CDK and Reynolds executed the 2015 Agreements, a Reynolds executive referenced those agreements on a phone call with Mr. Cottrell. He told Mr. Cottrell that CDK and Reynolds had agreed to "support each other's" integration programs and "therefore **[*951]** block competitors" like Authenticom from "pulling dealer data." (Compl. ¶ 181.) **[**44]** The Reynolds executive also told Mr. Cottrell that he was "in communications" with other DMS providers to join "in the agreement to block independent data integrators," like Authenticom. (*Id.*) A CDK executive allegedly repeated that message to Mr. Cottrell a year later, in April 2016. At an industry convention that month, CDK's Vice President of Product Management told Mr. Cottrell that CDK and Reynolds had agreed to "lock you and the other parties out." (*Id.* ¶ 180.) In the same conversation, he then told Mr. Cottrell that he planned to "destroy" Authenticom's "great little business," according to the Complaint.[9]

These allegations straightforwardly suffice. They are, for one, direct-evidence allegations of the agreement: Taken as true, the fact that two of Defendants' executives admitted an agreement to block Authenticom and other integrators from accessing dealer data shows directly the existence of such an agreement. No further inference is required. *See, e.g.,* Baby Food, 166 F.3d at 118. Indeed, such **HN9**[] "admission[s] by [ ] employee[s] . . . of the conspirators" are textbook examples of adequate direct-evidence allegations. *Text Messaging, 630 F.3d at 628*; *see also* W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 100 (3d Cir. 2010) (defendant's alleged admission of an "agreement" to do harm to plaintiff constituted **[**45]** direct-evidence allegations); *cf.* *In re Plasma-Derivative Protein Therapies Antitrust Litig., 764 F. Supp. 2d 991, 998 (N.D. Ill. 2011)* ("an admission by an insider" constitutes "direct evidence of agreement"). Even if it were otherwise, and as Defendants assert, there was some ambiguity in the admissions, they are at a minimum "highly suggestive of the existence" agreement to block Authenticom from accessing dealer data and thus out of the market. *High Fructose Corn Syrup, 295 F.3d at 662*.

The potential impact of the 2015 Agreements, and Section 4.5 of the DEA specifically, further support the existence of the alleged agreement. Defendants correctly point out that the 2015 Agreements do not require them to preclude third-party integration on their own DMSs. They do, however, effectively require that CDK stop hostile access of Reynolds DMSs (for a period, at least) and, more importantly, expressly prohibit Defendants from assisting in the hostile access of one another's DMSs. Such a partial ceasefire and mutual forbearance between two rivals would make sense if—as the executives allegedly admitted—Defendants sought to "support" one another's integration services to the exclusion of third-party integrators from the competition. Defendants also contend that there are legitimate explanations for the 2015 Agreements, such as resolving CDK's hostile **[**46]** access and addressing security concerns. But at this stage, it is reasonably inferable that such agreements were a part of the broader and admitted agreement to block third-party integrators.

That broader agreement is, moreover, anticompetitive. Under established law, **HN10**[] "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" merit per se treatment. *Toys "R" Us, Inc. v. F.T.C., 221 F.3d 928, 936 (7th Cir. 2000)* (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery &* **[*952]** *Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985))*; *see also* *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. In this case, the Complaint in essence claims that Defendants conspired to block integrators from accessing necessary data from the dealers—meaning,

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[9] Authenticom also cites Mr. Cottrell's preliminary-injunction testimony, which is consistent with these factual allegations.

"relationships" integrators "need"—by (among other things) withholding authorization and disabling third-party credentials, so that Defendants, ultimately, could charge more for their integration services.

Defendants do not contest that an agreement to block integrators from the market is plausibly anticompetitive.[10] They do, however, argue that the Court should disregard the Complaint's direct-evidence (or at a minimum, highly probative) allegations of the agreement's existence. CDK, for example, contends that the **[**47]** alleged confessions are "nonsensical" because Reynolds had decided long before 2015 to block Authenticom's access. Accepting that argument, though, requires the Court to ignore well-pleaded allegations of fact (that the executives admitted the agreement), and then credit an inference in Defendants' favor (that the agreement did not exist because Reynolds had already engaged in integrator blocking) over a contrary one in Authenticom's favor (that Reynolds agreed, for example, to escalate or enhance its blocking, or agreed not to go after CDK for its hostile access, in exchange for CDK's commitment to begin blocking). The Court cannot do that at this stage. *Accord Forgue, 873 F.3d at 966*. CDK further submits that the executive's comment to Mr. Cottrell—that "Reynolds and CDK had agreed to 'lock [Authenticom] and the other third parties out'"—does not "tend to exclude independent conduct." (R. 54 at 14.) Again, the allegation is that Defendants admittedly "*agreed*" to block third parties.

Reynolds's similar arguments are equally misplaced. It identifies innocent explanations for and interpretations of the executives' comments, and then attempts to persuade the Court that those exculpatory **[**48]** explanations are "more plausible" than Authenticom's inculpatory ones. That is not the inquiry at this stage. ***HN11***[] "A court ruling on [ ] a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible." *Anderson News, L.L.C. v. Am. Media, Inc., 680 F.3d 162, 185 (2d Cir. 2012)*; *see also Lormand v. US Unwired, Inc., 565 F.3d 228, 267 (5th Cir. 2009)* ("we are not authorized or required to determine whether the plaintiff's plausible inference . . . is equally or more plausible than other competing inferences"); *Pennsylvania Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n, No. 09C5619, 2010 U.S. Dist. LEXIS 49151, 2010 WL 1979569, at *6 (N.D. Ill. May 17, 2010)* (rejecting the argument that courts should assess under *Twombly* which parties' version is the "more plausible" one); *see also* **[*953]** *Evergreen Partnering Grp., Inc. v. Pactiv Corp., 720 F.3d 33, 45 (1st Cir. 2013)* ("At these early stages in the litigation, the court has no substantiated basis in the record to credit a defendant's counterallegations."). Instead, under *Twombly*, the Court abdicates probability weighing, assumes that all the well-pleaded "allegations in the complaint are true (even if doubtful in fact)," and decides whether the totality of those allegations "suggest that an agreement was made." *Twombly, 550 U.S. at 556*. Reynolds may ultimately have it right—the agreement identified by Defendants' executives may have referred to legitimate business arrangements, or it may not have even happened as alleged—but the Court **[**49]** cannot credit those alternatives at this stage.

Defendants also insist that the alleged confessions do not refer to a broader agreement to block integrators but only the 2015 Agreements, which are facially legitimate. That is a bad argument. For one, it requires an inference in Defendants' favor and Authenticom's disfavor. It also backfires. The executives allegedly confessed to an agreement to "block" third-party integrators; Defendants' position that the agreement referenced was in fact the 2015 Agreements suggests that Defendants (or at least their executives) thought that the 2015 Agreements aimed to "block" third-party integrators—precisely as the Complaint claims.

Defendants' other argument, that there is no plausibly pleaded agreement to block integrator access to dealer data because Defendants could have done so independently, fails for similar reasons. In making that argument, both

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[10] Defendants do argue that an alleged "group boycott" is a "factual mismatch" to this case because they do not deal with Authenticom directly and because both Defendants could have unilaterally blocked Authenticom based on their service contracts. As Authenticom correctly responds, the first argument misunderstands a group boycott under *Klor's*, and the second fails at this stage because it ignores an inferable reason Defendants would conspire—to prevent unhappy dealers from, for example, turning to another DMS provider, as discussed further below. None of this, however, is to say that the per se test will ultimately apply to Authenticom's *Section 1* conspiracy claim. *See, e.g., In re High-Tech Employee Antitrust Litig., 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012)* (determining that that plaintiff had alleged "a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion" but that the ultimate decision of which test applies "is more appropriate on a motion for summary judgment").

Defendants rely on the Supreme Court's decision in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 596, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, that ***HN12***[] a plaintiff must present evidence showing that defendants had a "rational economic motive to conspire" and evidence "that tends to exclude the possibility" of independent conduct to survive summary judgment. Courts, however, have correctly **[**50]** held that the bars described in *Matsushita* are not set at the pleading stage. *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc., 801 F.3d 412, 425 (4th Cir. 2015)* (considering *Twombly* and *Matsushita*, and noting "courts must be careful not to import the summary-judgment standard into the motion-to-dismiss stage"); *Evergreen Partnering, 720 F.3d at 46* (post-*Twombly* "[p]leading requirements are thus starkly distinguished from what would be required at later litigation stages under *Matsushita*"); *Erie Cty., Ohio v. Morton Salt, Inc., 702 F.3d 860, 869 (6th Cir. 2012)* ("there is no authority cited . . . for extending the [*Matsushita*] standard to the pleading stage"); *Jung v. Ass'n of Am. Med. Colleges, 300 F. Supp. 2d 119, 159 (D.D.C. 2004)* ("The Court concludes that application of the *Matsushita* rule simply is not appropriate in the context of a motion to dismiss."); *see also In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 323 (3d Cir. 2010)* ("Although *Twombly*'s articulation of the pleading standard for *§ 1* cases draws from summary judgment jurisprudence, the standards applicable to *Rule 12(b)(6)* and *Rule 56* motions remain distinct.").

Even applying *Matsushita*, however, the Complaint raises a reasonable inference of Defendants' motive to conspire. Specifically, the Complaint alleges facts showing that many dealers preferred open architecture; when CDK began blocking, for example, several dealers loudly complained. In light of those claims, it is inferable that—as is true of most antitrust conspiracies—Defendants (which **[**51]** together control the DMS market) desired the luxury of taking an action profitable for them but disadvantageous to their customers (by excluding a cheaper rival in the downstream data-integration **[*954]** market) without fearing that their customers would respond by, for example, turning to another provider.[11] Making that inference, as the Court must, Defendants' argument fails. Reynolds or CDK could indeed have continued or began to block integrator access independently, like any oligopolist could, say, continue or decide to raise prices independently. But the former fact does not mean Defendants' lacked a motive to conspire to do so, like the latter fact does not mean that oligopolists lack motive to fix prices.

The Complaint plausibly pleads an anticompetitive conspiracy to block third-party integrators' access to DMSs and dealer data.[12] The Court, accordingly, denies Defendants' motions to dismiss with respect to this part of Count One.

b. The Alleged Market-Allocation Agreement

The Complaint also claims that Defendants agreed to divide the data-integration market, in which Authenticom, CDK, and Reynolds allegedly compete for vendors' business. Authenticom bases this theory on the 2015 Agreements' **[**52]** terms. (R. 59 at 23.) Specifically, it alleges that the DEA plainly evidences an agreement in which CDK would forebear from providing integration services on Reynolds DMSs, in exchange for Reynolds's forbearance from providing integration services on CDK DMSs. The point of Defendants' alleged conspiracy, according to Authenticom, is to reap monopoly rents for Defendants' data-integration services. (*E.g.*, Compl. ¶¶ 217.)

Whether or not the market-division agreement is plausible, and insofar as it is distinct from the alleged agreement to block third-party integrators, Authenticom lacks the antitrust injury (if not injury-in-fact) required to challenge that agreement. It is well-established that ***HN13***[] a competitor "cannot recover for a conspiracy to impose nonprice restraints that have the effect of either raising market price or limiting output. Such restrictions, though harmful to competition, actually *benefit* competitors by making supracompetitive pricing more attractive." *Matsushita, 475 U.S. at 583* (emphasis in original); *see also, e.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 778 (7th Cir. 1999)* (holding that there was no injury and stating, "You *want* your competitors to charge high prices."); *O.K.*

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11 Indeed, consistent with the Complaint, Authenticom has asserted and submitted evidence that Reynolds's DMS market share began to decline after it implemented closed architecture. As the Seventh Circuit recognized during oral argument on the preliminary injunction, such a fact makes Defendants' repeated declarations of facial "implausibility" dubious.

12 Defendants, correctly, do not argue that Authenticom lacks antitrust injury stemming from this agreement.

Sand & Gravel, Inc. v. Martin Marietta Techs., Inc., 36 F.3d 565, 572 (7th Cir. 1994) ("to the extent that [claimant] was also a seller in the market, increased **[**53]** prices caused it no injury, let alone antitrust injury."); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1418 (7th Cir. 1989) (competitor lacked injury based on *Matsushita*'s principle). Put differently, as Professors Areeda and Hovenkamp have: **HN14**[] "When a horizontal merger, price fixing, market division, or similar collaboration among competitors substantially reduces competition, consumers suffer while existing rivals benefit." Areeda & Hovenkamp, ***Antitrust Law*** ¶ 348b. That is the case here. As CDK puts it, the alleged market allocation Authenticom complains of "would have *helped* Authenticom" by eliminating its alleged competitors and, after they raised prices, allowing it to undercut them. (R. 54 at 11.) As such, the Complaint **[*955]** fails to plead plausibly injury caused by the alleged market allocation. *See, e.g.,* GSI Tech. v. United Memories, Inc., No. 5:13-CV-01081-PSG, 2014 U.S. Dist. LEXIS 54371, 2014 WL 1572358, at *4 (N.D. Cal. Apr. 18, 2014) ("to the extent that [a firm] claims an antitrust injury from an alleged market allocation agreement between [its competitors], [the firm] does not have standing because it is a competitor in the marketplace, rather than a consumer."); Banxcorp v. Bankrate Inc., No. CIV.A. 07-3398 ES, 2012 U.S. Dist. LEXIS 129098, 2012 WL 3988182, at *2 (D.N.J. Sept. 11, 2012) (same).

The Complaint alleges that it has suffered injury in **[**54]** that "Defendants' written market division agreement caused many vendors to leave Authenticom for Digital Motorworks (i.e., CDK) during the 'wind-down period' because those vendors knew they would not be blocked [from CDK] during that period." (Compl. ¶ 232.) That injury, however, stems from the alleged agreement (discussed earlier) to block Authenticom and other third-party integrators from accessing dealer data, not from the alleged agreement to divide the market and raise prices. In other words, the Complaint alleges that Authenticom's customers headed for the exits in 2015 and 2016 because Authenticom began to lose large-scale access to dealer data, not because competing integrators had divided the market and raised prices. The Court therefore grants Defendants' motions to dismiss with respect to the Complaint's market-division claims without prejudice.

2. Vertical Agreements with Vendors and Dealers

Counts Two and Three also assert *Section 1* violations. Count Two claims that Defendants engage in anticompetitive exclusive dealing, and Count Three claims that Defendants practice illegal tying arrangements. These claims, in essence, take issue with how Defendants have operated their DMSs, and **[**55]** specifically which companies they have permitted—and more importantly restricted—to use and access their DMSs. Defendants challenge both of Authenticom's vertical *Section 1* theories and argue that the Complaint's allegations do not meet the legal requirements for such claims. Before addressing those arguments, the Court addresses another threshold concern: the effect of *Trinko* and *Linkline* on the Complaint's claims.

a. *Trinko* and *Linkline*

The driving animus behind many of Defendants' *Section 1* arguments is that Authenticom essentially challenges Defendants' refusals to deal. The law, as Defendants note, generally permits unilateral refusals to deal by monopolists under *Section 2*, and so certainly permits such unilateral refusals by non-monopolists under *Section 1*.[13] Defendants specifically, and naturally, point to *Trinko* aned *Linkline*. In *Trinko*, the Supreme Court held that a monopolist exchange carrier, Verizon, had no duty to share access to system services it owned and competitors needed to operate their business effectively. *Trinko, 540 U.S. at 410*. The Supreme Court explained that "[c]ompelling such firms to share the source of their advantage is in some tension with the underlying purpose of ***antitrust law***, since it may lessen the incentive **[**56]** for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id. at 407-08*. A few years later, in *Linkline*, the Court repeated the principle. It held that another telecommunications monopolist, AT&T, had no antitrust duty to deal—let alone a duty to deal on favorable terms—in selling services to its competitors in the retail market. *Linkline, 555 U.S. at 450*. The Supreme

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[13] Defendants' related *Section 2* arguments are addressed further below.

Court **[*956]** said, as was true in *Trinko*, a monopolist can generally wield its upstream power "to prevent rival firms from competing effectively" in a downstream market. *Id.*

In this case, Defendants submit that Authenticom's *Section 1* claims are "end-run[s]" to *Trinko* and *Linkline*—brought against companies that are not even monopolists. Indeed, the Seventh Circuit, in hearing Defendants' preliminary-injunction appeal, expressed somewhat similar concerns both at oral argument and in its opinion. *See* *Authenticom, 874 F.3d at 1026* ("We are dubious in the extreme that [Authenticom's claims] amount to tying, rather than simply participation at two levels of the market, as in *Linkline*.").

Defendants may ultimately have it right, but the Court cannot adjudicate that issue at this stage. *Trinko* and *Linkline* did not involve exclusive-dealing or tying claims, nor did they abrogate **[**57]** long-standing jurisprudence in those areas. *Accord* *Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013)* (distinguishing unilateral refusals to deal from other recognized forms of anticompetitive conduct, like exclusive dealing and tying); *Z-TEL Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513, 547 (E.D. Tex. 2004)* ("The Court declines to read *Trinko* so as to lessen antitrust liability in contexts," like tying, which were not "addressed in that opinion"). The Complaint provides well-pleaded allegations regarding the purported markets and, to some extent, Defendants' conduct. Taken as true—as the Court must—those allegations plausibly suggest at least one *Section 1* violation (and a *Section 2* violation, as discussed in that section below). Discovery may reveal otherwise, and show that Authenticom's gripe is confined to Defendants' unilateral refusals to deal. But at this stage, the Court's only role is to determine whether the Complaint states a claim for the causes of actions it advances.

b. Exclusive Dealing (Count Two)

The Complaint claims that Defendants engaged in exclusive dealing with both dealers and vendors via their respective contractual arrangements. Defendants' DMS licenses require a dealer to agree that it will not provide anyone other than Defendants access to the dealer's data on the DMS. Likewise, Defendants' integration-services **[**58]** contracts require a vendor to agree that it will exclusively use Defendants' respective integration services (3PA and RCI) to access data on Defendants' respective DMSs.

HN15[] "An exclusive dealing contract obliges a firm to obtain its inputs from a single source." *Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42, 46 (7th Cir. 1996)*; *see also* Areeda & Hovenkap, ***ANTITRUST LAW*** ¶ 1800a. "The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement." *Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984)*. Courts, however, "'often approve' of exclusive dealing because of its 'procompetitive benefits.'" *Viamedia, Inc. v. Comcast Corp., 218 F. Supp. 3d 674, 696 (N.D. Ill. 2016)* (quoting *Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 736 (7th Cir. 2004))*. These benefits include "increasing allocative efficiency, reducing adverse selection and moral hazard barriers to deals, and preventing free-riding." *VBR Tours, LLC v. Nat'l R.R. Passenger Corp., No. 14-CV-00804, 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, at *12 (N.D. Ill. Sept. 28, 2015)* (citing *Republic Tobacco, 381 F.3d at 736*); *see also* *Methodist Health Servs. Corp. v. OSF Healthcare Sys., 859 F.3d 408, 410 (7th Cir. 2017)*. Because of those recognized procompetitive effects, exclusive dealing "must be analyzed under the Rule of Reason." *Dos Santos v. Columbus-Cuneo-Cabrini **[*957]** Med. Ctr., 684 F.2d 1346, 1352 (7th Cir. 1982)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.[14] Under that standard, "[e]xclusive dealing arrangements violate antitrust laws only when they foreclose competition in a substantial share of the line of commerce at issue." *Republic Tobacco, 381 F.3d at 736*; *cf.* *Roland Mach., 749 F.2d at 394* (plaintiff "must prove that [the arrangement] is likely to keep at least one significant competitor of the defendant from doing business in a relevant market . . . [and] he **[**59]** must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below)").[15]

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[14] ***HN16***[] Courts "routinely rely" on *Section 3 of the Clayton Act* cases in assessing exclusive dealing under *Section 1* of the Sherman Act. *Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 478 n. 4 (7th Cir. 1988)*.

[15] Defendants do not contend that the alleged exclusive dealings do not constitute agreements, or that injury is lacking.

Defendants' DMS licenses with dealers are not plausible exclusive dealing. The only thing the Complaint alleges that Defendants sell to dealers through those licenses are DMSs, and there is no allegation (or argument) that Defendants require dealers to purchase and use their respective DMSs exclusively. There is therefore "no exclusivity." *VBR Tours, 2015 U.S. Dist. LEXIS 130455, 2015 WL 5693735, at *12*; *see also* *Gumwood HP Shopping Partners, L.P. v. Simon Prop. Grp., Inc., No. 3:11-CV-268 JD, 2013 U.S. Dist. LEXIS 92133, 2013 WL 3214983, at *8 (N.D. Ind. Mar. 13, 2013)* (***HN17***[] "when a purchaser . . . requires only a single product, it makes no sense to label as an exclusive dealing agreement the decision to purchase that product from one supplier rather than another"). Despite Defendants raising this very point, Authenticom offers no defense of its theory. *See* *Cnty. of McHenry v. Ins. Co. of the West, 438 F.3d 813, 819 (7th Cir. 2006)* (***HN18***[] "When presented with a motion to dismiss, the non-moving party must proffer some legal basis to support his cause of action."); *Fonza v. Chicago Pub. Sch. Dist. #299, No. 17-CV-3571, 2018 U.S. Dist. LEXIS 3888, 2018 WL 337811, at *6 (N.D. Ill. Jan. 9, 2018)* ("it is not the court's role to make the parties' arguments for them") (citing *United States v. McLee, 436 F.3d 751, 760 (7th Cir. 2006))*.

The allegations regarding Defendants' integration-services **[**60]** contracts with vendors are a different story. The Complaint alleges that these contracts require a vendor that uses the 3PA or RCI programs for one dealer to use those programs to obtain data for any and all of its dealer-customers that use CDK or Reynolds DMSs, respectively. In other words, they require the vendor to obtain its integration-services exclusively from Defendants when obtaining data from their DMSs. *See* *Paddock, 103 F.3d at 46*.

The Complaint also has pleaded sufficient facts indicating that these exclusive-dealing contracts could foreclose a substantial portion of the data-integration market. It pleads that each Defendant accounts for at least 30 percent of the DMS market, or a collective 90 percent if judged by cars sold. CDK is right that Defendants' respective share of the *DMS* market is not the operative measure, but the Complaint further alleges that vendors rely on data integrators to access customer-dealers' data on the DMSs that Defendants' dominate. As a result, "[t]here are few, if any, [vendors] that could survive without serving CDK and Reynolds dealers." (Compl. ¶ 175). The Complaint also plausibly suggests that the enforcement of the exclusive-dealing arrangements—which again preclude **[**61]** vendors from working with **[*958]** other integrators on Defendants' DMSs—has likely forced integrators (including Authenticom to an extent) from the market, and that Defendants have been effective at hiking integration costs. *See* *Roland Mach., 749 F.2d at 394*. CDK's exclusive-dealing provisions, moreover, purport to last forever, while Reynolds's last the length of the contract (three years). *Cf.* *Paddock, 103 F.3d at 47*. These allegations raise a reasonable inference that, if enforced, Defendants' exclusive-dealing provisions with vendors could foreclose a substantial portion of the data-integration market and reduce output. *Accord, e.g.,* *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., No. 17-MD-2785-DDC-TJJ, 2017 U.S. Dist. LEXIS 209710, 2017 WL 6524839, at *10 (D. Kan. Dec. 21, 2017)* ("recognizing that *Tampa Electric* provides a number of other factors which may be relevant to a rule of reason analysis in an exclusive dealing claim . . . [we] refuse[ ] to decide at the pleading stage that plaintiff had failed to plead adequate foreclosure levels to state an exclusive dealing claim"); *In re Ductile Iron Pipe Fitting Direct Purchaser Antitrust Litig., No. 12-711, 2013 U.S. Dist. LEXIS 29865, 2013 WL 812143, at *19 (D.N.J. Mar. 5, 2013)* (***HN19***[] "The question of whether the alleged exclusive dealing arrangements foreclosed a substantial share of the line of commerce is a merits question not proper for the pleading stage.").

Defendants' contrary arguments **[**62]** are, again, ill-timed for this stage of the case. CDK primarily argues that 3PA (like, presumably, RCI) is not a data integrator that competes with Authenticom; it is instead interface software that permits vendors direct access to the DMS. The Court appreciates the distinction, but the Complaint plausibly suggests that it matters little to vendors which rely on either for the primary purpose of obtaining dealers' data. *See* *Ploss v. Kraft Foods Grp., Inc., 197 F. Supp. 3d 1037, 1070 (N.D. Ill. 2016)* (***HN20***[] "Courts should dismiss antitrust claims based on a market argument only when it is certain that the alleged relevant market clearly does not encompass all interchangeable substitute products"); *accord* *Avnet, Inc. v. Motio, Inc., No. 12 C 2100, 2015 U.S. Dist. LEXIS 120449, 2015 WL 5307515, at *4 (N.D. Ill. Sept. 9, 2015)* ("because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market") (quoting *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001))*.

Reynolds argues that the Complaint does not allege substantial foreclosure with respect to Reynolds's conduct, as Authenticom can still work with vendors that service non-Reynolds dealers. But based on Reynolds's allegedly correlated power in the DMS market, and in light of the other foreclosure allegations discussed earlier, the Complaint raises a reasonable inference that Reynolds's exclusive dealing **[**63]** caused substantial foreclosure.[16] Reynolds, like CDK, also cites the procompetitive upsides of exclusive dealing. Those may exist, and they may prevail on the ultimate rule-of-reason balancing, but at this stage Authenticom need only plead facts creating a reasonable inference of substantial foreclosure. *See, e.g.,* *Viamedia, 218 **[*959]** F. Supp. 3d at 696-97*; *accord* *Pecover v. Elecs. Arts Inc., 633 F. Supp. 2d 976, 983 (N.D. Cal. 2009)* ("The rule of reason analysis requires a factual analysis of the line of commerce, the market area and the affected share of the relevant market. Such a factual inquiry is improper at this stage in the proceedings.").

The Court, accordingly, grants Defendants' motions to dismiss as to Count Two's exclusive-dealing claim based on Defendants' DMS licenses with dealers without prejudice, but denies them as to Count Two's exclusive-dealing claim based on Defendants' contracts with vendors.

c. Tying (Count Three)

Regarding the tying claim, the Complaint alleges Defendants' respective DMS licenses with dealers prohibit the dealers from using integrations services other than Defendants' respective ones. As Authenticom puts it, the "contracts with dealers condition the purchase of DMS software (the tying product) on the dealers' agreement to use **[**64]** only Defendants' integration services (the tied product)." (R. 59 at 35.)

HN22[] "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 461-62, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* (quoting *N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958))*. "Such an arrangement [also] violates *§ 1* of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." *Batson v. Live Nation Entm't, Inc., 746 F.3d 827, 832 (7th Cir. 2014)* (quoting *Eastman Kodak, 504 U.S. at 462*); *see also* *Sheridan v. Marathon Petroleum Co. LLC, 530 F.3d 590, 594 (7th Cir. 2008)* (tying can violate *Section 1* when "the seller has 'market power' in the market for the tying product"). The Supreme Court has emphasized that the "essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish, 466 U.S. at 12*.

The Complaint attempts to allege an untraditional tying claim. Authenticom's depiction notwithstanding, the Complaint does not actually plead that Defendants condition the purchase of DMSs on the purchase **[**65]** of integration services. Rather, it claims that Defendants effectively condition the purchase of a DMS on an agreement not to use another company's integration services.

This arrangement is called a "negative tie." *See* *Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1178 (1st Cir. 1994)* (***HN23***[] "*Section 1* also forbids 'negative' ties"), *abrogated on other grounds by* *Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 130 S. Ct. 1237, 176 L. Ed. 2d 18 (2010)*. Although "courts rarely encounter" such claims, a "negative tie occurs when the customer promises not to take the tied product from the defendant's competitor." *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1178 (9th Cir. 2016)* (citation,

[16] Reynolds cites no law for the implied proposition that courts should not examine foreclosure in the aggregate among defendants. *See, e.g., See* *Schaefer v. Universal Scaffolding & Equip., LLC, 839 F.3d 599, 607 (7th Cir. 2016)* (***HN21***[] "Perfunctory and undeveloped legal arguments are waived, as are arguments unsupported by legal authority."). In any event, the Court need not address the proposition for the reasons just explained. *But see* *Paddock Publ'ns, Inc. v. Chicago Tribune Co., No. 93 C 7493, 1994 U.S. Dist. LEXIS 13696, 1995 WL 632031, at *5 (N.D. Ill. Oct. 25, 1995)*, *aff'd*, *103 F.3d 42 (7th Cir. 1996)* (addressing when aggregation of exclusive deal's anticompetitive effects is appropriate).

quotations, and modifications omitted); *see also* Grumman Sys., 36 F.3d at 1178 (negative ties are "arrangements conditioning the sale of one product on an agreement *not* to purchase a second product from competing suppliers"); **[*960]** Areeda & Hokenkamp, ***ANTITRUST LAW*** ¶ 1752c (although "rarely encountered," a tying arrangement "is fully satisfied when the defendant's customer promises not to take the tied product from the defendant's rival"). The Supreme Court recognized the arrangement (though not in name) in *Eastman Kodak* when it held that there was an issue of fact regarding whether a firm's sale of its parts premised on an agreement that the purchaser would not use a competitor's servicers was an illegal tie. 504 U.S. at 463; *see also* id. at 462 (defining tying as "at least [an] agree[ment] **[**66]** that [a purchaser] *will not purchase that product* from any other supplier'") (emphasis added); *accord* RealPage, Inc. v. Yardi Sys., Inc., 852 F. Supp. 2d 1215, 1223 (C.D. Cal. 2012) (holding that in light of *Eastman Kodak*, plaintiff had pleaded a negative tying claim); In2 Networks, Inc. v. Honeywell Int'l, No. 2:11-CV-6-TC, 2011 U.S. Dist. LEXIS 117589, 2011 WL 4842557, at *8 (D. Utah Oct. 12, 2011) ("[Plaintiff] alleges that [defendant] conditioned the sale of its products on the third-party *not buying* [plaintiff's] products. This type of 'negative tie' can be the basis of a tying claim") (citing Eastman Kodak, 504 U.S. at 461). That is the sort of sales conditioning that the Complaint attempts to allege.

Defendants, however, take issue with a second atypical feature of the alleged tie—dealers buy the tying product (DMS) but not the tied product (integration services). *See, e.g.,* Jefferson Parish, 466 U.S. at 12; *see also, e.g.,* Live Nation, 746 F.3d at 832. Authenticom does not contend that a cognizable tying arrangement can include two (or more) levels of purchasers, but they do claim that dealers are the "relevant targets" of the arrangement.

The Supreme Court has emphasized that **HN24**[] the Sherman Act "is aimed at substance rather than form." Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 760, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984); *see also* Eastman Kodak, 504 U.S. at 466-67 ("[F]ormalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***. This Court has preferred to resolve antitrust claims on a case-by-case **[**67]** basis, focusing on the particular facts disclosed by the record.") (internal quotations and citation omitted); In re Loestrin 24 Fe Antitrust Litig., 814 F.3d 538, 550 (1st Cir. 2016) (***antitrust law*** "consistently prioritize[s] substance over form"). When it comes to tying, ***antitrust law***'s substantive and "core concern" is that the practice "prevents goods from competing directly for consumer choice on their merits." United States v. Microsoft Corp., 253 F.3d 34, 87, 346 U.S. App. D.C. 330 (D.C. Cir. 2001) (citing Jefferson Parish, 466 U.S. at 13). In other words, tying presents a risk of anticompetitive "leverage"—the "special ability" of a supplier with market power "to force a purchaser to do something that he would not do in a competitive market." Jefferson Parish, 466 U.S. at 13-14 & n.20; *see also* Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶ 1700d; *accord* Sheridan, 530 F.3d at 592.

In this case, the Complaint does not plausibly plead that dealers are the purchasers whose "consumer choice" is improperly constrained by the alleged tie. *See* Microsoft, 253 F.3d at 87. To the contrary, the Complaint asserts that vendors engage and pay integrators for their services. The Complaint does claim that dealers have historically "had the right to grant data access to the integrator of their choice" and that "it is the dealer's choice to evaluate the security protections of data, and select one that meets their standards." (Compl. ¶¶ 5, 16.) Those allegations, **[**68]** however, are conclusory, and they are inconsistent **[*961]** with the other claims that vendors select integrators. (*Id.* ¶ 115 ("If CDK and Reynolds' integration products were reasonable substitutes, *application providers* would choose between them") (emphasis added), ¶ 18 (bringing suit "so that vendors (and dealers) can select a data integrator of their choice"), ¶ 5 ("When dealers and vendors had a choice of which integrator to use, the integration market flourished").) The Complaint also alleges that vendors "pass most if not all" of Defendants' increased data-integration fees on to dealers. (Compl. ¶ 224.) That generalized allegation, however, does not plausibly suggest that dealers, not vendors, make the economic choice about which integrator to use and suffer the consequences of those decisions. *Cf.* Dos Santos, 684 F.2d at 1354 (in dicta, stating that a hospital, rather than a patient, may be the "real purchaser" for antitrust purposes because the patient does not make the "significant economic decision[s]" about which anesthesia services to use); *see also* Aerotec, 836 F.3d at 1179 (holding that there was no "de facto" or "implied" tie because there was no evidence of conditioning on the consumer).

No alleged facts plausibly suggest that—despite **[**69]** vendors engaging, paying, and receiving directly integrators' services—dealers are the effective and actual purchasers of those services. The Complaint therefore does not state a tying claim, and the Court grants Defendants' motions to dismiss with respect to Count Three without prejudice.

C. Authenticom's *Section 2* Claim (Count Four)

The Complaint also includes a claim under *Section 2* of the Sherman Act for monopolization. ***HN25***[] To plead such a claim, a plaintiff must allege (1) that the defendant "possessed monopoly power" in an antitrust market, and (2) that the defendant "willfully acquired or maintained that power by means other than the quality of its product, its business acumen, or historical accident." *Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 (7th Cir. 2011)*; *see also* *Comcast Corp. v. Behrend, 569 U.S. 27, 43, 133 S. Ct. 1426, 185 L. Ed. 2d 515 (2013)*. The Complaint, however, does not plead that either CDK or Reynolds are monopolists in the DMS or data-integration markets. It claims instead that Defendants have monopolized the purported data-integration aftermarkets for their respective DMSs. Defendants, in response, argue that the Complaint fails to plead the narrow sort of aftermarket claim the Supreme Court blessed in *Eastman Kodak* and that it fails to allege the acquisition of power through unlawful conduct. The Court disagrees.

1. [**70] The Single-Brand Aftermarket

HN26[] "In rare circumstances, a single brand of a product or service can constitute a relevant market for antitrust purposes." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412, 418 (5th Cir. 2010)*. *Eastman Kodak* is the principal authority describing such circumstances. In that case, independent-service operators of photocopiers and micrographic equipment sued Kodak for, among other things, monopolizing the sale of services for Kodak machines. *504 U.S. at 459*. After doing well selling equipment, Kodak moved to control the repairs of its equipment. It specifically implemented a new policy of selling replacement parts only to owners that used Kodak's services or repair their own machines. As part of the same policy, manufacturers agreed not to sell replacement parts to anyone but Kodak, and Kodak "pressured" owners and distributors not to sell replacement parts to independent service providers. *Id.*

[*962] Kodak first argued that it could not exercise power in the markets for its parts and services because there was bona fide competition in the upstream market for equipment, and therefore customers could check supracompetitive pricing for parts and services by turning to Kodak's manufacturer-competitors. The Supreme Court disagreed. It held that ***HN27***[] in a "market **[**71]** for complex durable goods," like the one at issue, customers may face "significant information and switching costs" in attempting to change equipment manufacturers, and "[l]ifecycle pricing" is difficult for consumers to calculate when initially purchasing equipment. *Id. at 473*. The Supreme Court, moreover, found it important that Kodak had "locked in" many customers before changing its policy to dominate the parts and services aftermarkets. *Id. at 475*. The Supreme Court thus held that a factual question existed as to "whether information costs and switching costs foil the simple assumption that the equipment and service markets act as pure complements to one another." *Id. at 477*. Kodak later argued "that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act." *Id. at 481*. The Supreme Court again disagreed. It reasoned that the relevant antitrust market was "determined by the choices available for Kodak equipment owners." *Id. at 482* (citing *Jefferson Parish, 466 U.S. at 19*). Because Kodak's parts are not interchangeable with other manufacturers', the Supreme Court concluded that the relevant market from the "owner's perspective is composed of only those companies that service Kodak machines." *Id. at 482*.

The Seventh **[**72]** Circuit has since elucidated *Eastman Kodak*'s holding. In *Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756, 762 (7th Cir. 1996)*, the court explained that the *Eastman Kodak* Court "conceded that customers who had anticipated the change of policy could not be exploited." Indeed, "[c]ompetition among manufacturers fully protects buyers who accurately calculate life-cycle costs"—but for customers who did or could not have that anticipation, "Kodak had some ability to extract additional money by raising prices." *Digital Equip., 73 F.3d at 762*. It went on:

> The Court did not doubt in *Kodak* that if spare parts had been bundled with Kodak's copiers from the outset, or Kodak had informed customers about its policies before they bought its machines, purchasers could have shopped around for competitive life-cycle prices. The material dispute that called for a trial was whether the change in policy enabled Kodak to extract supra-competitive prices from customers who had already purchased its machines.

Id. at 763. In *Schor v. Abbott Labs., 457 F.3d 608, 614 (7th Cir. 2006)*, the court explained further: "What the Supreme Court held in [*Eastman Kodak*] is not that firms with market power are forbidden to deal in complimentary products, but that **HN28**[] they can't do this in ways that take advantage of customers' sunken costs" by, in *Kodak*'s case, "mov[ing] to claim all of **[**73]** the repair work for itself." *See also* *PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 819 (6th Cir. 1997)* ("Both the First and the Seventh Circuits have interpreted Kodak to be limited to situations in which the seller's policy was not generally known.") (citing *Digital Equip., 73 F.3d at 763*, *Lee v. Life Ins. Co. of North America, 23 F.3d 14, 20 (1st Cir. 1994)*, *cert. denied*, *513 U.S. 964, 115 S. Ct. 427, 130 L. Ed. 2d 340 (1994))*.

Other circuits have echoed that an *Eastman Kodak* claim depends on the consumer's **[*963]** unawareness of the supplier's aftermarket power and its terms when it purchased the primary-market product. *See, e.g.,* *id. at 820* ("the change in policy in Kodak was the crucial factor in the Court's decision"); *Avaya Inc., RP v. Telecom Labs, Inc., 838 F.3d 354, 405 (3d Cir. 2016)* ("no antitrust liability for a *Kodak*-style attempted monopolization claim could lie after May 2008 when customers were put on clear notice that purchasing [defendant's] precluded use of [third-party] maintenance"); *DSM Desotech Inc. v. 3D Sys. Corp., 749 F.3d 1332, 1346 (Fed. Cir. 2014)* (stating, "[c]rucial to the *Kodak* decision . . . was the fact that customers had already purchased their equipment before learning about Kodak's policies on aftermarket parts and services[,]" and holding, "[c]ustomers who learn about the RFID lock before buying the equipment cannot be exploited in the same way as the 'locked-in' customers because they can shop around for competitive life-cycle prices."); *see also, e.g.,* *Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 278 (6th Cir. 2015)* (holding that plaintiff sufficiently **[**74]** stated an *Eastman Kodak* claim in large part because "there is no indication that . . . customers had any reason to expect sharp variations in aftermarket prices" although they were sophisticated purchasers). The Ninth Circuit aptly summarized the post-*Eastman Kodak* world this way: **HN29**[] "[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue (as in *Eastman Kodak*)," but "the law prohibits an antitrust claimant from resting on market *power* that arises solely from contractual rights that consumers *knowingly and voluntarily* gave to the defendant." *Newcal Indus., Inc. v. Ikon Office Sol., 513 F.3d 1038, 1048 (9th Cir. 2008)* (second emphases added).[17]

Taking the aftermarket case against CDK first, the Complaint plausibly pleads a claim. The Complaint alleges facts suggesting that consumers are "locked in" after purchasing CDK DMSs, given the initial investments required, the contract length, and the resources required to change DMSs. It also alleges that CDK changed from open architecture to closed architecture as a matter of policy in 2015, which resulted in hefty integration-service fees. CDK contends that because its DMS licenses with dealers expressly prohibit DMS access to anyone other than the dealers' **[**75]** "employees and agents," dealers knew what they were signing up for. The Complaint is replete with detailed allegations, however, showing that, before 2015, CDK publicly and loudly took the position that it permitted third-party integrator access. It is thus inferable that dealers did not in fact "knowingly and voluntarily" agree to third-party blocking when they purchased DMSs. *See id.* That the licenses permit "agents" to access the DMS adds to the conclusion that CDK may have duped dealers by closing its architecture post-sale, even if CDK is correct that integrators do not actually constitute agents under state law.

In addition to the 2015 switch in policy, the Complaint alleges that CDK's contracts with vendors prohibit the vendors from informing dealers of how much CDK's integration services cost, or even telling dealers any part of its charges from vendors are "in any [ ] way associated with" CDK's costs. From that, it is reasonably inferable that dealers cannot price shop for "lifecycle"—a fact that the *Eastman Kodak* court found critical. *504 U.S.* **[*964]** *at*

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[17] Defendants do not challenge whether the alleged aftermarkets are insufficient for failing to exclude reasonable alternatives (*see* R. 54 at 20-23, R. 57 at 29-38)—a question best left for summary judgment anyway.

473-75. CDK's counter argument—that the Complaint pleads that some dealers complained about the costs, and thus the allegations about price-secrecy **[**76]** are not well-pleaded—is a stretch. A contract can prohibit vendors from sharing pricing information and a few vendors can do so anyway. Altogether, as was true in *Eastman Kodak*, "[t]he proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers." 504 U.S. at 482.

The aftermarket case against Reynolds is thinner, but nevertheless sufficient at this stage. Reynolds points out that the Complaint affirmatively pleads its long-standing opposition to thirdparty integration, which started in 2009 at the latest. It pleads further that Reynolds's has made this stance publicly known, and that its contracts expressly ban "provid[ing] access to . . . any third party." The Complaint, therefore, affirmatively pleads that Reynolds's closed architecture was generally known to customers before they purchased the product (during whatever can be considered the relevant period, at least).[18]

But a change in aftermarket practices is not the sole worry of *Eastman Kodak* and its progeny. *See* Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 384 (3d Cir. 2005) (**HN30**[] "an 'aftermarket policy change' is not the *sine qua non* of a *Kodak* claim"). Rather, as explained, the Supreme Court expressed more general concerns about customers **[**77]** that unknowingly and involuntarily sign on for the defendant's aftermarket power. *See* Eastman Kodak, 504 U.S. at 473-75. Included in that group, according to the Supreme Court, are those unable to undertake lifecycle-cost analyses (at least at some, reasonable level) before purchasing the primary product because the requisite "information is difficult—some of it impossible—to acquire at the time of purchase." Id. at 473-74. Indeed, the Seventh Circuit recognized as much in explaining that "[c]ompetition among manufacturers fully protects buyers who *accurately* calculate life-cycle costs," but where customers cannot do so, a supplier-defendant (*i.e.*, Kodak, in the court's description) can charge supracompetitive prices in the aftermarket. Digital Equip., 73 F.3d at 762 (emphasis added). Like CDK, the Complaint pleads that Reynolds employs contracts that prohibit vendors from sharing with dealers Reynolds's integration fees, which are allegedly subject to varying, significant, and frequent increases. Taken as true, those alleged "market imperfections" suggest that dealers may be unable to assess lifecycle costs like the Eastman Kodak owners. Newcal, 513 F.3d at 1050; Image Tech. Serv., Inc. v. Eastman Kodak Co., 903 F.2d 612, 617 (9th Cir. 1990), *aff'd sub nom.* Eastman Kodak, 504 U.S. 451, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (**HN31**[] "market imperfections can keep economic theories about how consumers will act from mirroring reality") **[**78]** (citing Jefferson Parish, 466 U.S. at 15 n. 24)); *see also* Areeda & Hovenkamp, ***ANTITRUST LAW*** ¶¶ 1740, 1740a. Despite Authenticom making this point, Reynolds ignores it altogether.

Ultimately, Authenticom "must produce hard evidence dissociating the competitive situation in the aftermarket from activities occurring in the primary market." Avaya, 838 F.3d at 402. At this stage, however, the Complaint adequately pleads an aftermarket claim against Reynolds.

[*965] 2. Acquisition of Power by Anticompetitive Means

That leaves the question of whether the Complaint has adequately alleged that Defendants have monopolized their respective aftermarkets through anticompetitive means. **HN32**[] "Where defendant has engaged in unlawful restraint of trade that would independently violate Section 1 of the Sherman Antitrust Act, it is well established that it also violates Section 2 if it acquires or maintains a monopoly by means of that restraint of trade." Gumwood HP, 2013 U.S. Dist. LEXIS 92133, 2013 WL 3214983, at *7 (citing United States v. Griffith, 334 U.S. 100, 106, 68 S. Ct. 941, 92 L. Ed. 1236 (1948)). As already determined, the Complaint adequately pleads that Defendants have engaged in a conspiracy to block Authenticom and exclusive dealing. Defendants do not argue that such conduct is insufficiently anticompetitive for Section 2's purposes.

Defendants do, however, fall back on *Trinko* and the CFAA. Those positions are unpersuasive mostly **[**79]** for reasons already explained. *Accord* Viamedia, 218 F. Supp. 3d 674 (denying a motion to dismiss with respect to Section 2 tying and exclusive dealing claims, but granting it with respect to Section 2 refusal-to-deal claim).

[18] Authenticom's attempt to walk back that pleading by calling Reynolds's initial blocking as "tepid" is unpersuasive.

Defendants emphasize, for example, that Authenticom has no right to access the DMSs, and that its *Section 2* claim is really an attempt to "enforce[ ] sharing" of Defendants' DMSs. That concern is both premature and misplaced. As the Seventh Circuit has made clear, ***HN33***[] in no event will there be an enforced duty to deal. *Authenticom, 874 F.3d at 1025-26*. If the alleged agreement violates the Sherman Act, the proper remedy is to "set the offending agreement aside." *Id. at 1026*. If the alleged ties (if later pleaded plausibly) do the same, "the proper remedy would be to enjoin the tie." *Id.* As for the cyber-security laws, Defendants argue that their right to deny third parties access to their computers is not "override[n]" by the Sherman Act. True, but so is the inverse—cyber-security laws do not give Defendants an antitrust defense.

The Court therefore denies Defendants' motions to dismiss with respect to Count Four.

II. Tortious Interference (Count Five)

Finally, the Complaint alleges that Defendants tortuously interfered with Authenticom's business by engaging in the **[**80]** conduct that forms the bases of the antitrust claims as well as by spreading "falsehoods" about Authenticom's security. ***HN34***[] "In an MDL, a court must apply the choice-of-law rules of the transferor forum." *Chang v. Baxter Healthcare Corp., 599 F.3d 728, 732 (7th Cir. 2010)*; *see also Dairy Farmers*, 2015 WL 3988488, at *22. ***HN35***[] Under Wisconsin law, tortious interference with contractual relations has five elements: "(1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional; (4) a causal connection exists between the interference and the damages; and (5) the defendant was not justified or privileged to interfere." *Comsys Inc. v. City of Kenosha, 2017 U.S. Dist. LEXIS 70518, 2017 WL 1906750, at *22 (E.D. Wis. May 9, 2017)* (quoting *Burbank Grease Servs., LLC v. Sokolowski, 2006 WI 103, 294 Wis. 2d 274, 717 N.W.2d 781, 796 (Wis. 2006))*. Wisconsin courts also appear to follow the Restatement (Second) of Torts' approach to tortious interference. *See* *Magnum Radio, Inc. v. Brieske, 217 Wis. 2d 130, 577 N.W.2d 377, 379 (Wis. Ct. App. 1998)*.

Defendants argue that the Complaint fails to plead the first and fifth elements. They contend that Authenticom's vendor contracts are invalid and unenforceable in that they are illegal under **[*966]** the cyber-security laws. The Complaint, however, does not plead that assertion. Further, as already noted, the question of "authorization" is fact-intensive and its resolution on these pleadings is inappropriate. *See, e.g.,* *Weingand, 2012 U.S. Dist. LEXIS 123160, 2012 WL 3763640, at *2*. Defendants point to no case **[**81]** in which a court has dismissed claims based on the notion that the Complaint affirmatively pleaded a violation of cyber-security laws. Defendants also contend that *Section 773 of the Restatement (Second) of Torts*, which says that ***HN36***[] a party may be "justified or privileged to interfere" if it is asserting "in good faith a legally protected interest," protects their conduct. As Authenticom correctly notes, however, that exception does not extend to otherwise illegal acts. *See* *Restatement (Second) of Torts § 767 cmt. c* (1979) ("Conduct specifically in violation of statutory provisions or contrary to established public policy may for that reason make an inference [that the defendant acted without inappropriate motive] improper. This may be true, for example, of conduct that is in violation of antitrust provisions or is in restraint of trade"). Moreover, courts recognize that the issue is a factual one inappropriate for resolution on a motion to dismiss. *See* *Metso Minerals Indus., Inc. v. FLSmidth-Excel LLC, No. 07-CV-926, 2010 U.S. Dist. LEXIS 483, 2010 WL 55845, at *3 (E.D. Wis. Jan. 5, 2010)*. The Court, accordingly, denies Defendants' motions to dismiss Count Five.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part Defendants' motions to dismiss. If Authenticom wishes to replead any claims that the Court has dismissed without prejudice, it has until June 4, 2018, to do so.

Dated: May **[**82]** 14, 2018

ENTERED

/s/ Amy J. St. Eve

AMY J. ST. EVE

United States District Court Judge

Cable Line, Inc. v. Comcast Cable Communs. of Pa., Inc.

United States District Court for the Middle District of Pennsylvania

May 14, 2018, Decided; May 14, 2018, Filed

3:16-CV-1000

Reporter
2018 U.S. Dist. LEXIS 80961 *; 2018-1 Trade Cas. (CCH) P80,390; 2018 WL 2209518

CABLE LINE, INC. and MCLAUGHLIN COMMUNICATIONS INC., Plaintiffs, v. COMCAST CABLE COMMUNICATIONS OF PENNSYLVANIA, INC., et al., Defendants.

Subsequent History: Affirmed by *Cable Line v. Comcast Cable Communs. of Pa., 2019 U.S. App. LEXIS 11521 (3d Cir. Pa., Apr. 19, 2019)*

Prior History: *Cable Line, Inc. v. Comcast Cable Communs. of Pa., Inc., 2017 U.S. Dist. LEXIS 172583 (M.D. Pa., Oct. 18, 2017)*

Core Terms

cable, allegations, installation, subcontractors, antitrust, conspiracy, anticompetitive, competitors, terminated, Defendants', consumers, buyer, costs, anti trust law, provider, Regions, prices, rates, relevant market, metrics, motion to dismiss, monopsony, predatory, reduction, bidding, antitrust action, new allegation, conclusory, decreased, Internet

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Judges: Robert D. Mariani, United States District Judge.

Opinion by: Robert D. Mariani

Opinion

MEMORANDUM OPINION

I. INTRODUCTION AND PROCEDURAL HISTORY

This opinion addresses a second round of motions to dismiss after Plaintiffs' Amended Complaint was dismissed **[*2]** with leave to amend on October 18, 2017. Doc. 68. Plaintiff filed a Second Amended Complaint ("SAC") on November 21, 2018. Doc. 71. All three Defendants moved to dismiss the SAC. Docs. 77, 79, 81. While Plaintiffs added certain new allegations in the SAC, the core of Plaintiffs' complaint remained the same Comcast, which once employed Plaintiffs as cable installation subcontractors, terminated Plaintiffs and many others in an effort to reduce its costs and streamline its subcontractor operations. Doc. 71 ¶¶ 40, 41. As a result, Plaintiffs lost the business of a lucrative client, while Defendants Decisive and Vitel, who were also Comcast's subcontractors, were able to retain Comcast's business. Id. ¶ 42.

The Court assumes the parties' familiarity with the facts, given the parties' extensive briefing on the matter and this Court's previous motion to dismiss opinion. Doc. 67. Thus, this memorandum will primarily address the new and relevant allegations from the SAC. For reasons stated below, the Court reaffirms the legal principles and its analyses found in its previous opinion. The SAC will be dismissed with prejudice because Plaintiffs failed to cure the defects specified in this Court's **[*3]** previous opinion.

II. FACTUAL ALLEGATIONS

Plaintiffs are cable installation companies that were former subcontractors of Comcast Cable Communications of Pennsylvania, Inc. ("Comcast"). Plaintiffs brought suit against Comcast and two other cable installation subcontractors, Vitel and Decisive, for alleged violations under the *Sherman Act* and state antitrust laws, as well as an employment claim against Comcast for reverse discrimination. Doc. 71. Comcast is a cable television company and an internet service provider, which "offer[s] broadband, cable- based Internet access" to individual consumers. *Id.* ¶¶ 11, 16. In order to service its customers, Comcast subcontracts with certain cable installation companies such as Plaintiffs and Vitel and Decisive, to install fiber optic cables and hardware. *Id.* ¶¶ 16, 29. In 2009, Comcast subcontracted with approximately 176 regional cable installation companies. Id. ¶ 41. In their previous complaint, which was dismissed by this Court, Plaintiffs alleged that they "competed successfully in a 2010 Request For Proposal [RFP] process." Doc. 41 ¶ 16. However, the SAC changed the allegation to "Plaintiffs mistakenly believed they competed successfully in **[*4]** [the RFP] process because they were told to 'ramp up' in certain Divisions [by Comcast]." Doc. 71 ¶ 30. The SAC alleges that operating under this mistaken assumption, "Plaintiffs 'ramped up' their operations, costing them hundreds of thousands of dollars to more likely over a million dollars." *Id.* ¶ 38. However, "Comcast never awarded any contracts pursuant to the RFP." *Id.* ¶ 39. Instead, Comcast initiated a "national subcontractor reduction plan" that called for a reduction of Comcast's cable installation subcontractors to 39 firms, which resulted in the termination of its relationship with Plaintiffs in 2012, while Decisive and Vitel were among the firms that were kept on by Comcast. *Id.* ¶¶ 42, 58. Plaintiffs allege that Comcast conspired with Vitel and Decisive to transition Plaintiffs' cable installation responsibilities to them and "helped develop a monopoly for Vitel and Decisive in the Regions that the Plaintiffs worked." *Id.* ¶¶ 170-174. Due to the loss of Comcast's business, Plaintiffs were forced to close down their business. *Id.* ¶¶ 82-84. The SAC further alleges that by hiring only a few regional cable installation companies, "Comcast controlled the price and pushed down **[*5]** the price of cable installation," with "the only benefit [going] to Comcast, Decisive, and Vitel," while installation workers' "wages decreased and the amount of hours employees had to perform increased." *Id.* ¶¶ 99-102. In support, the SAC cites certain newspaper articles from 2016, which purportedly reported poor working conditions for cable installation employees. *Id.* ¶¶ 90-96. Plaintiffs also allege, for the first time, that Comcast had bought up other cable providers, i.e. its competitors, "[i]n the very late 1990's...into the early 2000's" and that Comcast "used a non- compete agreement to block the sale of [Plaintiff]" to Comcast's competitor, Exelon, "in the early 2000's." *Id.* ¶¶ 10, 15, 24, 78.

Additionally, Plaintiffs rehashed their previous allegations that Decisive and Vitel were retained by Comcast was because they were able to underbill Comcast and manipulate performance metrics, thereby "saving Comcast hundreds of millions up to a billion dollars." *Id.* ¶¶ 43-57. Plaintiffs also allege that Vitel "misappropriated and resold hundreds of thousands of dollars of Comcast equipment." *Id.* ¶ 165. Yet, despite these practices, Comcast continued to retain Decisive and Vitel because **[*6]** "it benefitted them with their shareholders, rising stock prices, and a higher profitability." *Id.* ¶ 139.

Finally, the SAC restates Plaintiffs' reverse employment discrimination claim, largely relying on allegations from the Amended Complaint. The Court previously dismissed this claim for failing to raise an inference that Plaintiffs' termination was motivated by their owners' race, as opposed to other factors abundantly pleaded in their Amended Complaint. Doc. 67 at 26-29. The only new, substantive allegations in the SAC relating to employment discrimination are that Vitel was chosen over Plaintiffs even though both had "over 100 trucks" and "Plaintiffs performed as well, or better, as Defendant Vitel at installing cable." Doc. 71 ¶¶ 181, 195.

III. STANDARD OF REVIEW

A complaint must be dismissed under *Federal Rule of Civil Procedure 12(b)(6)* if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)*.

"While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual **[*7]** allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly, 550 U.S. at 555* (internal citations, alterations, and quotations marks omitted). A court "take[s] as true all the factual allegations in the Complaint and the reasonable inferences that can be drawn from those facts, but . . . disregard[s] legal conclusions and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 231 n.14 (3d Cir. 2013)* (internal citation, alteration, and quotation marks omitted). Thus, "the presumption of truth attaches only to those allegations for which there is sufficient 'factual matter' to render them 'plausible on [their] face." *Schuchardt v. President of the U.S., 839 F.3d 336, 347 (3d Cir. 2016)* (alteration in original) (quoting *Iqbal, 556 U.S. at 679*). "Conclusory assertions of fact and legal conclusions are not entitled to the same presumption." *Id.*

"Although the plausibility standard 'does not impose a probability requirement,' it does require a pleading to show 'more than a sheer possibility that a defendant has acted unlawfully." *Connelly v. Lane Constr. Corp., 809 F.3d 780, 786 (3d Cir. 2016)* (internal citation omitted) (first quoting *Twombly, 550 U.S. at 556*; then quoting *Iqbal, 556 U.S. at 678*). "The plausibility determination **[*8]** is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id. at 786-87* (quoting *Iqbal, 556 U.S. at 679*).

IV. ANALYSIS

A. Plaintiffs Continue to Fail to Allege Antitrust Injury, Conspiracy, and Anticompetitive Effects in the Relevant Market

The essence of Plaintiffs' allegations is that Comcast, in order to reduce costs and streamline operations, dramatically decreased its number of cable installation subcontractors through a "national subcontractor reduction plan." Doc. 71 ¶¶ 40, 41. As a consequence, Plaintiffs, who were two of Comcast's installation subcontractors, lost the business they had previously enjoyed with Comcast, while Defendants Decisive and Vitel, who were also Comcast's subcontractors, were chosen by Comcast to continue to retain its business. *Id.* ¶ 42. In its previous opinion, this Court held that the Amended Complaint did not state an antitrust action because Plaintiffs (1) failed to plead antitrust injury because they only alleged injury as to themselves, not to competition in the marketplace, (2) failed to plead a conspiracy among Defendants, but instead, consistently alleged unilateral decision- making by

Comcast, and (3) failed to **[*9]** allege anticompetitive effects as required by the "rule of reason" analysis. Doc. 67. Because the SAC fails to adequately cure any of deficiencies enumerated by this Court, Plaintiffs continue to fail to state a claim under the Sherman Act.

First, Plaintiffs' injury does not flow from anticompetitive behavior, but rather, from the termination by a single client, Comcast. This Court noted in its previous opinion that to plead an antitrust claim, Plaintiffs must first allege the threshold element of antitrust injury, that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)*. This requirement ensures that antitrust laws are enforced "for the protection of competition, not competitors." *Id. at 488*. After all, *Section 1 of the Sherman Act* does not prohibit all agreements among market participants, but only those aimed to create "*unreasonable* restraints of trade." *West Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 99 (3d Cir. 2010)* (citing *Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S.Ct. 502, 55 L.Ed. 619 (1911))* (emphasis in original).

As the Third Circuit recently held, "[c]ompetition is at the heart of the antitrust laws; it is only anticompetitive conduct, or 'a competition-reducing aspect or effect of the defendant's behavior,' that **[*10]** antitrust laws seek to curtail." *Philadelphia Taxi Ass'n, Inc v. Uber Techs., Inc., 886 F.3d 332, 338 (3d Cir. 2018)* (quoting *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990))*. In *Philadelphia Taxi Ass'n*, the Court noted that Appellants, Philadelphia taxi drivers, cannot plead antitrust injury by simply alleging that their own business was harmed when a powerful competitor, Uber, entered the market:

> [a]llegations of purportedly anticompetitive conduct are meritless if those acts would cause no deleterious effect on competition. This is where the SAC falters: Appellants set forth a litany of ways in which Uber's entry into the market has harmed Appellants' business and their investment in medallions; yet none of the allegations demonstrate a harmful effect on competition.

Id. at 339. *See also* *Eichorn v. AT&T Corp., 248 F.3d 131, 140 (3d Cir. 2001)* (noting that the Third Circuit has "consistently held an individual plaintiff personally aggrieved by an alleged anti-competitive agreement has not suffered an antitrust injury unless the activity has a wider impact on the competitive market."). An antitrust injury must "result from a lessening of competition," even if "there may be an agreement which is harming others in the marketplace." *City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 266 (3d Cir. 1998)*.

Despite having three chances to plead antitrust injury, the SAC still falls short of pleading negative impact beyond Plaintiffs' own injury. The SAC **[*11]** offers no new substantive allegations as to whether there are any buyers for Plaintiffs' cable installation services aside from Comcast, whether Plaintiffs attempted to obtain their business after being terminated by Comcast, or whether Defendants' actions led to more barriers to entry for cable installation companies. *See, e.g.*, Doc. 71 ¶ 82 (declaring that "if Comcast was not using your cable installation company, there was no work," without alleging that Plaintiffs actually tried to find business elsewhere after losing Comcast as a client, or that companies similar to Plaintiffs tried and failed to find business after being terminated by Comcast).

In addition, there is no indication that there was an overall decrease in demand for cable installation services. While Plaintiffs allege that a single buyer, Comcast, decreased its demand for cable installation services *as to Plaintiffs*, they have not alleged that Comcast decreased its demand for such services overall, nor that other buyers of installation services besides Comcast decreased their demand for such services. In other words, the SAC fails to allege that the overall demand for cable installation services suffered. *Cf.* *Philadelphia Taxi Ass'n, 886 F.3d at 342* (holding **[*12]** that Appellants failed to allege attempted monopolization claim when they only argued that Uber "pushed numerous competitors out of the market" but did not "allege anticompetitive practices by Uber" or "mention Uber's market share; [the complaint] merely suggests that Uber and medallion taxicabs had similar numbers of vehicles operating in Philadelphia....This allegation falls short of indicating Uber's market share in the context of all the competitors in the Philadelphia taxicab market, such as other [Transportation Network Companies].")

In fact, the SAC blithely alleges that "there was no longer the same demand for the amount of services by different companies since all the services were being channeled into Vitel and Decisive." *Id.* ¶ 80. This only reveals Plaintiffs' confusion over what constitutes antitrust injury, as they appear to concede that Comcast continued to have a healthy demand for installation services, only it chose to channel its demand to Plaintiffs' competitors, as opposed to Plaintiffs. Once again, a plaintiffs "own injury, namely, financial hardship," without more, cannot be used to in place of pleading "an antitrust injury, such as a negative impact on consumers **[*13]** or to competition in general, [or] any link between this impact and the harms Appellants have suffered." *Philadelphia Taxi Ass'n, 886 F.3d at 344*. But "harm to [Plaintiffs'] business does not equal harm to competition." *Id.* "Conduct that merely harms competitors...while not harming the competitive process itself, is not anticompetitive." *Id.* (quoting *Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007))*.

As the Court's previous opinion found, Plaintiffs' injury flows from their loss of "a single—albeit lucrative—client." Doc. 67 at 13. This type of injury does not amount to a decline in *competition* in the overall cable installation market. If anything, Comcast's subcontractor reduction plan, which the SAC alleges was the result of Comcast's effort to select subcontractors with the lowest prices, is exactly the type of competition that antitrust laws are meant to foster. In fact, the SAC repeatedly alleges that Comcast chose its subcontractors by "determin[ing] the lowest amount that Comcast could pay Plaintiffs and other cable installation companies" and by measuring the quality of its subcontractors through the use of performance metrics. *Id.* ¶¶ 27,125, 130-31. In particular, the SAC alleges that "Comcast chose to work with Decisive and Vitel t o . . . drive down labor costs" **[*14]** and that Decisive and Vitel were chosen because they could "absorb those losses in order to be allocated a larger share of the market." *Id.* ¶ 172. These allegations, if true, would only give rise to an inference that Comcast tried to reduce its costs, which may benefit its ultimate consumers. In sum, the SAC complains of the fact that Decisive and Vitel were able to reduce their rates to seem more attractive to Comcast, and were rewarded with a larger volume of Comcast's business over Plaintiffs—this is precisely the type of competitive behavior that antitrust laws are meant to foster, not deter. Even if Decisive and Vitel's competitive rates led to the byproduct of pushing other competitors, such as Plaintiffs, out of the market, it cannot be labeled as "anticompetitive" behavior because "[c]utting prices in order to increase business often is the very essence of competition." *Philadelphia Taxi Ass'n, 886 F.3d at 340* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 592, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986)*).

For the same reasons, the SAC's allegations that Comcast "helped develop a monopoly for Vitel and Decisive in the Regions that the Plaintiffs worked" and that "Vitel and Decisive are able to enjoy monopoly power in these markets because they were the only company[ies] able to have **[*15]** better rates" are without merit. Doc. 71 ¶¶ 157-58,174. First, Vitel and Decisive cannot both be monopolies in the same regions. A "monopoly exists when *one firm* controls all or the bulk of a product's output, and no other firm can enter the market or expand output at comparable costs." *Carpet Grp. Int'l v. Oriental Rug Importers Ass'n, Inc., 256 F. Supp. 2d 249, 284 (D.N.J. 2003)* (quoting 2 PHILLIP AREEDA, JOHN SOLOW, AND HERBERT HOVENKAMP, ***ANTITRUST LAW***, ¶ 403 at 7 (2d ed. 2002) (emphasis in original). Second, and more importantly, the SAC concedes that Vitel and Decisive were able to obtain a large share of Comcast's business *because* they offered the most competitive rates. The natural result of competition, without allegations of reduced output or barriers to entry, does not raise an inference of a monopoly.

Plaintiffs also continue to allege that Vitel and Decisive were able to charge lower rates by underbilling Comcast and manipulating their performance metrics in Comcast's system, and that Comcast was aware of this behavior, but did not terminate Decisive and Vitel because it "lowered Comcast's bottom line, pleasing shareholders and increased stock prices." Doc. 71 ¶¶ 44-57, 172. However, as the Court stated in its previous opinion, the allegations of fraudulent underbilling **[*16]** by Decisive and Vitel, even if true, "may form the basis for consumer fraud, unjust enrichment, or misrepresentation claims," but "violations of common law or state law do not give rise to antitrust injury." Doc. 67 at 24. This principle was recently reaffirmed by the Third Circuit in *Philadelphia Taxi Ass'n*, which stated that illegal conduct cannot serve as a basis for antitrust injury:

> Even if Uber were able to cut costs by allegedly violating [Philadelphia Parking Authority] regulations, Appellants cannot use the antitrust laws to hold Uber liable for these violations absent proof of anticompetitive conduct. Even unlawful conduct is 'of no concern to the antitrust laws' unless it produces an anticompetitive effect....
>
> [Appellants] attempt to circumvent the antitrust injury requirement by focusing on how Uber's purportedly illegal operation enabled it to cut costs and increase its market share. But again, the Supreme Court has squarely rejected illegal conduct as a basis for antitrust injury. A competitor's illegal presence in a market is not a per se antitrust violation, and any resulting injury is alone insufficient for a private plaintiff to state an antitrust injury.

886 F.3d at 340, 345 (citing Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990)). **[*17]** *See also* Alberta Gas Chems. Ltd. v. E.I. du Pont de Nemours and Co., 826 F.2d 1235, 1240 (3d Cir. 1987) (explaining that to establish antitrust injury, "plaintiffs must prove more than harm causally linked to an illegal presence in the market"). Thus, while Vitel and Decisive's alleged business tactics may be unsavory or fraudulent, they do not morph Plaintiffs' allegations into an antitrust cause of action. Because Plaintiffs continue to confuse harm to their own welfare as harm to the entire market, they have yet again failed to plead antitrust injury.

Second, even if Plaintiffs had adequately pleaded antitrust injury, their claims would nonetheless fail because they have failed to plead an illegal agreement to lessen competition among the Defendants. "An agreement exists when there is a unity of purpose, a common design and understanding, a meeting of the minds, or a conscious commitment to a common scheme." West Penn, 627 F.3d at 99 (citing Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)). In its previous opinion, this Court found Plaintiffs' allegations did not give rise to an inference of conspiracy, but rather, suggested that Comcast unilaterally decided to reduce its number of subcontractors, while Decisive and Vitel were merely informed of Comcast's decision. Doc. 67 at 16. The SAC does not cure this shortcoming. Instead, it continues to **[*18]** assert that "Defendants Vitel and Decisive *subsequently* became aware of Comcast's strategy." Doc. 71 ¶ 123. It also continues to suggest that all actions that led to Plaintiffs' harm were made by Comcast and Comcast alone. For example, the SAC alleges that in 2009 to 2010, "Comcast placed a Request for Proposal (RFP) seeking proposals from all of the cable installation companies that were working for Comcast at the time," and "Plaintiffs mistakenly believed they competed successfully in a 2010 Request For Proposal ("RFP") process because they were told to 'ramp up' in certain Divisions." *Id.* ¶¶ 27-30. Plaintiffs then invested "hundreds of thousands of dollars to more likely over a million dollars" in their operations, by purchasing new warehouse facilities, vehicles, real estate, and office space, as well as hiring and training new employees. Id. ¶¶ 36-38. However, to Plaintiffs' misfortune, "Comcast never awarded any contracts pursuant to the RFP." *Id.* ¶ 39.

The SAC also alleges that in 2009, "*Comcast* launched a national subcontractor reduction plan from its Philadelphia corporate headquarters," which "called for a reduction in the number of regional cable installation firms working **[*19]** with Comcast from 176 in 2009 to 39 in 2012," and that "*Comcast* had no intention of working with Plaintiffs or many other of the subcontractor/business partners for the long haul." *Id.* ¶¶ 40-42 (emphasis added). The SAC then alleges that in 2012, "*Comcast* sent a letter to Plaintiffs stating that their long-term relationships would be terminated." *Id.* ¶¶ 58 (emphasis added). It is also alleged that "*Comcast* chose to work with Vitel and Decisive" because they offered lower labor costs and manipulated their performance metrics. *Id.* ¶ 172. *See also id*. ¶¶ 130-31 (alleging that "*Comcast* developed a proprietary customer database, Cable Data, to track its subcontractor metrics" and that "*Comcast* would tally metrics data and identify the highest and lowest scoring subcontractors.") (emphasis added). Notably absent in these allegations is any indication that Decisive and Vitel had any influence over Comcast's unilateral decision to reduce its number of subcontractors and work only with those that offered the lowest rates.[1] Thus, by Plaintiffs' own allegations, their injury arises solely from unilateral decisions made by Comcast.

Furthermore, as the Court's previous opinion noted, "a claim **[*20]** of conspiracy predicated on parallel conduct should be dismissed if common economic experience, or the facts alleged in the complaint itself, show that independent self-interest is an obvious alternative explanation for defendants' common behavior." Doc. 67 at 15 (quoting In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 326 (3d Cir. 2010)). Here, the obvious explanation of the events is that Comcast decided to streamline the number of subcontractors it worked with, which resulted in the termination of Plaintiffs in favor of Vitel and Decisive, who in turn hired some of Plaintiffs' personnel and bought their inventory after Plaintiffs' termination. *See* Doc. 71 ¶¶ 71-77. These allegations further undermine the idea that

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[1] The SAC also alleges, for the first time, that after it terminated Plaintiff Cable Line, Comcast "gave Cable Line a 1 year contract; this was a complete farce to try to cover up the fraudulent activities, because Comcast never gave Cable Line any work in accordance with the contract, nor did Comcast have any intention to give them work." *Id.* ¶ 83. This allegation further undermines Plaintiffs' contention that their termination was the result of an agreement among all three co-defendants, as opposed to an independent decision by Comcast.

competition in the cable installation market suffered, as the SAC appears to acknowledge that Decisive and Vitel, by attracting a larger volume of business from Comcast, were also able to employ more cable installation employees and bolster their operations. *See* [*Philadelphia Taxi Ass'n, 886 F.3d at 341*] ("Appellants acknowledge that the nearly 1200 medallion taxicab drivers that Uber recruited did not remain idle, but rather they drove for Uber. In sum, what Appellants allege does not give rise to an inference of anticompetitive or exclusionary conduct and suggests, if anything, **[*21]** that Uber's ability to attract these drivers was due to its cost efficiency and competitive advantage.").[2]

In fact, Plaintiffs' own brief belies any notion that Comcast would have a plausible motive for conspiring with Decisive and Vitel. The brief describes the conspiracy as one where "Vitel and Decisive would do work at lower than cost rates, Comcast would get rid of all the competition, and Vitel and Decisive would get the majority of installation work and be able to charge higher for the installation work at a later date since virtually all of the competition in the market area would be eliminated." Doc. 90 at 2. Plaintiffs conveniently leave out the fact that these higher charges would presumably be *charged to Comcast*, which would dampen any motive on the part of Comcast to engage in an illegal conspiracy to drive up its own subcontractor costs. Similarly, elsewhere in their brief, Plaintiffs argue that Decisive and Vitel was "able to charge a rate below market in which these Defendants then would be able to recoup such undercharges once the competition was eliminated," and that Comcast "exercise[d] its monopsony power by only contracting with Vitel and Decisive," leading to **[*22]** Vitel and Decisive being "able to make higher than market profits," without explaining why Comcast would agree to a scheme that would lead to an increase in their own subcontractors' rates. *Id.* at 4, 34.

In place of allegations providing a plausible explanation as to why Comcast would enter into a conspiracy contrary to its own interests, the bulk of Plaintiffs' new allegations are vague and conclusory. For example, the SAC alleges that "[b]etween February 28, 2012 and May 27, 2012, Comcast agreed with Defendants Vitel and Decisive to allocate regional cable installation markets" and that "[t]he purpose and effect of Defendants' actions was not just to change Comcast's preferred installation vendors: it was to eliminate competitors to Vitel and Decisive." Doc. 71 ¶¶ 62, 79. These allegations of an agreement are not only conclusory, but they cannot be squared with the SAC's substantive allegations elsewhere that Comcast independently arrived at the decision to work with Vitel and Decisive, because they offered lower costs and better performance metrics (whether fraudulently obtained or otherwise. *See, e.g., id.* ¶¶ 27, 159-161. Likewise, the SAC's allegation that due to the conspiracy, Decisive and **[*23]** Vitel "were subsequently able to charge more for installation services and pass it on to the ultimate consumer," i.e. Comcast, defies logical inference—again, Comcast has no motive to enter into a conspiracy where its own subcontractors would be able to charge higher rates. *Id.* ¶ 105. In fact, the most substantive allegations that may be read as approximating an agreement are Plaintiffs' original allegations that Comcast was aware "of the manipulation of the metric system by Decisive and/or Vitel," and that Decisive and Vitel "subsequently became aware of Comcast's strategy" to eliminate many of its subcontractors through its subcontractor reduction plan. Doc. 71 ¶¶123, 139. But as this Court's previous opinion found, mere awareness of other market participants' actions does not constitute an *a priori* agreement to restrain trade. Doc. 67 at 16-17.

The fundamental flaw of Plaintiffs' complaint was—and remains—that even though Comcast may have an motive to reduce its number of cable installation subcontractors, it has no incentive to conspire with its own subcontractors to *eliminate competition* in the overall market and *increase the prices* for the services it was buying. Absent substantive, **[*24]** plausible allegations justifying such a conspiracy, the SAC fails to adequately allege that Plaintiffs suffered harm from an agreement entered into by Defendants to restrain competition. *Cf.* [*Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255-56 (3d Cir. 2010)*] (concluding that "simply because each Dealer, on its own, might have been economically motivated to exert efforts to keep [manufacturer's] business and

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[2] The SAC also claims that working conditions for cable installation employees deteriorated after Comcast reduced its number of installation subcontractors, but offer no explanation, plausible or otherwise, as to why the working conditions of individual workers are relevant to a conspiracy among the Defendants to consolidate the market for cable installation companies. Doc. 71 ¶¶ 99-104, 129. In any event, the allegations of declining working conditions are based upon news articles written in 2016. *Id.* ¶¶ 90-96. Plaintiffs, however, were terminated in 2012. Thus, even assuming that employees' working conditions are relevant to the alleged antitrust conspiracy, it is unclear how these temporally remote articles would be relevant to the core events at issue.

charge the elevated prices [manufacturer] imposed does not give rise to a plausible inference of an agreement among the Dealers themselves... [plaintiff's allegations] do no more than intimate 'merely parallel conduct that could just as well be independent action.'") (quoting *Twombly, 550 U.S. at 566*).

Third, even if the SAC had adequately pleaded antitrust injury and conspiracy, the claim would still fail under a rule of reason analysis. In an antitrust action, the plaintiff carries the "initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic market." *In re Ins. Brokerage, 618 F.3d at 315* (citing *Gordon v. Lewistown Hosp., 423 F.3d 184, 210 (3d Cir.2005))*. For reasons stated above, Plaintiffs have failed to plead anticompetitive effects beyond their own injury. Furthermore, they continue to fail to define a relevant market. Instead, the SAC makes vague claims that Comcast was "the largest **[*25]** purchaser for cable installation in the United States in the relevant markets," and that "within a specific community where it held the cable franchise, Comcast would be the sole purchaser of cable installation services," even though it is unclear what these "relevant markets" or "specific communit[ies]" are. Doc. 71 ¶¶ 13, 34.

However, the SAC did add some new allegations that may be read as an attempt to define a geographical market by making vague references to the "Northern Division," which purport to include certain parts of Pennsylvania, New Jersey, Ohio, Maryland, Delaware, Washington DC, Virginia, Connecticut, Massachusetts, Vermont, New Hampshire, and Maine. *Id.* ¶ 23. However, the SAC does not provide any justification for defining the market in this manner. In fact, references to the "Northern Division" often include other geographic areas in the same assertions. *See, e.g., id.* ¶ 86 (alleging that "[m]any other cable installation companies in the Northern Division *and in fact other Divisions*...that were terminated by Comcast, all went out of business"); *id.* ¶ 88 (alleging that "Comcast's monolithic actions were *not only done in the Northern Division*, particularly in the Regions **[*26]** in which Plaintiffs performed their work, *but in other Divisions* and Regions across the Country.") (emphasis added). Plaintiffs appear to believe that they may define a market by where *they themselves* operate, even though by their own admission, the same conspiracy has led to the same effect both inside and outside the "Northern Division."

"Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted." *Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430, 436 (3d Cir. 1997)*. Plaintiffs have failed to propose a market based on interchangeability of cable installation services or cross-elasticity of demand for such services. In particular, the SAC fails to allege whether other cable providers, aside from Comcast, hired cable installation subcontractors in the "Northern Division"; whether Plaintiffs' installation services are interchangeable with their competitors' services in the "Northern Division"; or whether **[*27]** the "Northern Division" incorporates the entirety of the market's limits, beyond which Plaintiffs' services are no longer interchangeable with those of its competitors. Additionally, Plaintiffs' attempt to confine the relevant market to the "Northern Division" is belied by the rest of the allegations in the SAC, which indicate that Plaintiffs regard the whole of the United States as the relevant market. *See* Doc. 71 ¶ 200 ("Defendant Comcast, who led the conspiracy, has substantial market power as the largest purchaser for cable installation in the United States."); *id.* ¶ 225 (same); *id.* ¶ 212 ("Defendant Comcast, which led the conspiracy, has substantial market power as the largest cable company and Internet Service Provider by revenue in the United States as well as the largest purchaser of cable installation services."); *id.* ¶ 237 (same).

Perhaps recognizing the inadequacies of the SAC's market definition, Plaintiffs attempt to bolster their allegations through their brief, arguing that Comcast has significant market power in the Northern Division according to a website called broadbandnow.com. Doc. 90 at 5. Even if the Court may consider new allegations in a party's briefing, the **[*28]** citation fails to offer support for Plaintiffs' contentions. Upon review, the website appears to be a tool to help *individual consumers* to find cable providers like Comcast by geographic location. This citation reveals that Plaintiffs continue to "mistakenly conflate two distinct markets"—the cable and internet service provider industry, where Comcast is a *seller* of cable content and services to individual consumers, and the cable installation industry, where Comcast is a *buyer* of installation services. Doc. 67 at 21.

The Court is baffled by Plaintiff's persistence in conflating the two markets, even after the Court's extensive discussion in its previous opinion. *See id.* at 21-22. Plaintiffs, as cable installation subcontractors, are not aggrieved

Comcast customers. Yet they insist on relying upon allegations of dissatisfaction among Comcast consumers as evidence of a conspiracy to lessen competition in the cable *installation* market. *See, e.g.*, Doc. 71 ¶¶ 110-112 (alleging that internet providers perform poorly on the "American customer Satisfaction Index" and that cost of cable consumers increased "nationally."). The problem is only confounded by Plaintiffs' opposition brief, which makes unsubstantiated **[*29]** claims to investigations by the FCC, Congress, and the Wall Street Journal regarding Comcast's customer dissatisfaction. *See, e.g.*, Doc. 90 at 33 ("Consumers now pay more, the service is awful, people are being charged for services they did not even receive, and consumers are subjected to service calls by overworked, untrained and unqualified technicians. These are not just Plaintiffs' allegations, but also constitute allegations put forth by the FCC, the United States Congress and Senate, the Wall Street Journal, various cable publications from the Internet and other articles cited in this memorandum of law."). Notwithstanding the fact that these claims do not appear anywhere in the SAC, the Court fails to see how regulatory action or news articles concerning customers' dissatisfaction in the *cable provider* market have any bearing on the competition within the *cable installation* market. As the Court previously found, Comcast's role as a seller in the cable provider market is not relevant to its role as a buyer in the installation market. Plaintiffs' continued conflation of the two, either by willfulness or by ignorance, does not warrant any further discussion from this Court.[3]

Finally, in its previous opinion, the Court noted that Plaintiffs may have been suggesting (though it was not clear from the previous complaint) that Comcast was a monopsony, that is, "[a] firm that has substantial power on the buy side of the market," but cautioned Plaintiffs that without proper allegations of a conspiracy, the mere existence of a monopsony does not constitute an antitrust violation. Doc. 67 at 22 (citing *West Penn, 627 F.3d at 103*). Plaintiffs have taken to use the word at length in their brief, arguing that Comcast engaged in "predatory bidding, as it led Comcast to determine what price it would accept which would be below cost pricing," and that "[t]he other Defendants, the predators, had a strong probability of recouping those losses incurred because Comcast through its monopsony power was able to give Vitel and Decisive all of the work because the competition would be eliminated and not be able to compete." Doc. 90 at 31 (citing *Weyhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc. 549 U.S. 312, 314, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007))*.

Plaintiffs misunderstand the concept of predatory bidding. There, the focus is on Comcast's attempt to drive out its cable provider competitors. In the context of a monopsony engaging in anticompetitive behavior, a powerful buyer such as Comcast may engage **[*31]** in predatory bidding by initially accepting *higher* prices for the services of Plaintiffs, Decisive, and Vitel, even if it meant that Comcast would have to temporarily bear higher subcontractor costs and perhaps even sell its own end-products at a loss. In the second stage of predatory bidding, however, Comcast would have driven other buyers out of the cable installation market, leaving it to be the *only* buyer in the market, and therefore be able to force sellers such as Decisive, Vitel, and Plaintiffs to sell their services to Comcast at unreasonably low prices. There are no allegations resembling such a scheme here. Just as Comcast would have no motive in conspiring with Decisive and Vitel to drive up subcontractor rates, Decisive and Vitel would have no motive in conspiring with Comcast to help it engage in predatory bidding. In essence, predatory bidding is a scheme

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[3] On the whole, Plaintiffs' brief is heavy in rhetoric and low in substance. In place of legal arguments, the brief is filled with hyperbolic rhetorical questions or melodramatic rants. *See,* ***[*30]*** *e.g.* Doc. 90 at 35 (asserting that Comcast had a practice of lying to government regulators: "This is Comcast's modus operandi: to run over any company, destroy competition and make misrepresentations, believing that it can get away with anything because Comcast has too much money for anyone to be able to go against it"); *id.* at 4 ("Why else would Comcast keep Decisive and Vitel as subcontractors or business partners when they were both involved in the illegal activities, unless they had some sort of deal going on?"); *id.* at 24 ("The Court should look at the agreement or conspiracy as an ordinary prudent person using common sense. Who would partner with two dishonest companies that stole hundreds of thousands of dollars of equipment, manipulated your performance metrics system, and caused you to be fined by the SEC or report the fraudulent representations or misrepresentations to shareholders? No rational company would partner with companies like this unless there were some sort of illegal agreement.").

At best, these dubious "arguments" reveal a deep confusion over the legal basis for Plaintiffs' claims. At worst, they may be a ploy to distract from Plaintiffs' inability to shoulder their burdens of pleading antitrust injury and anticompetitive effects under a rule of reason analysis. In any event, Plaintiffs' counsel would do well to focus their briefing on substantive legal arguments in the future.

engaged in by a single, powerful buyer to drive other buyers out of the market, not a conspiracy between buyers and sellers to drive other sellers from the market. Plaintiffs' arguments that Comcast engaged in predatory bidding as a monopsony are therefore without merit. As this Court noted in its previous opinion, barring **[*32]** allegations that would substantiate an antitrust action, a monopsony "is generally free to bargain aggressively when negotiating the prices it will pay for goods and services." *West Penn, 627 F.3d at 103*.[4] *See also* *LifeWatch Servs., Inc. v. Highmark, Inc., 248 F. Supp. 3d 641, 650 (E.D. Pa. 2017)* (holding that "Defendants' refusal--whether concerted or not—to purchase any telemetry device—whether produced by [Plaintiff] or not—is not an antitrust violation, but rather a legal exercise of Defendants' monopsony power....The alleged fact that Defendants' decisions have caused [Plaintiff's] revenues to drop [ ] dramatically does not render Defendants' behavior illegal under the Sherman Act.") (citing *West Penn, 627 F.3d at 103*).

In sum, the SAC continues to be plagued by Plaintiffs' tunnel vision focus on their own injury without tying their allegations to a conspiracy to harm overall competition. Plaintiffs' plight, which directly arose out of Comcast's decisions favoring Vitel and Decisive over them, may invite sympathy, especially if the allegations of Vitel and Decisive's unsavory business tactics are indeed true. However, these allegations cannot convert Plaintiffs' aggrievement into a Sherman Act claim. Antitrust laws are concerned with market, not any particular players within it. Thus, Plaintiffs' Sherman Act claim **[*33]** must again be dismissed.

Having had three opportunities to adequately plead an antitrust action and the benefit of the Court's guidance on the previous complaint's deficiencies, Plaintiffs have not demonstrated that another opportunity to amend would be able to cure the defects of their antitrust action. *See* *LifeWatch, 248 F. Supp. 3d at 651* (granting motion to dismiss antitrust action with prejudice when "[o]ver the past five years, LifeWatch has amended its complaint three separate times—yet it still has not alleged any colorable antitrust violation and would not be able to do so even if the Court granted leave to amend yet again.").

B. Plaintiffs Failed to Plausibly Allege An Employment Discrimination Claim

Similar to the antitrust claim, the SAC added a few desultory allegations to the employment discrimination claim without curing its fundamental defects. In its previous opinion, this Court provided extensive guidance on how the claim may be adequately pleaded:

> Plaintiffs do not allege, for example, how many of the original 176 cable installation companies hired by Comcast were minority or Caucasian owned, if there are any "diverse" cable installation companies that are comparable to plaintiffs in size, regions served, **[*34]** or types of services provided, and if there are, whether those comparable "diverse" companies were retained by Comcast. Furthermore, it cannot be said that Vitel is a comparable firm to plaintiffs, as the Amended Complaint repeatedly allege[s] that Vitel is a "larger" firm that enjoys the concomitant advantages in gaining Comcast's business. Thus, plaintiffs have not plausibly alleged that they were passed over in favor of Vitel *because of* their race.... Save for the conclusory allegations that Plaintiffs are "owned and operated by Caucasian people" and that "Vitel was tracked as diverse," plaintiffs have failed to plead that they were treated unfavorably because their owners are Caucasian.

Doc. 67 at 29 (internal citations omitted). The only new allegations in the SAC that may plausibly be read as attempting to conform to the Court's guidance above are that "Plaintiffs performed as well, or better, as Defendant Vitel at installing cable"; that "[u]nlike Vitel, Plaintiffs had not been routinely investigated for misappropriating Comcast property"; and that Plaintiffs "were not chosen over Vitel even though Vitel was the only minority company that had over 100 trucks, and both McLaughlin **[*35]** and Cable Line had 100 trucks." Doc. 71 ¶¶ 181, 195, 196.

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[4] Similarly, the SAC also alleges, for the first time, that Comcast had bought up other cable providers "[i]n the very late 1990's...into the early 2000's" and used a restrictive covenant to block a potential sale of Plaintiff "in the early 2000's." Doc. 71 ¶¶ 10, 15. However, the fact that Comcast is a large cable provider company does not, by itself, suggest that it had any reason to engage in a conspiracy to increase cable installation companies' rates. In any event, the remote events from the early 2000's have little bearing on Plaintiffs' termination in 2012.

These new allegations are conclusory and insufficient to raise an inference that Vitel was chosen over Plaintiffs for racially motivated reasons. Similarly to the dismissed Amended Complaint, the SAC does not include any allegations about other, "non-diverse" firms that were terminated by Comcast, or any allegations about other, "diverse" firms that were kept on by Comcast. Instead, Plaintiffs continue to rely solely on a comparison between Vitel and the Plaintiffs. Such comparisons do not make out a claim for reverse discrimination, especially since elsewhere in the SAC, Plaintiffs maintain that Vitel was selected by Comcast by manipulating performance metrics and underbilling services "to help Comcast improve profit margins and less expenses." Doc. 71 ¶¶ 159-161.

In other words, the SAC itself undermines the discrimination claim by providing alternative reasons for Comcast's choice of Vitel over Plaintiffs. While a plaintiff may put forth inconsistent claims in their pleadings, *see* *Fed. R. Civ. P. 8(d)*, they must still muster sufficient allegations as to *each* claim lodged against a defendant. *See* *Sheinman Provisions, Inc. v. Nat'l Deli, LLC, 2008 U.S. Dist. LEXIS 54357, 2008 WL 2758029, at *4 (E.D. Pa. July 15, 2008)* ("*Rule 8* only allows alternative claims to be ple[d] **[*36]** if all of the claims are sufficient on their own."); *Davis v. Abington Mem'l Hosp., 2012 U.S. Dist. LEXIS 111160, 2012 WL 3206030, at *6 n. 63 (E.D. Pa. Aug. 7, 2012)* (finding that "internal inconsistencies render [Plaintiff's] allegations deficient and prevent the Court from making a [requisite] finding" in an FLSA claim), *aff'd*, *765 F.3d 236 (3d Cir. 2014)*. As with the antitrust claim, Plaintiffs have failed in their third opportunity to adequately plead an employment discrimination claim; thus, the claim will be dismissed with prejudice.

C. The Court Declines to Exercise Jurisdiction Over the Pendent Claims

Having determined that Plaintiffs' federal claims must be dismissed, the Court will decline to exercise supplemental jurisdiction over Plaintiffs' state law claims premised on the same allegations. Doc. 71, Counts II, III, and IV. The decision whether to exercise supplemental jurisdiction under *28 U.S.C. § 1367(a)* is subject to the district court's discretion. *28 U.S.C. § 1367(c)(3)* ("The district courts may decline to exercise supplemental jurisdiction over a claim under *subsection (a)* if ... the district court has dismissed claims over which it has original jurisdiction."). "[W]here the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendent state claims unless considerations of **[*37]** judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Borough of W. Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir.1995)* (internal citations omitted). In light of the dismissal of the federal claims, the Court will dismiss Counts II, III, and IV without prejudice.

V. Conclusion

For the reasons stated above, as well as the legal principles and analyses espoused in the Court's previous opinion (Doc. 67), Defendants' motions to dismiss the Second Amended Complaint (Doc. 71) will be granted. A separate Order shall issue.

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

<u>ORDER</u>

AND NOW, THIS 14th **DAY OF MAY, 2018**, upon consideration of Defendants' Motions to Dismiss Plaintiffs' Amended Complaint (Docs. 77, 79, 81), **IT IS HEREBY ORDERED THAT**:

1. The Defendants' Motions to Dismiss Plaintiffs' Amended Complaint (Docs. 77, 79, 81) are **GRANTED**.

2. Counts I and V of the Amended Complaint (Doc. 71) are **DISMISSED WITH PREJUDICE** for failure to state a claim pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* against Defendants.

3. Counts II, III, and IV are **DISMISSED WITHOUT PREJUDICE** pursuant to *28 U.S.C. § 1367(c)(3)*.

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

Swallow v. Torngren

United States District Court for the Northern District of California, San Jose Division

May 14, 2018, Decided; May 14, 2018, Filed

Case No. 17-cv-05261-BLF

Reporter
2018 U.S. Dist. LEXIS 82014 *; 125 A.F.T.R.2d (RIA) 2020-392; 2018 WL 2197614

ERIC G SWALLOW, Plaintiff, v. WILLIAM P TORNGREN, et al., Defendants.

Subsequent History: Affirmed by *Swallow v. Torngren, 2020 U.S. App. LEXIS 580 (9th Cir. Cal., Jan. 7, 2020)*

Core Terms

license, shares, allegations, disciplinary proceeding, gambling, emergency order, conspiracy, settlement, proceedings, arbitration, revoked, violations, immunity, absolute immunity, asserts, parties, prosecutorial, emails, fair market value, motion to dismiss, cause of action, judicial notice, accusation, revocation, deprive, rights, issue preclusion, leave to amend, distributions, sham

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For Peter V Lunardi, III, Jeanine L Lunardi, Defendants: Bernard S. Greenfield, Maureen Ann Harrington, LEAD ATTORNEYS, Greenfield Draa & Harrington LLP, San Jose, CA.

For Deborah A Swallow, Defendant: Chad Richard Fitzgerald, Gregory Steven Gabriel, LEAD ATTORNEYS, Kinsella Weitzman Iser Kump & Aldisert LLP, Santa Monica, CA; Michael Joseph Kump, LEAD ATTORNEY, Kinsella Weitzman et al LLP, Santa Monica, CA; Daniela Michele Spencer , Spenc, Kinsella Weitzman Iser Kump and Aldisert, Santa Monica, CA.

Judges: BETH LABSON FREEMAN, United States District Judge.

Opinion by: BETH LABSON FREEMAN

Opinion

ORDER GRANTING MOTIONS TO DISMISS WITHOUT LEAVE TO AMEND AND DISMISSING ACTION WITH PREJUDICE

[Re: ECF 51, 52, 53]

According to Plaintiff Eric Swallow ("Eric"),[1] the disciplinary proceeding initiated by California's Bureau of Gambling Control to revoke his gambling license was part **[*2]** of a larger conspiracy. The players in the alleged conspiracy range from the prosecuting Deputy Attorney General, William Torngren ("Torngren"); to Eric's former business partners, Peter and Jeanine Lunardi (individually, "Peter" and "Jeanine," and collectively, the "Lunardis"); to Eric's estranged wife, Dr. Deborah Swallow ("Deborah"). Torngren, the Lunardis, and Deborah each move to dismiss Eric's First Amended Complaint ("FAC"), ECF 41, which asserts claims for violations of *42 U.S.C. § 1983* and the *Racketeer Influenced and Corrupt Organizations Act ("RICO")* as well as claims for tax fraud. ECF 51, 52, 53. For the reasons discussed below, the motions to dismiss are GRANTED WITHOUT LEAVE TO AMEND and the action is DISMISSED WITH PREJUDICE.

I. BACKGROUND

The centerpiece of this lawsuit is Garden City, Inc. ("Garden City"), a California corporation that has operated the Casino M8trix card room in San Jose, California since 1974. FAC ¶ 1. Facing financial trouble, Garden City filed for bankruptcy around 1998 but continued to run its operation. *Id.* ¶ 54. The Lunardis saw an opportunity: Peter approached Eric in or around 2005 with a proposal to buy Garden City out of bankruptcy. *Id.* Eric agreed, and he **[*3]** and the Lunardis each purchased equal shares of Garden City stock in 2007, with Eric and Peter becoming the sole directors and officers of the company. *Id.* ¶¶ 55-57. For purposes of succession planning, Eric and the Lunardis entered into a 2008 Buy/Sell Agreement, which, among other things, provided reciprocal rights of first refusal with regard to the sale of their respective shares in Garden City. *Id.* ¶ 59.

Important here, Eric and the Lunardis secured gambling licenses to comply with the California Gambling Control Act. *Id.* ¶ 66. Two separate agencies implement the Gambling Control Act's provisions: the California Gambling Control Commission (the "Commission") and the Bureau of Gambling Control (the "Bureau"). The Commission has adjudicatory powers, including the ability to impose a penalty or discipline against an individual owner's license. *See* *Cal. Bus. & Prof. Code §§ 19824-19825*, *19870(a)*, *19871*. The Bureau, which falls under the auspices of the California Attorney General's Division of Law Enforcement, performs investigatory functions and, when appropriate, initiates and prosecutes disciplinary actions against current licensees. *Id.* *§§ 19826-19827*.

Eric asserts that Torngren is a state actor who "used and abused his authority **[*4]** as a Deputy Attorney General by conspiring with the [Lunardis] to . . . cause [Eric] to lose his gambling license and force [him] to sell his interest in [Garden City] at a price far below fair market value." FAC ¶ 34. To pursue that objective, Torngren and the Lunardis allegedly recruited Eric's estranged wife, Deborah, to join the conspiracy and committed multiple acts of mail and wire fraud, bank fraud, extortion, and money laundering. *Id.* ¶¶ 34, 49. In the FAC's characterization, Torngren and the Lunardis "devised a scheme to defraud the [Commission] and commit extortion." *Id.* ¶ 36.

Things kicked off in 2013 when Torngren launched an investigation into Eric, the Lunardis, and Garden City. *Id.* ¶¶ 70, 72. Torngren sought more information about the various affiliated legal entities that Eric and the Lunardis had created to control Garden City. *Id.* ¶¶ 60-66, 72. At the beginning of May 2014, the Bureau served an accusation against Garden City, which sought to revoke or suspend Eric's and the Lunardis' gambling licenses "for repeated violations of, and lack of suitability for, continued licensing under the [Gambling Control Act]." *Id.* ¶ 82. The accusation set forth the facts and specific **[*5]** violations supporting discipline, including that Eric and the Lunardis had provided false information to the Bureau, engaged in self-dealing to siphon off money and reduce reported income, and benefitted from illegal payments. *Id.* ¶ 83, Ex. 4. At the end of May 2014, the Bureau issued an Emergency Order that partially prevented Garden City from making payments to Eric and the Lunardis. *Id.* ¶ 94, Ex. 6. The Bureau amended the Emergency Order in June 2014 to ensure that Garden City could maintain its corporate status. *Id.* ¶ 95, Ex. 7.

[1] The Court means no disrespect to the parties by using their first names. This nomenclature is simply a matter of convenience due to the overlap in last names.

By early February 2015, the Lunardis began negotiating a settlement with the Bureau. *Id.* ¶¶ 108-14. Eric alleges that these settlement communications between Torngren and the Lunardis and between Torngren, the Lunardis, and Eric were acts of mail or wire fraud in furtherance of the conspiracy. For example, Eric pleads an act of mail fraud on March 5, 2015 when the Lunardis sent a letter to Eric offering to purchase his Garden City shares in connection with a global settlement offer proposed by Torngren that obligated Eric to dispose of his shares. *Id.* ¶¶ 115-19, Ex. 10. Similarly, Eric alleges acts of mail and wire fraud based on the Lunardis' March 27, **[*6]** 2015 letter advising Eric that they had settled with the Bureau and their March 30, 2015 email renewing their offer to purchase Eric's shares. *Id.* ¶¶ 120-23.[2] Eric also asserts that Torngren committed wire fraud when he rejected a settlement proposed by Eric's attorney and sent a counterproposal "alleging that the gravity of [Eric] purportedly misrepresenting and omitting requested information alone justified [Eric]'s disqualification from licensure and subjected him to a hefty fine." *Id.* PP 124-25. Eric's attorney responded with confusion as to why the Lunardis were allowed to settle without losing their license while Eric was not. *Id.* ¶ 126.

Because the parties could not reach a settlement, they proceeded to an administrative hearing on the accusation. In August 2015, Administrative Law Judge ("ALJ") Mary-Margaret Anderson presided over a seven-day evidentiary proceeding during which Eric was represented by counsel. *Id.* ¶¶ 18-20, 131, 136. The FAC describes this proceeding as being "plagued with a number of irregularities orchestrated by [Torngren]." *Id.* ¶ 132. The FAC asserts instances in which Torngren promised to assist Eric's information technology contractor, Bryan Roberts ("Roberts"), **[*7]** with claims against Eric in exchange for Roberts's testimony and encouraged Roberts to illegally retrieve confidential information from Eric's server and emails. *Id.* ¶¶ 139-40, 153-54. The FAC further pleads that Torngren acted beyond his prosecutorial function by discussing "whether [Peter] would be able to divert [Eric]'s distributions to himself if [Eric]'s license were revoked," by agreeing with Peter's attorney to "improperly use his influence to divert [Eric]'s distributions to [Peter]," and by directing Deborah to "collect information and evidence . . . through [her] divorce proceedings." *Id.* ¶¶ 135, 166.

In December 2015, the ALJ issued a proposed decision, which revoked Eric's gambling license and denied the request for renewal. *Id.* ¶¶ 136, 142. In particular, the ALJ stated that "[t]he record is more than sufficient to support the removal of [Eric] as a . . . licensee in California" because he has shown "a lack of good character, honesty, and integrity by his violations." *Id.*, Ex. 16 at 26. In February 2016, the Commission rejected the ALJ's proposed decision. *Id.* ¶ 143, Ex. 17. The Commission also requested that the parties submit written argument on a number of specific **[*8]** issues. *Id.*, Ex. 17 at 1-3. After the parties did so, the Commission issued its decision in May 2016. *Id.* ¶ 144. Like the ALJ, the Commission ordered that Eric's license be revoked and that renewal be denied; the Commission also assessed a penalty and costs. *Id.*, Ex. 18 at 62. Eric filed a writ petition in July 2016 in California Superior Court seeking to vacate and set aside the Commission's decision, but that proceeding remains pending. *Id.* ¶ 145.

The revocation of Eric's license had another consequence: he was required by law to sell his shares in Garden City. *See* Cal. Bus. & Prof. Code §§ 19882(a) ("The owner of the security shall sell the security for an amount not greater than fair market value, within 60 calendar days of the . . . revocation."), 19892(b) ("The individual . . . whose license is revoked . . . shall sell his or her interest in an amount not greater than fair market value, within 60 calendar days of the . . . revocation."). In April 2015 and again in February 2016, a third party had offered to purchase Eric's shares. FAC ¶¶ 204, 210. The FAC alleges that Torngren acted outside his prosecutorial role by engaging in numerous acts to "block [the third party]'s offer and interfere[] with [Eric]'s ability **[*9]** to get fair market value for his shares." *Id.* ¶ 212. Meanwhile, Eric commenced two arbitration proceedings against the Lunardis with regard to his right to sell his shares. In the first, an arbitrator concluded that the third party's $55 million offer was a bona fide offer that triggered Eric's contractual obligation under the Buy/Sell Agreement to notify the Lunardis and provide them a right of first refusal to match the third party's price. ECF 18-3, Ex. 1. That award was subsequently confirmed by the California Superior Court. *Id.*, Ex. 2. In the second arbitration, which was also confirmed by the

[2] The Lunardis' settlement was later reviewed and approved by the Commission on May 14, 2015. *Id.* ¶ 127, Ex. 13. As part of the settlement, the Lunardis and Garden City admitted to certain facts and violations, agreed to certain conditions for future operations, and paid a fine of almost $2 million. *Id.*, Ex. 11.

California Superior Court, an arbitrator found that the Lunardis had properly exercised their right to buy Eric's shares, so Eric was ordered to sell his Garden City shares to the Lunardis for $55 million. *Id.*, Ex. 3-5.

After the disciplinary proceeding, Eric initiated this lawsuit in September 2017. ECF 1. He filed the operative FAC in January 2018. ECF 41. The FAC asserts six causes of action: (1) a *§ 1983* claim for conspiracy to commit violations of substantive due process against Torngren, the Lunardis, and Deborah; (2) a *§ 1983* claim for conspiracy to commit violations of equal protection against **[*10]** Torngren, the Lunardis, and Deborah; (3) a RICO claim against Torngren and the Lunardis; (4) a RICO conspiracy claim against Torngren, the Lunardis, and Deborah; (5) a tax fraud claim regarding Garden City's 2015 tax return against the Lunardis; and (6) a tax fraud claim regarding Garden City's 2016 tax return against the Lunardis. FAC ¶¶ 241-72. Torngren, the Lunardis, and Deborah move to dismiss the FAC in its entirety. ECF 51, 52, 53.

II. LEGAL STANDARD

"A motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* for failure to state a claim upon which relief can be granted 'tests the legal sufficiency of a claim.'" *Conservation Force v. Salazar, 646 F.3d 1240, 1241-42 (9th Cir. 2011)* (quoting *Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001))*. When determining whether a claim has been stated, the Court accepts as true all well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese v. BP Exploration (Alaska) Inc., 643 F.3d 681, 690 (9th Cir. 2011)*.

However, the Court need not "accept as true allegations that contradict matters properly subject to judicial notice" or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008)* (quoting *Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001))*. While a complaint need not contain detailed factual allegations, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" **[*11]** *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007))*. A claim is facially plausible when the alleged facts "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

A. Judicial Notice

In connection with their motion to dismiss, the Lunardis seek judicial notice of (1) final awards from two arbitration proceedings between Eric and the Lunardis and (2) orders by the California Superior Court confirming those awards. ECF 18-3 at 1-2. Eric does not contest that these documents are properly subject to judicial notice. *See Fed. R. Evid. 201(b)*; *United States v. Black, 482 F.3d 1035, 1041 (9th Cir. 2007)* ("[Courts] may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue."). Instead, Eric "objects to [the Lunardis'] request for judicial notice to the extent they invite this Court to adopt another tribunal's factual finding(s)." ECF 65 at 1. Accordingly, the Court takes judicial notice of these documents without taking judicial notice of reasonably disputed facts contained in the documents. *See Lee v. City of Los Angeles, 250 F.3d 668, 690 (9th Cir. 2001)* (explaining that a court may take judicial notice of "*undisputed* matters of public record" but not "*disputed* facts stated in public records"). **[*12]**

B. *§ 1983* and RICO Claims

Eric's first four claims variously assert that Torngren, the Lunardis, and Deborah have violated *§ 1983* and RICO. Specifically, Eric alleges that Torngren, the Lunardis, and Deborah all engaged in conspiracy to commit violations of substantive due process and equal protection under *§ 1983* and conspiracy to commit RICO violations. FAC ¶¶

241-50, 259-64. Eric separately charges Torngren and the Lunardis with RICO violations. *Id.* ¶¶ 251-58. The Court concludes that Torngren's challenged conduct is covered by absolute immunity and that the Lunardis' and Deborah's challenged conduct is petitioning activity protected by the *Noerr-Pennington* doctrine. Although those rulings are sufficient to compel dismissal of Eric's *§ 1983* and RICO claims, the Court also briefly addresses independent bases on which Eric's claims fail.

1. Absolute Immunity

Torngren asserts that he is absolutely immune from suit under *§ 1983* and RICO for his challenged conduct. Claims for monetary damages against prosecutors pursuant to *§ 1983* and RICO may be barred by absolute prosecutorial immunity. *Imbler v. Pachtman, 424 U.S. 409, 430-31, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)* (*§ 1983*); *Van Beek v. AG-Credit Bonus Partners, 316 F. App'x 554, 555-56 (9th Cir. 2008)* (RICO). Although absolute immunity originally arose in the context of criminal prosecutions, the Supreme Court has extended immunity to agency officials performing functions analogous to **[*13]** those of a prosecutor in administrative enforcement proceedings. *See Butz v. Economou, 438 U.S. 478, 515, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978)*. This immunity is designed to allow officials acting in a prosecutorial role to make important discretionary decisions integral to their office without fear of retaliatory litigation for those decisions, especially where the judicial process itself already acts as a check on prosecutorial actions. *Burns v. Reed, 500 U.S. 478, 492, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991)*.

Because absolute immunity serves a limited purpose, it is justified when "any lesser degree of immunity could impair the judicial process itself." *Kalina v. Fletcher, 522 U.S. 118, 127, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997)* (quoting *Malley v. Briggs, 475 U.S. 335, 342, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986))*. Thus, in determining whether immunity attaches, courts examine "the nature of the function performed, not the identity of the actor who performed it." *Forrester v. White, 484 U.S. 219, 229, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)*. Immunity applies to conduct "intimately associated with the judicial phase of the criminal process" and protects prosecutors when they perform traditional activities as officers of the court. *Van de Kamp v. Goldstein, 555 U.S. 335, 342-43, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009)* (quoting *Imbler, 424 U.S. at 430-31*). In contrast, absolute immunity does not extend to a prosecutor's "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993)*. Thus, entitlement to absolute immunity for particular conduct turns on whether **[*14]** the prosecutor was "functioning as [an] 'advocate[]'" while engaging in that conduct. *Id. at 274*.

As a general matter, Torngren's actions were performed in his capacity as Deputy Attorney General in pursuance of the prosecution of the Bureau's accusation against Eric's license. By statute, "any power or authority of the department described in [the *Gambling Control Act*] may be exercised by the Attorney General or any other person as the Attorney General may delegate." *Cal. Bus. & Prof. Code § 19810*. The department is responsible for "perform[ing] all investigatory functions required by [the Gambling Control Act]," including "investigat[ing] suspected violations of [the Gambling Control Act] or [California laws] relating to gambling" and "initiat[ing], where appropriate, disciplinary actions." *Id. § 19826*; *see also id*. *§ 19827* (spelling out investigatory powers of the department). The FAC and Eric's opposition acknowledge that much of Torngren's conduct may properly be viewed as within his prosecutorial function. *See* ECF 62 at 1.

But the FAC and opposition appear to pinpoint nine acts that allegedly fall outside the prosecutorial umbrella: (1) Torngren attempted to force Eric to sell his Garden City shares to the Lunardis at below-market **[*15]** value; (2) Torngren authorized the Lunardis to send Eric a letter of intent to buy Eric's shares in installment payments; (3) Torngren interfered with a third party's attempt to purchase Eric's shares; (4) Torngren promised to assist Eric's IT contractor, Roberts, with software licensing claims against Eric in exchange for his testimony; (5) Torngren provided an opinion to assist Roberts in litigation efforts against Swallow; and (6) Torngren facilitated and encouraged Roberts to illegally access confidential information from Eric's server and emails; (7) Torngren had discussions with Peter and made an agreement with Peter's attorney regarding diverting Eric's shares to Peter upon revocation; (8) Torngren directed Deborah to collect information and evidence against Eric in her divorce proceedings; and (9) Torngren issued and enforced the Emergency Orders prohibiting Garden City from paying Eric his distributions. *Id.*

at 1-2; FAC ¶¶ 129-30, 135, 166. Contrary to Eric's assertion, Torngren's challenged conduct was intimately related to his advocacy function in the disciplinary proceeding. The Court examines the nine acts in turn.

First, Eric points to the allegation that at a scheduled mediation, **[*16]** Torngren "attempted to compel settlement of the Accusation by forcing [Eric] to sell his shares in [Garden City] and his share of the [land] to the [Lunardis] at below market, fire-sale prices." FAC ¶ 112. That act of proposing a resolution plainly qualifies for absolute immunity because it goes to the heart of what the disciplinary proceeding was designed to achieve. Indeed, in a case involving Nevada's Gaming Control Board, the Ninth Circuit granted absolute immunity where "[t]he Board initiated disciplinary proceedings against [the plaintiff] and entered into settlement negotiations with him, actions that are prosecutorial in nature." *Romano v. Bible, 169 F.3d 1182, 1187 (9th Cir.)*, *cert. denied*, *528 U.S. 816, 120 S. Ct. 55, 145 L. Ed. 2d 48 (1999)*. Here, too, Torngren presented Eric with an opportunity to settle the disciplinary proceeding, but Eric turned the offer down. FAC ¶ 112.

Second, Eric directs the Court's attention to the allegations that the Lunardis sent a letter of intent to purchase Eric's Garden City shares at depressed value in connection with a global settlement proposed by Torngren. *Id.* ¶¶ 115, 117. As a preliminary matter, the FAC mischaracterizes some of the facts: while the FAC says that Torngren dictated the terms of Eric's sale to the Lunardis, *id*. ¶ 117, **[*17]** the Lunardis' letter and accompanying email (which are attached as an exhibit to the FAC) do not support that account. *Id.*, Ex. 10. Rather, Torngren proposed a global settlement under which Eric would give up his shares in Garden City while the Lunardis would pay a small fine and renew their license, and the Lunardis acceded to the settlement. *Id.* P 130. In line with that agreement, the Lunardis sent a letter of intent to purchase Eric's shares with their proposed terms of sale. *Id.*, Ex. 10. Notwithstanding the FAC's inaccurate description, as discussed above, Torngren's settlement negotiations fall within the ambit of his role as an advocate. *See* *Romano, 169 F.3d at 1187*.

Third, Eric identifies Torngren's actions with respect to a third party's $55 million offer to purchase Eric's shares. The FAC pleads without further explanation that Torngren exceeded his prosecutorial function by "(1) causing delay in [the third party]'s application; (2) challenging [the third party]'s offer by claiming it was in excess of Fair Market Value; and (3) interfering with [the third party]'s purchase." FAC ¶ 212. The FAC goes on to say that "the fair market value of [Eric]'s shares was in excess of $100 million." *Id.* The problem for **[*18]** Eric is that revocation of his license triggered a legal obligation for him to sell his shares within 60 days for an amount not greater than fair market value. *Cal. Bus. & Prof. Code §§ 19882(a)*, *19892(b)*. In this way, Torngren's actions were intended to preserve and enforce the Bureau's settlement with the Lunardis and the Commission's final revocation decision; his conduct is therefore tightly tied to the disciplinary proceeding, which remains open in light of Eric's pending writ petition in California Superior Court to vacate and set aside the Commission's decision. *Cf.* *Romano, 169 F.3d at 1187* (concluding that, in "approv[ing] the stipulation entered into by [the defendant] and the Board to resolve his disciplinary proceeding," the "Commission members carried out acts of independent decision-making integral to the functioning of a quasi-judicial process"); *Demery v. Kupperman, 735 F.2d 1139, 1144 (9th Cir. 1984)* (holding that "prosecutors are absolutely immune from civil suits alleging wrongdoing with regard to post-litigation . . . handling of a case").[3] In these circumstances, the Court disagrees with Eric's contention that Torngren's acts were not performed as part of his prosecutorial function.

The fourth and fifth alleged acts are that Torngren "promis[ed] to assist [Roberts] with purported software **[*19]** licensing claims against [Eric]" and "provided an opinion of [Roberts's] contractual rights" in exchange for Roberts's testimony against Eric. FAC ¶¶ 139-40. However, these post-accusation acts of securing witnesses and organizing testimony for trial were part and parcel of Torngren's preparation for the disciplinary proceeding. *See* *Buckley, 509 U.S. at 273* (recognizing "the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial"); *Genzler v. Longanbach, 410 F.3d 630, 639 (9th Cir. 2005)* ("A prosecutor gathering evidence is more likely to be performing a quasi-judicial advocacy function when the prosecutor is 'organiz[ing], evaluati[ng], and marshaling [that] evidence' in preparation for a pending trial, in contrast to the police-like activity of '*acquiring* evidence which might be used in a prosecution.'" (quoting *Barbera v. Smith, 836 F.2d 96, 100 (2d Cir. 1987)))*. It does not matter if

[3] Additionally, the third party's $55 million offer was a bona fide offer that triggered Eric's obligation under the Buy/Sell Agreement to notify the Lunardis and provide them a right of first refusal, as two arbitrations later confirmed. ECF 18-3, Exs. 1-5.

Torngren's motives were sinister and his promises were in furtherance of a larger conspiracy because "[i]ntent . . . play[s] no role in the immunity analysis." *Ashelman v. Pope, 793 F.2d 1072, 1078 (9th Cir. 1986)* (en banc). Indeed, the Ninth Circuit has observed that "allegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence." ***[*20]*** *Id.* Employing that rule, the Ninth Circuit concluded that prosecutorial immunity barred a claim alleging that a prosecutor conspired with a judge to predetermine the outcome of a trial. *Id.* Prosecutorial immunity is likewise justified here.

Sixth, the FAC separately asserts that Torngren "facilitated and encouraged" Roberts to collect evidence by "illegally accessing [Eric]'s server and emails that contain privileged, confidential communications" in violation of federal and state computer trespass laws. FAC PP 153-54. But the supporting document attached to the FAC definitively contradicts those allegations. Specifically, the FAC cites an interview transcript in which San Jose's Division of Gaming Control Administrator asked Roberts to provide non-proprietary access information from a server that Roberts maintained. *Id.*, Ex. 21. Thus, even though the legality of the prosecutor's acts may be indicative or determinative of the scope of immunity, *see* *Lacey v. Maricopa Cty., 693 F.3d 896, 914 (9th Cir. 2012)* (en banc) ("Where the prosecutor has side-stepped the judicial process [by disobeying applicable law], he has forfeited the protections the law offers to those who work within the process."), Torngren's actions here were not outside the bounds **[*21]** of the law. Instead, Torngren was performing his quasi-judicial advocacy function by marshalling evidence for the disciplinary proceeding. *See* *Genzler, 410 F.3d at 639*.

Seventh, Eric cites the allegation that Torngren and Peter "had discussions . . . about whether [Peter] would be able to divert [Eric]'s distributions to himself if [Eric]'s license were revoked." FAC ¶ 135. In a similar vein, before Peter testified, Torngren allegedly reached an agreement with Peter's attorney "that [Torngren] would improperly use his influence to divert [Eric]'s distributions to [Peter]." *Id.* But Torngren is easily entitled to prosecutorial immunity for discussing and preparing Peter's testimony with Peter and his attorney. *See* *Imbler, 424 U.S. at 431 n.32* (concluding that out-of-court "effort[s] to control the presentation of [a] witness' testimony" are "task[s] fairly within [the] function as an advocate").

Eighth, the FAC alleges that Torngren contacted Deborah by phone and directed her to collect evidence through her divorce proceedings in order to build an effective case against Eric. FAC ¶¶ 162, 164-66. Although the FAC contemplates that the phone call between Torngren and Deborah took place before the Bureau served the accusation against Garden **[*22]** City, *id*. ¶ 162 (noting that Torngren learned of the divorce proceedings around November 2013 and called Deborah), it does not appear to suggest that Torngren was acting in an investigatory role by, for example, "searching for . . . clues and corroboration." *Buckley, 509 U.S. at 273*. Rather, the FAC states that Torngren was assembling evidence for trial: he told Deborah to "collect information and evidence [that he] was looking for her to gather and/or develop," and Deborah agreed to "provide information that would assist [Torngren] in his efforts to induce the [Commission] to revoke [Eric]'s gaming license." FAC ¶¶ 166-67. It appears that Torngren's intent was for Deborah to testify at the revocation hearing. *Id.* ¶ 187. Accordingly, Torngren's conduct was "intimately associated with the judicial phase of the criminal process." *Imbler, 424 U.S. at 430*.

Ninth, and finally, Eric argues that Torngren improperly "issued and enforced an Emergency Order that prohibited [Garden City] from paying Swallow his distributions as a 50% shareholder." ECF 62 at 14. It is not certain whether Torngren could be liable for issuance of the Emergency Orders given that they were signed by the Bureau's Chief and issued by the Bureau. FAC, Exs. 6-7. In **[*23]** any event, the department has the legal authority to "issue any emergency orders against an owner licensee . . . that the department deems reasonably necessary for the immediate preservation of the public peace, health, safety, or general welfare." *Cal. Bus. & Prof. Code § 19931(a)*. Here, each Emergency Order "set[s] forth the grounds upon which it is based, including a statement of facts constituting the alleged emergency necessitating the action." *Id.* *§ 19931(b)*; FAC, Exs. 6-7. That conclusion is not altered by the FAC's bare allegation that Garden City's situation did not present an emergency. FAC ¶ 39. The FAC mistakenly assumes that Torngren's admission that emergency orders are typically used to shut down casinos means that emergency orders can never be used to prevent a casino from making certain payments. *Id.* PP 39-40, 90. In fact, the statute says that an "emergency order may suspend, limit, condition, or take other action in relation to the license of one or more persons in an operation." *Cal. Bus. & Prof. Code § 19931(c)*. Indeed, at the hearing before the Commission, the Chief Counsel for the Legal Division of the Commission recognized the Bureau's authority in this regard. FAC ¶ 92 (stating that conditions "could be imposed [immediately] in an emergency order"). **[*24]**

And Torngren had the authority to enforce the Emergency Orders against Garden City. As a general matter, "[t]he emergency order is effective immediately upon issuance and service." *Cal. Bus. & Prof. Code § 19931(c)*. Thus, when Eric's attorney asked Garden City to remit all withheld funds to Eric based on the entry of settlement between the Bureau and the Lunardis, Torngren properly responded that the settlement provided that Garden City must continue to comply with the payment restrictions in the Amended Emergency Order until there was a resolution of the accusation against Eric. *Id.* ¶¶ 129-30, Ex. 14. These enforcement efforts served the important purposes of protecting the Bureau's settlement with the Lunardis and preserving the status quo until the disciplinary proceeding was resolved. *See* *Imbler, 424 U.S. at 431 n.33* (explaining that "the duties of the prosecutor in his role as advocate for the State [can] involve . . . actions apart from the courtroom"). The Court views the enforcement of the Emergency Orders issued in connection with the underlying accusation as closely connected to the judicial phase of the disciplinary proceeding. *See* *Van de Kamp, 555 U.S. at 342-43*.

Because absolute immunity bars Eric's *§ 1983* and RICO claims against Torngren, the Court GRANTS Torngren's motion to **[*25]** dismiss claims one through four. "[W]here prosecutorial immunity bars a plaintiff's claim[s], the deficiencies . . . cannot be cured by amendment." *Inman v. Anderson, No. 17-CV-04470-LHK, 294 F. Supp. 3d 907, 2018 U.S. Dist. LEXIS 32976, 2018 WL 1071158, at *6 (N.D. Cal. Feb. 27, 2018)*. Therefore, the Court dismisses these claims against Torngren without leave to amend.

2. ***Noerr-Pennington*** Doctrine

Torngren's conduct is completely shielded from suit by prosecutorial immunity. The remaining defendants—the Lunardis and Deborah—argue that their conduct is protected petitioning activity under the *Noerr-Pennington* doctrine.[4] *Noerr-Pennington* stands for the proposition that "those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DirecTV, Inc., 437 F.3d 923, 929 (9th Cir. 2006)* (citing *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)* ("*Noerr*"), and *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* ("*Pennington*")). This doctrine arose in the context of ***antitrust law***, *see, e.g.,* *Noerr, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464*, but the Ninth Circuit has applied its protections to *§ 1983* and RICO actions. *See, e.g., Kearney v. Foley & Lardner, LLP, 590 F.3d 638, 643-48 (9th Cir. 2009)* (applying *Noerr-Pennington* in an action brought under *§ 1983* and RICO).

Protected petitioning activity includes bringing a lawsuit, defending a lawsuit brought by another, and filing papers with a court. *See, e.g.,* *Freeman v. Lasky, Haas & Cohler, 410 F.3d 1180, 1184 (9th Cir. 2005)* (defining petitioning activity as any "communication to the court" and concluding that **[*26]** *Noerr-Pennington* applies to defensive pleadings "because asking a court to deny one's opponent's petition is also a form of petition"). "[C]onduct incidental to a petition is protected by *Noerr-Pennington* if the petition itself is protected." *Id.* (internal quotation marks omitted) (quoting *Theofel v. Farey-Jones, 359 F.3d 1066, 1078 (9th Cir. 2004))*.

Noerr-Pennington's protections are not absolute, however. There exists a "sham litigation" exception to the doctrine. *Id. at 1183-84* ("While *Noerr-Pennington* immunity is broad, it is not so broad as to cover all litigation: 'Sham' petitions don't fall within the protection of the doctrine."). The Ninth Circuit has recognized three circumstances that fit the sham exception: (1) "where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful," (2) "where the conduct involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose," and (3) where "'a party's

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[4] Torngren also raises *Noerr-Pennington* as a ground for dismissal. Although the Court need not reach the issue because Torngren's conduct was performed as part of his prosecutorial function, the Court notes that the conclusions reached below as to the Lunardis and Deborah would apply equally to Torngren.

knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.'" *Sosa, 437 F.3d at 938* (quoting *Kottle v. Nw. Kidney Ctrs., 146 F.3d 1056, 1060 (9th Cir. 1998))*. Eric does not dispute that the relevant actions of the Lunardis and Deborah fall within the scope of the *Noerr-Pennington* ***[*27]*** doctrine; instead, he invokes the third formulation of the sham exception, arguing that fraud and intentional misrepresentations deprived the disciplinary proceeding of its legitimacy.

The Court finds that this exception is inapplicable because the FAC and supporting exhibits conclusively show that Eric's identified issues did not deprive the disciplinary proceeding of its legitimacy. Starting at the high level, the Court notes that the proceeding lasted seven days before an ALJ during which Eric was permitted to submit evidence and make arguments in support of his case. FAC ¶¶ 131, 136. Afterward, the ALJ issued an extensive proposed decision detailing the reasons for revoking Eric's gambling license and denying his request for renewal. *Id.*, Ex. 16. The ALJ's review was followed by a second-layer review by the Commission. Not completely satisfied some of with the ALJ's findings, the Commission rejected the ALJ's proposed decision and requested that the parties submit written argument on a number of specific issues, *id.*, Ex. 17 at 1-3, which the parties did. In a thorough 62-page decision, the Commission explained its reasons for ordering that Eric's license be revoked, ordering that **[*28]** renewal be denied, and assessing a penalty and costs against Eric. *Id.*, Ex. 18. It is important to note that throughout the entirety of the proceedings before the ALJ and the Commission, Eric was represented by an attorney. *Id.* ¶¶ 18-20. Furthermore, Eric has challenged the Commission's decision in a writ petition that is still pending before the California Superior Court. *Id.* ¶ 145.

Turning to the specifics, the Court concludes that Eric cannot show that any of the alleged irregularities in the proceeding had any influence on the underlying decision. *See* *Rupert v. Bond, 68 F. Supp. 3d 1142, 1159 (N.D. Cal. 2014)*. Eric first pleads that Deputy Attorney General Ronald Diedrich ("Diedrich") made an unexpected appearance on the first day of the hearing. FAC ¶ 132. The ALJ acknowledged Diedrich's presence (in part because the ALJ had previously worked for him) and asked Torngren to explain his role. *Id.* ¶ 134. As reflected in the transcript from the proceeding, Torngren responded: "[Diedrich] and I are coworkers. Because of his wealth of experience in administrative law matters, he's here to provide some assistance today." *Id.*, Ex. 15 at 48. The ALJ also gave Eric's attorney an opportunity to be heard on the issue, but counsel declined. *Id.* Outside **[*29]** of these acknowledgements of Diedrich's presence, *id*. ¶¶ 132-34, the Court has not found or been pointed to any point at which Diedrich played any role in the proceeding. Nor does the ALJ's decision reference Diedrich. Even if the Court were to agree that Diedrich's presence was inappropriate, it had no demonstrated effect on the proceeding or final decision, as required to invoke the pertinent sham exception. *See* *Rupert, 68 F. Supp. 3d at 1159*.

Next, Eric looks to the testimony and evidence submitted with respect to three witnesses—Peter, Roberts, and Deborah—which the Court addresses successively. With respect to Peter, the FAC challenges the veracity of his testimony when he admitted, during the course of that testimony, that he had had discussions with Torngren about whether Peter would profit if Eric's license were revoked. FAC ¶ 135. The FAC describes the ALJ as finding that "[Peter]'s testimony against [Eric] was 'evasive and disingenuous' and that [Peter] was effectively trying to find a way to divert millions of dollars in [Eric]'s distributions to himself." *Id.* ¶ 136. But the fact that Peter's motives were revealed and that the ALJ accordingly discounted his testimony demonstrate that the process was working, **[*30]** not that it was defective. Indeed, the ALJ's decision explicitly noted that "[Peter]'s testimony was accorded less weight because of his self-interest in the proceedings." *Id.*, Ex. 16 at 4. The Commission repeated the same observation about Peter's diminished credibility and relied on his testimony only when "supported by documentary evidence and other witnesses." *Id.*, Ex. 18 at 11-12.

The same is true with respect to Roberts's testimony. The FAC says that Torngren "directly coerced and influenced the testimony of [Roberts]." *Id.* ¶ 146. In particular, the FAC alleges that, in exchange for Roberts's cooperation, the Lunardis promised to pay Roberts for IT work at Garden City and Torngren promised to help Roberts pursue licensing claims against Eric. *Id.* ¶¶ 138-40. But the methods used to acquire Roberts's declaration were raised during the hearing. Accordingly, the ALJ "accorded no weight" to Roberts's declaration based on her finding that "Roberts's statement was essentially purchased by the Bureau with [Peter]'s assistance." *Id.* ¶ 137, Ex. 16 at 4. In deciding not to adopt the ALJ's proposed decision, the Commission specifically asked the parties to address the weight that it should **[*31]** give to Roberts's declaration. *Id.*, Ex. 17 at 3. Based on the parties' responses and the evidence, the Commission disagreed that "Roberts's testimony was coerced or that he was forced to say anything he did not wish to say." *Id.*, Ex. 18 at 11. The Commission therefore considered Roberts's declaration "as part of the record but afforded less weight in making [its] factual findings." *Id.* Again, these circumstances typify the orderly progression of a legitimate process.

Relatedly, the Court rejects Eric's unsupported assertion that Torngren "deliberately withheld [certain] discovery and repeatedly misled the ALJ about its existence." *Id.* ¶ 151. In particular, the FAC states that "[Torngren] withheld hundreds of e-mails between himself and [Roberts] and hundreds of additional e-mails between himself, [Peter], [Roberts], [Peter's attorney] and others acting as [the Lunardis'] agents." *Id.* But as the FAC admits, Torngren's privilege log submitted in the pending writ proceeding in California Superior Court lists these emails and provides the grounds on which the documents were withheld—e.g., attorney work product privilege. *Id.*, Ex. 20. Eric does not particularly challenge any withholding **[*32]** decision or privilege designation. The FAC suggests that these emails would have mattered because they would have served to show that Torngren was responsible for coercing Roberts's testimony. *Id.* PP 148-50.[5] Even putting aside that the supporting evidence does not support that narrative, *see id.*, Ex. 19, Eric does not allege that Roberts said anything untruthful in the disciplinary hearing, and neither the ALJ nor the Commission placed much weight on Roberts's testimony in reaching their decisions.

As to Deborah, Eric alleges that she made untrue statements regarding her participation and interest in a business called Secure Stone, LLC ("Secure Stone"). *Id.* ¶¶ 168-69. Specifically, the FAC states that Deborah falsely testified under oath that Secure Stone was community property, not her sole property; that she never saw or received from Eric checks made out to Secure Stone; and that she never deposited checks made out to Secure Stone. *Id.* ¶ 168. According to the FAC, Deborah later recanted this testimony and refused to testify at the disciplinary hearing. *Id.* ¶¶ 185-87. Although it appears that the ALJ and the Commission may have relied on Deborah's representation that Secure Stone was community **[*33]** property, *see id.*, Ex. 16 at 7, Ex. 18 at 16, the proceeding was not deprived of its legitimacy. For one thing, Eric knew of the alleged errors in her testimony and had an opportunity to bring up any perceived falsities during the disciplinary proceeding. *Alers v. Bank of Am., NA, No. 14-CV-00611-GW, 2014 U.S. Dist. LEXIS 199727, 2014 WL 12787629, at *2 (C.D. Cal. Apr. 24, 2014)*, *aff'd*, *671 F. App'x 425 (9th Cir. 2016)*. Additionally, the ALJ and the Commission both found that "the record [was] replete with credible evidence that Secure Stone was operated and controlled by [Eric], including his testimony that he considered it his company." *Id.*, Ex. 16 at 7, Ex. 18 at 16. Most importantly, however, it is a certainty that there was no ultimate effect on the Commission's decision because the Commission concluded that, as a legal matter, "the charges regarding [Secure Stone] were not proven." *Id.* ¶ 191. Eric's opposition essentially concedes that Deborah's statements about Secure Stone had no bearing on the Commission's decision but urges the Court to "consider her misrepresentations in the context of the entire conspiracy." ECF 64 at 21. However, because the Court has already rejected Eric's other challenges, there is no basis to conclude that the disciplinary proceeding was a sham.

In sum, to the extent **[*34]** that the irregularities identified by Eric were actually irregular, none of them so deprived the disciplinary proceeding of its legitimacy as to render it a sham. In large part, the alleged misrepresentations "were clearly not relied upon by [the decisionmakers]." *Rupert, 68 F. Supp. 3d at 1159*. Additionally, Eric improperly seeks to rehash arguments already addressed by the ALJ and the Commission or to "recast disputed issues from the underlying litigation as 'misrepresentations' by the other party." *Kottle, 146 F.3d at 1063* (citation omitted). These efforts "are therefore insufficient to overcome *Noerr-Pennington* protection." *Id. at 1064* (citation omitted). Accordingly, the Court concludes that the conduct of the Lunardis and Deborah is petitioning activity entitled to immunity under the *Noerr*-*Pennington* doctrine and GRANTS their motions to dismiss claims one through four. Because there does not appear to be any way in which Eric could amend the FAC, consistent with his present allegations, to overcome the *Noerr-Pennington* doctrine, the Court dismisses these claims without leave to amend.

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[5] The FAC also repeats the allegation that Torngren encouraged Roberts to secure Eric's confidential information by illegal means. *Id.* ¶¶ 148, 153-54. Not only does Eric fail to identify any confidential information that was illegally taken from him or introduced during the proceeding, but his story is contradicted by the interview transcript attached to his FAC. As noted above, Roberts was asked to provide non-proprietary information from a server that Roberts maintained. *Id.*, Ex. 21.

3. Alternative Bases for Dismissal

The Court also briefly addresses other grounds raised by Torngren, the Lunardis, and Deborah, many of which supply legitimate **[*35]** alternative bases on which to dismiss Eric's *§ 1983* and RICO claims.

a. Claim and Issue Preclusion

The Lunardis and Deborah assert that the prior two rounds of arbitration between Eric and the Lunardis bar Eric's *§ 1983* and RICO claims under the doctrines of claim and issue preclusion. Claim and issue preclusion are related doctrines that involve the "effects of former adjudication." 18 Charles Alan Wright et al., Federal Practice and Procedure § 4402 (3d ed. 2018). Claim preclusion "operates as a bar to the maintenance of a second suit between the same parties on the same cause of action." *People v. Barragan, 32 Cal. 4th 236, 9 Cal. Rptr. 3d 76, 83 P.3d 480, 492 (Cal. 2004)*. Issue preclusion "prohibits the relitigation of issues argued and decided in a previous case, even if the second suit raises different causes of action." *DKN Holdings LLC v. Faerber, 61 Cal. 4th 813, 189 Cal. Rptr. 3d 809, 352 P.3d 378, 386 (Cal. 2015)*. The Court examines each of these doctrines in turn.

Claim preclusion has no application in this case. "Claim preclusion arises if a second suit involves: (1) the same cause of action (2) between the same parties (3) after a final judgment on the merits in the first suit." *Id.* Although elements (2) and (3) are satisfied for the Lunardis, element (1) is not. To distinguish between causes of action, California employs the primary rights doctrine, which focuses on the harm suffered. **[*36]** *San Diego Police Officers' Ass'n v. San Diego City Emps.' Ret. Sys., 568 F.3d 725, 734 (9th Cir. 2009)*. While the prior arbitration actions dealt with the Lunardis' right of first refusal under the Buy/Sell Agreement, Eric's present action alleges deprivation of his civil rights under *§ 1983* and violations of RICO. The rights protected by those federal statutes are distinct from the common law right to enforce only agreed-upon contractual terms, the claim presented in arbitration. *See* *Ivanoff v. Bank of Am., N.A., 9 Cal. App. 5th 719, 215 Cal. Rptr. 3d 442, 451 (Ct. App. 2017)* (concluding that a violation of a federal statutory consumer protection statute triggered a different primary right than a contract claim). It is not even clear if these issues could have been raised in arbitration, and claim preclusion extends only to those claims that actually were or could have been litigated previously. *Ass'n of Irritated Residents v. Dep't of Conservation, 11 Cal. App. 5th 1202, 218 Cal. Rptr. 3d 517, 531 n.14 (Ct. App. 2017)*.

In contrast, issue preclusion prevents Eric from relitigating issues regarding the sale of his shares in Garden City. At multiple points, the FAC bleeds into this territory when it asserts that the Lunardis impeded Eric's sale to a third party and required Eric to sell his shares to the Lunardis at below-market prices. *See, e.g.*, FAC ¶¶ 34-36, 59, 79. Those assertions appear to be at odds with the arbitrators' findings that the third party's offer to purchase Eric's Garden City shares **[*37]** for $55 million was a bona fide offer that triggered the Lunardis' right of first refusal to purchase the shares at the same price. ECF 18-3, Exs. 1, 3. And the arbitration decisions became binding when they were confirmed by the Superior Court. *See* *Cal. Civ. Proc. Code §§ 1908(a)(2)*, *1287.4*. Eric cannot reopen these settled issues. Such "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment" is exactly what issue preclusion is designed to avoid. *Taylor v. Sturgell, 553 U.S. 880, 892, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008)* (quoting *New Hampshire v. Maine, 532 U.S. 742, 748-49, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001))*. Eric appears to acknowledge this point, as he "agrees that the arbitration decisions are final and dispositive as to whether the Lunardis could exercise their right of first refusal . . . and match [the third party's] $55 million offer and the terms of that specific sale." ECF 63 at 8. Thus, the Court concludes that Eric's claims are barred by issue preclusion to the extent they seek to revisit the arbitrators' determinations about the sale of Eric's Garden City shares.

b. Failure to State a *§ 1983* Claim

Eric cannot state a cognizable claim under *§ 1983* against any of the defendants. *Section 1983* provides a tort remedy against "[e]very person who, under color of [state law], subjects, or causes to be subjected, **[*38]** any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *42 U.S.C. § 1983*. Eric's two *§ 1983* claims allege that Torngren, the Lunardis, and Deborah conspired to deprive Eric of his constitutional rights to substantive due process and equal protection. FAC ¶¶ 241-50.

Conspiracy under *§ 1983* is typically deployed by plaintiffs as a means to "draw in private parties who would otherwise not be susceptible to a *§ 1983* action because of the state action doctrine." *Lacey, 693 F.3d at 935* (citing *Adickes v. S. H. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970))*. Private parties may still be liable even if the state actor is shielded from suit by some form of immunity. *See* *Dennis v. Sparks, 449 U.S. 24, 28, 101 S. Ct. 183, 66 L. Ed. 2d 185 (1980)*. Nevertheless, conspiracy is not itself a constitutional tort under *§ 1983*. *Lacey, 693 F.3d at 935*. Thus, the plaintiff must always show "an underlying constitutional violation" to sustain a *§ 1983* claim. *Id.* Eric cannot do that here.[6]

Eric's substantive due process rights have not been violated. The substantive due process guarantee protects against the arbitrary and oppressive wielding of government power. *Cty. of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)*. Government conduct violates substantive due process when it is so severe as to "shock[] the conscious." *United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)* (quoting *Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952))*. None of the conduct that Eric challenges can fairly be characterized as rising **[*39]** to that level. Rather, based on Eric's behavior as a gambling establishment owner, Torngren initiated and prosecuted an action to revoke Eric's license. The Lunardis and Deborah participated in that action either by collecting evidence or providing testimony. After a seven-day administrative hearing, the ALJ and the Commission decided that revocation was appropriate. Accordingly, Eric cannot make out a claim for violation of his substantive due process rights.

The same result obtains with respect to Eric's class-of-one equal protection claim. The Supreme Court has held that a "class of one" may sustain an equal protection claim by alleging that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000)*. Assuming that Eric can rely on the class-of-one theory, his equal protection claim fails because there is a rational basis for the difference in treatment. In particular, the Bureau's and Commission's various decisions detail Eric's egregious and unlawful conduct that warranted issuing Emergency Orders and revoking his license. FAC, Exs. 4, 6-9, 18. In response, the FAC asserts, with no further **[*40]** elaboration, that Eric was "treated differently than others similarly situated and there is no rational basis for the difference in treatment." *Id.* ¶ 248. The only possible comparator is Peter, but the FAC admits that Torngren and the Commission offered an explanation for his disparate treatment—namely, Peter was an "absentee owner." *Id.* ¶¶ 198-99. As the Commission stated in its decision, "the record established clearly that [Eric] was far more culpable than [Peter] which justifies disparate treatment." *Id.*, Ex. 18 at 58.[7] Therefore, Eric cannot make out a claim for violation of his equal protection rights.

c. Failure to State a RICO Claim

Eric's two RICO claims also fail. Eric brings a RICO claim against Torngren and the Lunardis for violations of *18 U.S.C. § 1962(c)*, which provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." FAC ¶¶

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[6] Eric relatedly has not shown "the existence of an agreement or meeting of the minds" between Torngren, the Lunardis, and Deborah "to violate constitutional rights." ***Crowe v. County of San Diego, 608 F.3d 406, 440 (9th Cir. 2010)*** (citation omitted).

[7] In his opposition, Eric also suggests that Torngren defied the Commission's decision, which Eric characterizes as "requiring the Lunardis to disburse Plaintiff's income to him as a 50% shareholder in a [sic] 'S' corporation." ECF 62 at 18. But the cited portion of the decision provides only that "[California Business and Professions Code] [s]ection 19882 controls any denial or revocation of license for a shareholder in a corporation. [Peter did] not stand to receive any withheld distributions and [Eric]'s shares would be subject to sale; not automatic transfer to remaining shareholders." FAC, Ex. 18 at 11 n.6.

251-58. Eric's second RICO claim includes Deborah as a defendant in addition to Torngren and the Lunardis. The **[*41]** FAC alleges a *§ 1962(d)* violation for conspiracy to violate *§ 1962(c)*. FAC ¶¶ 259-64.

Eric has not established the contemplated or actual existence of a "pattern of racketeering activity," which is necessary for his two RICO claims. *Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 368 n.8 (9th Cir. 1992)* (per curiam). A "pattern of racketeering activity" requires commission of at least two enumerated predicate offenses within a ten-year period. *18 U.S.C. § 1961(1)*, *(5)*. As predicate offenses, Eric has alleged mail and wire fraud, bank fraud, extortion, and money laundering. FAC ¶ 49. The Supreme Court, however, has made clear that in addition to the requisite number of predicate acts, the plaintiff must show that the predicates are related and "amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*. The latter concept, "continuity," refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id. at 241*.

Eric obviously cannot demonstrate a future threat because the alleged RICO scheme ceases once the prosecution is complete. *See* *Wollersheim, 971 F.2d at 366* ("Since the only goal . . . was the successful prosecution of the . . . state tort suit, there was no threat of activity continuing beyond the conclusion of that suit."). Nor can Eric establish **[*42]** a closed period of continued criminal activity. The Ninth Circuit has found that a plaintiff fails to allege a "pattern of racketeering activity" when the defendant's "collective conduct is in a sense a single episode having the singular purpose of impoverishing [the sole plaintiff]." *Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1535 (9th Cir. 1992)* (citing *Medallion Television Enters., Inc. v. SelecTV of Cal., Inc., 833 F.2d 1360, 1364 (9th Cir. 1987))*. The instant case fits that bill: the alleged RICO scheme was designed to achieve one "common goal, i.e., to cause [Eric] to lose his gambling license and force [him] to sell his interest in [Garden City] at a price far below fair market value." FAC ¶ 34. Other circuits have reached the same conclusion on similar facts to those here. *See, e.g.,* *Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1267 (11th Cir. 2004)* ("[W]here the RICO allegations concern only a single scheme with a discrete goal, the courts have refused to find a closed-ended pattern of racketeering even when the scheme took place over longer [than ninth months]."); *Edmondson & Gallagher v. Alban Towers Tenants Ass'n, 48 F.3d 1260, 1265, 310 U.S. App. D.C. 409 (D.C. Cir. 1995)* (noting that it is "virtually impossible" to show a pattern of racketeering activity for a "single scheme" with a "single injury" and "few victims"); *SIL-FLO, Inc. v. SFHC, Inc., 917 F.2d 1507, 1516 (10th Cir. 1990)* (holding that multiple predicate acts failed to show a pattern where the acts "constituted a single scheme to accomplish 'one discrete goal,' directed at one individual with no potential **[*43]** to extend to other persons"). Accordingly, Eric's RICO claims are also doomed.

C. Tax Fraud Claims

Eric's final two causes of action charge the Lunardis with willfully filing fraudulent information returns with the Internal Revenue Service for the 2015 and 2016 calendar years. FAC PP 265-72. Specifically, the FAC states that the Lunardis earned more than was reported on Garden City's 2015 and 2016 returns and paid Eric less than the amount reported in the returns (and less than he was entitled). *Id.* ¶¶ 266, 270. Eric invokes *26 U.S.C. § 7434(a)*, which provides that "[i]f any person willfully files a fraudulent information return with respect to payments purported to be made to any other person, such other person may bring a civil action for damages against the person so filing such return."

Eric has sued the wrong "person" under *§ 7434(a)*. That statutory section provides a cause of action against the person who files the allegedly fraudulent return. And under the Internal Revenue Code, the term "person" encompasses companies and corporations. *See* *26 U.S.C. § 7701(a)(1)* ("The term 'person' shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation."). Here, as the FAC itself **[*44]** makes plain, Garden City is the "person" who filed the allegedly fraudulent returns. Indeed, the FAC explains that the two causes of action are based on Garden City's submissions of "U.S. Income Tax Return[s] for an S Corporation" for the 2015 and 2016 calendar years. FAC ¶¶ 266, 270. At least one other district court has held that the taxpayer, not the preparers of the return, is liable under *§ 7434(a)*, *see* *Vandenheede v. Vecchio, No. 12-CV-12284-GCS, 2013 U.S. Dist. LEXIS 25845, 2013 WL 692876, at *3 (E.D. Mich. Feb. 26, 2013)*, *aff'd*, *541 Fed. Appx. 577 (6th Cir. 2013)*, and Eric provides no authority to the contrary. Accordingly, because Eric cannot maintain his tax fraud claims under *§ 7434(a)* against the Lunardis as a matter of law, the Court dismisses claims five and six without leave to amend.

IV. ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Torngren's, the Lunardis', and Deborah's motions to dismiss are GRANTED WITHOUT LEAVE TO AMEND and the action is hereby DISMISSED WITH PREJUDICE.

Dated: May 14, 2018

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

JUDGMENT

Plaintiff's First Amended Complaint having been dismissed without leave to amend and the action having been dismissed with prejudice,

It is hereby ordered and adjudged that Plaintiff take nothing by this action and that Judgment **[*45]** is entered for Defendants and against Plaintiff.

Dated: May 14, 2018

/s/ Beth Labson Freeman

BETH LABSON FREEMAN

United States District Judge

United States v. Giraudo

United States District Court for the Northern District of California

May 14, 2018, Decided; May 14, 2018, Filed

Case No. 14-cr-00534-CRB-1

Reporter

2018 U.S. Dist. LEXIS 81019 *; 2018 WL 2214660

UNITED STATES OF AMERICA, Plaintiff, v. JOSEPH J. GIRAUDO and KEVIN CULLINANE, Defendants.

Prior History: *United States v. Giraudo, 2016 U.S. Dist. LEXIS 100486 (N.D. Cal., Aug. 1, 2016)*

Core Terms

bid, commerce, enhancement, volume, Big, Sentencing, guidelines, calculation, auctions, co-conspirators, properties, cartel, conspiracy, payoffs, argues, bidders, volume-of-commerce, bid-rigging, buy, rigged, cases, price-fixing, antitrust, agreeing, transactions, foreclosure, partnership, contends, harmed, sales

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Judges: CHARLES R. BREYER, United States District Judge.

Opinion by: CHARLES R. BREYER

Opinion

ORDER SETTING SENTENCING GUIDELINES OFFENSE LEVEL FOR DEFENDANTS GIRAUDO AND CULLINANE

Defendants Joseph Giraudo and Kevin Cullinane have pled guilty to criminal violations of the *Sherman Antitrust Act, 15 U.S.C. § 1*. Unlike the other 21 defendants in this and related cases, Giraudo and Cullinane did not enter into plea agreements with the government. Not surprisingly, they contest the government's calculation **[*2]** of the appropriate offense level under the United States Sentencing Guidelines. The offense level determines the recommended length of custodial sentence under the guidelines.

The Court held a hearing on May 7, 2018, to set each defendant's offense level. The government calculated Giraudo's at 18 and Cullinane's at 17. Giraudo argued that his correct offense level was 9, while Cullinane contended that his was 12. The Court sided with the government's calculation with respect to both defendants. Having determined the appropriate offense level, the Court then proceeded to sentence Giraudo and Cullinane on May 8.

Given the complexity of this issue, the Court stated at the May 7 hearing that it would provide its reasoning as to the offense-level calculation in the form of a written order, rather than on the oral record. That reasoning follows. United States District Court Northern District of California

I. BRIEF BACKGROUND

Having described the background of this case in detail in an earlier order, see Order Denying Mot. to Suppress (dkt. 248) at 1-5, the Court discusses it here only briefly. Giraudo and Cullinane are two of 23 defendants scheduled to be sentenced by this Court for their involvement in a conspiracy to rig **[*3]** bids at foreclosure auctions in the counties of San Francisco and San Mateo. According to the government, Giraudo and Cullinane orchestrated the scheme along with Ray Grinsell, Daniel Rosenblatt, and Mohammed Rezaian, a group that other bidders sometimes referred to as the "Big Five." The members of the Big Five allegedly conspired to drive down the prices of properties at foreclosure auctions by agreeing with other individuals and groups to refrain from bidding on certain properties. Giraudo and Cullinane, for their part, dispute the notion that they were involved in orchestrating the scheme, saying their roles were no different than those of the other 18 conspirators.

All of the defendants, including Giraudo and Cullinane, pled guilty to entering into a criminal agreement to restrain trade under the Sherman Antitrust Act, *15 U.S.C. § 1*. Unlike their co-conspirators, however, Giraudo and Cullinane entered open pleas—that is, they did not plead pursuant to agreement with the government. See Applications to Enter Pleas (dkts. 263, 265). Accordingly, while admitting guilt, they dispute some of the facts on which the government bases its calculation under the guidelines, and challenge some of the government's **[*4]** legal arguments regarding guidelines interpretation.

II. LEGAL STANDARD

The Federal Sentencing Guidelines set out a uniform system of sentencing aimed at reducing disparities in sentences. *United States v. Booker, 543 U.S. 220, 250, 253, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005)* (Breyer, J., delivering op. of Court in part); see also *28 U.S.C. § 991(b)(1)(B)*. To this end, the guidelines establish standards for calculating offenders' culpability in the form of "offense levels" that may be translated into a recommended range of time in custody. These guidelines are advisory, not mandatory. *Booker, 543 U.S. at 259*. Determining the sentence ultimately rests in the discretion of the district court.

Cullinane and Giraudo agree that *§ 2R1.1* of the guidelines, which apply to horizontal agreements in restraint of trade, provides the starting point for the analysis. See *U.S.S.G. § 2R1.1 background* (2017). The base offense level under *§ 2R1.1* is 12. *§ 2R1.1(a)*. The government agrees that Giraudo and Cullinane are entitled to a three-level reduction for accepting responsibility by pleading guilty.

Among other things, the guidelines provide for enhancements based on the magnitude of commerce affected, *§ 2R1.1(b)(2)*, and the defendant's role in the offense, *§ 2R1.1 note 1*. They also provide for a one-point enhancement "[i]f the conduct involved participation in an agreement to submit non-competitive **[*5]** bids." *§ 2R1.1(b)(1)*.

A district court generally "uses a preponderance of the evidence standard when finding facts pertinent to sentencing," though a different standard applies when a sentencing factor has an "extremely disproportionate effect on the sentence relative to the offense of conviction." *United States v. Berger, 587 F.3d 1038, 1047-48 (9th Cir. 2009)* (emphasis omitted); see also *United States v. Andreas, 216 F.3d 645, 678 (7th Cir. 2000)*.

III. DISCUSSION

A. Giraudo

1. Volume-of-commerce enhancements

The Sentencing Guidelines provide for enhancements in antitrust cases based on the "volume of commerce done by [a participant in a conspiracy] or his principal in goods or services that were affected by the violation." *U.S.S.G. § 2R1.1(b)(2)*. "Affected" commerce "includes all sales made within the scope of the conspiracy." *Andreas, 216 F.3d at 676*. The parties disagree on both the proper methodology for calculating the volume of commerce and the factual basis of the calculation.

According to the Sentencing Guidelines, "Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun." *U.S.S.G. § 2R1.1 background*. However, "[t]he offense levels are not based directly on the damage caused or profit made by the defendant[,] because damages **[*6]** are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute." Id. The guidelines estimate that the average gain from horizontal agreements in restraint of trade is 10 percent of the total volume of commerce, and the offense-level adjustments are based on that assumption. See *§ 2R1.1 note 3*.

The government calculates Giraudo's volume of commerce at $36,663,335.66, exceeding the threshold of $10,000,000 required for a four-level increase in the offense level. Giraudo, meanwhile, maintains that his volume of commerce was essentially negligible, warranting no increase at all.

a. Treatment of Big Five as single entity

First, Giraudo argues that the government improperly attributes the full purchase price of the properties he was involved in rigging to him, even for properties in which he only retained a partial ownership share. He contends that these sales should instead be allocated proportionately to each buyer.

Giraudo is quite right that the guidelines section applicable to violations of *§ 1* of the Sherman Antitrust Act, unlike those for other conspiracies, "counts every sale just once." *United States v. Heffernan, 43 F.3d 1144, 1147 (7th Cir. 1994)* (Posner, J.). In antitrust cases, co-conspirators **[*7]** are not liable for sales made by other co-conspirators solely by virtue of their association. However, the volume-of-commerce calculation does include "commerce done by [a participant] or his principal in goods or services that were affected by the violation." *U.S.S.G. § 2R1.1(b)* (emphasis added). The law treats members of partnerships as agents of the partnership, with the partnership functioning as the principal. 46 Noah J. Gordon, *Am. Jur. 2d Joint Ventures § 36* (2018). So the government's treatment is appropriate.

Giraudo points out that the partnership agreements were not consistent from property to property, sometimes involving a different mix of owners.[1] But this changes nothing: nowhere does *§ 2R1.1* state that a conspirator may

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[1] In his papers, Giraudo made this point only obliquely. See Giraudo Response (dkt. 319) at 17. He pressed it at oral argument on May 7, however. While the argument is probably waived, the Court considers it on the merits because doing so does not prejudice the government, given the outcome of the analysis.

only be liable for commerce done by a single principal. Such a rule would allow co-conspirators to avoid liability by forming an endless series of joint ventures with each other, frustrating the purpose of the antitrust laws.[2]

But wait, Giraudo says: if the government is treating the Big Five as a joint venture, then there was no Sherman Act violation at all, because a single entity cannot conspire with itself to violate *15 U.S.C. § 1*. *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. True enough. . . . But there were 18 other co-conspirators who were not members **[*8]** of the Big Five. In its volume-of-commerce analysis, the government omits bids on properties on which members of the Big Five did not make an agreement with anyone outside the group. Gov't Sentencing Mem. (dkt. 307) at 8 n.9. In other words, the government did not treat members of the Big Five as co-conspirators with each other. The government's treatment is therefore entirely consistent with Copperweld.

b. Methodological disputes

Giraudo next objects to the government's methodology for calculating his volume of commerce. First, he insists that it is not necessary to calculate the volume of commerce at all, because a reliable measure of the actual gain is close at hand: the amount of the payoffs that co-conspirators accepted in exchange for refraining from submitting bids. Giraudo argues that, for any given property, the payoff will be equal to the difference between the market price (that is, what a property would have gone for had the auction been clean) and the rigged price (what the property actually went for). Indeed, Giraudo and Cullinane argue that, in some cases, the bids were entirely gratuitous, pushing the total payout for the property over the market price.

However, neither **[*9]** Giraudo nor Cullinane have identified any case or treatise supporting the proposition that the harm caused by bid-rigging may be measured solely by the amount of the payment given in exchange for a promise not to bid. Indeed, there is good reason to think that the price the properties would have sold for in a clean market is higher than the combination of the purchase price and payoff—perhaps much higher. For one thing, no rational bidder—and Giraudo had decades of experience in real estate transactions in general, and foreclosure auctions in particular—would choose to make a payoff to another bidder that is equal to the market price minus the purchase price. If the required payoff were that substantial, the bidder would instead simply purchase the property at the market price. There is evidence that this is exactly how members of the conspiracy viewed the auctions. See dkt. 307-7 at 3 ("Fong was not concerned about the payoff agreements as long as the total paid for a property including the payoff was equal to or less than the amount Fong was willing to pay for a property prior to the trustee sale.").[3]

Moreover, bid-rigging may be accomplished without any payoff at all, but rather with **[*10]** an agreement to "rotate" bids—I win this round, you win next round. (Indeed, that is the usual method.). Here, nearly every member of the conspiracy bid sometimes while agreeing to refrain from bidding at others. Accordingly, it is conceivable that the agreements consisted of reciprocal promises not to bid, in addition to monetary payments. See dkt. 307-8 at 5 ("Fung overheard Giraudo advise other people that Giraudo would allow them to buy a property if they agreed not to buy more property for a period of time."); dkt. 307-8 at 6 ("[B]idders at auctions [took] turns buying property in order to keep the price low.") (emphasis added); dkt. 307-11 at 3-4 ("Giraudo told Lipton that since he (Giraudo) let Lipton buy the Thomas Street property, Lipton should not bid against Giraudo for a property Giraudo wanted to buy."). The evidence that payoffs were often offset against other payoffs suggests that they served at least in part as a bookkeeping method to keep track of how many times bidders had agreed not to bid, rather than as compensation for so agreeing. See dkt. 307-9 at 8-9.

Other evidence indicates that the value of the non-compete agreement dwarfed the amount of the payoffs. For **[*11]** instance, there is evidence that the payoffs were much higher when the bidders involved were not repeat

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[2] Giraudo also raises factual objections to the government's treatment of his involvement with alleged co-venturers on particular transactions. Those objections are addressed below, along with his other factual objections. See infra Part II.A.1.c.

[3] All of the evidence cited in this order comes in the form of summaries of witness interviews prepared by the government. Accordingly, all quotations are of the government's summaries, and do not necessarily reflect the witnesses' actual words.

players. A co-conspirator who pled guilty in a related case, Laith Salma, stated that, in his first encounter with the Big Five—presumably before its members knew whether or not Salma would be a repeat player—Cullinane requested $150,000 in exchange for agreeing not to bid on a property. Dkt. 307-19 at 4-5. The scheme's longevity and the persistence with which Giraudo and other members of the Big Five pursued it, despite clear awareness of the legal risks, also belies the claim that it was not lucrative. See dkt. 307-9 at 5 (Grinsell said he was "scared to death" in the late 1990s when he heard a rumor that investigators were focusing on the foreclosure auctions.); dkt. 307-12 at 6-7 (describing changing tactics once Rezaian began to suspect law enforcement was looking into the bidding schemes).

Indeed, there are equally compelling reasons to believe that the volume-of-commerce analysis understates the profit made by Giraudo and his co-conspirators. Bid-rigging schemes at foreclosure auctions are likely to be more profitable than other price-fixing ventures because (1) the public **[*12]** nature of the bids makes it easier to catch and punish those who cheat on the cartel; (2) the cartel underpay does not reduce output (the same number of homes come to auction whatever the sale price); and (3) banks are relatively price-insensitive sellers (indeed, they were apparently oblivious to the conspiracy, which a number of co-conspirators described as obvious to anyone at the auctions, with participants sometimes paying off criers[4]). See *Heffernan, 43 F.3d at 1149*. Moreover, individuals convicted of price-fixing often participate in cartels on behalf of large corporations, and thus appropriate for themselves only a small percentage of the total profit. See, e.g., *Andreas, 216 F.3d at 649*. Here, in contrast, the bidders acted on behalf of themselves, or as members of small partnerships. They therefore took home a much higher fraction of the gain than in the ordinary case.

But this discussion only highlights a broader point: "[antitrust] damages are difficult and time consuming to establish." *U.S.S.G. § 2R1.1 background*. This is precisely why the guidelines calculate harm based on volume of commerce, rather than more direct measures. Id. And indeed, the volume-of-commerce analysis is the only method the Sentencing Guidelines provide for calculating **[*13]** the harm caused. There may be a case in which in which it is appropriate to fashion an alternative method, but if so, this is not it.

Giraudo's next contention is that the portion of the bid amount below the pre-set minimum selling price should be excluded from the volume-of-commerce analysis because the sellers would have made that amount in any event. In other words, that portion was not "affected" by Giraudo's conduct. This is a weird argument. Giraudo might have contended that the entire purchase price should be excluded because the sellers actually received that amount, and were therefore not harmed up to that amount. In other words, he might have argued that "affected" commerce, as used in *§ 2R1.1(b)(2)*, means the actual loss, measured by the delta between the market price and the purchase price. Of course, this is plainly not what the guidelines mean by volume of commerce, as evidenced by the explanation in the application notes that the harm resulting from horizontal agreements in restraint of trade represents a small fraction of the total "volume of affected commerce." *U.S.S.G. § 2R1.1 note 3*.

Giraudo's actual argument is even more perplexing, however. Under his logic, if the market value of a home is $150,000, **[*14]** the minimum bid is $100,000, and a rigged property is purchased for $100,000, the volume of commerce is $0. Meanwhile, if the purchase price on the same property is $150,000, the volume of commerce is $50,000. In other words, where the actual harm is $50,000, the volume of commerce is $0, and where the actual harm is $0, the volume of commerce is $50,000.

One need not be Judge Posner to know that this makes no sense. It is equivalent to arguing that a consumer is not harmed by a price-fixing scheme so long as he is not forced to buy a product at a price above what he is willing to pay. If that were the case, antitrust laws would be a dead letter: buyers and sellers would never be harmed by price-fixing or bid-rigging. Fortunately for the antitrust bar, this is not how the law sees it: a buyer is harmed by price-fixing whenever he is (1) forced to pay more than the market price or (2) dissuaded from buying at a price above what he is willing to pay[5]—not only when he is somehow coerced into paying more than he would otherwise be willing to. So

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[4] Dkt. 307-10 at 8.

Giraudo's argument that banks were not harmed because they could have withdrawn the property if they did not receive any bids above the pre-set **[*15]** minimum is unavailing.

Giraudo next likens this case to component-price-fixing cases in which courts calculate the volume of commerce based on the price-fixed component, rather than the end product sold to the consumer. He argues that the auctioned properties should really be separated into two—the portion up to the minimum bid (presumably equal to the amount of the encumbrance), and the portion that exceeds the minimum bid—and that he should only be taxed on the latter for properties he rigged. Some commodities can be separated into components because there are in fact two separate sales: the sale of the component to the manufacturer, and the sale of the entire commodity to the end user. If the component manufacturer engages in a price-fixing scheme on the component, then of course the volume of commerce is calculated with regard to only that component. But that is not the situation here: the homes were not sold piecemeal. Giraudo's argument is unavailing.

Next, Giraudo argues that sales which occurred more than five years prior to the filing of the indictment should not factor into the volume-of-commerce calculation because they are outside the statute of limitations. In support **[*16]** of this point, he cites a securities-fraud case concerning whether a statute of limitations applied to claims for disgorgement. *Kokesh v. S.E.C., U.S. , 137 S. Ct. 1635, 1639, 198 L. Ed. 2d 86 (2017)*. But the question here is not whether the statute of limitations at issue applies, but rather how. And that question has already been answered in the context of agreements in restraint of trade charged under *15 U.S.C. § 1*. Every circuit to rule on this issue has held that "each sale in a price-fixing conspiracy is an overt act that restarts the statute of limitations." *In re Pre-Filled Propane Tank Antitrust Litig., 860 F.3d 1059, 1065 (8th Cir. 2017)*, cert. denied sub nom. *Ferrellgas Partners, L.P. v. Morgan-Larson, LLC, 138 S. Ct. 647, 199 L. Ed. 2d 530 (2018)* (citing cases). So Giraudo's argument fails.

c. Factual disputes

Giraudo next contends that the government has not put forth sufficient evidence that he actually participated in the transactions it uses to calculate his volume of commerce. The government bases its volume-of-commerce calculation on some 206 transactions in which it claims Giraudo was involved. Having reviewed the evidence, and adopting the government's methodology, the Court finds by a preponderance of the evidence that Giraudo's volume of commerce is more than $10,000,000.

In challenging the factual basis of the government's volume-of-commerce calculation, Giraudo has taken a bit of a now-you-see-it, now-you-don't **[*17]** approach. The government represents that it provided the evidence supporting Giraudo's involvement in the listed transactions to his counsel over three years ago, see Gov't Response (dkt. 358) at 2 n.2, and gave his attorneys a list of the transactions cross-referenced to exhibits three months ago, id. at 8. Giraudo did not rebut these representations at oral argument.

Nevertheless, in his sentencing memorandum, Giraudo made only minor objections to the government's list of transactions, noting in footnotes that he had found several "discrepancies" and "factual errors." See Giraudo Sentencing Mem. (dkt. 313) at 20 n.30, n.34. Then, after receiving the government's sentencing memorandum—which included a chart of the allegedly rigged properties and cross-referenced (without actually attaching) supporting evidence—Giraudo responded that "the government has failed to offer a single piece of evidence to the Court to support the 206 property entries listed" as part of his volume of commerce. Giraudo Response (dkt. 319) at 14.

In response to this argument, the government duly served Giraudo and the Court with a thumb drive containing the referenced evidence. Gov't Reply (dkt. 358). After receiving **[*18]** the thumb drive, on the morning of the hearing set for determining the appropriate guidelines range, Giraudo identified 13 additional properties which he contended he had no role in purchasing. Reply (dkt. 363) at 2. Nevertheless, he did not ask for either a continuance or an

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[5] See *U.S.S.G. 2R1.1 note 3* ("The loss from price-fixing exceeds the gain because, among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices.").

evidentiary hearing to allow him further opportunities to contest the government's evidence. Instead, he urged the Court to refuse to consider the government's submission as untimely filed and find that his volume of commerce was $0.

Insofar as Giraudo moves the Court to exclude the evidence on the ground that the Court lacked sufficient time to review it, that motion is denied. Having reviewed the materials, the Court is satisfied that they are reliable and that the government has summarized them accurately. In the absence of specific objections by Giraudo that, if credited, would reduce the volume of commerce below $10,000,000, this is all that is required.[6] See *United States v. Gerald, 71 F. App'x 231, 232 (4th Cir. 2003)*.

Giraudo's contention that the Court should exclude the evidence on the ground that the government failed to give him notice consistent with due process also fails. Giraudo notes that "due process requires . . . that the defendant be given an opportunity **[*19]** to refute . . . . any information presented at sentencing." *United States v. Giltner, 889 F.2d 1004, 1008 (11th Cir. 1989)*. But he does not cite any cases in which a court held that this information must be disclosed to the defendant via the court's filing system, rather than through discovery. He cites a case in which a court excluded evidence of sales used to calculate volume of commerce as untimely where the government submitted the evidence after the court had already determined the volume of commerce. *United States v. SKW Metals & Alloys, Inc., 6 F. App'x 65, 66 (2d Cir. 2001)*. That case is obviously inapposite: here, the government submitted its evidence prior to the hearing at which the Court was to determine the guidelines range.

Even if the Court were to find that Giraudo lacked adequate notice of the evidentiary basis for the government's calculation of the volume of commerce, it would hold that the proper remedy would have been a continuance, not exclusion of the evidence. However, Giraudo's attorney emphatically stated at the May 7 hearing that he was not requesting a continuance. In doing so, he waived any argument that his client was entitled to a court-ordered remedy for the government's alleged delay in providing the evidence. Giraudo wants to have his cake, eat it too, and share it with his friends; but **[*20]** his lawyers, excellent as they may be, are not magicians.

2. Bid-rigging enhancement

Sentencing Guidelines § 2R1.1 provides for a one-point enhancement for defendants who participate "in an agreement to submit non-competitive bids." *§ 2R1.1(b)(1)*. The government argues that this enhancement applies to Giraudo's conduct. Giraudo counters that it only applies where defendants agree to rotate bids without making payoffs to each other. He cites Judge Posner's opinion in Heffernan for this proposition. See *43 F.3d at 1147*.

The panel in Heffernan held that the bid-rigging enhancement in *§ 2R1.1* is meant to capture the scenario in which a defendant agrees not to make a bid, "hence has not made a sale, hence has no volume of commerce." Id.; see also *U.S.S.G. § 2R1.1 note 6*. The panel held that the enhancement did not apply in the circumstances of that case, in which the defendants had agreed to submit matching bids. *Heffernan, 43 F.3d at 1147-50*. Giraudo's case is readily distinguishable: he frequently agreed not to bid. Heffernan made no distinction between cases in which the agreement not to bid involves a payoff, and cases in which it does not—and such a distinction would not make sense. In either case, the party on the other side of the transaction is harmed because the winning bid is artificially high **[*21]** or low; but the volume-of-commerce calculation does not account for this fact with regard to the party who does not bid. And there are other reasons why agreements to submit noncompetitive bids tend to be more harmful than agreements to submit matching bids or offers. See supra Part II.A.1.b.; see also *Heffernan, 43 F.3d at 1149*. Accordingly, to the extent Giraudo contends that the bid-rigging in this case was not particularly harmful compared to bid-rigging that does not involve payoffs, this argument is unavailing.

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[6] The arguments Giraudo included in his reply to the government's response to his sentencing memorandum regarding specific transactions are waived. Giraudo had the evidence on which the government based its calculation for three years, and had the specific list of transactions the government considered for three months. The government also filed the list as an attachment to its own sentencing memorandum, which Giraudo could have addressed in his response. In any event, even if the Court were to exclude all of the transactions that Giraudo lists in his three briefs, the volume of commerce would still be well over $10,000,000.

In the alternative, Giraudo argues that the payoffs he received for not bidding are reflected in the requirement that he pay restitution, and that he shouldn't be punished further. But the guideline increase only bears on the recommended length of the custodial sentence. There is nothing in the guidelines to indicate that the applicability of the enhancement in *§ 2R1.1(b)(1)* depends on the magnitude of the fine levied on the defendant.

3. Role enhancement

The government argues that Giraudo is deserving of a four-point enhancement for his role as "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." *U.S.S.G. § 3B1.1*; see also *§ 2R1.1 note 1*. The guidelines advise courts to **[*22]** consider the following factors in determining whether this enhancement is warranted: (1) the exercise of decision-making authority, (2) the nature of participation in the commission of the offense, (3) the recruitment of accomplices, (4) the claimed right to a larger share of the fruits of the crime, (5) the degree of participation in planning or organizing the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority exercised over others. *§ 3B1.1 note 4*.

a. Applicability of enhancement

Giraudo first appears to argue that this enhancement is not applicable to white-collar criminals: "The four-level enhancement is intended for sophisticated drug cartels or organized crime syndicates, not octogenarian real estate investors." Sentencing Mem. at 13. But the notes to the guidelines for bid-rigging make express reference to the role-enhancement provision. *U.S.S.G. § 2R1.1 note 1*. So this argument fails.

b. Organization of the cartel

Giraudo next contends that the enhancement does not apply because there was no "organization" to speak of: "This was a disorganized group of people who would show up at auctions and make ad hoc agreements to bid or not bid when an opportunity arose." **[*23]** Sentencing Mem. at 13-14. Cullinane extends this argument in his brief, contending that "[n]o one was empowered to tell another when or how much to bid; each participant made those decisions for his/her self." Cullinane Sentencing Mem. (dkt. 297) at 5. Cullinane continues: "In reality, [the participants] were rivals who agreed on the structure for their rivalry but acted independently within it." Id. Certain bidders may have had more influence or resources than others, but "each participant crafted his or her own strategy and made bids on the basis of self-interest." Id. at 5-7.

Price-fixing cartels need not always have leaders in order to function effectively. Indeed, "some markets are by their structure so conducive to collusion-like behavior that it is to be expected even in the absence of a legal 'agreement' among the parties." 12 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and their Application ¶ 2002a (3d ed. 2012). But it is almost inconceivable that a cartel of the type at issue here could agree to rig bids without a strong management structure. Schemes such as this one require a high degree of organization and coordination. Id. at ¶ 2002f4. **[*24]** While agreeing to charge the same price for commodity products may require only a single agreement, with periodic updates to account for market fluctuations, see, e.g., *Andreas, 216 F.3d 645*, successive bid-rigging requires many (here, hundreds) of successive accords. And each agreement was likely more difficult to reach, given that members were agreeing not just to buy at a particular price, but to entirely forego the benefits of bidding in most transactions. In sum, it is extremely unlikely that cartel members spontaneously agreed when to bid and when not to bid, without any cajoling or assurances of future benefits from cartel leaders.

Controlling cheaters on a large cartel also requires strong management. See Areeda & Hovenkamp, ***Antitrust Law**, supra*, at ¶¶ 2002d, 2002d2, 2002f1 ("[T]he managers of the cartel must be vigilant about detecting cheating and disciplining the cheater."). Cheating on the cartel price becomes more profitable as the group becomes larger, and strong leadership is required because there are more members who need to be kept in line. See id. ¶ 2002d

("[C]artels become less stable as the number of members increases."). It is not in the interest of any individual bidder to try to out-bid a renegade without **[*25]** an understanding that he will be compensated for doing so. See id.; see also *United States v. Romer, 148 F.3d 359 (4th Cir. 1998)*, cert. denied, *525 U.S. 1141, 119 S. Ct. 1032, 143 L. Ed. 2d 41 (1999)*. Strong management solves this collective-action problem.

Guidelines determinations require more than cartel theory, of course: they also need actual evidence. The theory helps, however, to put the evidence into context. Here, the evidence overwhelmingly establishes that the Big Five managed the conspiracy, getting others involved and disciplining those who did not get with the program. According to Michael Navone, "It was known that Rezaian, Grinsell, Giraudo, Rosenbledt, and Cullinane worked together and were known as 'the group' or 'the big five.'" Dkt. 307-13 at 5; see also 307-8 at 6 (testimony of Florence Fung, describing the group as the "Board of Directors"). According to Salma, the Big Five set the rules of the bidding among co-conspirators and determined how much of a share each bidder would get in a given property, often dividing the shares unequally to give themselves a bigger cut of the pie. Dkt. 307-22 at 13. "Giraudo . . . explained to Salma the rule that if you were interested in a property, you had to tell Giraudo or someone else in the Big Five, and the Big Five made the determination **[*26]** as to who got the property." Dkt. 307-22 at 5. According to Grinsell, Giraudo kept a list tracking who had been paid to refrain from bidding on various properties. Dkt. 307-9 at 7. Later, Rezaian took on this role. Dkt. 307-16 at 1-2.

The Big Five also took responsibility for disciplining would-be cheaters on the cartel and threatening those who declined to participate. According to Salma, Giraudo and other members of the Big Five would bid up properties to punish those who did not follow the bid-rigging rules set by the Big Five, or would threaten to do so. Dkt. 307-22 at 5-6. According to Navone, "It was common for a person not associated with the group to have difficulty purchasing property . . . unless [he] agreed to pay the group." Dkt. 307-13 at 5. In sum, the evidence shows that this was a well-organized cartel in which the members of the Big Five played a managerial role.

c. Giraudo's role

Giraudo next argues that the leadership enhancement does not apply because he did not enjoy a leadership role within the Big Five. Rather, he and his four partners "operated as equals." But the evidence shows that Giraudo made the final decision over which co-conspirators could join the partnership; **[*27]** that Giraudo settled disputes within the conspiracy; that Giraudo gave direction to other members of the Big Five; and that other members of the Big Five regarded Giraudo as the leader.

Giraudo's representation to the Court that he only began bidding at the auctions during the financial crisis, apparently joining an already existing conspiracy, is belied by the statements of numerous co-conspirators that he had been bid-rigging much earlier, with a rotating cast. See, e.g., dkt. 307-9 at 4-5 (Grinsell); dkt. 307-6 at 2-3 (Abraham Farag). Rezaian, Rosenbledt and Cullinane only joined Giraudo and Grinsell once the foreclosure crisis was underway in 2009, when more people began attending the auctions. Dkt. 307-10 at 4 (According to Grinsell, the number of attendees more than doubled in 2009, from six to twelve or fifteen.). Grinsell maintained that Giraudo bullied him into joining the conspiracy, and admitted others to the "Big Five" partnership over Grinsell's objections. Dkt. 307-9 at 8-9. The members of the Big Five may have worked collaboratively in certain ways, but when there were disagreements, the other members consistently deferred to Giraudo. According to Rezaian, "Everyone at **[*28]** the auctions looked to Giraudo to make deals." Dkt. 307-16 at 4.

According to Salma, other co-conspirators referred to Giraudo as the "boss," "don," or "king" of the auctions: "From attending the auctions, one learned Giraudo was the boss and his position of being in charge was clear. Those attending the auctions learned that you did not 'fuck' with Giraudo." Dkt. 307-22 at 6. Cullinane would tell other bidders, "Don't make Joe angry." Dkt. 307-22 at 6-7. Giraudo would bully and shame other bidders, calling one the "Bad Indian." Dkt. 307-22 at 5-6. One bidder labeled the Big Five "Joe's Group." Dkt. 307-23 at 5.

Giraudo argues that Rezaian was the real ring-leader, pointing to Rezaian's role as an enforcer and intimidator, and his active direction of co-conspirators. Giraudo Response at 12-13. The evidence clearly indicates that Rezaian played an important part, orchestrating bidders and often threatening them. Grinsell noted that Giraudo decided to partner with Rezaian partly in order to "eliminate a competitor" (meaning Rezaian), a fact which suggests that Rezaian had significant leverage. Dkt. 307-10 at 4. But Grinsell also stated that "Rezaian went along with anything Giraudo said," **[*29]** and that "Rezaian would not have opposed Giraudo as it would have undermined Rezaian wanting to become Giraudo's friend and right hand man." Dkt. 307-10 at 3.

Rezaian may well have qualified for the leadership enhancement, had the government requested it. But "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." *U.S.S.G. § 3B1.1 note 4*. That other members also played crucial roles does not establish that Giraudo was not nonetheless a leader, and he has pointed to no evidence indicating that he took orders from anyone.

Giraudo contends that his co-conspirators' statements regarding his involvement are unreliable because they were not subject to cross-examination. But Giraudo does not point to any specific inconsistencies, and "hearsay is admissible at sentencing, so long as it is accompanied by some minimal indicia of reliability." *United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006)*. At the May 7 hearing, Giraudo's counsel contended that the government has hung its entire argument on the testimony of a single co-conspirator, Laith Salma. But it should be evident from the foregoing summary of the record that a bevy of other co-conspirators also spoke to Giraudo's leadership role within **[*30]** the Big Five, and the conspiracy as a whole. He is deserving of the enhancement.

B. Cullinane

Cullinane and the government disagree about the proper calculation of the volume of commerce affected by him. Cullinane also argues that an enhancement based on his role in the offense is improper. The Court takes these arguments in turn.

1. Volume of commerce

Like Giraudo, Cullinane argues that the Court should allocate his volume of commerce based on his ownership stake in the rigged properties, and that the volume-of-commerce calculation provided for in the guidelines overstates the actual profit he made. The Court rejects these arguments for the reasons already stated with respect to Giraudo. See supra Part II.A.1.

Cullinane also argues that the volume-of-commerce enhancement is only meant to address "collusion among providers of services or products to extract a higher price from consumers for those services and products." Cullinane Sentencing Mem. at 4. The enhancement is not designed for cases like this one, in which the agreements "served to reduce the profits made by banks and lenders on their foreclosed mortgages." Id. It is not quite clear what rationale Cullinane thinks supports this **[*31]** conclusion. He may be saying that the guidelines only apply to upstream (or selling) cartels, not downstream (or buying) ones. But "a buying cartel's low buying prices are illegal and bring antitrust injury and standing to the victimized suppliers. Clearly mistaken is the occasional court that considers low buying prices pro-competitive or that thinks sellers receiving illegally low prices do not suffer antitrust injury." *Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988-89 (9th Cir. 2000)* (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, ***Antitrust Law*** ¶ 375b at 297 (rev. ed. 1995)). "To hold otherwise would be contrary to long-established ***antitrust law***," id., not to mention binding Ninth Circuit precedent, see id.

Cullinane's attorney offered a different logic at the May 7 hearing, maintaining that the volume-of-commerce enhancement does not contemplate the conduct at issue here because that conduct only harmed lenders, not homeowners—and that it was the abusive lending practices of the banks themselves which precipitated the widespread sales of homes at foreclosure auctions like the ones rigged by the defendants in this case. Cf. dkt. 307-22 ("Salma recalled Giraudo always saying 'fuck the banks.'"). But while civil ***antitrust law*** does distinguish **[*32]** between the directness of the harm suffered by plaintiffs in determining who has standing to sue, see *Assoc. Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 545, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the victim's conduct is otherwise of no account. "[T]he Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism." United States v. Apple, Inc., *791 F.3d 290, 332 (2d Cir. 2015)*.

2. Role enhancement

Cullinane argues that he is not deserving of a three-level role enhancement as "a manager or supervisor." *U.S.S.G. § 3B1.1(b)*. To the extent he is contending that the Big Five did not manage the conspiracy, that argument fails for the reasons discussed above. See supra Part II.A.3.b.

Cullinane also argues that he did not personally play a sufficiently significant role within the group to warrant the enhancement. He argues that the government has "fail[ed] to identify any specific conduct by [him] that satisfies the requirements of *U.S.S.G. § 3B1.1(b)* or to provide any evidence for the attribution to him of responsibility for the specific conduct of others." Cullinane Sentencing Mem. at 7. Cullinane argues that his role within the Big Five was "clearly secondary," noting that he principally researched the status and value of properties and "rarely participated in negotiations and agreements." Id.

Cullinane was the last to join the group, and the government **[*33]** does not dispute that he had less sway within it than the others. See dkt. 307-10 at 4-5. Nevertheless, he played an important role within the Big Five, managing the real estate it acquired, and shared equally in the profits on most properties. Id. at 5-6. This is sufficient for the Court to find by a preponderance of the evidence that he is deserving of the three-level enhancement. In addition, the application notes to *Guideline § 3B1.1* state than "[a]n upward departure may be warranted . . . in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization." *U.S.S.G. § 3B1.1 note 2*. According to Grinsell, Cullinane managed and held title to most of the properties. Dkt. 307-10 at 5-6. So in the alternative, the Court finds that Cullinane is deserving of the enhancement based on his role in managing properties the Big Five acquired through rigging bids.

IV. CONCLUSION

For the foregoing reasons, the Court finds pursuant to the *Sentencing Reform Act of 1984* that Giraudo's offense level is 18 and Cullinane's is 17.

IT IS SO ORDERED.

Dated: May 14, 2018

/s/ Charles R. Breyer

CHARLES R. BREYER **[*34]**

United States District Judge

End of Document

Boardman v. Pac. Seafood Grp.

United States District Court for the District of Oregon, Medford Division

May 15, 2018, Decided; May 15, 2018, Filed

No. 1:15-cv-108-MC

Reporter
2018 U.S. Dist. LEXIS 81611 *; 2018-1 Trade Cas. (CCH) P80,382; 2018 WL 2223317

JEFF BOARDMAN, et al., Plaintiffs, v. PACIFIC SEAFOOD GROUP, et al., Defendants.

Prior History: Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 2016 U.S. App. LEXIS 8008 (9th Cir. Or., May 3, 2016)

Core Terms

Seafood, antitrust, geographic, markets, shrimp, discovery, summary judgment motion, groundfish, fishing, quotas, non-moving, fishermen, deliver, merger, vessel, Coast, processors, damages, prices, proposed acquisition, summary judgment, trawl-caught, acquisition, definitions, purchases, suppress, leasing, additional discovery, injunctive relief, relevant market

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN1[] Opposing Materials, Motions for Additional Discovery

Fed. R. Civ. P. 56(d) allows the court to defer ruling on a pending motion for summary judgment if a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Civil Procedure > ... > Summary Judgment > Opposing Materials > Motions for Additional Discovery

HN2[] Judges, Discretionary Powers

Fed. R. Civ. P. 56(d) provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence. To justify a stay, the requesting party must establish that (1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment. Failure to comply with these requirements is a proper ground for denying discovery and proceeding to summary judgment. The court has discretion in ruling on a motion to stay under Fed. R. Civ. P. 56(d).

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

HN3[] **Private Actions, Standing**

A defendant may challenge a plaintiff's antitrust standing as early as possible to avoid needless expense. Antitrust standing requirements are often disputed and resolved early in the litigation when they can be decided as a matter of law without the need for full discovery, trial or any determination of what the defendant did and whether it constituted an antitrust violation.

Evidence > Admissibility > Expert Witnesses

HN4[] **Admissibility, Expert Witnesses**

The substitute expert should have the opportunity to express his opinions in his own language after reviewing the evidence and performing whatever tests prior experts on both sides were allowed to perform.

Antitrust & Trade Law > Clayton Act > Claims

HN5[] **Clayton Act, Claims**

Determination of the relevant product and geographic markets is a necessary predicate to deciding whether a merger contravenes the Clayton Act.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Scintilla Rule

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN6[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(a)*. A factual dispute is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. In ruling on a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party and may not credibility determinations or weigh evidence. Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some metaphysical doubt as to the material facts at issue.

Antitrust & Trade Law > Clayton Act > Claims

HN7[] Clayton Act, Claims

To prove an unlawful merger claim under § 7 of the Clayton Act, 15 U.S.C.S. § 18, a plaintiff must show that the effect of the challenged acquisition may be substantially to lessen competition, or to tend to create a monopoly. 15 U.S.C.S. § 18. An antitrust plaintiff does not need to prove that the challenged acquisition has altered prices in the relevant market; rather, all that is necessary is that the merger create an appreciable danger of such consequences in the future.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] Standing, Requirements

Antitrust plaintiffs who seek only injunctive relief are subject to less stringent standards to prove standing than antitrust plaintiffs who seek damages. In determining whether a plaintiff seeking damages has antitrust standing, courts examine factors in addition to antitrust injury, including the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] Standing, Clayton Act

An antitrust plaintiff who seeks only injunctive relief still must show antitrust injury in order to establish standing -- either real or threatened. The antitrust injury requirement ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants acts unlawful. In holding that a plaintiff seeking only injunctive relief must show an antitrust injury, the Supreme Court of the United States explained that it would be incongruous to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN10[] Standing, Requirements

To establish an antitrust injury, the plaintiff must show (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. Antitrust injury requires the plaintiff to have suffered its injury in the market where the competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury. Antitrust standing is a question of law.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN11[] Standing, Requirements

A plaintiff cannot show an antitrust injury if the plaintiff does not participate in the market where the allegedly anticompetitive merger would occur.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN12[] **Standing, Requirements**

In the context of antitrust injury, the relevant inquiry is not whether dominance in one geographic market could be used to create pressure in another, which it very well might, but whether the plaintiff was a market participant, or potential entrant, in both geographic areas for the relevant product.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN13[] **Standing, Requirements**

Plaintiffs whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN14[] **Standing, Requirements**

Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Some injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff. The fact that injury has occurred and that other claims have failed does not permit the appellate court to expand the coverage of ***antitrust law***.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Strike

HN15[] **Defenses, Demurrers & Objections, Motions to Strike**

A motion to strike is an extreme and drastic remedy that is heavily disfavored.

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For Pacific Seafood Group, Ocean Gold Holding Co., Inc., Dulcich Inc., Frank Dulcich, Pacific Seafood Group Acquisition Company, Inc., Pacific Seafood Washington Acquisition Co., Inc., Bandon Pacific, Inc., Bio-Oregon Protein, Inc.Pacific Choice Seafood Company, Pacific Coast Seafoods Company, Pacific Garibaldi, Inc., Pacific Gold Seafood Company, Pacific Pride Sea Food Company, Pacific Sea Food Co., Pacific Surimi Co.,Inc., Pacific Tuna Company, LLC, Washington Crab Producers, Inc., Washington Crab Producers, Inc., Pacific Alaska Shellfish, Inc., Sea Level Seafoods, LLC, Sea Level Seafoods, LLC, Pacific Resurrection Bay, Pacific Conquest, Inc., Calamari, LLC, Jo Marie LLC, Leslie Lee, LLC, Miss Pacific, LLC, Pacific Future, LLC, Pacific Grumpy J, LLC, Pacific Hooker, LLC, Pacific Horizon, LLC, Pacific Knight, LLC, Privateer LLC, Sea Princess, LLC, Triple Star, LLC, Pacific Fishing, LLC, Pacific Sea Food of Arizona, Inc., Starfish Investments, Inc., **[*2]** Dulcich Surimi, LLC, Defendants: Michael J. Esler, LEAD ATTORNEY, John W. Stephens, Esler, Stephens & Buckley, LLP, Portland, OR; Rachel C. Lee, LEAD ATTORNEY, Randolph C. Foster, Timothy W. Snider, Stoel Rives LLP, Portland, OR.

For Bio-Oregon Properties, LLC, Pacific Group Transport, Co., Pacific Marketing Group, Inc., Pacific Russia, Inc., Pacific Russia Ventures, LLC, Pacific Tuna Holding Company, Inc., Powell Street Market, LLC, Pacific Fresh Sea

Food Company, Seacliff Seafoods, Inc., Copper River Resource Holding Co., Inc., Pacific Copper River Acquisition Co., Inc., Sea Level Seafoods Acquisition, Inc., Island Coho, LLC, S&S Seafood Co., Inc., Pacific Seafood Disc., Inc., Dulcich Realty, LLC, Dulcich Realty Acquisition, LLC, Dulcich Jet, LLC, Ocean Companies Holding Co., LLC, Defendants: Michael J. Esler, LEAD ATTORNEY, John W. Stephens, Esler, Stephens & Buckley, LLP, Portland, OR; Rachel C. Lee, LEAD ATTORNEY, Randolph C. Foster, Timothy W. Snider, Stoel Rives LLP, Portland, OR.

For Francis Miller, Jacquelyn Rydman, Intervenor Defendants: Christopher J. Kayser, Larkins Vacura LLP, Portland, OR.

For Sherry Miller, Mark Rydman, Intervenor Defendants: Cody B. Hoesly, LEAD ATTORNEY, **[*3]** Larkins Vacura, LLP, Portland, OR; Christopher J. Kayser, Larkins Vacura LLP, Portland, OR.

For Attorney General of the State of Oregon, Amicus: Elleanor H. Chin, LEAD ATTORNEY, Oregon Department of Justice, Salem, OR; Tim D. Nord, LEAD ATTORNEY, Oregon Department of Justice, Civil Enforcement, Salem, OR.

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For Jacquelyn Rydman, Mark Rydman, Intervenors: Christopher J. Kayser, Larkins Vacura LLP, Portland, OR; Cody B. Hoesly, Larkins Vacura, LLP, Portland, OR.

For Da Yang Seafood Inc., Movant: Peter D. Hawkes, Lane Powell, PC, Portland, OR.

For Pacific Surimi Co.,Inc., Pacific Tuna Company, LLC, Frank Dulcich, Pacific Fresh Sea Food Company, Dulcich Realty, LLC, Pacific Choice Seafood Company, Pacific Seafood Group, Dulcich Realty Acquisition, LLC, Pacific Future, LLC, Dulcich Surimi, LLC, Pacific Coast Seafoods Company, Pacific Group Transport, Co., Pacific Tuna Holding Company, Inc., Seacliff Seafoods, Inc., Pacific Conquest, Inc., Sea Princess, LLC, Pacific Gold Seafood Company, Copper River Resource Holding Co., Inc., **[*4]** Pacific Knight, LLC, Pacific Alaska Shellfish, Inc., Pacific Sea Food Co., Dulcich Inc., Pacific Fishing, LLC, Pacific Russia Ventures, LLC, Bio-Oregon Properties, LLC, Dulcich Jet, LLC, Pacific Copper River Acquisition Co., Inc., Pacific Grumpy J, LLC, Ocean Gold Holding Co., Inc., Powell Street Market, LLC, Starfish Investments, Inc., Sea Level Seafoods Acquisition, Inc., Pacific Seafood Disc., Inc., Island Coho, LLC, Pacific Pride Sea Food Company, Bio-Oregon Protein, Inc., Pacific Garibaldi, Inc., Calamari, LLC, Pacific Russia, Inc, S&S Seafood Co., Inc., Privateer LLC, Bandon Pacific, Inc., Pacific Sea Food of Arizona, Inc., Leslie Lee, LLC, Pacific Seafood Washington Acquisition Co., Inc., Sea Level Seafoods, LLC, Triple Star, LLC, Pacific Horizon, LLC, Pacific Resurrection Bay, Washington Crab Producers, Inc., Island Fish Co., LLC, Counter Claimants: Michael J. Esler, LEAD ATTORNEY, John W. Stephens, Esler, Stephens & Buckley, LLP, Portland, OR; Rachel C. Lee, LEAD ATTORNEY, Timothy W. Snider, Stoel Rives LLP, Portland, OR.

For Pacific Surimi Co., Inc., Pacific Tuna Company, LLC, Frank Dulcich, Pacific Fresh Sea Food Company, Dulcich Realty, LLC, Pacific Choice Seafood Company, **[*5]** Pacific Seafood Group, Dulcich Realty Acquisition, LLC, Pacific Future, LLC, Dulcich Surimi, LLC, Pacific Coast Seafoods Company, Pacific Group Transport, Co., Pacific Tuna Holding Company, Inc., Dulcich Inc., Pacific Sea Food Co., Pacific Alaska Shellfish, Inc., Pacific Knight, LLC, Copper River Resource Holding Co., Inc., Pacific Gold Seafood Company, Sea Princess, LLC, Pacific Conquest, Inc., Seacliff Seafoods, Inc., Pacific Seafood Disc., Inc., Island Coho, LLC, Pacific Pride Sea Food Company, Bio-Oregon Protein, Inc., Pacific Garibaldi, Inc., Calamari, LLC, Pacific Russia, Inc., S&S Seafood Co., Inc., Privateer LLC, Bandon Pacific, Inc., Pacific Sea Food of Arizona, Inc., Leslie Lee, LLC, Pacific Seafood Group Acquisition Company, Inc., Pacific Hooker, LLC, Pacific Seafood Washington Acquisition Co., Inc., Sea Level Seafoods, LLC, Triple Star, LLC, Pacific Horizon, LLC, Pacific Horizon, LLC, Washington Crab Producers, Inc., Island Fish Co., LLC, Miss Pacific, LLC, Counter Defendants: Michael J. Esler, LEAD ATTORNEY, John W. Stephens, Esler, Stephens & Buckley, LLP, Portland, OR; Rachel C. Lee, LEAD ATTORNEY, Timothy W. Snider, Stoel Rives LLP, Portland, OR.

For Pacific Marketing **[*6]** Group, Inc., Jo Marie LLC, Pacific Fishing, LLC, Pacific Russia Ventures, LLC, Bio-Oregon Properties, LLC, Dulcich Jet, LLC, Pacific Copper River Acquisition Co., Inc., Pacific Grumpy J, LLC, Ocean Gold Holding Co., Inc., Powell Street Market, LLC, Starfish Investments, Inc., Sea Level Seafoods Acquisition, Inc., Counter Defendants: Michael J. Esler, LEAD ATTORNEY, John W. Stephens, Esler, Stephens & Buckley, LLP, Portland, OR; Rachel C. Lee, LEAD ATTORNEY, Randolph C. Foster, Timothy W. Snider, Stoel Rives LLP, Portland, OR.

Judges: MICHAEL MCSHANE, UNITED STATES DISTRICT JUDGE.

Opinion by: MICHAEL MCSHANE

Opinion

OPINION AND ORDER

McShane, District Judge:

Plaintiffs[1] Jeff Boardman, Dennis Rankin, Lloyd D. Whaley, and MV Fisheries, Inc. bring this antitrust action against Defendants Pacific Seafood Group (Pacific Seafood) and more than 50 other businesses owned in whole or part by Defendants Frank Dulcich and Dulcich, Inc. Plaintiffs, who are commercial fishermen, seek a permanent injunction prohibiting Pacific Seafood from acquiring any additional ownership interest in Ocean Gold Seafoods and its affiliates, including Ocean Protein, LLC and Hoquiam Riverview Properties, LLC (Ocean Gold). Pacific Seafood currently **[*7]** owns about a third of Ocean Gold. Mot. Intervene 1, ECF No. 220. Francis Miller, Sherry Miller, Jacquelyn Rydman, and Mark Rydman, who collectively own about 48% of Ocean Gold, have intervened as Defendants.

Pacific Seafood moves for summary judgment, contending that Plaintiffs have not shown antitrust standing to bring this action because they do not participate in the relevant markets. Plaintiffs respond that they have antitrust standing, and alternatively that Pacific Seafood's motion for summary judgment should be stayed to allow additional discovery.

Because the Plaintiffs do not participate in the relevant markets, Plaintiffs lack antitrust standing. Pacific Seafood's motion for summary judgment is GRANTED. Plaintiffs' request for further discovery is denied.

PROCEDURAL BACKGROUND

Plaintiffs filed this action in January 2015 after Pacific Seafood notified Plaintiffs' counsel of the proposed acquisition of Ocean Gold. The settlement agreement in a prior action, *Whaley v. Pacific Seafood Group*, No. 10-cv-3057-MC, required that Pacific Seafood notify Plaintiff's counsel about any proposed acquisition of Ocean Gold. *See* Pls.' Mem. Opp'n 13 n.6, ECF No. 211.

Plaintiffs bring claims against **[*8]** Pacific Seafood for monopolization and attempted monopolization in violation of the *Sherman Act*, *15 U.S.C. § 2*, and for unlawful merger in violation of the *Clayton Act*, *15 U.S.C. § 18*. Plaintiffs seek only injunctive relief, not damages.

Plaintiffs assert that Pacific Seafood's proposed acquisition of Ocean Gold would cause a "substantial lessening of competition and the enhancement of an existing monopoly held by Pacific Seafood Group in the West Coast seafood input markets for trawl-caught groundfish, Pacific onshore whiting and Pacific coldwater shrimp." Second Am. Compl. ¶ 63, ECF No. 52. Plaintiffs claim that "[t]his resulting increased concentration in these West Coast seafood input markets will result in ex vessel price suppression to the detriment of plaintiffs." *Id.*

[1] Plaintiffs Todd Whaley, Miss Sarah LLC, Robert Seitz, and South Bay Wild, Inc., have settled with Defendants. The parties have agreed that these Plaintiffs should be dismissed with prejudice. ECF No. 243.

Shortly after filing their complaint, Plaintiffs moved for a preliminary injunction prohibiting Pacific Seafood from acquiring full ownership of Ocean Gold. Pls.' Mot. Prelim. Inj., ECF No. 22. In March 2015, this court granted Plaintiffs' motion for a preliminary injunction. *Boardman v. Pacific Seafood Group, 2015 U.S. Dist. LEXIS 190896, 2015 WL 13357739 (D. Or. Mar. 6, 2015)*, ECF No. 55.

Pacific Seafood moved to compel arbitration, based on the terms of the settlement agreement in *Whaley*. Defs.' Mot. Compel Arbitration, ECF No. 71. In June **[*9]** 2015, this court denied Pacific Seafood's motion to compel arbitration. *Boardman v. Pacific Seafood Group, 2015 U.S. Dist. LEXIS 190981, 2015 WL 13358335 (D. Or. June 8, 2015)*, ECF No. 83. In August 2015, this court granted Pacific Seafood's motion to stay proceedings pending its appeal of this court's rulings. Order, ECF No. 103. On appeal, the Ninth Circuit affirmed. *Boardman v. Pacific Seafood Group, 822 F.3d 1011 (9th Cir. 2016)*. The preliminary injunction remains in place.

After remand from the Ninth Circuit, the parties resumed discovery, which has been ongoing since the fall of 2016. Plaintiffs served Dr. Radtke's expert report on June 30, 2017.

Pacific Seafood deposed Dr. Radtke on October 25, 2017. Pacific Seafood filed the current motion for summary judgment on December 5, 2017. On December 19, 2017, Plaintiffs moved to replace Dr. Radtke after he stated that he was no longer able to testify due to his age and concerns about his ability to testify at trial. Pls.' Mot. Substitute Testifying Expert Witness, ECF No. 196. I granted Plaintiffs' motion to substitute, and Plaintiffs named Dr. Richard Sexton, a professor of agricultural and resource economics at University of California, Davis, to replace Dr. Radtke as an expert witness. *See* Sexton Decl. 3, ECF No. 212.

PLAINTIFFS' REQUEST FOR A STAY TO ALLOW ADDITIONAL DISCOVERY

I. Plaintiffs' Request [*10] for a Stay

In their response to Pacific Seafood's motion for summary judgment, Plaintiffs seek a stay for additional discovery based on *Federal Rule of Civil Procedure 56(d)*. Pls.' Mem. Opp'n 22, ECF No. 211. ***HN1***[] *Rule 56(d)* allows this court to defer ruling on a pending motion for summary judgment "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition."

Plaintiffs contend that they need additional discovery to respond to Pacific Seafood's motion for summary judgment. For example, they seek "documents and depositions necessary to assess the relative market shares of Pacific Seafood and Ocean Gold in Westport." Pls.' Mem. Opp'n 15. Plaintiffs state that although Dr. Radtke defined the relevant geographic markets based on his finding that commercial fishermen were willing to travel from 60 to 100 miles to sell their catch, Plaintiffs learned that Plaintiff Dennis Rankin has traveled more than 100 miles from the point of harvest to deliver his catch. Pls.' Mem. Opp'n 21.

Plaintiffs also contend that their substitute expert witness, Dr. Sexton, should be given time to formulate his own market definitions, arguing that Dr. Sexton "has not had a reasonable **[*11]** opportunity to review the evidence or form his own opinions on relevant subjects," including geographic markets. Pls.' Mem. Opp'n 20. Dr. Sexton states that "insufficient analysis has been conducted to render a definitive opinion on the correct geographic market or markets for the acquisition of Pacific whiting, Pacific coldwater pink shrimp, and trawl-caught groundfish." Sexton Decl. ¶ 9.

II. Legal Standards for a Stay of Summary Judgment Proceedings

Rule 56(d)[2] provides:

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[2] Formerly designated as *Rule 56(f)* until *Rule 56* was amended in 2010.

> **(d) When Facts Are Unavailable to the Nonmovant.** If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> **(1)** defer considering the motion or deny it;
>
> **(2)** allow time to obtain affidavits or declarations or to take discovery; or
>
> **(3)** issue any other appropriate order.

HN2[] *Rule 56(d)* "provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence." *United States v. Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002)*. To justify a stay, the requesting party must establish that "(1) it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose **[*12]** summary judgment." *Family Home and Fin. Ctr., Inc. v. Fed. Home Loan Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008)* "Failure to comply with these requirements 'is a proper ground for denying discovery and proceeding to summary judgment.'" *Id.* (citation omitted). This court has discretion in ruling on a motion to stay under *Rule 56(d)*. *Morton v. Hall, 599 F.3d 942, 945 (9th Cir. 2010)*.

III. Discussion

Plaintiffs have not met their burden under *Rule 56(d)* that would support this court allowing additional discovery before ruling on Pacific Seafood's motion for summary judgment. Some of the evidence Plaintiffs claim they need to obtain through additional discovery is clearly within Plaintiffs' own knowledge. For example, Plaintiffs should know "where, when, and to whom [Plaintiffs] have delivered their seafood." Defs.' Reply 30, ECF No. 215. Other evidence Plaintiffs claim that they need, such as the relative market shares of Pacific Seafood and Ocean Gold in the Westport market, is not relevant in determining whether Plaintiffs are participants in the Westport market.

Plaintiffs also argue that Pacific Seafood's motion for summary judgment is premature. Plaintiffs' counsel, who is very experienced in antitrust litigation, stated at the hearing that

> in the typical case, . . . the plaintiff generates its expert witness disclosure, then the defendant does **[*13]** the same, and the plaintiff then responds in some sort of rebuttal filing. . . . . [U]nder the wave of filings that precede the actual trial, you will see clarification, modification, change based upon discovery, and comment from the other side. We never got through that process.

Tr. 10, ECF No. 242. Plaintiffs imply that Pacific Seafood has improperly short-circuited the expert discovery process by using Plaintiffs' own expert opinions to support Pacific Seafood's motion for summary judgment. However, ***HN3***[] a defendant may challenge a plaintiff's antitrust standing as early as possible to avoid needless expense. Antitrust standing requirements "are often disputed and resolved early in the litigation when they can be decided 'as a matter of law' without the need for full discovery, trial or any determination of what the defendant did and whether it constituted an antitrust violation." IIA Phillip E. Areeda et al., ***Antitrust Law*** ¶ 335e2 (4th ed. 2014). Here, Plaintiffs should have not have been surprised by Pacific Seafood's challenge to Plaintiffs' antitrust standing in light of the information it sought in discovery. Plaintiffs' expert defined the market. Plaintiffs are hard pressed now **[*14]** to argue that they are being unfairly bound by their own expert's findings.

Plaintiffs also argue that a stay is necessary to allow their new expert, Dr. Sexton, to draft a report, which presumably would include his own definitions of the relevant markets. In the order allowing Plaintiffs to replace Dr. Radtke, I limited the permissible scope of the new expert's opinions:

> I find that Defendants are entitled to strict limits on the new expert witness's report and testimony, and that Defendants may use Dr. Radtke's expert report and deposition testimony for impeachment. Plaintiffs do not contend that Dr. Radtke was incompetent when he drafted his expert report, but rather that he is no longer competent to testify in support of its conclusions. I conclude that to minimize the prejudice to Defendants,

> *Plaintiffs' new expert witness "may not testify in any manner that is contrary to or inconsistent" with Dr. Radtke's disclosure. Fujifilm Corp. v. Motorola Mobility LLC, No. 12-cv-03587-WHO, 2014 U.S. Dist. LEXIS 162733, 2014 WL 8094582, at *2 (N.D. Cal. Nov. 19, 2014)*. In other words, *the new expert's opinions must be "substantially similar" to Dr. Radtke's opinions. See In re Northrop Grumman Corp. ERISA Litig., 2016 U.S. Dist. LEXIS 185126, 2016 WL 6826171, at *4. Plaintiffs' new expert may, however, perform his or her own analysis and calculations so long as the* **[*15]** *results are not contrary to or inconsistent with Dr. Radtke's conclusions. See id.* As one court explained, ***HN4***[] the substitute expert "should have the opportunity to express his opinions in his own language after reviewing the evidence and performing whatever tests prior experts on both sides were allowed to perform." *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co., Nos. 1:04-cv-396, 1:06-CV-317, 2010 U.S. Dist. LEXIS 103744, 2010 WL 3892860, at *3 (N.D. Ind. Sept. 30, 2010)* (further quotation marks and citation omitted).

Order at 7 (emphasis added), ECF No. 214.

I agree with Pacific Seafood that allowing Dr. Sexton to formulate market definitions that are inconsistent with Dr. Radtke's market definitions would violate the limits imposed by the order. Plaintiffs have had ample time to formulate their market definitions, which are crucial to evaluating antitrust claims. *See Rebel Oil Co. v. Atlantic Richfield Co.,51 F.3d 1421, 1434 (9th Cir. 1995)*; *United States v. Marine Bancorporation, Inc., 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974)* ("***HN5***[] Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act.") (quoting *United States v. E.I. Du Pont De Nemours & Co., 353 U.S. 586, 593 (1962))*. Plaintiffs have not shown that summary judgment proceedings should be stayed to allow further discovery.

FACTUAL BACKGROUND

I. Plaintiffs' Market Definitions

For purposes of the current motion for summary judgment, Pacific Seafood **[*16]** accepts Plaintiffs' market definitions. Plaintiffs allege three product markets: trawl-caught groundfish; whiting delivered onshore (i.e., whiting sold to an onshore processor rather than a vessel-based processor); and cold-water shrimp. Snider Am. Decl., Ex. 5, at 3, ECF No. 193. Plaintiffs define the following geographic markets for each of the three products at issue as follows:

1) For trawl-caught groundfish, Plaintiffs allege six economically distinct geographic markets: the Ft. Bragg market, off the north California coast at Mendocino County; the Eureka market, off the north California coast at Del Norte and Humboldt counties; the Charleston/Coos Bay market, off the south Oregon coast; the Newport market, off the central Oregon coast; the Astoria/Ilwaco market, offshore of the mouth of the Columbia River; and, most importantly here, the Westport, Washington market, drawing from fishing grounds north of the entrance to the Columbia River to the Canadian border north of the western tip of the Olympic Peninsula. Snider Am. Decl., Ex. 6, at 3. Because Ocean Gold operates only in Westport, the Westport market is the focus of Plaintiffs' antitrust claims.

2) For onshore whiting, Plaintiffs **[*17]** allege three economically distinct geographic markets: the Newport market, the Astoria/Ilwaco market, and the Westport market.

3) For cold-water shrimp, Plaintiffs allege five economically distinct geographic markets: the Eureka market, the Charleston/Coos Bay market, the Newport market, the Astoria/Ilwaco market, and the Westport market.

II. Plaintiffs Do Not Participate in the Westport Market or Sell to Pacific Seafood

Ocean Gold operates seafood processing facilities only in Westport. Since 2011, Ocean Gold has been purchasing whiting almost exclusively, accounting for 98% of Ocean Gold's seafood purchases. Defs.' Mot. Summ. J. 5-6. Trawl-caught groundfish and cold-water shrimp account for the remainder of Ocean Gold's purchases. For example, in 2016, Ocean Gold purchased 72,570,000 pounds of whiting, 730,000 pounds of trawl-caught groundfish, and 45,000 pounds of shrimp. Defs.' Mot. Summ. J. 6.

Pacific Seafood's Westport facility purchases the vast majority of cold-water shrimp sold there. Ocean Gold processes most of the shrimp purchased by Pacific Seafood.

None of the Plaintiffs delivers his harvest to the Westport market. For Boardman, it has been 25 or 30 years since he delivered **[*18]** to Westport; for Rankin, it has been 20 years; and for Whaley, it has been 6 years.

Nor have Plaintiffs presented credible evidence that they are prepared to deliver seafood to the Westport market in the future. Boardman, who harvests only shrimp, testified that he would not leave his long-time processor, Hallmark Fisheries. Snider Am. Decl., Ex. 1, at 179 (Boardman Depo.) Rankin, who harvests only groundfish, has not considered ports other than Astoria for the last six years, stating that he is "happy where I am." Snider Am. Decl., Ex. 2, at 95 (Rankin Depo.). Whaley, who harvests only shrimp, has not reached out to any processors in Westport for the last six years. Snider Am. Decl., Ex. 3, at 169 (Whaley Depo.).

None of the Plaintiffs has delivered to Pacific Seafood at any of its West Coast facilities since 2012. Boardman delivers his shrimp only to Hallmark Fisheries in Newport and Coos Bay, Oregon. Rankin delivers his groundfish only to Bornstein's facilities in Astoria, Oregon. Whaley has delivered shrimp and groundfish to processors in Newport, Oregon, and ports south of Newport. None of the Plaintiffs fish for whiting.

In response to the undisputed evidence that Plaintiffs do **[*19]** not participate in the Westport market, Plaintiffs state, "Every single plaintiff annually renews permits that allow them to deliver to Washington ports." Pls.' Mem. Opp'n 29. Plaintiffs state that Whaley and Boardman hold Washington shrimp permits and own vessels that could range along the entire West Coast. Plaintiffs also note that Whaley and Rankin own federal fishing quotas that they lease to other fishermen on an open exchange.

LEGAL STANDARDS FOR SUMMARY JUDGMENT MOTIONS

HN6[] Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. In ruling on a motion for summary judgment, the court must draw all reasonable inferences in favor of the nonmoving party and may not credibility determinations or weigh evidence. *See* *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*.

> Where the non-moving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case. Where the moving party meets that burden, the burden then shifts **[*20]** to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. This burden is not a light one. The non-moving party must show more than the mere existence of a scintilla of evidence. The non-moving party must do more than show there is some "metaphysical doubt" as to the material facts at issue.

In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citations omitted).

DISCUSSION

I. Antitrust Standing and Antitrust Injury

"***HN7***[] To prove an unlawful merger claim under *§ 7* of the Clayton Act, a plaintiff must show that the effect of the challenged acquisition 'may be substantially to lessen competition, or to tend to create a monopoly.'" *Boardman v. Pacific Seafood Group, 822 F.3d 1011, 1021 (9th Cir. 2016)* (quoting *15 U.S.C. § 18*). An antitrust plaintiff does not need to prove that the challenged acquisition "has altered prices in the relevant market; rather, '[a]ll that is necessary is that the merger create an appreciable danger of such consequences in the future.'" *Id.* (quoting *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 788 (9th Cir. 2015)* (further citation and quotation marks omitted; alteration in *Boardman*)).

As Plaintiffs emphasize, ***HN8***[] antitrust plaintiffs who seek only injunctive relief are subject to less stringent standards to prove standing than antitrust plaintiffs who seek damages. *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc., 185 F.3d 957, 966 (9th Cir. 1999)* (*Oregon Laborers*) (citing *Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110-11, 107 S. Ct. 484, 93 L. Ed. 2d 427 & nn.5-6 (1986)*); *Cargill, 479 U.S. at 111 n.6* (in determining **[*21]** whether a plaintiff seeking damages has antitrust standing, courts examine factors in addition to antitrust injury, including "the potential for duplicative recovery, the complexity of apportioning damages, and the existence of other parties that have been more directly harmed"). At the hearing, Plaintiffs argued that because they do not seek damages, "the standing requirement . . . drops all the way to just general standing." Tr. 13. That is not correct. As I recently noted in separate antitrust action brought by Plaintiffs' counsel on behalf of other plaintiffs, "Plaintiffs appear to confuse the requirements for Article III standing with the 'more demanding standard for antitrust standing.'" *Innovation Marine Protein, LLC v. Pacific Seafood Group, No. 6:17-cv-00815-MC, 2018 U.S. Dist. LEXIS 48296, 2018 WL 1461501, at *7 (D. Or. Mar. 23, 2018)* (quoting *Lucas Automotive Eng'g v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 (9th Cir. 1998)* (further citation omitted)). ***HN9***[] An antitrust plaintiff who seeks only injunctive relief "still [must] show antitrust injury-- either real or threatened." *Oregon Laborers, 185 F.3d at 966*. The antitrust injury requirement "'ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place.'" *Id.* (quoting *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*). An antitrust injury is defined as "an 'injury of the type the antitrust **[*22]** laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1102 (9th Cir. 1999)* (quoting *Atlantic Richfield Co., 495 U.S. at 334* (internal quotation marks omitted)). In holding that a plaintiff seeking only injunctive relief must show an antitrust injury, the Supreme Court has explained that "[i]t would be incongruous . . . to read the Clayton Act to authorize a private plaintiff to secure an injunction against a threatened injury for which he would not be entitled to compensation if the injury actually occurred." *Cargill, 479 U.S. at 112*.

HN10[] To establish an antitrust injury, the plaintiff must show "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *American Ad Mgmt. v. General Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999)*. "Antitrust injury requires the plaintiff to have suffered its injury in the market where the competition is being restrained. Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury." *Id. at 1057* (footnote omitted). Antitrust standing "is a question of law." *Id. at 1054*.

II. Plaintiffs Lack Antitrust Standing

Pacific Seafood argues that Plaintiffs lack antitrust **[*23]** standing to bring this action because they do not participate in the relevant geographic market, and because Plaintiffs do not sell to Pacific Seafood or Ocean Gold. I agree.

A. Plaintiffs Do Not Participate in the Westport Market

The record here shows that Plaintiffs do not participate in the Westport market and are not likely to do so in the future. ***HN11***[] A plaintiff cannot show an antitrust injury if the plaintiff does not participate in the market where the allegedly anticompetitive merger would occur. For example, in *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301 (S.D.N.Y. 2003)*, the court held that the owner, operator, and landlord of a movie theater had not shown an antitrust injury caused by the defendant exhibitors' acquisitions of theaters outside of the "relevant geographic product market." *Id. at 311*. The court noted that courts addressing this issue generally hold that "to have standing, a plaintiff must be a participant in some capacity in the market in which the merger occurs." *Id. at 312*. The court found no decision "that has recognized antitrust standing where the defendant's horizontal acquisitions took place in a geographic market in which the plaintiff was not a consumer or an actual or potential competitor." *Id.* The court held, "***HN12***[] The relevant inquiry, **[*24]** therefore, is not whether dominance in one geographic market could be used to create pressure in another, which it very well might, but whether the plaintiff was a market participant (or potential entrant) in *both* geographic areas for the relevant product." *Id.* (footnote omitted); *see also* *Killian Pest Control, Inc. v. HomeTeam Pest Defense, Inc., No. 14-cv-05239-VC, 2015 U.S. Dist. LEXIS 192648, 2015 WL 13385918, at *3 (N.D. Cal. Dec. 21, 2015)* (the plaintiff lacked antitrust standing as to geographic markets where it did not participate or intend to participate).

Here, even if Pacific Seafood's proposed acquisition of Ocean Gold would suppress prices paid to fishermen who deliver to Westport, these Plaintiffs are not the proper parties to challenge the proposed merger. There is no evidence to support that they participate in the Westport market. More than 800 individual fishing vessels deliver seafood to Pacific Seafood at its facilities along the West Coast, but none of those fishing vessels or their owners are plaintiffs here. None of the fishing vessels or owners that deliver to Westport have joined this action.

Plaintiffs have not cited any authority to support their argument that a plaintiff whose most recent participation in the relevant market occurred more **[*25]** than six years before a proposed merger could qualify as a market participant. Nor have Plaintiffs shown that they are likely to sell in Westport, although they may have the hypothetical ability to do so. Plaintiffs have longstanding business relationships with their seafood processors and have shown no inclination to seek new processors or markets. I conclude as a matter of law that Plaintiffs are not participants in the Westport market, and will not be participants in the foreseeable future, and therefore lack antitrust standing to bring this action.

Plaintiffs argue that they have standing under the "inextricably intertwined" doctrine, which is a "narrow exception" to the market participation requirement. *American Ad Mgmt., 190 F.3d at 1057 n.5*. The inextricably intertwined exception originated with *Blue Shield of Virginia v. McCready, 457 U.S. 465, 483-84, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)*, in which the defendant group health plan refused to reimburse subscribers for psychotherapy performed by psychologists, while reimbursing subscribers for psychotherapy provided by psychiatrists. The plaintiff was not a provider of psychotherapy services but rather was a consumer of such services who was denied reimbursement because of the defendant's alleged unlawful conspiracy to restrain competition in the market for psychotherapy **[*26]** services. The *McCready* Court held that the plaintiff had antitrust standing to bring an antitrust action because she was "within that area of the economy . . . endangered by that breakdown of competitive conditions." *Id. at 480* (quotation marks and citation omitted). The injury in *McCready*, the failure to reimburse, was caused directly by the anti-competitive method employed by the defendant to suppress competition between psychologists and psychiatrists.

Here, Plaintiffs argue that Pacific Seafood's acquisition of Ocean Gold would injure Plaintiffs "by creating a monopsony that enables Pacific Seafood to suppress ex vessel prices it pays its own suppliers, and, in turn, compel other processors to follow suit." Pls.' Mem. Opp'n 23. Unlike the plaintiff in *McCready*, however, Plaintiffs here have not shown that they would be harmed as a direct result of the allegedly anti-competitive merger. Plaintiffs do not sell in the Westport market, so their alleged injuries would be derivative of the harm to fishermen who do sell in the Westport market. The "inextricably intertwined" exception does not apply under these circumstances.

Plaintiffs also contend that they should be allowed to pursue a new theory **[*27]** of liability based on their participation in the market for leasing shares of their annual federal groundfish quotas to other fishermen.[3] Plaintiffs contend Pacific Seafood's proposed acquisition of Ocean Gold would reduce the revenue they earn from leasing

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[3] Rankin and Whaley apparently hold quotas, while Boardman does not. *See* Defs.' Reply 15.

quota shares because the merger would result in the suppression of ex vessel prices paid to the fishermen who lease from Plaintiffs. Plaintiffs have not previously asserted standing based on their participation in the market for leasing quotas. In May 2017, when Defendants sought to compel discovery on Plaintiffs' Individual Fishing Quotas and Individual Transfer Quotas, Plaintiffs insisted that this very information ("what [Plaintiffs] have . . . done in terms of holding or transferred quota share") was "not an issue in this case." Tr. 10 (transcript of hearing on discovery), ECF No. 135. Based on Plaintiffs' statement, I denied Pacific Seafood's motion to compel Plaintiffs to produce information about the fishing quotas. *See* Order, ECF No. 132. At this stage of the litigation, and after Plaintiffs previously asserted that the fishing quotas were not relevant, it is too late for Plaintiffs to introduce a new theory of liability **[*28]** based on a market not alleged in the operative complaint. Even if Plaintiffs timely raised this theory, they have not shown that they would suffer a direct antitrust injury based on the possible loss of revenue from leasing quotas. I agree with Pacific Seafood that the market for quota leases is separate from the markets for ex vessel whiting or trawl-caught groundfish. *See* American Ad Mgmt., 190 F.3d at 1057 (**HN13**[] plaintiffs "whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury").

Plaintiffs also argue that Pacific Seafood's proposed acquisition of Ocean Gold "will eliminate both actual and potential competition in Westport, resulting in suppressed ex vessel prices in adjacent ports." Pls.' Mem. 27. But geographic markets, by definition, are economically independent, so lowered prices in one market should not affect prices in an adjacent market. *See* Kaplan v. Burroughs Corp., 611 F.2d 286, 292 (9th Cir. 1979). I note that at the hearing, Plaintiffs disclaimed reliance on an umbrella theory of liability, which posits that price suppression by one buyer in a market may cause other buyers to lower their prices as well. *See* Boardman, 2015 U.S. Dist. LEXIS 190896, 2015 WL 13357739, at *3 (describing umbrella theory).

Plaintiffs also argue that they **[*29]** have antitrust standing based on their interest in preserving the economic health of the fishing industry. Plaintiffs state, "Fishermen are stewards of their unique industry, charged with caring for its biological and economic sustainability. Plaintiffs have a long history of performing that obligation, and this case is a continuation of their commitment." Pls.' Mem. Opp'n 29. This creative argument stretches the concept of antitrust standing and antitrust injury well beyond their current boundaries. The Ninth Circuit has explained that

> **HN14**[] Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation. Some injuries caused by an antitrust violation may thus be left unremedied for lack of a proper plaintiff. As we recognized in Exhibitors' Serv., Inc. v. American Multi-Cinema, Inc., 788 F.2d 574, 580 n.7 (9th Cir. 1986): "The fact that injury has occurred and that other claims have failed does not permit this court to expand the coverage of [***antitrust law***]."

Oregon Laborers,185 F.3d at 964 (additional citation and quotation marks omitted). However well-intentioned Plaintiffs are in trying to protect the fishing industry from Pacific Seafood's allegedly anti-competitive conduct, to bring an antitrust action Plaintiffs still **[*30]** must show that they will suffer an antitrust injury.

Pacific Seafood also contends that Plaintiffs lack antitrust standing because they do not sell to Pacific Seafood or Ocean Gold, and have not done so since at least 2012. Plaintiffs respond that because they seek only injunctive relief, they have standing even as an indirect purchaser. Plaintiffs cite dicta from Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1234 (9th Cir. 1998), in which the court stated, "To maintain an antitrust divestiture suit, a private plaintiff must generally meet all the requirements that apply to the damages plaintiff, except that the injury itself need only be threatened, and *occasionally a party too remote for damages might be granted an injunction*." (Emphasis added.) Plaintiffs have not cited any decision issued since *Lucas Automotive* that applied this hypothetical exception to grant injunctive relief. I conclude that Plaintiffs cannot show a threatened antitrust injury caused by the proposed merger both because they do not participate in the Westport market and because they do not sell to either Pacific Seafood or Ocean Gold.

B. Market Conditions After Pacific Seafood's Proposed Acquisition of Ocean Gold

Pacific Seafood argues that Plaintiffs cannot show that they would **[*31]** be harmed by Pacific Seafood's acquisition of Ocean Gold because the market situation as to fishermen selling their catch in Westport would not change after the proposed merger. Pacific Seafood argues that because it currently purchases nearly all of the shrimp delivered to Westport, and because Ocean Gold purchases nearly all of the whiting and most of the groundfish delivered to Westport, fishermen delivering to the merged entity would face the same market conditions as before the merger. Plaintiffs contend that further discovery is required to determine the effect of a proposed merger on the Westport market. Because I conclude that Pacific Seafood has shown that Plaintiffs lack antitrust standing based on their failure to participate in the relevant markets, I need not address this issue.

III. Pacific Seafood's Motion to Strike

Pacific Seafood moves to strike Dr. Sexton's declaration; portions of Dr. Radtke's disclosure that were not adopted by Plaintiffs in their responses to interrogatories; a 2015 declaration by Dr. Radtke; and three declarations submitted by another expert witness, Dr. James Wilen, in the *Whaley* litigation.

HN15[] A motion to strike "is an extreme and drastic remedy" **[*32]** that "is heavily disfavored." *Novva Ausrustung Group, Inc. v. Kajioka, No. 2:17-cv-01293-RFB-VCF, 2017 U.S. Dist. LEXIS 108614, 2017 WL 2990850, at *2 (D. Nev. July 13, 2017)*. I deny Pacific Seafood's motion to strike as moot in light of my decision to grant summary judgment.

CONCLUSION

Defendants' Motion for Summary Judgment, ECF No. 190, is GRANTED. Defendants' Motion to Strike, ECF No. 217, is DENIED.

IT IS SO ORDERED.

DATED this 15th day of May, 2018.

/s/ Michael J. McShane

MICHAEL MCSHANE

U.S. DISTRICT JUDGE

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Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV

United States District Court for the Western District of Wisconsin

May 16, 2018, Decided; May 16, 2018, Filed

17-cv-595-jdp

Reporter
2018 U.S. Dist. LEXIS 83471 *; 2018-1 Trade Cas. (CCH) P80,381; 2018 WL 2247224

MOUNTAIN CREST SRL, LLC, Plaintiff, v. ANHEUSER-BUSCH InBEV SA/NV, individually and as successor to InBev SA/NV and Interbrew S.A. and MOLSON COORS BREWING COMPANY, individually and as successor to Molson Canada Inc., Defendants.

Subsequent History: Affirmed in part and vacated in part by, Remanded by, in part *Mt. Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067, 2019 U.S. App. LEXIS 26840, 2019 WL 4198809 (7th Cir. Wis., Sept. 5, 2019)*

On remand at, Reconsideration denied by, Motion granted by, Dismissed by *Mt. Crest SRL, LLC v. Anheuser-Busch InBEV SA/NV, 2020 U.S. Dist. LEXIS 72843 (W.D. Wis., Apr. 24, 2020)*

Motion denied by *Mt. Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 2020 U.S. Dist. LEXIS 202951 (W.D. Wis., Sept. 21, 2020)*

Core Terms

act of state doctrine, beer, Brewers, defendants', packs, sovereign, Liquor Control Act, Retail, courts, liquor, packages, foreign government, public act, Sherman Act, Breweries, Brewing, foreign sovereign, antitrust claim, sell beer, conspiracy, regulation, practices, state law claim, Relations, Consumer, pack-up, pricing, motion to dismiss, allegations, challenging

Counsel: **[*1]** For Mountain Crest SRL, LLC, Plaintiff: Charles E Benoit, LEAD ATTORNEY, Washington, DC.

For Anheuser-Busch InBEV SA/NV, Individually and as successor to InBev SA/NV and Interbrew S.A., Defendant: Steven Sunshine, LEAD ATTORNEY, Tara Reinhart, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC; Kendall W. Harrison, Kevin J. O'Connor, Godfrey & Kahn, S.C., Madison, WI.

For Molson Coors Brewing Company, Individually and as successor to Molson Canada Inc., Defendant: Donald Karl Schott, LEAD ATTORNEY, Stacy Ann Alexejun, Quarles & Brady, Madison, WI; David I Gelfand, Matthew Bachrack, Cleary Gottlieb Steen & Hamilton LLP, Washington, DC; James Eric Goldschmidt, Quarles & Brady LLP, Milwaukee, WI; Matthew Charles Vogel, Sr., Quarles & Brady, Milwaukee, WI.

Judges: JAMES D. PETERSON, District Judge.

Opinion by: JAMES D. PETERSON

Opinion

OPINION & ORDER

Plaintiff Mountain Crest SRL, LLC owns and operates Minhas Brewery, which is located in Monroe, Wisconsin. Mountain Crest is suing defendants Anheuser-Busch InBev SA/NV and Molson Coors Brewing Company under both the Sherman Act and Wisconsin common law, alleging that a conspiracy between defendants has hindered its efforts to export its beer to Ontario, Canada. Defendants **[*2]** have moved to dismiss Mountain Crest's second amended complaint on multiple grounds. Dkt. 50.

According to Mountain Crest, defendants' conspiracy has led to limitations on its ability to sell larger quantities of beer at a discount in some Ontario liquor stores. But the conduct Mountain Crest challenges is governed by a contract with the government of Ontario. The agreement was reaffirmed in 2015 and is now authorized by an Ontario statute enacted the same year. Liquor Control Act, R.S.O. 1990, c. L.18, § 10(3) (Can.). Under these circumstances, even if the court assumes that defendants urged the Ontario government to adopt the limitations that Mountain Crest is challenging, defendants' conduct is authorized under the act of state doctrine, which prohibits federal courts from invalidating the public acts of a foreign government. This conclusion is consistent with a recent decision by an Ontario court, *Hughes v. Liquor Control Board of Ontario*, CV-14-518059CP, 2018 ONSC 1723 (Ont. Sup. Ct. Mar. 15, 2018), concluding that the same conduct alleged in this case did not violate Canadian ***antitrust law*** because the conduct was approved by the Ontario government. The court will grant the motion to **[*3]** dismiss Mountain Crest's claims under the Sherman Act and decline to exercise supplemental jurisdiction over the state law claims in accordance with *28 U.S.C. § 1367(c)(3)*.

REGULATORY BACKGROUND

To help place Mountain Crest's factual allegations and claims in context, it is useful to first provide a brief overview of the relevant regulatory framework.[1] In Ontario, the sale of beer is governed by the Liquor Control Act, which created the Liquor Control Board of Ontario (LCBO) and declared that the LCBO "is for all purposes an agent of Her Majesty and its powers may be exercised only as an agent of Her Majesty." Liquor Control Act, R.S.O. 1990, c. L.18, §§ 2(1) and 4.03(2) (Can.). *See also Hughes*, 2018 ONSC 1723, ¶ 82 (LCBO is "a Crown agency wholly owned by the Government of Ontario").

Among other things, the LCBO has the power "to control the sale, transportation and delivery of liquor," "to establish government stores for the sale of liquor to the public," "to authorize manufacturers of beer and spirits and wineries that manufacture Ontario wine to sell their beer, spirits or Ontario wine in stores owned and operated by the manufacturer or the winery and to authorize Brewers Retail Inc. to operate stores for the sale of **[*4]** beer to the public," "to determine the nature, form and capacity of all packages to be used for containing liquor to be kept or sold," and "to do all things necessary for the management and operation of the Board in the conduct of its business." Liquor Control Act, R.S.O. 1990, c. L.18, § 3(1) (Can.). Only a government agency may import liquor into Canada. Importation of Intoxicating Liquors Act, R.S.C. 1985, c. I-3, § 3(1) (Can.).

The LCBO has authorized Brewers Retail Inc. (BRI) to sell liquor as a "government store" under the Liquor Control Act. Sale of Liquor in Government Stores, O. Reg. 232/16, § 6 (Can.). *See also Hughes*, 2018 ONSC 1723, ¶ 86 ("Brewers Retail is an established government store and the LCBO determines in what municipalities Brewers Retail may have stores."). BRI is a distribution and retail business that was incorporated in 1927 as a cooperative of Ontario brewers. Dkt. 49, ¶ 44. *See also Hughes*, 2018 ONSC 1723, ¶ 92 ("Brewers Retail was established for the specific purpose of providing Ontario with an efficient and cost-effective channel through which large volumes and packages of beer could be distributed and sold across the province."). BRI does business as "The Beer Store." **[*5]** BRI and the LCBO are the only two options in Ontario for buying beer for consumption off site. *Hughes*, 2018 ONSC 1723, ¶ 91. If an American brewer such as Mountain Crest wishes to export its beer to Ontario, the brewer must go through the LCBO or BRI. BRI has a three-quarter market share of beer sales in the province. Dkt. 49, ¶ 52. *See also Hughes*, 2018 ONSC 1723, ¶ 91 ("Save for the beer sold at the LCBO's Ordinary, Combination, and Agency Stores, Brewers Retail is the distributor, wholesaler, and retailer of beer in Ontario.").

ALLEGATIONS OF FACT

[1] A federal court may consider a foreign jurisdiction's law under *Rule 44.1 of the Federal Rules of Civil Procedure*. Both sides discuss various Canadian laws in their briefs and neither side objects to the court's consideration of that law.

The court draws the following allegations from Mountain Crest's second amended complaint, Dkt. 49, which is the operative pleading.

A. The parties

Mountain Crest owns and operates Minhas Brewery in Monroe, Wisconsin, which is Mountain Crest's principal place of business and operations. In 2003, the brewery started brewing for the Canadian "value-beer label" Mountain Crest, and exported the beer to Alberta, Canada on a contract basis. *Id.*, ¶ 17. In 2009, Mountain Crest began exporting beer to Ontario, Canada from Wisconsin. The brewery Mountain Crest operates is currently the 12th largest independently owned brewery in the United States. Mountain **[*6]** Crest's goal is "to compete with the major brewers in the low-cost value end of the beer market." *Id.*, ¶ 19.

Anheuser-Busch InBev SA/NV (ABI) is a corporation organized and existing under the laws of Belgium, with its headquarters in Leuven, Belgium. The Belgian company was previously known as Interbrew SA and later, InBev SA. In 1995, Interbrew SA acquired 100% of Labatt Breweries of Canada. Molson Coors Brewing Company is the result of the combination of Molson Inc. (Canada) into the Adolph Coors Company (Delaware) in February 2005.

ABI and Molson Coors acquired control of BRI by acquiring Labatt Breweries of Canada and Molson Inc. (Canada), the original members of the BRI cooperative. Defendants' subsidiaries each own 49% of BRI. At all relevant times, "defendants" have exclusively shared control. Sleeman Breweries Ltd, the Canadian subsidiary of Japanese brewer Sapporo, is a minority shareholder of BRI.

B. Events leading up to the June 2000 agreement

In 1992, Labatt and Molson were both independent Canadian companies that dominated the Ontario beer market and jointly controlled BRI. At that time, BRI sold only beer brewed in Ontario. The LCBO sold both domestic and imported beer, but **[*7]** focused on wine and spirits. *See also Hughes*, 2018 ONSC 1723, ¶¶ 92 and 114 ("The LCBO focused on wine and spirits [because it] did not develop the infrastructure necessary to warehouse, distribute and sell beer on a scale necessary to service Ontario's retail and licencee consumers. . . . In the early 1990's, approximately 95% of all domestic beer sold in Ontario was sold through Brewers Retail.").

During the 1990s and into the 2000s, Labatt and Molson operated an unincorporated trade association that consisted of just the two companies called "Brewers of Ontario," led by Jan H. Westcott, the executive director. Westcott operated as a representative of Labatt and Molson executives and took direction directly from the CEOs of both companies on a regular basis. They used this trade association (as opposed to BRI itself) to negotiate their commercial relationship with the LCBO.

The historical practice of the LCBO was to limit its sale of beer to containers no larger than a six pack, with some exceptions. *See also Hughes*, 2018 ONSC 1723, ¶ 115 (LCBO "followed [that practice] for decades"). In September 1993, the LCBO began considering a change to this practice, noting in a memo that "[n]o **[*8]** legislative or regulatory changes [would be] required." Dkt. 49, ¶ 73. *But see Hughes*, 2018 ONSC 1723, ¶ 157 ("The LCBO would have needed the Provincial Government's approval to change this status quo [regarding the sale 12 packs and 24 packs], and the Government refused to grant any such approval."). The author of the LCBO memo anticipated opposition from Molson and Labatt because BRI "sales will be diverted to the LCBO." Dkt. 49, ¶ 73.

In July 1994, Molson and Labatt executives met with LCBO executives. Molson and Labatt were "not interested in any widespread sale of 12's and 24's in LCBO stores" because it would give too much access to their U.S.-based competitors with whom they did not have distribution agreements. Dkt. 49, ¶ 75. The LCBO "felt completely at the mercy of Labatt and Molson" because Labatt and Molson already had exclusive distribution agreements with Anheuser-Busch, Miller Brewing, and Coors Brewing. *Id.*, ¶ 77.

In 1995, Interbrew acquired Labatt. Also in 1995, Molson and Labatt representatives agreed to begin supplying the LCBO with 12 and 24 packs for a limited number of LCBO stores. But in December 1998, LCBO corporate staff and Molson and Labatt executives produced **[*9]** a joint "Working Protocol," stating in part that "[t]he LCBO agrees to discontinue its stocking of 12 and 24 SKUs." *Id.*, ¶ 102. LCBO CEO Andy Brandt "felt pressure from Minister [of Consumer and Commercial Relations David] Tsubouchi to concede to demands from Molson and Labatt." *Id.*, ¶ 103. During a January 1999 LCBO board meeting, board members expressed their support for "allowing various package sizes for brewers wishing to sell beer through the LCBO." *Id.*, ¶ 104.

The brewers and the LCBO continued negotiating an agreement related to the LCBO's sales of larger format beer packages. At this time, Molson and Interbrew "were still engaged in their multi-year group boycott, refusing to supply the LCBO with any 6-packs beyond what the LCBO already had, providing any cases of beer larger than a 6-pack, or any beer in cans, to force the LCBO to comply with their demand that the LCBO not purchase 12s & 24s of beer from any U.S. brewer." *Id.*, ¶ 108.[2]

In April 1999, the LCBO was still pushing for the option of selling eight packs and nine packs, but by May 2000, the LCBO gave up on this idea because it knew that it "could not compel [BRI] to supply it with new brands of beer for sale." *Id.*, **[*10]** ¶ 119.

Minister of Consumer and Commercial Relations Bob Runciman (who succeeded Tsubouchi in June 1999) directed LCBO CEO Brandt to sign the proposed agreement, which would sharply limit the LCBO's sales of large format beer packages. On June 1, 2000, Brandt complied. Dave Perkins of Molson also signed the agreement on behalf of BRI.

Paragraph D of the June 2000 agreement included the following provision: "Consistent with historical practice, LCBO will not sell beer . . . in packages containing more than 6 containers and not promote beer at price points greater than 6 containers." Dkt. 49-19, at 4. The agreement about price points relates to "pack-up pricing," which is offering discounts when multiple six packs are purchased.

The agreement was kept "a closely guarded secret." Dkt. 49, ¶ 128. BRI's minority shareholder, Sleeman Breweries did not know about the agreement at the time it was signed. Ontario municipalities were not aware of the agreement either. They wrote letters to the LCBO asking them to stock 12 packs and 24 packs of beer.

C. Events leading up to the 2015 agreement

In the years that followed, the LCBO continued efforts to renegotiate the agreement to allow sales of large **[*11]** format beer packages, but Interbrew and Molson resisted those efforts. For example, in February 2003, the LCBO expressed an interest in offering pack-up pricing and selling 12 and 24 packs at selected stores, but Molson and Labatt refused. And in October 2010, BRI accused the LCBO of violating Section D of the June 2000 agreement by selling beer in packages containing more than six containers.

In August 2004, Interbrew merged with AmBev, a Brazilian-based brewing conglomerate. After the merger, Interbrew changed its named to InBev. AmBev effectively became InBev's Americas division, with Labatt merged into AmBev. In February 2005, Molson Inc. merged with Colorado based Adolph Coors Co. to form the current Molson Coors Brewing Company.

In April 2014, the Premier of Ontario appointed Ed Clark to form a "Premier's Advisory Council on Government Assets," in part to investigate ways to "further monetize" the LCBO. *Id.*, ¶ 184. In November 2014, the council published its initial report, recommending that the LCBO sell 12-packs of beer.

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[2] In ***antitrust law***, a group boycott is "an agreement to pressure a supplier or customer not to deal with another competitor." *Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 318 (S.D.N.Y. 2003)*. Mountain Crest does not say when the alleged boycott started or how long it lasted.

In December 2014, the *Toronto Star* published for the first time a copy of the June 2000 agreement. Three days later, a proposed class action was filed in Ontario **[*12]** Superior Court, *Hughes v. Liquor Control Board of Ontario*, challenging the validity of the agreement on behalf of Ontario consumers, bars, and restaurants.

In January 2015, BRI announced in a press release that its ownership would become "open[] to all Ontario-based brewers." *Id.*, ¶ 194. The announcement was criticized because "the big three brewers [would] hold 12 seats on a 15-member board of directors, and retain overall control." *Id.*, ¶ 196.

In 2014 and 2015, BRI threatened the government of Ontario with NAFTA expropriation litigation if the government "took steps to undermine their cartel or system of restraints on U.S. exports to Ontario." *Id.*, ¶ 200. These threats "were planned and authorized by [d]efendants['] respective U.S. offices in St. Louis and Denver." *Id.*

On September 22, 2015, the government of Ontario entered into a "master framework agreement" with BRI, Labatt Brewing Company Ltd., Molson Canada 2005, and Sleeman Breweries Ltd. This agreement replaced the June 2000 agreement with the LCBO.

The 2015 agreement includes the following provision: "The Province shall direct the LCBO not to, at any time during the Term: (A) sell Beer in its stores, other than in Combination **[*13]** Stores, in formats larger than Six-Packs (with the exception of the one 8-unit SKU currently carried by LCBO stores that are not Combination Stores) or (B) provide Pack-up Pricing in LCBO stores." The agreement also granted Ontario immunity from suit by BRI and its members.

ANALYSIS

A. Overview of claims and defenses

At the heart of this case are two related practices at LCBO stores in Ontario, Canada: (1) not selling beer in a container larger than a six pack; and (2) not allowing "pack-up pricing," which would provide a discount for buying multiple six packs. Mountain Crest objects to these practices for the obvious reason that they inhibit sales of large quantities of beer at LCBO stores.

Mountain Crest's theory is that defendants are responsible for both of the LCBO practices at issue. According to Mountain Crest, defendants control the Beer Store, which is the LCBO's only competitor in Ontario for the retail sale of beer. Although the Beer Store is operated by BRI, defendants' Canadian subsidiaries are the major shareholders of BRI and Mountain Crest says that defendants may be held liable for actions taken on BRI's behalf. In order to keep the exclusive right to sell 12 packs and **[*14]** 24 packs of beer at the Beer Store, defendants allegedly limited their supply of beer to LCBO until LCBO agreed to defendants' demands regarding pack size and pack-up pricing. Dkt. 49, ¶ 108. Defendants later threatened to sue the government of Ontario under the North American Free Trade Agreement if LCBO changed its practices. *Id.*, ¶ 200.

Mountain Crest contends that defendants' alleged conduct is a restraint of trade in violation of *15 U.S.C. § 1* of the Sherman Act and an attempt to create a monopoly in violation of *15 U.S.C. § 2*. Mountain Crest also contends that defendants were unjustly enriched in violation of Wisconsin law when they charged various fees to Mountain Crest without providing Mountain Crest a corresponding benefit.[3]

Defendants seek dismissal of Mountain Crest's claims under the Sherman Act on multiple grounds: (1) the claims are barred under the act of state doctrine; (2) the claims are barred under the *Noerr-Pennington* doctrine; (3) the Sherman Act does not reach the alleged conduct; (4) comity requires dismissal of the claims; (5) the doctrine of

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[3] Mountain Crest's second amended complaint is a sprawling 93 pages and includes numerous allegations about what it views as unfair practices by BRI and defendants. For example, Mountain Crest alleges that BRI consistently understocks brands of beer that defendants do not own. Dkt. 49, ¶¶ 100-02, 113, and 173-75. But both sides have assumed in their briefing that Mountain Crest's claims under the Sherman Act are limited to restrictions on selling larger packs of beer and pack-up pricing, so the court has made the same assumption.

forum non conveniens requires dismissal of the claims; (6) Mountain Crest has not stated a plausible claim under §1 or § 2; and (7) all of the alleged **[*15]** conduct involves BRI or defendants' Canadian subsidiaries rather than defendants and Mountain Crest has not alleged facts showing that it is appropriate to pierce the corporate veil. Because the court agrees with the first contention, it is not necessary to consider the others.

B. Act of state doctrine

1. Legal standard

The Supreme Court has been applying the act of state doctrine since at least *Underhill v. Hernandez*, in which it described the doctrine as follows:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

168 U.S. 250, 252, 18 S. Ct. 83, 42 L. Ed. 456 (1897). The "Court's description of the jurisprudential foundation for the act of state doctrine has undergone some evolution over the years," W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 404-05, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990), but the Court's adherence to the doctrine has not wavered. The Court's most recent articulation of the doctrine is in Republic of Austria v. Altmann, 541 U.S. 677, 700, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004): "the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns **[*16]** within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *See also* Kirkpatrick, 493 U.S. at 409-10 ("The act of state doctrine . . . requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 400-01, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

Although neither the Supreme Court nor the Court of Appeals for the Seventh Circuit has considered whether the doctrine applies in the context of an antitrust claim, numerous lower courts have said that it does. *E.g.,* Spectrum Stores, Inc. v. Citgo Petroleum Corp., 632 F.3d 938 (5th Cir. 2011); *O.N.E. Shipping Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449 (2d Cir. 1987)*; Sea Breeze Salt, Inc. v. Mitsubishi Corp., No. CV162345DMGAGRX, 2016 U.S. Dist. LEXIS 139342, 2016 WL 8648638, at *4 (C.D. Cal. Aug. 18, 2016); In re Fresh & Process Potatoes Antitrust Litig., 834 F. Supp. 2d 1141, 1180 (D. Idaho 2011); In re Refined Petroleum Prod. Antitrust Litig., 649 F. Supp. 2d 572 (S.D. Tex. 2009).[4] The parties have not cited any cases to the contrary. And the Supreme Court has rejected antitrust claims under the "state action doctrine," which applies a rule similar to the act of state doctrine in the context of claims against state governments in the United States. City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) ("[T]he Sherman Act [does] not apply to anticompetitive restraints imposed by **[*17]** the States as an act of government."). Courts have also consistently held that the sovereign does not have to be a party for the act of state doctrine to apply. *O.N.E. Shipping, 830 F.2d at 452*; Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir.1985); Int'l Ass'n of Machinists & Aerospace Workers, (IAM) v. Org. of Petroleum Exporting Countries (OPEC), 649 F.2d 1354, 1359 (9th Cir. 1981).

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[4] American Banana Co. v. United Fruit Co., 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 (1909), is sometimes described as a case in which the Supreme Court applied the act of state doctrine to an antitrust claim. *E.g.,* Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 605 (9th Cir. 1976); 1B Areeda & Hovenkamp ¶ 274b, at 385-86 (4th ed.) (stating that *American Banana* applied act of state doctrine to hold that "a seizure by a foreign government of the plaintiff's properties could not support an antitrust claim against the private party who allegedly induced the government to take the action"). But the Supreme Court has rejected that reading. Kirkpatrick, 493 U.S. at 407-08 ("*American Banana* was not an act of state case.").

2. Application of the doctrine to this case

Under a straightforward application of the act of state doctrine, Mountain Crest's antitrust claims against defendants fail as a matter of law because all of the conduct that allegedly violates the Sherman Act involves a public act by the Ontario government and a ruling in Mountain Crest's favor would require the court to determine that the Ontario government violated the Sherman Act as well.[5] *Kirkpatrick, 493 U.S. at 406* (act of state doctrine may apply "when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign"). In fact, Mountain Crest's own allegations show that a ruling in Mountain Crest's favor would require this court to question the validity of no fewer than four public acts, all of which were performed in Ontario.

First, in June 2000, the LCBO and BRI entered into an agreement in which the parties agreed that the LCBO would not sell 12 packs and 24 packs of beer or offer pack-up pricing. The practices **[*18]** embodied in that agreement are the same practices that Mountain Crest is challenging as antitrust violations. Because the LCBO is a government agency created by the Liquor Control Act, R.S.O. 1990, c. L.18, §§ 2(1) (Can.), the 2000 agreement is a public act under the act of state doctrine.

Second, the Ontario Minister of Consumer and Commercial Relations directed the LCBO to sign the 2000 agreement. The parties agree that the LCBO was required to follow the direction of the Minister. *Hughes*, 2018 ONSC 1723, ¶¶ 82-83 ("[In 2000], the LCBO . . . reported to the Minister of Consumer and Commercial Relations [, who] was given express responsibility for approving all policy decisions that related to changes in the role of the LCBO.").

Third, in 2015, the Ontario legislature enacted an amendment to the Liquor Control Act, which states that the LCBO "is deemed to have been directed, and Brewers Retail Inc. is deemed to have been authorized, to enter into the June 2000 framework in relation to the Crown's or a Crown agent's regulation and control of the sale of beer in Ontario." Liquor Control Act. R.S.O. 1990. c. L.18, § 10(3) (Can.). The parties agree that the "June 2000 framework" is the agreement at issue **[*19]** in this case.

Fourth, also in 2015, BRI entered into a new agreement, this time with the government of Ontario itself. The agreement reaffirmed the same practices that Mountain Crest is challenging in this case. In fact, in the new agreement, the government "direct[s]" the LCBO not to sell "formats larger than Six-Packs" except in limited circumstances and not to provide "Pack-up Pricing in LCBO stores." Dkt. 49, ¶ 207.

Collectively, these acts make it clear that the conduct that allegedly violates the Sherman Act is the official policy of the Ontario government. "[W]hen it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Sabbatino, 376 U.S. at 418*.

There is no way to separate defendants' alleged conduct from Ontario's official acts. Thus, the court agrees with defendants that there is no way to find that they violated the Sherman Act without also finding that the Ontario government violated the Act by entering into the 2000 and 2015 agreements. That is fatal to Mountain Crest's federal claims. *O.N.E. Shipping, 830 F.2d 449 at 452-53* (dismissing antitrust **[*20]** claim under act of state doctrine because the plaintiff's "allegations make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on"); *Sea Breeze Salt, 2016 U.S. Dist. LEXIS 139342, 2016 WL 8648638, at *4-5* (dismissing antitrust claims under act of state doctrine because, "for Plaintiffs' antitrust claims to succeed, Plaintiffs must prove the participation of ESSA, a joint-venture majority controlled by the Mexican government, in a conspiracy to restrain trade"); *In re Fresh & Process Potatoes, 834 F. Supp. 2d at 1180* (dismissing antitrust claims under act of state

[5] Both sides assume that the act of state doctrine applies the same way to a provincial government as to the national government, so the court has made the same assumption.

doctrine because "the Court would need to conclude that [Canadian government agencies] illegally agreed to reduce the supply and export of potatoes in their respective provinces").

Perhaps equally important, the court sees no way that it could remedy any alleged restraints on trade without enjoining the Ontario government. After all, it is the practices at *LCBO* stores, not BRI stores, that Mountain Crest is challenging. Thus, no injunction against defendants could provide Mountain Crest any immediate relief. In fact, defendants observed in their opening brief that relief in Mountain Crest's favor would require **[*21]** the cooperation of the Ontario government, but Mountain Crest did not discuss the issue in its opposition brief, suggesting that Mountain Crest concedes the point. That in itself is sufficient to defeat Mountain Crest's federal claims. *Spectrum Stores, 632 F.3d at 955-56* (applying act of state doctrine because "granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories"); *IAM, 649 F.2d at 1361* (applying act of state doctrine because "the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources").

3. *Hughes v. Liquor Control Board of Ontario*

This court's conclusion that the act of state doctrine applies is consistent with *Hughes*, 2018 ONSC 1723, a recent decision by the Ontario Superior Court of Justice. In that case, the court considered a challenge similar to the one raised by Mountain Crest in this case. The plaintiffs asserted that defendants' Canadian subsidiaries and the LCBO violated Canadian ***antitrust law*** when they agreed that the LCBO would not sell beer **[*22]** in packages greater than six containers. *Id.*, ¶ 7. The defendants said that their conduct was justified under the "regulated conduct" defense. *Id.*, ¶ 9. Under that defense, "conduct authorized by valid provincial or federal legislation is deemed to be in the public interest, and . . . such regulated conduct cannot constitute an 'undue' limit on competition contrary to the conspiracy provisions of the Competition Act." *Id.*, ¶ 221.

The Ontario court dismissed all of the plaintiffs' claims, concluding that "the Defendants were operating under a regulated provincial regime governing commerce in alcohol and that the 2000 Beer Framework Agreement was authorized conduct within the scope of the Regulated Conduct Defence." *Id.*, ¶ 197. The court rejected the plaintiffs' contentions that the defense did not apply because the Ontario government did not have authority to approve conduct that would otherwise violate ***antitrust law***. *Id.*, ¶¶ 235 and 241.

Hughes is instructive for at least three reasons. First, it confirms the view that the actions challenged in this case are public acts taken by the Ontario government. Second, it shows that defendants' conduct is valid under the law of the land where **[*23]** the conduct occurred. *Sabbatino, 376 U.S. at 415 n.17* (in determining that act of state doctrine applied, noting that "[i]t has not been seriously contended that the judicial institutions of [the foreign government] would declare the decree invalid"); *Riggs Nat. Corp. & Subsidiaries v. C.I.R., 163 F.3d 1363, 1368, 333 U.S. App. D.C. 371 (D.C. Cir. 1999)* (in determining that act of state doctrine applied, noting that the conduct in question had been upheld by foreign court where conduct occurred). Third, it shows that the Ontario government is unified in its approval of defendants' conduct: the executive, legislative, and judicial branches have each authorized that conduct.

A primary purpose of the act of state doctrine is to avoid unnecessary conflict with other countries. *Kirkpatrick, 493 U.S. at 404* (doctrine "reflect[s] the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs") (internal quotations omitted); *Sabbatino, 376 U.S. at 417-18* ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotations omitted). Although the regulation of alcohol may not present the most sensitive **[*24]** of international issues, the reasons for deferring to the Ontario government in this case are many. Not only has the policy of the Ontario government been stated clearly by all three branches, but the current policy reflects a careful consideration and balancing of many competing factors over a period of "decades." *Hughes*, 2018 ONSC 1723, ¶ 115.

The court in *Hughes* emphasized that point:

> The regulation of alcohol has very significant public policy ramifications because it touches upon, among other things, public health and welfare, the environment (recycling), public safety, jobs and employment, and government finances. Complex, high-level decisions were made from time-to-time by senior Government officials or in some cases, through the enactment of legislation by the Legislative Assembly that directed the activities of the LCBO. The LCBO was expected to implement Government policy with regard to the distribution and sale of alcohol within the parameters set out by the Liquor Control Act and related legislation

Id., ¶ 84. The court also noted that the particular rules being challenged had pragmatic justifications unrelated to any intent to suppress competition:

> Brewers Retail was established **[*25]** for the specific purpose of providing Ontario with an efficient and cost-effective channel through which large volumes and packages of beer could be distributed and sold across the province, which was not part of the LCBO's business. The LCBO focused on wine and spirits. The LCBO did not develop the infrastructure necessary to warehouse, distribute and sell beer on a scale necessary to service Ontario's retail and licencee consumers.

Id., ¶ 92.

4. Conclusion

Regardless of the reason for the rules at issue, the important point is that the Ontario government chose to reaffirm them despite being aware of the objections like the ones Mountain Crest is raising. (Mountain Crest alleges in its second amended complaint that, after the details of the 2000 agreement became public in 2014, there was widespread criticism of the agreement in the press.) A ruling in Mountain Crest's favor would both declare the Ontario government's policy choices invalid *and* require the government to dismantle its policy.

Mountain Crest does not allege that it is a singular victim of BRI's agreement with the Ontario government. Rather, it says that all independent American brewers are being harmed. If the harm is as **[*26]** significant as Mountain Crest suggests, then the executive branch may choose to intervene. *Sabbatino, 376 U.S. at 422-23* ("[T]he usual method for an individual to seek relief [for harm caused by an act of state] is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."). In fact, as noted in *Hughes*, that is exactly what the United States did previously when it concluded in the 1980s that Canada was discriminating against imported beer. 2018 ONSC 1723, ¶¶ 118-19 (discussing complaint brought under the General Agreement on Tariffs and Trade). But the proper remedy is not a showdown between a United States federal court and a foreign government. That is exactly the type of conflict that the act of state doctrine is intended to avoid.

5. Mountain Crest's objections

Mountain Crest advances several reasons for rejecting the application of the act of state doctrine in this case, but none are persuasive.

a. Commercial activity

Mountain Crest says that the act of state doctrine does not apply to a "private" or "commercial" agreement, even if the government is a party to the agreement, and that the June **[*27]** 2000 agreement was "private" and "commercial." But both aspects of this contention are incorrect. The "private or commercial" exception that Mountain Crest cites comes from the *Foreign Sovereign Immunity Act*, not the act of state doctrine, *Saudi Arabia v. Nelson, 507 U.S. 349, 359-60, 113 S. Ct. 1471, 123 L. Ed. 2d 47 (1993)*, so it has no application to this case.

To support the application of a "commercial activity" exception to the act of state doctrine, Mountain Crest cites *Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 96 S. Ct. 1854, 48 L. Ed. 2d 301 (1976)*. That case was about the act of state doctrine, but the Court's holding was that the doctrine did not apply because the defendants failed to show that the conduct in question was authorized by the foreign government. *Id. at 694-95*. Unlike this case, there was "[n]o statute, decree, order, or resolution" from the foreign government. *Id.*

A minority of justices would have decided *Alfred Dunhill* on the alternate ground that the claim at issue was simply an attempt to collect a debt and "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities." *Id. at 695* (opinion of White, J.). Lower courts have debated whether to follow this view. *Compare Honduras Aircraft Registry, Ltd. v. Honduras, 129 F.3d 543, 550 (11th Cir.1997)* ("[T]here is no commercial exception to the Act of **[*28]** State Doctrine as there is under the FSIA."), *and IAM, 649 F.2d at 1360* ("The act of state doctrine is not diluted by the commercial activity exception which limits the doctrine of sovereign immunity."), *with Petersen Energia Inversora, S.A.U. v. Argentine Republic, No. 15-cv-2739, 2016 U.S. Dist. LEXIS 122244, 2016 WL 4735367, at *7 (S.D.N.Y. Sept. 9, 2016)* ("The [act of state] doctrine does not, however, apply to the purely commercial conduct of a foreign sovereign."). Neither a majority of the Supreme Court nor the Court of Appeals for the Seventh Circuit has taken sides on this question. *E.g., Kirkpatrick, 493 U.S. at 404-05* (noting question but concluding that it was unnecessary to decide it).

But even if this court were to follow Justice White's view in *Alfred Dunhill*, it would make no difference. The public acts at issue in this case cannot be compared to the conduct in *Alfred Dunhill*, which was a simple failure to pay a debt. As the court noted in *Hughes*, the decisions at issue in this case involved policy choices regarding how Ontario wanted alcohol to be distributed and sold. 2018 ONSC 1723, ¶ 92. "The LCBO was never free to carry on business as if it were a private, profit-maximizing commercial enterprise free of government influence." *Id.*, ¶ 85. And the 2015 amendment to the Liquor Control Act states **[*29]** that the agreement relates to the "regulation and control of the sale of beer in Ontario." Liquor Control Act, R.S.O. 1990 c. L.18 § 10(3) (Can.).

Even the commercial activity exception under the FSIA does not extend to actions like those in this case in which the government is acting as a regulator. *Saudi Arabia, 507 U.S. at 360* ("[Under the FSIA], a state engages in commercial activity . . . where it exercises only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns"); *Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)* ("[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA."). Even if the government was motivated by commercial interests, that would not be enough to trigger the exception when it is acting as a sovereign. *Weltover, 504 U.S. at 614*.

Mountain Crest also says that there is a separate exception to the act of state doctrine for "private" activities and that the 2000 agreement was "private" because it was secret. But Mountain Crest cites no authority for this view. Even under the FSIA, courts interpret "private" and "commercial" as having a similar meaning: not acting in a sovereign **[*30]** capacity. *E.g., Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 984 F. Supp. 2d 1070, 1079-80 (S.D. Cal. 2013)*, *aff'd sub nom. Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym, 814 F.3d 1053 (9th Cir. 2016)*. It has nothing to do with secrecy. In any event, it is undisputed that the 2015 agreement and the legislation authorizing the 2000 agreement were both "public" in the sense to which Mountain Crest is referring. So even if Mountain Crest's understanding of the term "private" were correct, it would make no difference to this case.

b. Questioning the validity of a public act

Mountain Crest's second objection is that the court will not have to question the validity of the 2000 agreement or the 2015 amendment to Liquor Control Act in order to grant Mountain Crest relief. As to the 2000 agreement, Mountain Crest says that it is not controlling because defendants "continued their conspiracies to restrain the LCBO's ability to buy beer via package size limitations and price fixing arrangements even after the signing of the contract." Dkt. 55, at 32. As to the amendment to the Liquor Control Act, Mountain Crest says that it "did not prescribe as law the contents of the June 2000 contract." *Id.* at 33.

Neither argument is persuasive. Mountain Crest does not explain how defendants "continued their conspiracies" after the 2000 agreement, but presumably Mountain Crest is referring **[*31]** to BRI's alleged refusal to renegotiate the terms of that agreement despite the LCBO's interest in doing so. Even if that is what happened, Mountain Crest fails to explain the significance of those events. Regardless of any conduct by defendants, the source of the harm is still the agreement with the government. *Gen. Aircraft Corp. v. Air Am., Inc., 482 F. Supp. 3, 6-7 (D.D.C. 1979)* ("[W]here the injury complained of results directly from the acts or decisions of a foreign sovereign and only indirectly from defendants' allegedly unlawful anticompetitive activities, the Court must dismiss the claims [under act of state doctrine]."); *Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 24 (S.D.N.Y. 1975)* (act of state doctrine barred antitrust claim for "defendants' conspiratorial manipulative activities" because source of harm was still "acts and conduct of Libyan officials"), *aff'd*, *550 F.2d 68 (2d Cir. 1977)*. And the government chose to reaffirm that agreement in 2015 and went so far as to endorse it in legislation. Thus, any alleged conspiracy between defendants was approved and adopted by the government. Mountain Crest points to no conduct by defendants after 2015 that contributed to any additional harm.

Mountain Crest's argument about the 2015 legislation is puzzling. Mountain Crest says that the law did not "prescribe the contents" of the agreement **[*32]** but again fails to explain the significance of its observation. The amendment states that the LCBO was "directed" and BRI was "authorized" to enter into the agreement. Liquor Control Act, R.S.O. 1990 c. L.18 § 10(3) (Can.). Because the agreement was already in effect at the time of the legislation, there is no reasonable reading of the provision other than as an approval of the contents of the agreement. If the agreement was unlawful, it follows that the government's approval of the agreement was unlawful as well. So a challenge to the agreement is also a challenge to the statute.

Mountain Crest does not deny that granting relief in its favor would require the court to invalidate the 2015 agreement. Instead, Mountain Crest says that agreement is not a public act because it is a "commercial contract," but the court has already rejected that argument.

c. Motives of Ontario government

Mountain Crest also says that the language of the 2015 agreement shows that the Ontario government was concerned about being sued by defendants because the agreement includes promises from BRI not to sue the government. This is related to another argument by Mountain Crest that the act of state doctrine should not **[*33]** apply because "the LCBO never gave up trying to resist Defendants' market allocation conspiracies." Dkt. 55, at 27.

Yet again, Mountain Crest does not explain the relevance of these observations. The question under the act of state doctrine is whether "the foreign government has acted in a given way on the subject-matter of the litigation," *Sabbatino, 376 U.S. at 418*; "the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Id.* In other words, "the act of state doctrine is applied without inquiry into motives." *Konowaloff v. Metro. Museum of Art, No. 10 CIV. 9126 SAS, 2011 U.S. Dist. LEXIS 107262, 2011 WL 4430856, at *8 (S.D.N.Y. Sept. 22, 2011)*, *aff'd*, *702 F.3d 140 (2d Cir. 2012)*. All that matters is that the government took the act in question; it does not matter why. *In re Vitamin C Antitrust Litigation, 837 F.3d 175, 191 (2d Cir. 2016)* (in determining that act of state doctrine applies, "[w]hether Defendants had a hand in the [foreign] government's decision to mandate some level of price-fixing is irrelevant"; the court will "decline to analyze why [the foreign government] regulated [a market] in the manner it did and instead focus on what [foreign] law required"). *See also* *Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 358, 29 S. Ct. 511, 53 L. Ed. 826 (1909)* ("[P]ersuading a sovereign power to do this or that cannot be a tort [because] **[*34]** it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to b[r]ing about a result that it declares by its conduct to be desirable and proper. . . . The very meaning of sovereignty is that the decree of the sovereign makes law."). In this case, the agreements at issue were approved by the minister responsible for supervising the LCBO, the Ontario legislature, the Ontario government, and now an Ontario court. That is sufficient for applying the act of state doctrine, regardless whether the LCBO may have originally objected to the agreement.

d. Other arguments

Finally, Mountain Crest makes a series of conclusory arguments that do not require extended discussion: (1) the act of state doctrine should not apply because it was possible before entering into the 2000 and 2015 agreements for defendants to comply with both Canadian and U.S. law; (2) the doctrine is not jurisdictional; and (3) the doctrine should not be applied in the context of a motion to dismiss. In support of the first argument, Mountain Crest cites *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 797, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*. But that case is about the doctrine of international comity, not the act of state doctrine, which on its face does not **[*35]** require a private defendant to show that it was compelled to act a certain way.

As to the second argument, it is true that the act of state doctrine is not jurisdictional, but that means only that the court is not required to raise the issue on its own. Because defendants have raised a defense under the doctrine, it is simply irrelevant for the purpose of defendants' motion whether the doctrine is jurisdictional.

As to the third argument, Mountain Crest cites no authority for the view that a court may not apply the act of state doctrine in the context of a motion to dismiss for failure to state a claim. As with any other issue, it is appropriate to dismiss a claim on act of state grounds when it is clear from the face of the complaint that the doctrine applies. *Parungao v. Cmty. Health Sys., Inc., 858 F.3d 452, 457 (7th Cir. 2017)*. That is what the court has concluded in this case. As defendants note, other courts have held in the context of a motion under *Rule 12(b)(6)* that a claim should be dismissed under the act of state doctrine. *Konowaloff v. Metro. Museum of Art, 702 F.3d 140 (2d Cir. 2012)*; *Spectrum Stores, 632 F.3d at 956*; *In re Refined Petroleum Prods. Antitrust Litig., 649 F. Supp. 2d 572 (S.D. Tex. 2009)*; *Glen v. Club Mediterranee S.A., 365 F. Supp. 2d 1263 (S.D. Fla. 2005)*, *aff'd*, *450 F.3d 1251 (11th Cir. 2006)*; *Roe v. Unocal Corp., 70 F. Supp. 2d 1073 (C.D. Cal. 1999)*.

The bottom line is that the allegations in Mountain Crest's second amended complaint fall within the scope of the act of state doctrine as it has been defined by the Supreme Court and Mountain Crest has not identified **[*36]** a persuasive reason for declining to apply the doctrine in this case. The court will grant defendants' motion to dismiss Mountain Crest's claims under the Sherman Act.

C. State law claims

Mountain Crest relies on *28 U.S.C. § 1367* as the basis for exercising jurisdiction over its state law claim for unjust enrichment. Dkt. 49, ¶ 10. In their motion to dismiss, defendants ask the court to decline to exercise supplemental jurisdiction over the state law claims in accordance with *§ 1367(c)(3)*, which stands for the general rule that courts should dismiss state law claims when the court dismisses all the federal claims in the case before trial. *Burritt v. Ditlefsen, 807 F.3d 239, 252 (7th Cir. 2015)*. Because Mountain Crest does not object to defendants' request or otherwise respond to this argument, the court will dismiss Mountain Crest's state law claims without prejudice to its refiling them in state court.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants Anheuser-Busch InBev SA/NV and Molson Coors Brewing Company, Dkt. 50, is GRANTED as to plaintiff Mountain Crest SRL, LLC's federal claims. In accordance with *28 U.S.C. § 1367(c)(3)*, the court declines to exercise supplemental jurisdiction over Mountain Crest's state law claims and those claims are DISMISSED without prejudice **[*37]** to Mountain Crest refiling them in state court.

Entered May 16, 2018.

BY THE COURT:

/s/ JAMES D. PETERSON

District Judge

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Nemickas v. Linn Cty. Anesthesiologists, P.C.

Court of Appeals of Iowa

May 16, 2018, Filed

No. 16-1493

Reporter

2018 Iowa App. LEXIS 474 *; 919 N.W.2d 637; 2018-1 Trade Cas. (CCH) P80,388; 2018 WL 2230721

RIMAS NEMICKAS, M.D., Plaintiff-Appellant, vs. LINN COUNTY ANESTHESIOLOGISTS, P.C., Defendant-Appellee.

Notice: PUBLISHED IN TABLE FORMAT IN THE NORTH WESTERN REPORTER.

Prior History: **[*1]** Appeal from the Iowa District Court for Linn County, Mary E. Chicchelly, Judge. An anesthesiologist appeals (1) the dismissal of his action alleging his former practice group violated the Iowa Competition Law and (2) the grant of summary judgment on his claims for breach of contract, fraudulent inducement, and tortious interference.

Disposition: AFFIRMED.

Core Terms

district court, antitrust, amend, summary judgment, exclusive contract, shareholders, tortious interference, employment contract, grievance committee, antitrust claim, anti trust law, anesthesiology, consumers, enforcer, patients, allegations, termination, contracts, motion to dismiss, asserts, damages, notice, fraudulent inducement, fair dealing, anesthesiologist, competitors, contractual, anesthesia, practicing, prices

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > Standing

Civil Procedure > Appeals > Standards of Review

HN1[] **Private Actions, Standing**

A dismissal for lack of standing in an antitrust suit is reviewed for errors at law. The reviewing court will affirm if the petition shows no right of recovery under any state of the facts. The petition's allegations are considered in the light most favorable to the plaintiff.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN2[] Standards of Review, Abuse of Discretion

District courts are afforded considerable discretion in ruling on motions for leave to amend pleadings. An appellate court will only reverse when a clear abuse of discretion has been shown.

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN3[] Appellate Review, Standards of Review

A grant of summary judgment is reviewed for the correction of legal error.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

HN4[] Relevant Market, Geographic Market Definition

Iowa Code § 553.5 (2015) is the counterpart to Sherman Act *§ 2* (*15 U.S.C.S. § 2*). Under Iowa's Competition Law, the definition of person includes an enterprise which, in turn, includes a professional corporation. *Iowa Code § 553.3(2)*, *(4)*. The law defines trade or commerce broadly as any economic activity involving or relating to any commodity, service, or business activity. *§ 553.3(8)*. And to round out the definitions, "relevant market" means the geographical area of actual or potential competition in a line of commerce, all or any part of which is within the state. *§ 553.3(6)*. Iowa's Competition Law lacks a definition for one significant term—monopoly. Stepping into the void, the Iowa Supreme Court has defined that term as the power to control market prices or exclude competition.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN5[] Defenses, Demurrers & Objections, Motions to Dismiss

Dismissal is not a favored resolution. There is case law cautioning that if the viability of a claim is debatable then it should not be dismissed, but endorsing continued use of motions to dismiss when the issue is standing.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization

Governments > Legislation > Interpretation

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN6[] Regulated Practices, Monopolies & Monopolization

A continued mandate exists for Iowa courts to follow the harmonization provision in *Iowa Code § 553.2*.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN7[] Standing, Requirements

Antitrust standing is more than a search for an injury in fact. It is a search for the proper plaintiff to enforce the antitrust laws. To determine standing, a court examines the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them. The court considers five factors: (1) whether the petition asserts a causal connection between the antitrust violation and the plaintiff's alleged harm; (2) if the injury is the type sought to be redressed by antitrust laws; (3) the directness of the injury; (4) whether failing to provide a remedy would leave a significant antitrust violation undetected or unremedied; and (5) whether the damages claimed are highly speculative or abstract. Condensed into a more precise test, first, a court should determine whether the plaintiff suffered antitrust injury; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN8[] **Standing, Requirements**

A plaintiff does not have antitrust standing to prosecute an economic injury to himself unless that injury corresponds to an injury of the same type to the relevant market.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

HN9[] **Standing, Requirements**

Iowa's antitrust provisions are not intended to deal with claimed wrongs inflicted on individual parties. Their function is only to foster the public's access to a freely competitive market. The marketplace is often unfair, sometimes brutal; sometimes tortious acts take place there. Iowa Code ch. 553 presupposes all this. But, until an act impacts on the public's access to a competitive market, the injured are left to proceed with traditional tort or contract remedies. Chapter 553 simply does not provide a remedy for a private wrong.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN10[] **Standing, Requirements**

Medical practitioners denied privileges at one or more hospitals in a geographic area face a difficult task in establishing standing to bring an antitrust claim. An efficient enforcer of antitrust laws is one who can proficiently vindicate the legislative goals. There is case law analyzing five factors: (1) the directness or indirectness of the asserted injury; (2) whether there exists an identifiable class of persons motivated to vindicate the public interest in antitrust enforcement; (3) the nature of the damages; (4) the importance of avoiding duplicate recoveries; and (5) whether the plaintiff can enforce an antitrust judgment.

Antitrust & Trade Law > ... > Private Actions > Standing > Requirements

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN11[] **Standing, Requirements**

A well-established body of federal precedent rejects antitrust standing for claims by physicians challenging exclusive contracts.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN12[] **Amendment of Pleadings, Leave of Court**

As a matter of practice, district courts should permit amendments and treat denials as the exception. And the district court should allow amendments so long as the amendment does not substantially change the issues in the case. Even amendments substantially changing the issues are permissible so long as the defendant is not prejudiced or unfairly surprised.

Civil Procedure > Judgments > Summary Judgment > Entitlement as Matter of Law

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

HN13[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Iowa R. Civ. P. 1.981(3)*. Courts view the summary-judgment record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that can be drawn from the record. The moving party must prove the facts are undisputed. And even when the facts are undisputed, summary judgment is inappropriate if reasonable minds could draw different inferences from those facts. The district court must not reach credibility determinations in granting summary judgment; assessments of what evidence to believe are left to the trier of fact.

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

HN14[] **Breach, Nonperformance**

A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract.

Torts > ... > Fraud & Misrepresentation > Actual Fraud > Elements

HN15[] **Actual Fraud, Elements**

To prove a defendant engaged in fraudulent representation or inducement, a plaintiff is required to show the following elements: (1) the defendant made a representation; (2) that proved to be false; (3) the representation was material; (4) the defendant did so with scienter; (5) the defendant intended to deceive persons; (6) the persons relied on the misrepresentation; and (7) the plaintiff suffered damages as a result.

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

Labor & Employment Law > Employment Relationships > Employment Contracts > Contract Interpretation

HN16[] **Contract Interpretation, Good Faith & Fair Dealing**

The Iowa Supreme Court has not applied the doctrine of an implied duty of good faith and fair dealing to employment contracts.

Torts > ... > Contracts > Intentional Interference > Elements

HN17[] **Intentional Interference, Elements**

To prove tortious interference with existing contractual relationships, a plaintiff must show: (1) an existing valid contractual relationship or business expectancy; (2) knowledge of this by the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damages.

Torts > ... > Prospective Advantage > Intentional Interference > Elements

HN18[] **Intentional Interference, Elements**

To prove tortious interference with a prospective contractual relationship, a plaintiff must show: (1) a prospective contractual or business relationship; (2) the defendant knew of the prospective relationship; (3) the defendant intentionally and improperly interfered with the relationship; (4) the defendant's interference caused the relationship to fail to materialize; and (5) resulting damages. And interference with a prospective contract requires the plaintiff to show the defendant's sole or predominant reason for interfering was to financially injure or destroy him.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Nonmovant Persuasion & Proof

HN19[] **Summary Judgment, Evidentiary Considerations**

The nonmoving party is entitled to all reasonable inferences in a motion for summary judgment. But the requirement to identify specific facts in response to a summary judgment motion includes the requirement to identify those facts that support the inference sought to be drawn.

Counsel: Michael M. Sellers of Sellers, Galenbeck & Nelson, Des Moines, for appellant.

Mark L. Zaiger and Kerry A. Finley for Shuttleworth & Ingersoll, P.L.C., Cedar Rapids, for appellee.

Judges: Heard by Doyle, P.J., and Tabor and McDonald, JJ.

Opinion by: TABOR

Opinion

TABOR, Judge.

When Dr. Rimas Nemickas was practicing with Linn County Anesthesiologists, P.C. (LCA), the group entered into exclusive contracts with two Cedar Rapids hospitals. After the practice group terminated his employment contract, Dr. Nemickas sued LCA under Iowa's anti-monopoly statute, *Iowa Code section 553.5 (2015)*. Dr. Nemickas also accused LCA of breach of contract, fraudulent inducement, and tortious interference. The district court granted LCA's motion to dismiss the *section 553.5* action, finding the doctor lacked standing to bring a state antitrust claim.

The district court issued summary judgment for LCA on the remaining claims. Dr. Nemickas now challenges **[*2]** the district court's rejection of his amended pleadings, the dismissal of his antitrust suit, and the grant of summary judgment. We find no abuse of discretion in the district court's handling of the myriad of amended pleadings filed by Dr. Nemickas. And we find no legal error in the district court's dismissal of the antitrust action or its grant of summary judgment on the contract-related claims. Accordingly, we affirm.

I. Facts and Prior Proceedings

Dr. Nemickas is a board-certified doctor of medicine and anesthesiology. He joined LCA in 1999 and became a shareholder of the practice in 2005. In 2012, LCA entered into separate contracts with two Cedar Rapids hospitals, Mercy Medical Center and St. Luke's Hospital, to be their exclusive provider of anesthesiology services. Two years later, in July 2014, LCA notified Dr. Nemickas that the officers of the practice would recommend his contract not be renewed as of December 2014. In August 2014, Dr. Nemickas filed a petition at law and requested a temporary restraining order against LCA's employment action. The petition also alleged a breach of contract by LCA.

The district court restrained LCA from holding its board meeting to consider Dr. **[*3]** Nemickas's employment status until after the parties conducted mediation as spelled out in the employment agreement. In September, the court expanded its injunction, ordering mediation occur within thirty days as set out in amendments to the agreement and that LCA provide Dr. Nemickas with ten days' written notice of the mediation and a list of specific events contributing to its decision not to renew his contract.

LCA provided Dr. Nemickas with notice on October 1 of the grievance committee meeting set for October 14. The practice also provided reasons for its proposed action, a series of complaints dating from 2000 to 2014 "demonstrating a lack of diligence regarding patient care." The list included: "complaints and reports from charge nurses at both Mercy and St. Luke's of a routine failure to review patient charts prior to administering anesthetic," "making social plans on phone while patient moving on table," "several incidents of falling asleep," and "inattentiveness to patients during general anesthesia while talking on phone". LCA also provided reports and complaints dating from 2000 to 2013 reflecting "disruptive and inappropriate conduct" by Dr. Nemickas, including "multiple **[*4]** events centered around explosive personality and inappropriate conversations in front of awake patients and Dr. Nemickas denying having any problem at follow up meeting." LCA summarized: "Based on chronic and recurring issues the Practice did not find Dr. Nemickas's behavior and performance consistent with the Practice's mission statement." Dr. Nemickas submitted a ten-page response to LCA's concerns to the grievance committee.

After its October 14 meeting, the grievance committee recommended LCA's concerns be considered by all shareholders in December 2014. Some data findings gathered by the grievance committee were sent late to Nemickas, but he received them before the scheduled meeting. Dr. Nemickas filed a request to enjoin any meeting to address his employment status which the district court denied. Dr. Nemickas was not present when the grievance committee presented to the LCA, but was able to make his own presentation and participate in the shareholder vote. After hearing presentations from both sides, twenty-four shareholders voted to issue Dr. Nemickas a ninety-day notice of "voluntary termination"; four opposed the motion and one abstained. On December 12, LCA sent Dr. Nemickas **[*5]** written notice of termination effective March 14, 2015. The doctor filed a fourth request for injunctive relief on March 2, asking the court to set aside LCA's decision to terminate his contract. The court denied the request. On March 14, Dr. Nemickas resigned his position with LCA. Both Mercy and St. Luke's advised Dr. Nemickas that he could not provide anesthesia services because of their exclusive contracts with LCA. But Dr. Nemickas continued to provide anesthesia services at the Surgery Center of Cedar Rapids under his St. Luke's privileges.

In April 2015, Dr. Nemickas filed an amended and substituted petition alleging three counts: breach of contract, fraudulent inducement, and antitrust violations under chapter 553. In May 2015, the court granted leave to amend. In June 2015, LCA filed a partial motion to dismiss, asserting Dr. Nemickas lacked standing to pursue the state antitrust claim.

During the summer of 2015, Dr. Nemickas tried repeatedly to amend his amended and substituted petition. On July 24, 2015, Dr. Nemickas filed a motion for leave to amend his petition to add a count of tortious interference. The motion also sought to change the caption to assert he was bringing **[*6]** the action "on behalf of himself and consumers of anesthesia services." LCA resisted the proposed amendment, arguing Dr. Nemickas lacked third-party standing to assert the chapter 553 action on behalf of unidentified consumers. In a third motion to amend filed August 12, Dr. Nemickas sought permission to add Mercy and St. Luke's hospitals as defendants in his antitrust action. LCA resisted.

The district court granted LCA's partial motion to dismiss on October 5, 2015. In that same ruling, the court denied Dr. Nemickas's motion to file a second amended and substituted petition. After a series of filings by Dr. Nemickas seeking reconsideration, the district court confirmed the dismissal on December 10. Dr. Nemickas sought interlocutory review of that ruling, which our supreme court denied.

LCA filed a motion for summary judgment in May 2016 with respect to Dr. Nemickas's claims for breach of contract, tortious interference, and fraudulent inducement. The motion noted the court had not granted Dr. Nemickas express permission to amend his petition to include the tortious interference claim but asserted LCA did not resist the motion to amend with respect to that claim. In August 2016, the **[*7]** district court granted LCA's motion for summary judgment in its entirety and ordered Dr. Nemickas to resign his clinical privileges and to "cease and desist" practicing anesthesia at St. Luke's Hospital. Dr. Nemickas appeals.

II. Scope and Standards of Review

Dr. Nemickas contends because he requested remedies in equity regarding the antitrust claim, our review should be de novo. *See* *Iowa R. App. P. 6.907*. LCA disagrees, arguing appellate review of dismissals for lack of standing in antitrust suits is for the correction of legal error. *See* *Southard v. Visa U.S.A. Inc., 734 N.W.2d 192, 194 (Iowa 2007)*. We agree with LCA. ***HN1***[] We review the dismissal for errors at law. *Comes v. Microsoft Corp., 646 N.W.2d 440, 442 (Iowa 2002)*. We will affirm "if the petition shows no right of recovery under any state of the facts." *Id.* (citing *Barnes v. State, 611 N.W.2d 290, 292 (Iowa 2000))*. We consider the petition's allegations in the light most favorable to the plaintiff. *Id.*

Dr. Nemickas asks us to review the district court's denial of his motions to amend for the correction of errors at law. LCA argues our review is for abuse of discretion. *See* *Rife v. D.T. Corner, Inc., 641 N.W.2d 761, 766 (Iowa 2002)*. (***HN2***[] "We afford district courts considerable discretion in ruling on motions for leave to amend pleadings." (citing *Davis v. Ottumwa YMCA, 438 N.W.2d 10, 14 (Iowa 1989)))*. LCA is again correct, we will only reverse "when a clear abuse of discretion has been shown." *See* *Davis, 438 N.W.2d at 14* (citing *B & B Asphalt Co. v. T.S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976))*.

The parties agree ***HN3***[] we **[*8]** review the grant of summary judgment for the correction of legal error. *See* *Baker v. City of Iowa City, 867 N.W.2d 44, 51 (Iowa 2015)*.

III. Analysis

A. Did the District Court Properly Dismiss the Antitrust Claim?

Dr. Nemickas based his antitrust claim on *section 553.5*,[1] known as the anti-monopoly provision, which reads: "A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant

[1] In its October 2015 ruling, the district court noted the doctor's amended petition did not specify whether he was advancing a claim under *section 553.4* (Restraint prohibited) or *553.5* (Monopoly prohibited) but clarified it was the latter in his partial resistance to LCA's motion to dismiss.

market for the purpose of excluding competition or of controlling, fixing, or maintaining prices." HN4[] Section 553.5 is the counterpart to section 2 of the Sherman Act.[2] *See* Mueller v. Wellmark, Inc., 861 N.W.2d 563, 565 (Iowa 2015).[3] Under Iowa's Competition Law, the definition of "person" includes an "enterprise" which, in turn, includes a professional corporation. Iowa Code § 553.3(2), (4). The law defines "trade or commerce" broadly as "any economic activity involving or relating to any commodity, service, or business activity." *Id.* § 553.3(8); *see* Neyens v. Roth, 326 N.W.2d 294, 297 (Iowa 1982). And to round out the definitions, "'relevant market' means the geographical area of actual or potential competition in a line of commerce, all or any part of which is within this state." Iowa Code § 553.3(6). Iowa's Competition Law lacks a definition for one significant term—monopoly. Stepping into the void, our supreme court defined that term as "the power to control market prices or exclude competition." Neyens, 326 N.W.2d at 297 (quoting **[*9]** United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)).

In his April 2015 petition, Dr. Nemickas alleged: "The confidential exclusive anesthesiology services contracts between defendant and each of the hospitals in Cedar Rapids constitute an illegal monopoly." In his July 2015 resistance to LCA's partial motion to dismiss, he alleged the contracts were intended "to establish and maintain a monopoly of anesthesiology services in a relevant market with the purpose of excluding competition and of controlling, fixing or maintaining prices in violation of said law. Iowa Code § 553.5."[4]

So the question before the district court was whether Dr. Nemickas's allegations that LCA engaged in monopolistic practices, taken as true, stated a claim upon which relief could be granted. In considering LCA's motion, the district court recognized HN5[] dismissal is not a favored resolution. *See* Southard, 734 N.W.2d at 194 (cautioning if viability of a claim is debatable then it should not be dismissed, but endorsing continued use of motions to dismiss when issue is standing). But the district court reasoned dismissal was proper here because Dr. Nemickas neither

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[2] Congress passed the Sherman Act, 15 U.S.C. §§ 1-7, in 1890 to preserve "free and unfettered competition as the rule of trade." *See* Molly Ebraheim, *Antitrust and Hospital Mergers: Uniqueness and Consistency in Market Definition Analysis*, 48 U. Tol. L. Rev. 337, 343 (2017). In 1914, Congress passed additional antitrust laws, including the Clayton Act, 15 U.S.C. § 18, to address certain mergers and acquisitions. *Id.* "Exclusive dealing arrangements that involve commodities may be challenged under either the Sherman Act or the Clayton Act, while those that involve a service or something other than a commodity may be challenged only under the Sherman Act." 54 Am. Jur. 2d Monopolies and Restraints of Trade § 141 (2018) (citing Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of Rhode Island, 239 F. Supp. 2d 180 (D.R.I. 2003).

[3] *Mueller* rejected a claim under section 553.4, which provides: "A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." Section 553.4 is the counterpart to section 1 of the Sherman Act. Id. at 567-68. Because section 1 applies to concerted action that restrains trade, federal courts have held that it requires two or more defendants. Energy Conversion Devices Liquidation Tr. v. Trina Solar Ltd., 833 F.3d 680, 684 (6th Cir. 2016), *cert. denied*, ***137 S. Ct. 1582, 197 L. Ed. 2d 705 (2017)***.

[4] Because Dr. Nemickas named only LCA in his antitrust action, and was unsuccessful in adding the two Cedar Rapids hospitals as defendants, he is unable to pursue a restraint-of-trade claim. *See* Iowa Code § 553.4 (requiring proof of a "contract, combination, or conspiracy between two or more persons"); *see also* Energy Conversion Devices Liquidation Tr., 833 F.3d at 684 (interpreting parallel federal provision to require two or more defendants). And we are skeptical that he could obtain relief under his section 553.5 claim—naming LCA as a single monopolist—given his concentration on LCA's exclusive contracts with the hospitals. In similar suits, the excluding party, the hospital or surgical center, is consistently named as a defendant. *See, e.g.,* Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 657 (8th Cir. 2000); BCB Anesthesia Care, Ltd. v. Passavant Mem'l Area Hosp. Ass'n, 36 F.3d 664, 665 (7th Cir. 1994); Balaklaw v. Lovell, 14 F.3d 793, 795 (2d Cir. 1994); Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1407 (9th Cir. 1991); Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1442 (9th Cir. 1988); Konik v. Champlain Valley Physicians Hosp. Med. Ctr., 733 F.2d 1007, 1009 (2d Cir. 1984); New Mexico Oncology v. Presbyterian Healthcare Services, 169 F. Supp. 3d 1204, 1205 (D.N.M. 2016); Korshin v. Benedictine Hospital, 34 F. Supp. 2d 133, 134 (N.D.N.Y. 1999); Davies v. Genesis Med. Ctr. Anesthesia & Analgesia, P.C., 994 F. Supp. 1078, 1085 (S.D. Iowa 1998); **Leyba v. Renger, 874 F. Supp. 1229, 1231 (D.N.M. 1994)**; Rockland Physician Associates, P.C. v. Grodin, 616 F. Supp. 945, 947 (S.D.N.Y. 1985); Belmar v. Cipolla, 96 N.J. 199, 475 A.2d 533, 535 (N.J. 1984). But because we affirm the district court's dismissal on the standing question, we need not decide if Dr. Nemickas otherwise states a claim upon which relief can be granted.

alleged a valid **[*10]** antitrust injury nor identified a "genuine market-wide anticompetitive effect" from LCA's exclusive contracts with the two Cedar Rapids hospitals. *See Midwest Comm'n. v. Minnesota Twins, Inc., 779 F.2d 444, 450 (8th Cir. 1985)* (holding if injury alleged is not an "antitrust injury," the plaintiff does not have a claim cognizable under the antitrust laws); *Davies, 994 F. Supp. at 1101* (advising that to avoid dismissal of complaint, plaintiff asserting an attempt-to-monopolize claim must allege a relevant geographic market).

On appeal, Dr. Nemickas contends the district court leaned too heavily on federal law in deciding the standing question. He cites *Comes, 646 N.W.2d at 445*,[5] for the proposition that the Iowa Competition Law "does not restrict the class of persons who may bring suit." *See Iowa Code § 553.12*. He further argues *Southard* "refined *Comes*" and held "competitors and consumers as participants in the market are proper anticompetition plaintiffs." *See 734 N.W.2d at 199*. Dr. Nemickas sees *Comes* and *Southard* through rose-colored glasses. A more clear-eyed view of that case law reveals ***HN6***[] a continued mandate for Iowa courts to follow the "harmonization provision" in *section 553.2*.[6] *See Comes, 646 N.W.2d at 446*; *see also Southard, 734 N.W.2d at 196* (clarifying "with respect to setting the outer limits of what injuries are compensable under Iowa's competition law, our decision in *Comes* is narrow"). Accordingly, **[*11]** the district court appropriately looked to federal standing requirements when deciding LCA's motion to dismiss.

HN7[] Antitrust standing is a more than a search for an injury in fact. *See Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1448 (11th Cir. 1991)*. It is a search for the proper plaintiff to enforce the antitrust laws. *Id.* To determine standing, we examine "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *Southard, 734 N.W.2d at 198* (quoting *Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 535, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*. We consider five factors: (1) whether the petition asserts a causal connection between the antitrust violation and the plaintiff's alleged harm; (2) if the injury is the type sought to be redressed by antitrust laws; (3) the directness of the injury; (4) whether failing to provide a remedy would leave a significant antitrust violation undetected **[*12]** or unremedied; and (5) whether the damages claimed are highly speculative or abstract. *Id.* Condensed into a more precise test, "[f]irst, a court should determine whether the plaintiff suffered 'antitrust injury'; second, the court should determine whether the plaintiff is an efficient enforcer of the antitrust laws, which requires some analysis of the directness or remoteness of the plaintiff's injury." *Todorov, 921 F.2d at 1449*.

1. *No antitrust injury*. Applying the *Southard* test to the facts asserted in Dr. Nemickas's amended petition, we conclude he does not have antitrust standing. His petition does not allege an antitrust injury. He complains LCA's exclusive contracts with the two hospitals bar any anesthesiologist who is not a LCA member from enjoying staff privileges. Dr. Nemickas practiced in Cedar Rapids for several years under the exclusive contracts. He was only prevented from practicing at the local hospitals after leaving LCA. His alleged injury, the inability to practice at St. Luke's and Mercy, resulted from his separation from LCA not the exclusive contracts.

And even considering his current inability to practice at the hospitals without regard to his separation from LCA, Dr. Nemickas does not **[*13]** allege the type of injury protected by antitrust laws. *See Next Generation Realty, Inc. v. Iowa Realty Co., Inc., 686 N.W.2d 206, 208 (Iowa 2004)* ("Antitrust is in place to protect the market, not any

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[5] In *Comes*, our supreme court declined to follow federal precedent on whether indirect purchasers had standing to sue under the Iowa Competition Law. *Id. at 445-49*. The *Comes* court did so because: (1) the language of *section 553.12* supported indirect purchaser standing; (2) uniformity only requires a uniform standard of conduct under state and federal law, not a uniform rule as to who may sue; and (3) most federal courts allowed indirect purchasers to sue at the time the Iowa Competition Law was enacted in 1976. *See id.*

[6] *Iowa Code section 553.2* states:

> This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

individual merchant doing business there."); *see also* Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) ("The antitrust laws protect *competition*, not *competitors*." (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))).

Dr. Nemickas asserts in his amended petition that patients in Cedar Rapids "have no availability of any alternative anesthesiology services" except those of LCA, and he alleges LCA "dominates and controls charges and prices" for those services. But Dr. Nemickas doesn't share whatever hardship patients may suffer based on LCA's market dominance. His ox is being gored in a different quarter. His personal financial hit—resulting from being let go by a practice that has an exclusive contract with two local hospitals—differs from any injury to the competitive marketplace. *See* Scott v. Galusha, 890 S.W.2d 945, 950 (Tex. App. 1994) (***HN8***[] "[A] plaintiff does not have antitrust standing to prosecute an economic injury to himself unless that injury corresponds to an injury of the same type to the relevant market."); *see also* In re Crude Oil Commodity Futures Litig., 913 F. Supp. 2d 41, 57 (S.D.N.Y. 2012) ("The antitrust standing requirement weeds out claims by jilted competitors against firms that legitimately outperform them or choose not to partner with them.").

HN9[] Iowa's antitrust provisions are **[*14]** "not intended to deal with claimed wrongs inflicted on individual parties. Their function is only to foster the public's access to a freely competitive market." Next Generation Realty, Inc., 686 N.W.2d at 208. The *Next Generation* court rejected the claim of a disgruntled competitor, waxing:

> The marketplace is often unfair, sometimes brutal; sometimes tortious acts take place there. Chapter 553 presupposes all this. But, until an act impacts on the public's access to a competitive market, the injured are left to proceed with traditional tort or contract remedies. Iowa Code chapter 553 simply does not provide a remedy for a private wrong.

Id. at 208-09. The district court correctly determined Dr. Nemickas did not allege an antitrust injury as necessary to proceed under chapter 553.

2. *Not efficient enforcer*. Even had Dr. Nemickas alleged an antitrust injury he would be ill-suited to bring an antitrust claim because he is not an efficient enforcer. ***HN10***[] Medical practitioners denied privileges at one or more hospitals in a geographic area face a difficult task in establishing standing to bring an antitrust claim. *See, e.g.,* Davies, 994 F. Supp. at 1093-96 (finding anesthesiologist did not establish efficient enforcer status). An "efficient enforcer" of antitrust laws is one who can proficiently vindicate **[*15]** the legislative goals. *See* Todorov, 921 F.2d at 1450 (analyzing five factors: (1) the directness or indirectness of the asserted injury; (2) whether there exists an identifiable class of persons motivated to vindicate the public interest in antitrust enforcement; (3) the nature of the damages; (4) the importance of avoiding duplicate recoveries; and (5) whether the plaintiff can enforce an antitrust judgment).

Dr. Nemickas asserts an average consumer is ill-equipped to notice changes in availability, quality, and price of anesthesiology services—making a competitor, like him, better suited to serve as an enforcer. On the contrary, Dr. Nemickas could benefit from LCA's exclusive contracts with the hospitals because consumers may seek out alternative sources for anesthesiology services. *See* Davies, 994 F. Supp. at 1096 (noting if the defendant began charging more for anesthesiology services or providing lower quality care then consumers will seek out alternative care with other facilities or physicians). And if the exclusive contracts do result in higher prices and a lower level of care "these effects will not be missed by patient-consumers or insurers." *See* Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 719 (7th Cir. 2006).

Dr. Nemickas failed to allege an antitrust injury and would not be an efficient **[*16]** enforcer of such claim.[7] Because Iowa antitrust statute is guided by federal law, we are not inclined to diverge from ***HN11***[] a well-established body of federal precedent rejecting antitrust standing for claims by physicians challenging exclusive contracts. *See, e.g.,* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 31, 104 S. Ct. 1551, 80 L. Ed. 2d 2

[7] Because we conclude the district court properly dismissed the petition on these standing grounds, we need not reach the question whether Dr. Nemickas correctly identified the relevant anesthesiology market as the two hospitals in Cedar Rapids.

(1984) (abrogated on other grounds by Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)); Balaklaw, 14 F.3d at 797; Konik, 733 F.2d at 1015; Korshin, 34 F. Supp. 2d at 138; Davies, 994 F. Supp. at 1096. Any expansion of antitrust standing is best left to our supreme court. *See* Rosauer Corp. v. Sapp Dev., L.L.C., 856 N.W.2d 906, 907 (Iowa 2014) (finding appropriate for court of appeals to defer to supreme court on whether to extend reach of "implied warranty of workmanlike construction").

B. Did the District Court Abuse its Discretion by Denying Attempts by Dr. Nemickas to Amend His Petition?

Dr. Nemickas next argues he was "given no opportunity to remedy or substantiate his petition." At issue is (1) a motion for leave to amend petition filed July 24, 2015; (2) an amendment to the motion for leave to amend petition filed August 12, 2015; and (3) a motion for extension of time filed October 14, 2015, to "plead over" in accordance with Nesper Sign & Neon Co. v. Nugent, 168 N.W.2d 805 (Iowa 1969). In its appellee's brief, LCA interprets these motions as Dr. Nemickas's efforts to advance three purposes: (1) add a tortious interference claim[8]; (2) add the two hospitals as antitrust defendants; and (3) "bolster his allegations **[*17]** that he had suffered an antitrust injury, primarily by seeking to claim that he was prosecuting the antitrust claims on behalf of not only himself, but unidentified 'consumers.'"

We first address the district court's refusal to accept the amendments filed on July 24 and August 12. In reviewing the district court's exercise of discretion, we start with the language of the applicable rule:

> A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Iowa R. Civ. P. 1.402(4). ***HN12***[] As a matter of practice, district courts should permit amendments and treat denials as the exception. Baker v. City of Iowa City, 867 N.W.2d 44, 51 (Iowa 2015). And "[t]he district court should allow amendments so long as the amendment does not substantially change the issues in the case." *Id.* Even amendments substantially changing the **[*18]** issues are permissible so long as the defendant is "not prejudiced or unfairly surprised." *Id.*

Here, the district court rejected the doctor's motion to add the hospitals as parties because it determined Dr. Nemickas lacked standing and dismissed the chapter 553 claim leaving no surviving claim relevant to the hospitals. That rejection was not an abuse of discretion because the amendment would not have altered the outcome of the suit. The same rationale supports Dr. Nemickas's belated attempts to bolster his allegations concerning the antitrust injury by claiming he brought suit on behalf of consumers. The district court did not abuse its discretion in denying Dr. Nemickas's request to amend his pleadings.

Dr. Nemickas also complains he was denied permission to "plead over" to correct deficiencies in his petition under Iowa Rule of Civil Procedure 1.444.[9] The district court correctly concluded Dr. Nemickas could not rely on the "pleading over" language in rule 1.444 and its interpretation in *Nesper Sign*. In *Nesper Sign*, the plaintiff misnamed

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[8] LCA did not resist addition of the tortious interference claim. The district court addressed the merits of that claim, as does LCA on appeal. Accordingly, we reach the merits of this claim later in this opinion.

[9] Iowa Rule of Civil Procedure 1.444 states:

> If a party is required or permitted to plead further by an order or ruling, the clerk shall forthwith mail or deliver notice of such order or ruling to the attorneys of record. Unless otherwise provided by order or ruling, such party shall file such further pleading within ten days after such mailing or delivery; and if such party fails to do so within such time, the party thereby elects to stand on the record theretofore made. On such election, the ruling shall be deemed a final adjudication in the trial court without further judgment or order; reserving only such issues, if any, which remain undisposed of by such ruling and election.

the defendant, Nugent, as an individual rather than a corporation, but otherwise filed a legitimate cause of action. *168 N.W.2d at 806-07*. In the present case, Dr. Nemickas did not misidentify a defendant through **[*19]** inadvertent error. Rather, he identified LCA as the sole defendant and failed to name either hospital as a defendant in his original amended petition. In concluding Dr. Nemickas was not an efficient enforcer of Iowa's ***antitrust law***, the district court did not require or permit further pleading. Accordingly, *rule 1.444* did not apply. *See* *Hubbard v. Marsh, 239 Iowa 472, 32 N.W.2d 67, 68 (Iowa 1948)*.

C. Did the District Court Properly Grant Summary Judgment on the Remaining Claims?

HN13[] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **[*20]** *Iowa R. Civ. P. 1.981(3)*. We view the summary-judgment "record in the light most favorable to the nonmoving party and will grant that party all reasonable inferences that we can draw from the record." *See* *Estate of Gray ex rel. Gray v. Baldi, 880 N.W.2d 451, 455 (Iowa 2016)* (quoting *Cawthorn v. Catholic Health Initiatives Iowa Corp., 806 N.W.2d 282, 286 (Iowa 2011))*. As the moving party, LCA must prove the facts are undisputed. *See* *Phillips v. Covenant Clinic, 625 N.W.2d 714, 717 (Iowa 2001)*. And "[e]ven when the facts are undisputed, summary judgment is inappropriate if reasonable minds could draw different inferences from those facts." *Frontier Leasing Corp. v. Links Eng'g, LLC, 781 N.W.2d 772, 775-76 (Iowa 2010)* (quoting *Colonial Baking Co. of Des Moines v. Dowie, 330 N.W.2d 279, 282 (Iowa 1983))*. The district court must not reach credibility determinations in granting summary judgment; assessments of what evidence to believe are left to the trier of fact. *See* *id. at 776*.

1. **Breach of Contract**

"***HN14***[] A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract." *Molo Oil Co. v. River City Ford Truck Sales, Inc., 578 N.W.2d 222, 224 (Iowa 1998)* (citing *Magnusson Agency v. Pub. Entity Nat'l Co., 560 N.W.2d 20, 27 (Iowa 1997))*. To show LCA breached the employment contract, Dr. Nemickas was required to satisfy five elements: (1) a contract existed; (2) its terms and conditions were established; (3) he performed those required terms and conditions; (4) LCA breached the contract in a particular way; and (5) Dr. Nemickas suffered damages as a result of the breach. *See* *id.*

Dr. Nemickas insists the employee handbook and LCA's bylaws served as contracts between him and LCA. **[*21]** He further claims LCA breached contractual guarantees by not conducting a proper peer-review procedure. He also contends he did not have a chance to address all of the allegations against him.

As an initial matter, the district court decided the handbook was not a binding contract. The handbook explicitly stated "these documents are not a contract of employment and that my employment relationship with [LCA] is voluntary and subject to the terms of my Employment Contract," and Dr. Nemickas signed his name below this disclaimer. We agree with the district court that the handbook was specific in avoiding the creation of a contract. *See* *Vick v. Heatilator, Inc., 537 N.W.2d 810, 812 (Iowa Ct. App. 1995)*.

Next, the district court decided LCA complied with the peer-review and grievance procedures set out in its bylaws. That process allowed Dr. Nemickas to counter the allegations against him in writing and at the grievance committee and shareholder meetings. Dr. Nemickas presented a ten-page response, spoke with the grievance committee, presented to the shareholders and participated in the shareholder vote. The district court found Dr. Nemickas was afforded due process and LCA met each requirement set out in the bylaws. Accordingly, the court decided the doctor **[*22]** had not presented a genuine issue of material fact as to any breach of the employment contract by LCA. We find no error in the court's conclusion.

2. Fraudulent Inducement/Misrepresentation/Good Faith & Fair Dealing

Dr. Nemickas next asserts LCA misled the shareholders in connection with his termination in violation of an implied duty of good and fair dealing. Specifically, he claims LCA purported to share negative results from a peer review when no true peer review was conducted; LCA inaccurately alleged his conduct threatened its contracts with the hospitals; LCA alleged he had a high number of "no-requests" from doctors who work with the group's anesthesiologists when he had no opportunity to determine the veracity of that data; LCA would waive the non-compete clause in Dr. Nemickas's employment contract; and "putative concerns raised by LCA as required by court order were a pretext to other positive pressures being exerted from outside the group." On appeal, Dr. Nemickas argues Iowa courts should recognize an implied duty of good faith and fair dealing in all contracts.

HN15[] To prove LCA engaged in fraudulent representation or inducement, Dr. Nemickas was required to show the following **[*23]** elements: (1) LCA made a representation; (2) that proved to be false; (3) the representation was material; (4) LCA did so with scienter; (5) LCA intended to deceive the shareholders; (6) the shareholders relied on the misrepresentation; and (7) Dr. Nemickas suffered damages as a result. *See* *Whalen v. Connelly, 545 N.W.2d 284, 294 (Iowa 1996)*.

The district court determined Dr. Nemickas had not met his "burden of production as to any of the elements of a claim of fraudulent inducement to generate a viable jury question." We agree with the district court's determination. Dr. Nemickas failed to present baseline facts from which a jury could find LCA made false representations to the shareholders with an intent to deceive them. Rather, the grievance committee presented reports of Dr. Nemickas's misconduct that it gathered in response to a court order obtained by the doctor. Moreover, as LCA points out on appeal, the practice group did not need a "pretext" to fire Dr. Nemickas; the employment contract allowed for voluntary termination for any reason or no reason upon ninety days' notice, which Dr. Nemickas received.

On the issue of an implied duty of good faith and fair dealing, Dr. Nemickas acknowledges ***HN16***[] our supreme court has not applied the **[*24]** doctrine to employment contracts. *See, e.g., Fogel v. Trustees of Iowa Coll., 446 N.W.2d 451, 456 (Iowa 1989)*; *see also* *Anderson v. Douglas & Lomason Co., 540 N.W.2d 277, 282 (Iowa 1995)* ("We have consistently rejected recognition of a covenant of good faith and fair dealing."). But Dr. Nemickas contends his contract with LCA included this implied duty and that LCA had "an even higher duty" to him because its shareholders were fiduciaries. Dr. Nemickas is asking to expand the application of this doctrine beyond the existing Iowa precedent. We believe any such an expansion would be better left to our supreme court. *See* *Rosauer, 856 N.W.2d at 907*.

3. Tortious Interference

In his final claim, Dr. Nemickas seeks damages based on LCA's alleged interference with his existing and prospective business contracts—the interference, according to Dr. Nemickas, is LCA's act of maintaining exclusive contracts that allow only LCA anesthesiologists to provide services at the two Cedar Rapids hospitals.

HN17[] To prove LCA's tortious interference with Dr. Nemickas's *existing* contractual relationships he must show: (1) an *existing* valid contractual relationship or business expectancy; (2) knowledge of this by the interferer; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resulting damages. *Locksley v. Anesthesiologists of Cedar Rapids, P.C., 333 N.W.2d 451, 457 (Iowa 1983)*. Similarly, **[*25]** ***HN18***[] to prove tortious interference with a *prospective* contractual relationship Dr. Nemickas must show: (1) a *prospective* contractual or business relationship; (2) that LCA knew of the prospective relationship; (3) LCA intentionally and improperly interfered with the relationship; (4) LCA's interference caused the relationship to fail to materialize; and (5) resulting damages. *See* *Iowa Coal Min. Co. v. Monroe Cty., 555 N.W.2d 418, 438 (Iowa 1996)*. And interference with a prospective contract requires Dr. Nemickas to show LCA's sole or predominant reason for interfering was to financially injure or destroy him. *See* *Tredrea v. Anesthesia & Analgesia, P.C., 584 N.W.2d 276, 283 (Iowa 1998)*.

The district court concluded Dr. Nemickas failed to demonstrate that a reasonable jury could find LCA entered into the exclusive contracts with the sole or predominant purpose of interfering with Dr. Nemickas's business relationships with patients and physicians at the two hospitals. The district court continued: "In fact, Dr. Nemickas consented to and benefited from these contracts." We find no error in the district court's conclusion.

We recognize Dr. Nemickas, as ***HN19***[] the nonmoving party, "is entitled to all reasonable inferences in a motion for summary judgment." *See* *Green v. Racing Ass'n of Cent. Iowa, 713 N.W.2d 234, 246 (Iowa 2006)*. But "the requirement to identify specific facts in response to a summary judgment **[*26]** motion includes the requirement to identify those facts that support the inference sought to be drawn." *Id.* Dr. Nemickas did not meet that requirement on any of the summary judgment claims.

IV. Conclusion

To recap, the district court properly dismissed Dr. Nemickas's *section 553.5* claim because he lacked antitrust standing. The court did not abuse its discretion by denying the doctor's numerous motions to amend. And the court properly granted summary judgment on the remaining claims.

AFFIRMED.

Thompson v. 1-800 Contacts, Inc.

United States District Court for the District of Utah, Central Division

May 17, 2018, Decided; May 17, 2018, Filed

Case No. 2:16-CV-1183-TC

Reporter

2018 U.S. Dist. LEXIS 83806 *; 2018-1 Trade Cas. (CCH) P80,384; 2018 WL 2271024

J. THOMPSON, et al., Plaintiffs, vs. 1-800 CONTACTS, INC., et al., Defendants.

Subsequent History: Motion denied by, Motion denied by, As moot *Thompson v. 1-800 Contacts, Inc., 2019 U.S. Dist. LEXIS 114615 (D. Utah, July 5, 2019)*

Motion granted by *Thompson v. 1-800 Contacts, Inc., 2019 U.S. Dist. LEXIS 174892 (D. Utah, Aug. 29, 2019)*

Settled by *Thompson v. 1-800 Contacts, Inc., 2020 U.S. Dist. LEXIS 125004 (D. Utah, June 3, 2020)*

Core Terms

online, retailers, contact lens, prices, advertising, antitrust, consumers, Plaintiffs', tolling, parties, settlement agreement, customers, anticompetitive, Defendants', allegations, conspiracy, non-disclosure, courts, motion to dismiss, sellers, notice, terms, Sherman Act, factors, offline, fraudulent concealment, provisions, products, interchangeability, restrictions

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For Tyler Nance, on behalf of himself and all others similarly situated, Iysha Abed, On Behalf of Herself and All Others Similarly Situated, Jill Schulson, On Behalf of Herself and All Others Similarly Situated, Leia Pinto, On Behalf of Herself and All Others Similarly Situated, Alexa Bean, on behalf of herself and all others similarly situated, Consol Plaintiffs: Carl E. Goldfarb, LEAD ATTORNEY, PRO HAC VICE, BOIES SCHILLER & FLEXNER, FORT LAUDERDALE, FL; Jared D. Scott, LEAD ATTORNEY, ANDERSON & KARRENBERG, SALT LAKE CITY, UT; David W. Mitchell, PRO HAC VICE, ROBBINS GELLER RUDMAN & DOWD LLP, SAN DIEGO, CA; Melissa Felder

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Judges: TENA CAMPBELL, United States District Judge.

Opinion by: TENA CAMPBELL

Opinion

ORDER AND MEMORANDUM DECISION

Plaintiffs, who bought contact lenses online from the Defendants, allege that they paid artificially-inflated prices for those contact lenses due to Defendants' anti-competitive agreements. **[*5]** To recover damages, they bring this proposed class action alleging antitrust violations of *§ 1 of the Sherman Act*.

Defendants move to dismiss the claims[1] for failure to allege antitrust standing, failure to establish a relevant product market, and failure to allege a single overarching conspiracy. Alternatively, they argue that any damages Plaintiffs

[1] Two Defendants—Arlington Lens Contact Services (AC Lens) and National Vision (NV)—have tentatively settled with the Plaintiffs and are not part of the current proceedings.

can prove must be limited to contact lens purchases made within the *Sherman Act*'s four-year statute of limitations—i.e., 2012 to 2016. Because Plaintiffs seek damages for purchases dating back to 2004, they rely on two bases for tolling that statute: fraudulent concealment and statutory tolling. Defendants respond that Plaintiffs' allegations do not establish either. For the reasons set forth below, the motions are

BACKGROUND[2]

Antitrust Complaint

Plaintiffs assert in their Consolidated Amended Complaint (CAC)[3] that a series of trademark litigation settlement agreements between 1-800 and other on-line contact lens retailers suppressed competition in the online market for contact lenses, artificially inflated the cost of contact lenses purchased online, and deprived consumers of complete and important information about competing retailers and their **[*6]** products. This, they contend, violated *§ 1* of the Sherman Act, which provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." *15 U.S.C. § 1*.

The Agreements

In 2004, Defendant 1-800 Contacts began filing trademark infringement cases against its competitors. It settled those suits and entered into settlement agreements with the targets of its trademark litigation. Plaintiffs contend that those settlement agreements restrain competition in violation of the Sherman Act.

In each bilateral settlement agreement, the parties agreed to limit or withhold use of certain trademark and related key words in their bids for advertisement space on Internet search engines like Google and Yahoo. The agreements prohibited the retailers "from bidding on any search keywords or phrases with the other company's names, websites or trademarks in them" and required them to use "negative keywords" to prevent that company's advertisement from appearing in a response to a search query that contains one or more of the specified words. (CAC ¶¶ 10-11, ECF No. 72.) This, Plaintiffs allege, **[*7]** illegally manipulated the number and types of ads seen by the online shopper.

Altogether the CAC alleges the existence of fifteen agreements (see Pls.' Omnibus Mem. in Opp'n to Defs.' Mot. Dismiss ("Opp'n") at 30, ECF No. 142), four of which are addressed in some detail in the CAC. 1-800 and Vision Direct entered into two agreements: one dated June 2004 and a follow-up settlement agreement dated May 2009. In March 2010, 1-800 settled its lawsuit against AC Lens and National Vision. And finally, in June 2010, 1-800 settled with Walgreens in the fourth agreement.

FTC's Investigation and Decision

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[2] The court's recitation of facts throughout this order is based on well-pleaded factual allegations in Plaintiffs' complaint, as well as reasonable inferences drawn from those facts. The court treats those facts as true for purpose of analyzing the motions under *Federal Rule of Civil Procedure 12(b)(6)*.

[3] In November 2016, contact lens purchasers J. Thompson and William Duncanson filed an antitrust complaint on behalf of themselves and others similarly situated against 1-800 Contacts, Inc. (1-800) and Vision Direct, Inc. Around the same time, other consumers filed similar but independent complaints, either here or in other federal districts. Given the similarity of the claims, the cases were transferred and consolidated. On May 31, 2017, the consolidated Plaintiffs filed an amended complaint—the Consolidated Amended Complaint (CAC)—against 1-800 and Vision Direct, as well as Walgreens Boots Alliance, Inc., Walgreen Co., Luxottica Retail North America, Inc., AC Lens, and National Vision.

Before the private consumers filed their private antitrust actions, the Federal Trade Commission (FTC), in 2015, began investigating 1-800's practice of suing competitors for trademark violations and then settling with those parties on terms that limited the parties' use of trademarks in on-line advertising. In January 2015, the FTC issued a Civil Investigative Demand to 1-800,[4] in which it sought information to determine whether 1-800 was violating ***antitrust law***. In August 2016, following its investigation, the FTC filed an administrative complaint against 1-800. In October 2017, after a lengthy **[*8]** evidentiary hearing conducted by an administrative law judge, the FTC issued Findings of Fact and Conclusions of Law and ruled that 1-800 had violated *Section 5 of the FTC Act*, "which encompasses violations of *Section 1* of the Sherman Act." (See Oct. 27, 2017 FTC Initial Decision In the Matter of 1-800 Contacts, Inc. at 117, attached as Ex. A to Notice of Supplemental Authority, ECF No. 152-1.)

The Plaintiffs, in their opposition to the motions to dismiss, point to the FTC's findings to bolster their complaint and convince the court to deny the motions to dismiss. But because the FTC decision is not part of the CAC and has no precedential value, the court will not consider it here.

The Motions to Dismiss

Defendants jointly filed two motions to dismiss. In the first motion, they contend that Plaintiffs lack antitrust standing, fail to allege a cognizable relevant market, and fail to allege a single overarching conspiracy or other concerted activity barred by the Sherman Act. (See Defs. Vision Direct, Inc., Walgreens Boots Alliance, Inc., Walgreen Co., & Luxottica Retail N. Am. Inc.'s Mot. Dismiss Pls.' Consol. Am. Compl., ECF No. 116 (hereinafter "Vision Direct Motion") (incorporated by 1-800 in its motion).)

In the second motion, they focus on **[*9]** the statute of limitations, asserting that claims based on purchases of contact lenses before October 13, 2012, are time-barred. And they challenge Plaintiffs' reliance on two separate rules that prevent dismissal of damages incurred before that date: (1) statutory tolling, and (2) fraudulent concealment. (See 1-800 Contacts' Mot. Dismiss Pls.' Consol. Am. Compl., ECF No. 118 (hereinafter "1-800 Motion") (incorporated by Vision Direct et al. in their motion).)[5]

LEGAL STANDARD

When analyzing a motion to dismiss, the court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." *Thomas v. Kaven, 765 F.3d 1183, 1190 (10th Cir. 2014)* (internal citation and quotation marks omitted). To withstand the motions to dismiss, Plaintiffs need only show that the allegations in the CAC "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

ANTITRUST STANDING

In order to bring a private antitrust claim, the party must have antitrust standing, which consists of "antitrust injury" and a plausible connection between that injury and the alleged violation of the antitrust laws. *Tal v. Hogan, 453 F.3d 1244, 1253 (10th Cir. 2006)*. According to Plaintiffs, they suffered antitrust injury because the advertisement

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[4] Ex. 4 to Decl. of Carl E. Goldfarb, ECF No. 143-4.

[5] All parties filed requests for judicial notice of documents relevant to the statute of limitations issue. (See Pls.' Request for Judicial Notice, ECF No. 144; Vision Direct et al. Request for Judicial Notice, ECF No. 117; 1-800 Contacts' Request for Judicial Notice, ECF No. 120.) Judicially-noticed "documents may only be considered to show their contents, not to prove the truth of the matters asserted therein." *Tal v. Hogan, 453 F.3d 1244, 1264-65 n.24 (10th Cir. 2006)*. The court will only consider those documents when analyzing the statute of limitations question of whether, or when, Plaintiffs were on notice of their claims against Defendants.

restrictions **[*10]** deprived them of truthful information and caused them to pay artificially inflated prices online. Defendants contend that the alleged connection between their injury and Defendants' agreements, as well as the economic theory underlying the antitrust claims, are flawed.

Courts typically consider six non-exclusive factors when analyzing whether a plaintiff has antitrust standing. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* (AGC). These AGC factors include:

> (1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the defendant's intent or motivation; (3) the nature of the plaintiff's injury—i.e., whether it is one intended to be redressed by the antitrust laws; (4) the directness or the indirectness of the connection between the plaintiff's injury and the market restraint resulting from the alleged antitrust violation; (5) the speculative nature of the damages sought; and (6) the risk of duplicative recoveries or complex damages apportionment.

Sharp v. United Airlines, Inc., 967 F.2d 404, 406-07 (10th Cir. 1992) (noting that the AGC factors are not "black-letter rules" but rather guidelines for analysis).

Defendants focus on causation, the nature of the injury, and the remoteness of that injury to the alleged anti-competitive behavior. They say that "Plaintiffs fail **[*11]** to allege any facts at all showing how these narrowly tailored advertising agreements caused them to pay higher prices for contact lenses than they would have but for the existence of these agreements" and that "Plaintiffs' harm (overcharges on contact lenses purchased online) is too far removed from the alleged anticompetitive conduct (restrictions on bidding for certain online advertising keywords relating to contact lenses)." (Vision Direct Mot. at 12, 15.)

Causation and Nature of the Injury

In response, Plaintiffs say that their injury—a financial loss stemming from a "competition-reducing aspect or effect"[6] of the settlement agreements—is carefully alleged in the CAC. (See Opp'n at 5-6.) This financial injury, they assert, is the "epitome of 'antitrust injury'" and is "precisely the type of injury that is likely to result from defendants' advertising restrictions: higher search costs and higher prices." (Id. at 6-7.) The court agrees.

Plaintiffs back up their theory of causation with multiple allegations in the CAC. According to Plaintiffs, Defendants (who together control "approximately 80% of the online retail market for contact lens sales") "committed not to compete against one **[*12]** another in certain critical online advertising, thereby suppressing competition and inflating the amount consumers paid for the online purchase of contact lenses from Defendants." (CAC ¶ 2.) Their allegations link the agreements to higher prices. Plaintiffs identify the agreements and the key provisions, explain how the agreements work, and explain that, under their theory, they paid overcharges and were deprived of "the total amount of truthful information about sellers of contact lenses online and about the prices of contact lenses sold online." (Id. ¶ 75; see also id. ¶¶ 1-13, 51, 58-74.)

And, in their opposition brief, Plaintiffs elaborate on the connection between the alleged injury and the agreements.

> By suppressing one of the primary ways in which they compete [i.e., online advertising], defendants purposefully made it more difficult to communicate their goods and services to consumers. This, in turn, made it less likely for defendants to compete on price, thereby stabilizing prices, diminishing competition, and causing harm to consumers.

(Opp'n at 9.)

Defendants say that Plaintiffs' CAC is inadequate in part because it does not lay out, for example, prices and discounts offered **[*13]** by the online retailers, and because Plaintiffs' vague theory is "economically flawed on its

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[6] *Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*, quoted in *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1124-25 (10th Cir. 2005)*.

face." (Vision Direct Mot. at 3.) But Defendants ask Plaintiffs to provide an economic analysis that requires specific data and expert testimony. That is too much to expect of Plaintiffs at this stage. "The facts necessary to show 'antitrust injury' are often very complex," and Plaintiffs should not be required to provide an expert affidavit setting out Plaintiffs' economic theory at the motion-to-dismiss stage. See, e.g., *Davis v. Southern Bel Tel. & Tel. Co., 755 F. Supp. 1532, 1536, 1536-37 (S.D. Fla. 1991)* (rejecting argument in motion to dismiss based on plaintiffs' failure to provide a detailed economic analysis).

In addition to the CAC allegations, case law addressing advertising restrictions provides some support to Plaintiffs' argument that their theory (i.e., Defendants' advertising restrictions (even partial ones) resulted in higher search costs and higher prices for contact lenses purchased online) is plausible. In *Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)*, the United States Supreme Court noted that a restriction "on advertising serves to increase the difficulty of discovering the lowest cost seller of acceptable ability. As a result, to this extent [the advertisers] are isolated from competition, and the **[*14]** incentive to price competitively is reduced." *Id. at 377*. See also *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 773, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)* ("[R]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price."); *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992)* (finding that "restrictions on fare advertising have the forbidden effect upon fares"); *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461-62, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purposes of determining whether a particular purpose is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market . . . ."); *Realcomp II, Ltd. v. FTC, 635 F.3d 815, 830 (6th Cir. 2011)* (finding that even partial advertising restrictions in an agreement among real estate brokers to restrict internet advertising were anticompetitive).

Remoteness of the Harm

Defendants further contend that the alleged injury is too remote. According to Defendants, the Plaintiffs allege a "downstream effect on contact lens pricing" which is too far removed from the alleged anticompetitive agreements. (Vision Direct Mot. at 17.) But Plaintiffs purchased the contact lenses directly from Defendants in the market that was allegedly restrained.[7] That is sufficient to avoid dismissal. See, e.g., **[*15]** *Reiter v. Sonotone Corp., 442 U.S. 330, 342, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979)* ("where petitioner alleges a wrongful deprivation of her money because the price of the hearing aid she bought was artificially inflated by reason of respondents' anticompetitive conduct," she has alleged an antitrust injury); *McCready v. Blue Shield of Va., 649 F.2d 228, 231 (4th Cir. 1981)* (rejecting contention that patient's injury was too remote, because although alleged anticompetitive conduct was directed at psychologists, both patient and psychologists were "in the target area"); see also *Trans World Airlines, 504 U.S. at 388-89* (holding that restrictions on airfare advertising directly affected airfare prices paid by consumers).

For the reasons set forth above, the court finds that Plaintiffs have sufficiently alleged that they suffered an antitrust injury as a result of Defendants' settlement agreements.

RELEVANT PRODUCT MARKET

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[7] Defendants cite to *Lorenzo v. Qualcomm Inc., 603 F. Supp. 2d 1291 (S.D. Cal. 2009)*, and *Feitelson v. Google Inc., 80 F. Supp. 3d 1019 (N.D. Cal. 2015)*, to support their argument that Plaintiffs' injury is too remote from the advertising practices alleged. Those cases are distinguishable because the consumers in those cases were indirect purchasers who did not participate in the markets being restrained. See *Qualcomm, 603 F. Supp. 2d at 1299* (consumers "alleged injury at least three levels removed from any alleged misconduct by Qualcomm."); *Google, 80 F. Supp. 3d at 1028* (finding alleged injury too remote because there was a series of supply chain levels between the defendants alleged to have engaged in anticompetitive conduct and the end consumers).

Under *§ 1* of the Sherman Act, Plaintiffs must allege that the agreements unreasonably restrain trade in the "relevant market." *TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1027 (10th Cir. 1992)*. The relevant market has two components: a relevant geographic market and a relevant product market.

Here, the Defendants target the Plaintiffs' definition of the relevant product market, which Plaintiffs define as the online market for retail sales of contact lenses. According to Plaintiffs, "[b]ecause of the ease of purchasing **[*16]** contacts without going to a physical store, the retail market for contact lenses sold to customers at physical locations (e.g., brick-and-mortar stores and sales by eye care professionals) exists separately from, is not an adequate substitute for, and does not restrain prices in the online market for the sale of contact lenses." (CAC ¶ 39.) Defendants respond that the relevant product market must include the off-line market for retail sales of contact lenses (i.e., contact lenses sold by eye care providers and "brick and mortar" businesses such as Costco and Walmart who sell the very same product provided by online sellers).

According to Defendants, the online market proposed by Plaintiffs is too narrow because the products sold by the online and offline market are identical and, further, that Plaintiffs' "bald allegations" fail to establish "that offline sales do not restrain online prices and that online sellers would profitably impose a small but significant nontransitory price increase [the SSNIP analysis used in the "hypothetical monopolist test" applied by economists]." (Reply Br. of Vision Direct, Inc., Walgreens Boots Alliance, Inc., Walgreen Co., and Luxottica Retail N. Am. **[*17]** Inc. (hereinafter "Vision Direct Reply") at 10, ECF No. 148.) They point out that the "Plaintiffs do not set forth any facts that establish contact lens prices, let along identify the amount online retailers supposedly discount as compared to offline retailers." Accordingly, they argue, the CAC must be dismissed because it "provides no factual basis to infer that online prices would remain below offline prices if online sellers increased their prices." (Id. at 11.)

Typically, determination of the relevant product market is fact-intensive and not suitable for resolution at the motion-to-dismiss stage. "It is well settled that defining the relevant market is an issue of fact." *Telecor Communs., Inc. v. Southwestern Bell Tel. Co., 305 F.3d 1124, 1131 (10th Cir. 2002)*; see also, e.g., *Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 482, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)* ("The proper market definition in [an antitrust case] can be determined only after a factual inquiry into the 'commercial realities' faced by consumers.") (quoting *United States v. Grinnell Corp., 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*; *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1120 (10th Cir. 2014)* (noting that the definition of a relevant product market "involves an issue of fact."); *Todd v. Exxon Corp., 275 F.3d 191, 199-200 (2d Cir. 2001)* ("Because market definition is a deeply fact-intensive inquiry, courts hesitate to grant motions to dismiss for failure to plead a relevant product market.").

In limited circumstances, courts have dismissed complaints for failure to allege a relevant product **[*18]** market. In particular, courts have dismissed antitrust claims when the market definition was, on the face of the complaint, legally inadequate[8] or when the plaintiff made no attempt to allege facts applying the requisite interchangeability test announced in *Brown Shoe Co. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*.[9] But, as discussed below, the CAC does not suffer from either of those inadequacies.

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[8] See, e.g., *Campfield v. State Farm Mut. Auto. Ins. Co., 532 F.3d 1111, 1118-19 (10th Cir. 2008)* (the alleged product market was "inadequately pled because [the alleged conspiring defendants were] not competitors, and therefore [could not] engage in a per se illegal, horizontal restraint of trade."); *TV Commc'ns Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1025 (10th Cir. 1992)* ("[A] company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product. Consequently, [the plaintiff] has not alleged a relevant market which [the defendant] is capable of monopolizing in violation of the antitrust laws.") (internal citations omitted); *U.S. Gen., Inc. v. Draper City, No. 2:05-cv-917-TS, 2006 U.S. Dist. LEXIS 41598, 2006 WL 1594184, at *3 (D. Utah June 7, 2006)* (citing TV Commc'ns Network, and dismissing complaint because plaintiff too narrowly defined the relevant product market as a "single [real estate] development on Traverse Mountain.").

[9] See, e.g., *Total Renal Care, Inc. v. Western Nephrology & Metabolic Bone Disease, P.C., No. 08-cv-513-CMA-KMT, 2009 U.S. Dist. LEXIS 80821, 2009 WL 2596493, at *7 (D. Colo. Aug. 21, 2009)* (dismissing complaint because there was only a "cursory mention of a relevant product and geographic market"); *Commercial Data Servers, Inc. v. IBM Corp., 166 F. Supp. 2d 891, 897 (S.D.N.Y. 2001)* (dismissing complaint that failed to allege any facts or explanation supporting the proposed market); *B.V.*

To begin the analysis of the proposed relevant product market, courts focus on "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Id. at 325*. But while this general test defines the "outer boundaries of a product market," the United States Supreme Court explained that, "within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id. at 324-25*. Then, after considering reasonable interchangeability, courts apply the "hypothetical monopolist test."

Reasonably Interchangeable Products

The first step—reviewing the "reasonable interchangeability" of the product at issue (i.e., whether **[*19]** the product has a reasonably good substitute)—is easily determined here. There is no dispute that the products—the contact lenses—are "functionally interchangeable." Indeed, they are identical. See *FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997)* (finding functional interchangeability because office supplies sold by online and offline companies were identical).

But that does not end the analysis. "Courts will generally include functionally interchangeable products in the same product market unless factors *other than* use indicate that they are not actually part of the same market." *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C. 2004)* (underline emphasis added; italics emphasis in original). Here, Plaintiffs allege "factors other than use," as discussed below, to allege a "submarket" for the online sale of contact lenses.

Hypothetical Monopolist Test and *Brown Shoe* Practical Indicia

At the second step, courts focus on "how far buyers will go to substitute one commodity for another" and "'the responsiveness of the sales of one product to price changes of the other.'" *Staples, 970 F. Supp. at 1074* (citing and quoting *United States v. E. I. Du Pont de Nemours & Co., 351 U.S. 377, 400, 76 S. Ct. 994, 100 L. Ed. 1264 (1956))*. The courts determine this "cross-elasticity of demand" using the "SSNIP" analysis (i.e., whether the plaintiff has alleged that a small but significant (i.e., profitable) non-transitory (lasting or permanent) **[*20]** increase in price by the online retailers would not result in a material loss of online customers to the offline retailers).[10]

Courts generally look "to two main types of evidence in defining the relevant product market: the 'practical indicia' set forth by the Supreme Court in Brown Shoe and testimony from experts in the field of economics." *FTC v. Sysco Corp., 113 F. Supp. 3d 1, 27 (D.D.C. 2015)*. But in a complaint, providing economic expert testimony is neither practical nor required (particularly when key data is in the defendants' possession). Accordingly, Plaintiffs necessarily focus on the Brown Shoe indicia to demonstrate that their relevant product market definition is plausible.[11] See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218, 253 U.S. App. D.C.*

Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp 162, 171-72 (S.D.N.Y. 1995) ("Because a relevant market includes all products which are reasonably interchangeable, [p]laintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal.") (internal citations and quotation marks omitted).

[10] Generally speaking, if cross-elasticity of demand is low, the products are not substitutes and do not compete in the same market. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 762 F.3d 1114, 1120 (10th Cir. 2014)* ("A relevant product market excludes products with low or zero cross-elasticity of demand.").

[11] Defendants fault the Plaintiffs' reliance on the Brown Shoe indicia. "Unable to provide any factual allegations that support a traditional economic analysis, Plaintiffs turn to the Brown Shoe 'practical indicia.' But merely ticking off a handful of Brown Shoe factors is meaningless if those factors have no bearing on consumers' likely response to an increase in price." (Vision Direct Reply at 11 (internal citation omitted).) Significantly, the two cases Defendants cite to support their statement are, at a minimum, procedurally distinguishable because the courts were reviewing motions for summary judgment. See *Reifert v. S. Cent. Wis. MLS Corp., 450 F.3d 312, 320 (7th Cir. 2006)* (holding that although Brown Shoe indicia were "important considerations, . . . they were never intended to exclude economic analysis altogether" and granting summary judgment because plaintiff provided

142 (D.C. Cir. 1986) (identifying Brown Shoe indicia as "evidentiary proxies" for proof of low cross-elasticity); Sysco Corp., 113 F. Supp. 3d at 27 (same).

The Brown Shoe indicia include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Brown Shoe, 370 U.S. at 325. Applying those indicia, Plaintiffs assert that "[o]nline markets for consumer goods have long been considered to require **[*21]** unique pricing, sales models, strategies, advertising methods, and distribution channels." (Opp'n at 20.)

Plaintiffs allege that retailers of optical products recognize the online market as a separate economic entity. Given that "economic actors usually have accurate perceptions of economic realities,"[12] Plaintiffs' allegations suggest a distinct online market. According to the CAC, the relevant economic actors (1-800 and the other defendants) view their primary competition as online retailers. (CAC ¶ 44 (alleging that Defendants focus primarily on their online-retailer competition when setting price and developing customer-service offerings).) And online retailers tailor their advertisements to the online customer, relying "heavily on search engine advertising" and competing for search-engine advertising space. (Id. ¶ 45.)

Pricing and customer service offerings are tailored as well. Online prices are materially lower than the offline retailer prices. (Id. ¶¶ 42-43.) Furthermore, "[o]nline retailers' ability to offer a unique combination of selection, depth and breadth of inventory and delivery speed" distinguishes them from offline retailers and appeals to online customers. (Opp'n at **[*22]** 22.) Plaintiffs describe the online retailers as specialized vendors who "are able to sell contact lenses anywhere in the United States that receives mail. . . . [and can] provide consumers the convenience of being able to order contacts from any location without having to find a brick-and-mortar store selling the type of contact lenses covered by their prescription." (CAC ¶ 41.) Additionally, Plaintiffs allege that offline retailers are not able to carry the extensive inventory offered by online retailers: "Online retailers frequently maintain a large volume of inventory across various manufacturers and brands, a fulfillment center, a customer service center, and a scale of operations to develop new customer retention tools. This allows online retailers to fulfill and ship prescriptions rapidly, unlike many brick-and-mortar retailers." (Id. ¶ 42.)

As for price sensitivity, Plaintiffs allege that "[o]line sellers of contact lenses could impose a small but significant and non-transitory increase in price without losing so many sales to brick-and-mortar stores to make the price increase not profitable." (Id. ¶ 40.) Although this is simply a recitation of the economic SSNIP test, the court **[*23]** may not expect anything more from Plaintiffs short of an economic analysis, which is not suitable in a complaint.

To supplement their allegations, Plaintiffs point to similar cases. In those situations, courts defined the relevant product market as a subset of competitors (i.e., specialized vendors) who, like the broader group of competitors, sold the very same product.

In FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), the FTC challenged the proposed merger of office superstores Staples and Office Depot. There, the defendants argued that the market consisted of all retailers of office supplies (i.e., office superstores as well as "non-superstore alternatives such as Wal-Mart, Best Buy, Quill, or Viking"). Id. at 1074. The court disagreed. Although the court noted that "the products in question [i.e., office supplies] are undeniably the same no matter who sells them," it held that the "sale of consumable office supplies through office superstores" was the relevant product market. Id. at 1080. "[T]he mere fact that a firm may be termed a competitor in the overall marketplace does not necessarily require that it be included in the relevant product market for antitrust purposes." Id. at 1075. And although distinct pricing was a significant factor in the court's decision **[*24]** (something the court was able to determine after an evidentiary hearing filled with data and expert analyses), the court found other distinguishing factors significant as well. After comparing the different types of retail

no expert analysis); Ky. Speedway, LLC v. NASCAR, Inc., 588 F.3d 908, 919 (6th Cir. 2009) (granting summary judgment because plaintiff provided no expert testimony to define the relevant market). Defendants essentially ask the court to apply the more stringent summary-judgment standard to their motion to dismiss.

[12] ***FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1048 (D.C. Cir. 2008)***.

formats, the court found that the "high volume, discount office supply chain stores "are, in fact, very different in appearance, physical size, format, the number and variety of SKU's offered [over 5,000 SKU's], and the type of customers targeted and served . . . ." *Id. at 1078*. The court further noted that although "Staples and Office Depot do not ignore sellers such as warehouse clubs, Best Buy, or Wal-Mart, the evidence clearly shows that Staples and Office Depot each consider the other superstores as the primary competition." *Id. at 1079-80*. Here, Plaintiffs' allegations track the decisive factors in *Staples.*

The decision in *FTC v. Whole Foods Market, Inc., 548 F.3d 1028 (D.C. Cir. 2008)*, provides another good example. There, the FTC challenged a proposed merger between Whole Food and Wild Oats, which the court termed "premium, natural, and organic supermarkets" (PNOs). *Id. at 1032*. The court agreed with the FTC that the PNOs made up a submarket. Although the PNOs sold some of the same products that supermarkets sold, the court differentiated them by their **[*25]** intangible "non-product oriented" characteristics such as "higher levels of customer service" and a "'unique environment'" with "a particular focus on the 'core values' [their] customers espoused." *Id. at 1039*. These "factors other than use"[13] placed the PNOs in a submarket for antitrust purposes. As the FTC did in Whole Foods, Plaintiffs distinguish the online retail market by "factors other than use."

Finally, in *FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998)*, the court defined the relevant product market as the wholesale prescription drug industry, despite the fact that the wholesalers sold the same product (prescription drugs) that their competitors (e.g., drug manufacturers, or mail-order companies) sold. The Cardinal Health court focused not on the product (the prescription drugs) but on the services offered to consumers of that product. After asking the question whether "enough customers view other forms of prescription drug delivery methods as acceptable substitutes to the services provided by the [wholesale drug market]," *id. at 46*, the court found no reasonable substitutes for the products and services provided by the wholesale drug industry. According to the court, the industry offered "a 'unique cluster of products and services'" that "comprise[d] **[*26]** a distinct submarket within the larger market of drug delivery." *Id. at 46-47*. Those products and services gave customers "an efficient way to obtain prescription drugs through centralized warehousing, delivery, and billing services[.]" *Id. at 47*.

Here, as was done in *Staples, Whole Foods*, and *Cardinal Health*, Plaintiffs emphasize service-oriented characteristics of online contact lens retailers, the preference of their customers for those services, and the distinct "infrastructure" of the online retailers' business. Referring to online contact lens retailers as "specialized vendors," Plaintiffs assert that "[c]ustomers who shop online prefer the convenience of online shopping, home delivery and low prices. Online retailers' ability to offer a unique combination of selection, depth and breadth of inventory, and delivery speed appeals to these customers." (Opp'n at 22-23 (citing CAC ¶¶ 41-42); see also CAC ¶ 43 ("Pricing for contact lenses sold online typically falls below pricing for contacts sold by eye care professionals.").)

Given the market characteristics set forth in the CAC and the precedent for distinct submarkets of competitors selling identical products, Plaintiffs have plausibly alleged that the **[*27]** relevant product market is the online retail market for contact lenses. In other words, Plaintiffs allege a "theoretically rational explanation" for their market definition. *Commercial Data Servers, Inc. v. IBM Corp., 166 F. Supp. 2d 891, 896 (S.D.N.Y. 2001)*. That is sufficient to avoid dismissal.

CONSPIRACY

Defendants contend that Plaintiffs have not alleged an overarching conspiracy which, they say, is a necessary element of a Sherman Act *§ 1* claim. *Section 1* declares that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce" is illegal. *15 U.S.C. § 1*. A "conspiracy" is only one of three types of concerted

[13] *FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 119 (D.D.C. 2004)*.

actions targeted by the Act.[14] A "contract" in restraint of trade is another. No allegation of an "overarching" conspiracy is necessary.

Here, Plaintiffs allege contracts in restraint of trade. They challenge "a series of bilateral agreements [between 1-800 and] other online sellers of contact lenses . . . ." (Opp'n at 27.) Because Plaintiffs' theory focuses on a series of bilateral horizontal agreements,[15] not an overarching conspiracy, the CAC must allege that each agreement, standing alone, unreasonably restrains trade. The CAC accomplishes that.

According to the CAC, the parties to each contract agreed to terms designed to restrict each other's advertising **[*28]** efforts: "These agreements prohibit the parties from bidding against each other in certain search advertising auctions, and obligate the parties to implement certain negative keywords — thereby precluding certain competitive, truthful, and relevant online advertisement." (CAC ¶ 58; see also, e.g., id. ¶¶ 61, 63, 68, 70, 72.) Plaintiffs then allege that "[e]ach Defendant benefitted from the agreements 1-800 Contacts entered into with other Agreeing Contact Lens Sellers by, among other things, allowing Defendants to charge supracompetitive prices to the detriment of consumers" and depriving Plaintiffs "of truthful information about competing sellers of contact lenses online." (Id. ¶¶ 59, 73.) And, finally, Plaintiffs allege the anticompetitive effects of these agreements. (See, e.g., id. ¶¶ 74-75.)

Contrary to the Defendants' contention, the CAC does allege that each individual agreement causes anticompetitive effects. That satisfies the concerted action requirement.

STATUTE OF LIMITATIONS

A four-year statute of limitations applies to Plaintiffs' claims. *15 U.S.C. § 15b*. Under that statute, Plaintiffs' claims would be limited to purchases made after October 13, 2012 (i.e., four years before the Plaintiffs **[*29]** filed this action on October 13, 2016). But Plaintiffs contend they were on notice of their claims no earlier than August 8, 2016, when the FTC filed its administrative action against 1-800. In other words, they avoid Defendants' statute-of-limitations defense by relying on two tolling exceptions, which would extend recovery of damages as far back as January 1, 2004: (1) equitable tolling under the fraudulent concealment rule, and (2) statutory provision tolling linked to the FTC's administrative action.

A. Tolling based on Fraudulent Concealment

According to the CAC, Defendants' violations of the Sherman Act (and Plaintiffs' subsequent injuries) began in January 2004, at which point the statute of limitations began to run.[16] But Plaintiffs say the statute of limitations was tolled because Defendants concealed the information that gave rise to the antitrust claims "by inserting mandatory, contractual, non-disclosure provisions in the relevant agreements." (Opp'n at 30 (citing CAC ¶ 80).)

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[14] "By its language, *section 1* of the Sherman Act applies to three different types of conduct: contract, combination, or conspiracy. These terms have been interpreted generally to cover concerted action, or agreement by parties to act together." *James R. Snyder Co., Inc. v. Associated Gen. Contractors of Am., Detroit Chapter, Inc., 677 F.2d 1111, 1121 (6th Cir. 1982)*.

[15] "[A]greements between companies that directly compete with one another [are] called 'horizontal' agreements.'" *In re: Disposable Contact Lens Antitrust, 215 F. Supp. 3d 1272, 1287 (M.D. Fla. 2016)*.

[16] See *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* ("Generally, a cause of action [under the federal antitrust acts] accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."); *In re: Animation Workers Antitrust Litig., 87 F. Supp. 3d 1195, 1209-10 (N.D. Cal. 2015)* (antitrust claims begin to accrue (and the statute begins to run) when the injury occurs, not when plaintiffs should have discovered their injuries) (citing cases, including *Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer, 764 F.3d 1268, 1275-76 (10th Cir. 2014))*.

Under this equitable tolling doctrine, Plaintiffs must plead that Defendants used fraudulent means to successfully conceal relevant information from consumers, and that Plaintiffs did not know or through **[*30]** the exercise of due diligence could not have known that they might have a cause of action. *King & King Enters. v. Champlin Petroleum, 657 F.2d 1147, 1154 (10th Cir. 1981)*. Because this tolling rule is fraud-based, the *Rule 9(b)* pleading standard applies. *In re: Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d 181, 192 (S.D.N.Y. 2000)*. "At a minimum, *Rule 9(b)* requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud.'" *US ex rel. Sikkanga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 727 (10th Cir. 2006)* (internal citations and quotation marks omitted).

The question of whether the claims were fraudulently concealed is typically factual and not amenable to resolution on a motion to dismiss.

> As many courts have noted in the antitrust conspiracy context, it is generally inappropriate to resolve the fact-intensive allegations of fraudulent concealment at the motion to dismiss stage, particularly where the proof relating to the extent of the fraudulent concealment is alleged to be largely in the hands of the alleged conspirators.

In re: Rubber Chems. Antitrust Litig., 504 F. Supp. 2d at 789; see also *In re Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 373 (D.N.J. 2001)* ("any serious consideration of [reasonable diligence in a fraudulent concealment analysis] would take the Court well outside the boundaries of pleading").

1. Fraudulent Means

"[A]ny affirmative act of concealment, including those involved in the underlying violation, is sufficient" to satisfy the first element. *SEC v. Kovzan, 807 F. Supp. 2d 1024, 1035 (D. Kan. 2011)*. To support this element, Plaintiffs allege that

> [a]t various times **[*31]** between 2004 and 2013, 1-800 Contacts and the other Agreeing Contact Lens Sellers entered into a series of non-public, bilateral, written agreements under which each party to the particular agreement committed to cease using or to refrain from using certain keywords for online advertising. These ongoing agreements were all kept secret from consumers, with their secrecy enforced by non-disclosure provisions in the agreements.

(CAC ¶ 12.)

Plaintiffs assert that Defendants' non-disclosure provisions are affirmative acts to conceal the true nature and anti-competitive effect of the settlement agreements. In the CAC, they quote specific nondisclosure provisions in the Defendants' settlement agreements. (See Opp'n at 30-31 (quoting CAC ¶¶ 66-72).) Then they add the allegation that 1-800 "entered into 'substantially, similar written agreements'" with other non-parties. (Id. at 31 (citing CAC ¶ 56 (listing contracting parties and dates of agreements).)

1-800 and Vision Direct entered into two settlement agreements, one in 2004 and one in 2009, and both contain non-disclosure language. The 2004 Agreement contained the following limitation on disclosure:

> The Parties will mutually agree on press releases **[*32]** and/or public statements regarding this Agreement ("the mutually agreed PR"). Neither Party will deviate from the mutually agreed PR without the prior written consent of the other Party, which consent will not be unreasonably withheld.

(CAC ¶ 66.) The second agreement between 1-800 and Vision Direct, dated 2009, contains a similar non-disclosure provision:

> In the event that any Party wishes to issue a press release regarding this Settlement Agreement, then the Parties will jointly agree on the language of such press release.

(May 2009 Agreement ¶ 20, ECF No. 117-2 (attached to Vision Direct's Request for Judicial Notice, ECF No. 117).)

Following the settlements between 1-800 and Vision Direct, 1-800 entered into a settlement agreement with AC Lens. In that March 2010 Agreement, the parties agreed

> to generally keep this Agreement confidential. The parties will mutually agree on any press releases and/or public statements regarding this Agreement ("the mutually agreed PR"). Neither Party will deviate from the mutually agreed PR without the prior written consent of the other Party, which consent will not be unreasonably withheld.

(CAC ¶ 71.)

And the June 2010 Agreement between 1-800 and Walgreens **[*33]** contains a complete bar:

> NONDISCLOSURE: The terms of this Agreement and the Agreement itself shall be held in confidence and not disclosed by any Party to any third party or any other person or entity without the prior express written consent of the other Party. . . . The Parties agree to provide prompt written notice of any request, demand, subpoena, Order, or any other thing that might require disclosure of the Agreement or any of its terms, such that the other Party shall have as much time as possible to object to or attempt to prevent such disclosure. The Parties shall make no public statements regarding the Agreement or any of its terms. If asked by the media about this Lawsuit, the Parties shall only state that: "The matter has been resolved to the satisfaction of both parties."

(CAC ¶ 69.)

Defendants respond that a non-disclosure agreement is a standard term in settlement agreements and is not an affirmative act to conceal. But the non-disclosure provisions give Defendants a tremendous amount of discretion. The standard for disclosure is "reasonableness" as the parties choose to define it. (And the agreement between 1-800 and Walgreens provides little, if any, room to disclose **[*34]** any information.) What may constitute unreasonably-withheld consent is driven by factors unknown to the Plaintiffs, including motivations for including the non-disclosure provisions in the agreements. Such information is uniquely in the hands of Defendants.

Given that Plaintiffs have alleged agreements to engage in anti-competitive conduct, it is reasonable to infer that a provision requiring the contracting parties to keep the terms of that allegedly anti-competitive agreement private was an affirmative act to conceal. At this stage in the litigation, allegations identifying and quoting the nondisclosure provisions, listing names of the parties to the agreements, and providing dates of those agreements, satisfy the *Rule 9(b)* pleading standard and establish the first element of fraudulent concealment.

2. Successful Concealment

Plaintiffs have satisfied this element as well. They allege they did not have actual knowledge of the settlement agreements, much less the anti-competitive nature and financial harm to consumers such as themselves. And, they assert, as a result of the agreements' nondisclosure provisions, they "were prevented from learning of the facts needed to commence suit against Defendants." **[*35]** (CAC ¶ 80.)

3. Inquiry Notice and Due Diligence Element

Defendants contend that even if Plaintiffs did not have actual knowledge, they are not entitled to tolling because they had constructive knowledge of their potential claims when the settlement agreements or the material terms of those agreements were publicly disclosed. In other words, "Defendants' public disclosures of a number of the agreements in court and SEC filings, as well as other documents in the public record disclosing the facts Plaintiffs now rely upon in their CAC, put Plaintiffs on inquiry notice of their claims." (1-800 Mot. at 15.) Defendants also emphasize the antitrust complaint filed by Lens.com against 1-800 in June 2011.[17] All of that information, they say,

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[17] It appears that a fair amount of the Plaintiffs' complaint is drawn from (or at least tracks) the allegations in the Lens.com complaint, but that case has a significant distinguishing characteristic: it alleges unilateral action by 1-800 and does not name any other parties. At most, Lens.com alleged that "various other persons, firms and corporations, not named as defendants herein and presently unknown to Lens, have participated as co-conspirators with 1-800 . . . ." (Lens.com Compl. ¶ 7, attached as Ex. 21 to Decl. of Ashley D. Kaplan, ECF No. 119.)

would have been adequate to raise Plaintiffs' suspicions about their injuries and prompt a duty to exercise reasonable diligence to uncover their claims.

Plaintiffs respond that even though the settlement agreements or some terms were disclosed in some public settings, including unsealed lawsuits, that did not amount to constructive knowledge because the information was not reasonably accessible to them as consumers, and, even if known, the content would not **[*36]** allow an average consumer to make the analytical leap that he may have paid artificially inflated prices for contact lenses.

Publicly available documents may be sufficient to charge a plaintiff with constructive knowledge. For example, in cases alleging securities fraud, investors had reason to track the companies in which they invested. See, e.g., *Sterlin v. Biomune Sys., 154 F.3d 1191, 1201, 1203 (10th Cir. 1998)* (holding that news article in widely-read investor publication triggered investor's duty to exercise reasonable diligence); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp., 802 F. Supp. 2d 1125, 1139 (C.D. Cal. 2011)* (press reports and earlier-filed lawsuits placed investor on notice because "all the facts had been widely-reported"); *Salinger v. Projectavision, Inc., 934 F. Supp. 1402, 1408 (S.D.N.Y. 1996)* (in securities fraud case, SEC filings and press releases put investors on inquiry notice of the probability of fraud). But see *Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406, 412, 416, 427 (2nd Cir. 2009)* (holding that mainstream press reports, industry newsletters, regulatory filings, and multiple lawsuits did not provide "reasonable investor[s] of ordinary intelligence" with sufficient "storm warnings" of the probability of securities fraud by insurance company because the information was too vague and most of the publicly available information "was not reasonably accessible to the ordinary investor.").

Other cases cited by Defendants are distinguishable on their facts. **[*37]** For instance, the plaintiffs were organizations, significant material facts were revealed, or the information was widely disseminated through press releases, news reports, and multiple complaints. Here, Plaintiffs are individual consumers who had no reason to know about (much less understand) the antitrust implications of the settlement agreements or the disclosed terms. It would be unreasonable to expect a person making one, or even a few, discrete purchases online to research the legal actions and securities regulations involving that retailer, much less apply a complex economic analysis to determine that the prices he paid for their product were artificially inflated. "[O]nly by operation of a legal fiction could the filing of a private lawsuit by an unrelated party in a different vicinage put consumers on notice as a matter of law that [an antitrust] conspiracy was afoot." *In re: Mercedes-Benz Anti-Trust Litig., 157 F. Supp. 2d at 373-74* (a third party's earlier lawsuit did not place car purchasers on constructive notice of antitrust claim, which only became clear when details of alleged price-fixing conspiracy were outlined in *New York Times* article); see also *In re: Nine W. Shoes Antitrust Litig., 80 F. Supp. 2d at 193* (shoe purchasers did not have constructive notice of antitrust claims until national **[*38]** media reported the alleged antitrust conspiracy).

The information provided by Defendants does not convince the court that Plaintiffs would have had ready access to the information, much less any reasonable basis to begin investigating their antitrust claims. Consequently, the Plaintiffs satisfy the final prong of the fraudulent concealment rule.

B. Tolling based on the FTC Action

According to Plaintiffs, the first indication that they paid artificially inflated prices appeared in the FTC's administrative complaint in August 2016. (See Opp'n at 30 ("[A] reasonably diligent investigation would not have led to the discovery of defendants' anticompetitive conduct until the FTC, which had the benefit of pre-complaint discovery, filed its [complaint against 1-800].").) But at that point, the statute was independently tolled by *15 U.S.C. § 16(i)*, as discussed below.

The *Clayton Act* tolls the statute of limitations for private antitrust actions, such as the one brought by Plaintiffs, while a government action is pending and for one year after "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws," provided that the private **[*39]** action is "based in whole or in part on any matter complained of" in the government action. *15 U.S.C. § 16(i)* (emphasis added). Plaintiffs contend that, by operation of that provision, the statute of limitations was tolled when the FTC filed its complaint against 1-800.

Defendants respond that the tolling provision does not apply because "[t]he FTC administrative action was not brought 'to prevent, restrain, or punish violations of any of the antitrust laws. Rather, it was brought under *Section 5 of the FTC Act, 15 U.S.C. § 45*." (1-800 Motion at 11.) Although it is true that the FTC filed its action against 1-800 under *§ 5*, it did so to enforce Sherman Act *§ 1*. Defendants' strained interpretation of *§ 16(i)* is not supported by the statutory language or case law. See *Luria Steel & Trading Corp. v. Ogden Corp., 484 F.2d 1016, 1022 (3d Cir. 1973)* (holding that FTC proceedings under *§ 5* tolled statute of limitations for a private cause of action under Sherman Act *§ 1*); *Rader v. Balfour, 440 F.2d 469, 473 (7th Cir. 1971)* (same); *In re Antibiotic Antitrust Actions, 333 F. Supp. 317, 319-20 (S.D.N.Y. 1971)* (same); see also *In re: Nexium (Esomeprazole) Antitrust Litig., 842 F.3d 34, 60 (1st Cir. 2016)* (citing *FTC Act § 5(a)(2)*, the court said "the FTC is empowered to directly enforce the substantive antitrust laws."); *Realcomp II, Ltd. v. FTC, 635 F.3d 815, 824 (6th Cir. 2011)* (applying Sherman Act cases to determine whether the defendant's actions violated *§ 5 of the FTC Act*).

Given the above, the court holds that Plaintiffs are entitled to rely on the statutory tolling provision.

ORDER

For the foregoing reasons, the court DENIES Defendants **[*40]** Vision Direct, Inc., Walgreens Boots Alliance, Inc., Walgreen Co., and Luxottica Retail North America Inc.'s Motion to Dismiss Plaintiffs' Consolidated Amended Complaint (ECF No. 116) and 1-800 Contacts' Motion to Dismiss Plaintiffs' Consolidated Amended Complaint (ECF No. 118).

DATED this 17th day of May, 2018.

BY THE COURT:

/s/ Tena Campbell

TENA CAMPBELL

U.S. District Court Judge

United States v. W.A. Foote Mem. Hosp.

United States District Court for the Eastern District of Michigan, Southern Division

May 21, 2018, Decided; May 21, 2018, Filed

Case No.: 5:15-cv-12311-JEL-DRG

Reporter
2018 U.S. Dist. LEXIS 96326 *; 2018-1 Trade Cas. (CCH) P80,386

UNITED STATES OF AMERICA and STATE OF MICHIGAN, Plaintiffs, v. W.A. FOOTE MEMORIAL HOSPITAL, D/B/A ALLEGIANCE HEALTH, Defendant.

Prior History: *United States v. Hillsdale Cmty. Health Ctr., 2015 U.S. Dist. LEXIS 162025 (E.D. Mich., Oct. 21, 2015)*

Core Terms

Antitrust, Provider, Compliance, Marketing, Communicate, healthcare, potential violation, employees, notice, provisions, documents, annually

Counsel: **[*1]** For United States, Plaintiff: Andrew Robinson, Garrett Liskey, Jill Maguire, U.S. Department of Justice, Washington, DC USA; Katrina Rouse, United States Department of Justice, Antitrust Division, San Francisco, CA USA.

For Michigan, State of, Plaintiff: Dee J. Pascoe, MI Department of Attorney General, Social Services, Lansing, MI USA; Katrina Rouse, United States Department of Justice, Antitrust Division, San Francisco, CA USA; Mark A. Gabrielse, Department Of Attorney General, Lansing, MI USA.

For W.A. Foote Memorial Hospital, Doing business as Allegiance Health, Defendant: Doron Yitzchaki, Dickinson Wright, Ann Arbor, MI USA; James Michael Burns, Baker Donelson PC, Washington, DC USA.

Judges: JUDITH E. LEVY, United States District Judge. Magistrate Judge David R. Grand.

Opinion by: JUDITH E. LEVY

Opinion

FINAL JUDGMENT

WHEREAS, Plaintiffs, the United States of America and the State of Michigan, filed their joint Complaint on June 25, 2015, alleging that W.A. Foote Memorial Hospital, d/b/a/ Allegiance Health; Hillsdale Community Health Center; Community Health Center of Branch County; and ProMedica Health System, Inc. violated *Section 1 of the Sherman Act, 15 U.S.C. § 1*, and *Section 2 of the Michigan Antitrust Reform Act, MCL 445.772*;

AND WHEREAS, Plaintiffs **[*2]** and W.A. Foote Memorial Hospital, d/b/a Henry Ford Allegiance Health, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, Plaintiffs require Allegiance to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the anticompetitive effects alleged in the Complaint;

AND WHEREAS, Plaintiffs require Allegiance to agree to be bound by the provisions of the Final Judgment pending its approval by the Court;

NOW THEREFORE, before any testimony is taken, without this Final Judgment constituting any evidence against or admission by Allegiance regarding any issue of fact or law, and upon consent of the parties to this action, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. *28 U.S.C. §§ 1331*, *1337(a)*, *1345*, *1367(a)*. The Complaint states a claim upon which relief may be granted against Allegiance under *Section 1 of the Sherman Act, 15 U.S.C. § 1*, and *Section 2 of the Michigan Antitrust Reform Act, MCL 445.772*.

II. DEFINITIONS

As used in this Final Judgment:

A. "Allegiance" means Defendant W.A. Foote Memorial Hospital, d/b/a Henry Ford Allegiance **[*3]** Health, a corporation organized and existing under the laws of the State of Michigan and affiliated with the Henry Ford Health System with headquarters in Detroit, Michigan, (i) its successors and assigns, (ii) all subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures that are controlled by Henry Ford Allegiance Health, and (iii) their directors, officers, managers, agents, and employees.

B. "Agreement" means any contract, arrangement, or understanding, formal or informal, oral or written, between two or more persons.

C. "Communicate" means to discuss, disclose, transfer, disseminate, or exchange information or opinion, formally or informally, directly or indirectly, in any manner.

D. "Communication" means any discussion, disclosure, transfer, dissemination, or exchange of information or opinion.

E. "Joint Provision of Services" means any past, present, or future coordinated delivery of any healthcare services by two or more healthcare providers, including a clinical affiliation, joint venture, management agreement, accountable care organization, clinically integrated network, group purchasing organization, management services organization, or physician hospital **[*4]** organization.

F. "Marketing" means any past, present, or future activities that are involved in making persons aware of the services or products of the hospital or of physicians employed or with privileges at the hospital, including advertising, communications, public relations, provider network development, outreach to employers or physicians, and promotions, such as free health screenings and education.

G. "Marketing Manager" means any company officer or employee at the level of director, or above, with responsibility for or oversight of Marketing.

H. "Person" means any natural person, corporation, firm, company, sole proprietorship, partnership, joint venture, association, institute, governmental unit, or other legal entity.

I. "Provider" means any physician or physician group and any inpatient or outpatient medical facility including hospitals, ambulatory surgical centers, urgent care facilities, and nursing facilities.

III. APPLICABILITY

This Final Judgment applies to Allegiance and all other persons in active concert or participation with Allegiance who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT

A. Allegiance shall not enter **[*5]** into, attempt to enter into, maintain, or enforce any Agreement with any other Provider that:

(1) prohibits or limits Marketing; or

(2) allocates any service, customer, or geographic market or territory between or among Allegiance and any other Provider, unless such Agreement is reasonably necessary for and ancillary to a bona fide Agreement providing for the Joint Provision of Services.

B. Allegiance shall not Communicate with any other Provider about Allegiance's Marketing in its or the Provider's county, except Allegiance may:

(1) Communicate with any Provider about joint Marketing if the Communication is related to the Joint Provision of Services;

(2) Communicate with any Provider about Marketing if the Communication is part of customary due diligence relating to a merger, acquisition, joint venture, investment, or divestiture; or

(3) Market to Providers, including through its physician liaison program.

C. Allegiance shall not exclude or eliminate Hillsdale County from its Marketing or business development opportunities.

V. REQUIRED CONDUCT

A. Within thirty days of entry of this Final Judgment, Allegiance shall hire and appoint an Antitrust Compliance Officer. The Antitrust Compliance Officer **[*6]** may be a current employee of Henry Ford and must be approved by Plaintiffs.

B. Antitrust Compliance Officer shall:

(1) within sixty days of entry of the Final Judgment, furnish a copy of this Final Judgment, the Competitive Impact Statement, and a cover letter that is identical in content to Exhibit 1 to (a) all of Allegiance's Marketing Managers and other employees engaged, in whole or in part, in activities relating to Allegiance's Marketing or business development activities; (b) all direct reports of Allegiance's CEO; and (c) Allegiance's officers and directors (including their Boards of Directors);

(2) within thirty days of any person's succession to any position described in Section V.B.(1) above, furnish a copy of this Final Judgment, the Competitive Impact Statement, and a cover letter that is identical in content to Exhibit 1;

(3) annually brief each person designated in Section V.B.(1) and (2) on the meaning and requirements of this Final Judgment and the antitrust laws;

(4) obtain from each person designated in Section V.B.(1) and (2), within sixty days of that person's receipt of the Final Judgment, a certification that he or she (i) has read and, to the best of his or her ability, **[*7]** understands and agrees to abide by the terms of this Final Judgment; (ii) is not aware of any violation of the Final Judgment that has not already been reported to Allegiance; and (iii) understands that any person's failure to comply with this Final Judgment may result in an enforcement action for civil or criminal contempt of court against Allegiance and/or any person who violates this Final Judgment;

(5) maintain a record of certifications received pursuant to Section V.B.(4);

(6) annually communicate to Allegiance's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

(7) ensure that each person identified in Section V.B.(1) and (2) of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by the Antitrust Compliance Officer or an attorney with relevant experience in the field of ***antitrust law***; and

(8) maintain a log of telephonic, electronic, in-person, and other communications regarding Marketing with any Officers or Directors of any **[*8]** healthcare system Provider and make it available to Plaintiffs for inspection upon either Plaintiff's request.

(9) provide to Plaintiffs annually, on or before the anniversary of the effective date of this order, a written statement affirming Allegiance's compliance with Section V of this order, and including the training or instructional materials used or supplied by Allegiance or Henry Ford in connection with the training as required by Section V.B.(7).

C. Allegiance shall:

(1) upon learning of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, promptly take appropriate action to terminate or modify the activity so as to comply with this Final Judgment and maintain all documents related to any violation or potential violation of this Final Judgment;

(2) upon learning of any violation or potential violation of any of the terms and conditions contained in this Final Judgment, within thirty days of its becoming known, file with each Plaintiff a statement describing any violation or potential violation, and any steps taken in response to the violation, which statement shall include a description of any communication constituting the **[*9]** violation or potential violation, including the date and place of the communication, the persons involved, and the subject matter of the communication; and

(3) certify to each Plaintiff annually on the anniversary date of the entry of this Final Judgment that Allegiance has complied with the provisions of this Final Judgment.

VI. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time authorized representatives of the United States Department of Justice or the Office of the Michigan Attorney General, including consultants and other retained persons, shall, upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or of the Office of the Michigan Attorney General, and on reasonable notice to Allegiance, be permitted:

(1) access during Allegiance's office hours to inspect and copy, or at the option of the United States or the State of Michigan, to require Allegiance to provide hard copy or electronic copies of, all books, ledgers, **[*10]** accounts, records, data, and documents in the possession, custody, or control of Allegiance, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Allegiance's officers, directors, employees, or agents, who may have individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Allegiance.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or of the Office of the Michigan Attorney General, Allegiance shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States or the State of Michigan to any person other than an authorized representative of the executive branch of the United States or the State of Michigan, except in the course of legal proceedings to which the United States or the State of Michigan is a party **[*11]** (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Allegiance to the United States or the State of Michigan, Allegiance represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under *Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure*, and Allegiance marks each pertinent page of such material, "Subject to claim of protection under *Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure*," then the United States and the State of Michigan shall give Allegiance ten calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

VII. INVESTIGATION FEES AND COSTS

Allegiance shall pay to the United States the sum of $5,000.00 for pre-trial litigation costs and the State of Michigan the sum of $35,000.00 to partially cover transcripts and related litigation costs.

VIII. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time prior to the expiration of this Final Judgment for further orders and directions as may be necessary or appropriate to carry out **[*12]** or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

IX. ENFORCEMENT OF FINAL JUDGMENT

A. Plaintiffs retain and reserve all rights to enforce the provisions of this Final Judgment, including their right to seek an order of contempt from this Court. Allegiance agrees that in any civil contempt action, any motion to show cause, or any similar action brought by Plaintiffs regarding an alleged violation of this Final Judgment, Plaintiffs may establish a violation of the Final Judgment and the appropriateness of any remedy therefor by a preponderance of the evidence, and Allegiance waives any argument that a different standard of proof should apply.

B. In any enforcement proceeding in which the Court finds that Allegiance has violated this Final Judgment, Plaintiffs may apply for a one-time extension of this Final Judgment, together with such other relief as may be appropriate. Allegiance agrees to reimburse the Plaintiffs for any attorneys' fees, experts' fees, and costs incurred in connection with any effort to enforce this Final Judgment.

X. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this **[*13]** Final Judgment shall expire five years from the date of its entry.

XI. NOTICE

For purposes of this Final Judgment, any notice or other communication required to be filed with or provided to the United States or the State of Michigan shall be sent to the persons at the addresses set forth below (or such other address as the United States or the State of Michigan may specify in writing to Allegiance):

Chief
Healthcare & Consumer Products Section

U.S. Department of Justice
Antitrust Division
450 Fifth Street, Suite 4100
Washington, DC 20530
Division Chief
Corporate Oversight Division
Michigan Department of Attorney General
525 West Ottawa Street
P.O. Box 30755
Lansing, MI 48909

XII. PUBLIC INTEREST DETERMINATION

The parties, as required, have complied with the procedures of the Antitrust Procedures and Penalties Act, *15 U.S.C. § 16*, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon, and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Dated: **[*14]** May 21, 2018

Ann Arbor, MI

/s/ Judith E. Levy

JUDITH E. LEVY

United States District Judge

Exhibit 1

[Letterhead of Allegiance]

[Name and Address of Antitrust Compliance Officer]

Dear [XX]:

I am providing you this notice to make sure you are aware of a court order recently entered by the Honorable Judith E. Levy, a federal judge in Ann Arbor, Michigan. This court order applies to our institution and all of its employees, including you, so it is important that you understand the obligations it imposes on us. Ms. Georgia Fojtasek has asked me to let each of you know that they expect you to take these obligations seriously and abide by them.

In a nutshell, the order prohibits us from agreeing with other healthcare providers, including hospitals and physicians, to limit marketing or to divide any geographic market, territory, customers, or services between healthcare providers. This means you cannot give any assurance to another healthcare provider that Henry Ford Allegiance Health will refrain from marketing our services, and you cannot ask for any assurance from them that they will refrain from marketing. The court order also prohibits communicating with any health care system provider, or their **[*15]** employees about our marketing plans or about their marketing plans. There are limited exceptions to this restriction on communications, such as discussing joint projects, but you should check with me before relying on those exceptions.

A copy of the court order is attached. Please read it carefully and familiarize yourself with its terms. The order, rather than the above description, is controlling. If you have any questions about the order or how it affects your activities, please contact me. Thank you for your cooperation.

Sincerely,

[Allegiance's Antitrust Compliance Officer]

Conn. Ironworkers Employers' Ass'n v. New Eng. Reg'l Council of Carpenters

United States District Court for the District of Connecticut

May 23, 2018, Decided; May 23, 2018, Filed

No. 3:10-cv-00165 (SRU)

Reporter

324 F. Supp. 3d 293 *; 2018 U.S. Dist. LEXIS 86430 **; 2018-1 Trade Cas. (CCH) P80,392; 2018 WL 2337126

CONNECTICUT IRONWORKERS EMPLOYERS' ASSOCIATION, et al., Plaintiffs, v. NEW ENGLAND REGIONAL COUNCIL OF CARPENTERS, Defendant.

Subsequent History: Appeal terminated, 10/02/2018

Prior History: *Conn. Ironworkers Emplrs. Ass'n v. New Eng. Reg'l Council of Carpenters, 869 F.3d 92, 2017 U.S. App. LEXIS 16142 (2d Cir., Aug. 23, 2017)*

Core Terms

Ironworkers, Carpenters, clauses, rule of reason, antitrust, horizontal, anti trust law, vertical, subcontracting, competitors, exemption, non-statutory, prices, summary judgment, boycott, adverse effect, group boycott, anticompetitive, contractors, per se rule, analyzed, summary judgment motion, relevant market, distributors, bargaining, nonmoving, market power, Sherman Act, associations, Electrical

Counsel: [1]** For Connecticut Ironworkers Employers Assoc Inc, CT corp & assoc of employers, Associated Sheet Metal & Roofing Contractors of CT Inc, CT corp & assoc of employers, MRS Ent Inc, CT corp, Barrett Inc, CT corp, Ernest Peterson Inc, CT corp, Berlin Steel Construction Co., CT corp, Plaintiffs: George J. Kelly, Jr., LEAD ATTORNEY, Siegel, O'Connor, O'Donnell & Beck , P.C.- Htfd, Hartford, CT; Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Richard D. O'Connor, LEAD ATTORNEY, Siegel, O'Connor, Zangari, O'Donnell & Beck, Hartford, CT; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Hartnett Gladney Hetterman, LLC, St. Louis, MO.

For Iron Workers Local No 15, Intl Assoc of Bridge, Structural, Ornamental & Reinforcing, unincorporated assoc , labor organization, Iron Workers Local 37, Intl Assoc of Bridge, Structural, Ornamental & Reinforcing, unincorporated , labor organization, Iron Workers Local 424, Intl assoc of bridge, structural, ornamental & reinforcing, unincorporated labor organization, Sheet Metal Workers Local 38, Unincorporated assoc & labor organization, Sheet Metal Workers' Local No 40, Unincorporated assoc & labor organization, International Union of Painters **[**2]** & Allied Trades District Council 11, AFL-CIO, CLC,unincorporated assoc & labor organization, Intl Union of Painters, Allied Trades Local Unions,Glaziers Local Union Nos 1333 & 1274, Glaziers Union No 1333, Uninc assoc & labor organization, Glaziers Union Local No 1274, Uninc assoc & labor organization, Plaintiffs: Paul C Hetterman, LEAD ATTORNEY, Bartley Goffstein, LLC, St. Louis, MO; Ronald C. Gladney, LEAD ATTORNEY, PRO HAC VICE, Hartnett Gladney Hetterman, LLC, St. Louis, MO; Thomas W. Meiklejohn, LEAD ATTORNEY, Livingston, Adler, Pulda, Meiklejohn & Kelly, Hartford, CT.

For New England Regional Council of Carpenters, Defendant: Bruce D. Sokler, LEAD ATTORNEY, PRO HAC VICE, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo-DC, Washington, DC; Christopher N. Souris, LEAD ATTORNEY, Krakow & Souris, LLC-MA, Boston, MA; Daniel M. Shanley, Desmond C. Lee, John T. DeCarlo, Sook Y. Won, LEAD ATTORNEYS, PRO HAC VICE, DeCarlo & Shanley, APC, Los Angeles, CA; Keith P. Carroll, LEAD

ATTORNEY, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, PC-Boston-MA, Boston, MA; Kevin M. McGinty, Lisa F. Glahn, LEAD ATTORNEYS, PRO HAC VICE, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.-MA, Boston, MA.

Judges: Stefan R. **[**3]** Underhill, United States District Judge.

Opinion by: Stefan R. Underhill

Opinion

[*296] **RULING AND ORDER**

This case involves a "turf battle" between two sets of construction organizations. The defendant, New England Regional Council of Carpenters (the **[*297]** "Carpenters"), has entered into collective bargaining agreements ("CBAs") with non-party construction companies and construction managers (collectively, the "employers"). The agreements contain restrictive subcontracting clauses (sometimes known as "hot cargo" clauses, but which I call the "CBA clauses") that prohibit signatories from subcontracting work to any employer that has not acceded to a Carpenters' CBA. The plaintiffs—construction trade unions,[1] contractors,[2] and trade associations[3] (collectively, the "Ironworkers")[4]—allege that the Carpenters have used the CBA clauses to expand the scope of their work by preventing the Ironworkers from bidding on and performing work that traditionally was assigned to the Ironworkers. According to the complaint, that conduct constitutes anticompetitive behavior, in violation of *sections 1* and *2 of the Sherman Act*, *15 U.S.C. §§ 1* & *2*, and unfair labor practices, in violation of *29 U.S.C. § 187*.

I previously granted summary judgment for the Carpenters, *see* *Conn. Ironworkers Emp'rs Ass'n v. New Eng. Reg'l Council of Carpenters, 157 F. Supp. 3d 173, 175 (D. Conn. 2016)* ("*Ironworkers* ***[**4]*** *I*"), after I concluded that the Carpenters' conduct was shielded from antitrust scrutiny by both the non-statutory exemption to the antitrust laws and the construction industry proviso contained in *Section 8(e) of the National Labor Relations Act* ("NLRA"), *29 U.S.C. § 158(e)*. On appeal by the Ironworkers, the Second Circuit agreed that the Carpenters' actions fell within the construction industry proviso, and affirmed with respect to the unfair labor practices claim. *See* *Conn. Ironworkers Emplrs. Ass'n v. New Eng. Reg'l Council of Carpenters, 869 F.3d 92, 96-97 (2d Cir. 2017)* ("*Ironworkers II*"). The Court concluded, however, that "there are factual disputes that preclude a decision on whether the conduct falls within the non-statutory exemption," and reversed with respect to the Ironworkers' *Sherman Act* claim. *Id.* The Court remanded "for further proceedings consistent with this opinion, including for such additional discovery as will permit the District Court to be informed of the relevant history and permit the parties to move for summary judgment or, if necessary, to proceed to trial." *Id. at 97*.

Following the remand, and before allowing additional discovery, I scheduled a new argument on the undecided issue raised by the Carpenters' previously-briefed motion for summary judgment. After examining the parties' submissions, **[**5]** I conclude that the Ironworkers have failed to provide evidentiary support for the actual adverse

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[1] International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers Locals Nos. 15, 37, and 424 (the "Iron Workers"); Sheet Metal Workers Locals Nos. 38 and 40 (the "Sheet Metal Workers"); and Glaziers Locals Nos. 1274 and 1333 affiliated with District Council 11 of the International Union of Painters & Allied Trades, AFL-CIO (the "Glaziers").

[2] M.R.S. Enterprises ("M.R.S."); Barrett, Inc.; Ernest Peterson, Inc. ("Peterson"); and Berlin Steel Construction Co. ("Berlin Steel").

[3] Connecticut Ironworkers Employers Association ("Connecticut Ironworkers") and Associated Sheet Metal & Roofing Contractors of Connecticut ("Sheet Metal Contractors").

[4] Two union pension funds were originally also plaintiffs. I dismissed those plaintiffs for lack of standing in March 2012. *See* *2012 U.S. Dist. LEXIS 37523, 2012 WL 951793 (D. Conn. Mar. 20, 2012)*.

effect on competition required to state a prima facie case for violation of the Sherman Act under the rule of reason. Therefore, I again grant the Carpenters' motion for summary judgment.

I. Standard of Review

Summary judgment is appropriate when the record demonstrates that "there **[*298]** is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. When ruling on a summary judgment motion, the court must "view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Sologub v. City of New York, 202 F.3d 175, 178 (2d Cir. 2000)*; *Aldrich v. Randolph Ctrl. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992)* (court is required to "resolve all ambiguities and draw all inferences in favor of the nonmoving party"). "The burden of showing that no genuine factual dispute exists rests upon the moving party." *Carlton v. Mystic Transp., 202 F.3d 129, 133 (2d Cir. 2000)*. When a motion for summary judgment is properly supported by documentary and testimonial evidence, however, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but must present sufficient evidence supporting its position "to require a jury or judge to resolve the parties' differing versions of the **[**6]** truth at trial." *Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995)*.

"The trial court's function at this stage is to identify issues to be tried, not decide them," *Graham v. Long Island R.R. Co., 230 F.3d 34, 38 (2d Cir. 2000)*, and so "[o]nly when no reasonable trier of fact could find in favor of the non-moving party should summary judgment be granted." *White v. ABCO Eng'g Corp., 221 F.3d 293, 300 (2d Cir. 2000)*. Summary judgment therefore is improper "[w]hen reasonable persons, applying the proper legal standards, could differ . . . on the basis of the evidence presented." *Sologub, 202 F.3d at 178*. Nevertheless,

> the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material* fact. . . . Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.

Anderson, 477 U.S. at 247-48.

"[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial," and in such circumstances, there is "no genuine issue as to any material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *accord* *Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995)* (movant's burden satisfied if it can point to an absence of evidence to support an essential element of nonmoving party's claim). To present a "genuine" issue of material fact **[**7]** and avoid summary judgment, the record must contain contradictory evidence "such that a reasonable jury could return a verdict for the non-moving party." *Anderson, 477 U.S. at 248*.

"In the context of antitrust cases," the Second Circuit has noted that "summary judgment is particularly favored because of the concern that protracted litigation will chill pro-competitive market forces." *PepsiCo v. Coca-Cola Co., 315 F.3d 101, 104 (2d Cir. 2002)* (per curiam). Thus, "[a]lthough all reasonable inferences will be drawn in favor of the non-movant, those inferences 'must be reasonable in light of competing inferences of acceptable conduct.'" *Id. at 105* (quoting *Top Mkts. v. Quality Mkts., 142 F.3d 90, 95 (2d Cir. 1998))*.

II. Background

The Ironworkers and the Carpenters are both construction organizations that operate throughout New England. The **[*299]** Carpenters have entered into CBAs with many construction companies and construction managers in the region that contain restrictive subcontracting clauses.[5] Those clauses—"colloquially called 'hot cargo' clauses"—"bar signatories from subcontracting work to any employer that is not also a signatory to a Carpenters' CBA." *See* Ironworkers II, 869 F.3d at 97. The Ironworkers allege that the Carpenters have used the CBA clauses anticompetitively "to prevent the Ironworkers from performing the relevant work," thereby "secur[ing] work in **[**8]** the New England area that allegedly belonged to the Ironworkers." *See* *id. at 97-98*. They assert that the Carpenters' conduct constitutes anticompetitive behavior in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2.

The Carpenters moved for summary judgment in May 2014, Doc. No. 85, arguing that their actions were "shield[ed] . . . from antitrust scrutiny" by "the non-statutory labor exemption and the 'construction industry proviso' provided in Section 8(e)" of the NLRA. *See* Ironworkers I, 157 F. Supp. 3d at 175. I granted the Carpenters' motion. In a ruling issued on January 20, 2016, I held that the Carpenters had "established the requisite elements to be afforded the protection of the construction industry proviso" and had also shown that "the subcontracting provisions at issue," as "lawful provisions of a valid CBA, . . . [were] protected by the non-statutory labor exemption." *Id. at 187*. Therefore, I concluded, "the Carpenters [were] not subject to antitrust scrutiny for their attempts to enforce the subcontracting agreements." *Id. at 188*.

The Ironworkers appealed and the Second Circuit reversed in part. Although the Court agreed that "the construction industry proviso applies to the disputed subcontracting practices," it decided that "disputes of material **[**9]** fact prevent [it] from deciding . . . whether the non-statutory exemption applie[d]." *Ironworkers II, 869 F.3d at 104*. The Court referred to the standard for applying the non-statutory exemption set forth in *Local 210, Laborers' International Union of North America v. Labor Relations Division, Associated General Contractors of America, New York State Chapter, 844 F.2d 69 (2d Cir. 1988)* ("*Local 210*"):

> First, the agreement at issue must further goals that are protected by national labor law and that are within the scope of traditionally mandatory subjects of collective bargaining. Second, the agreement must not impose a direct restraint on the business market [that] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions that results from collective bargaining agreements.

Id. at 79-80 (citations, internal quotation marks, and alterations omitted).

With respect of the first prong of the *Local 210* test, I had relied on *Local 210* and a Supreme Court decision on which it relied, *Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 85 S. Ct. 398, 13 L. Ed. 2d 233 (1964)* ("*Fibreboard*"), for the proposition that most "subcontracting clauses *are* within the scope of the mandatory subjects of collective bargaining." *See* *Ironworkers II, 869 F.3d at 107*. Quoting **[*300]** Justice Stewart's concurrence in *Fibreboard*, I concluded that "the 'substitution of one group of workers for another to perform the same task in the same location under **[**10]** the ultimate control of the same employer' is a mandatory subject of collective bargaining." *Ironworkers I, 157 F. Supp. 3d at 184* (quoting *Fibreboard, 379 U.S. at 224* (Stewart, J., concurring)) (internal brackets omitted). Because "each subcontracting agreement . . . was a part of an existing CBA," and the Ironworkers failed to show that "the type of subcontracting agreement at issue [was] anything other than a lawful subject of a CBA," I held that the CBA clauses were protected by the non-statutory exemption. *Id. at 92* (emphasis removed).

The Second Circuit deemed my reliance on *Local 210* and *Fibreboard* "misplaced." *Ironworkers II, 869 F.3d at 107*. Both decisions, the Court determined, were "premised on the fact that the particular subcontracting clauses . . . were designed to '*preserve* work traditionally performed by a union for a particular employer.'" *Id.* (quoting *Local 210, 844 F.2d at 73*) (emphasis in *Ironworkers II*); *see also id.* ("[T]he 'contracting out' of the work *previously performed* by members of an existing bargaining unit is a subject about which the *National Labor Relations Act*

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[5] Some of the signatories to Carpenters' CBAs are individual contractors, but most are associations of employers such as the Associated General Contractors of Rhode Island, *see* Ex. 7 to Carroll Aff., Doc. No. 88-7, the Connecticut Construction Industries Association, *see* Ex. 10 to Carroll Aff., Doc. No. 88-10, and the Construction Industry Association of Western Massachusetts. *See* Ex. 12 to Carroll Aff., Doc. No. 88-12.

requires employers and the representative of their employees to bargain collectively.") (quoting Fibreboard, 379 U.S. at 209 (emphasis in *Ironworkers II*). Those precedents stood only "for the proposition that work *preservation*—not restrictive subcontracting **[**11]** generally—is a legitimate labor purpose and a mandatory subject of collective bargaining." *Id.* With respect to the present case, the Second Circuit concluded that "the record [was] insufficient to determine whether or not the[] subcontracting clauses were in fact being used to preserve work . . . or whether [they] were used for work *expansion*." *Id. at 108*. Because the latter "purpose . . . would not fall within the scope of traditionally mandatory subjects of collective bargaining," the Court held that I "erred in finding, as a matter of law, that the disputed subcontracting practices were entitled to the protection of the 'non-statutory exemption.'" *Id.*

The Second Circuit remanded "for further proceedings consistent with [its] opinion, including for such additional discovery as will permit the District Court to be informed of the relevant history and permit the parties to move for summary judgment or, if necessary, to proceed to trial." *Id. at 109*. On remand, prior to reopening discovery, I elected to address the undecided alternative ground raised by the Carpenters' previously-briefed motion for summary judgment. This ruling addresses the unresolved issues raised by that motion.

III. Discussion

Following **[**12]** the Second Circuit's determination that the CBA clauses are not entitled to the non-statutory exemption, the Carpenters' motion for summary judgment presents two further matters for decision. First, what is the proper standard for analysis of the Ironworkers' claims? The Ironworkers insist that the CBA clauses constitute "group boycott[s]" that should be deemed "*per se* violations of the antitrust laws." Mem. Opp'n Mot. Summ. J., Doc. No. 100, at 40. The Carpenters, conversely, argue that the CBA clauses are "exclusive dealing requirements" that should be "analyzed under the rule of reason." Mem. Supp. Mot. Summ. J., Doc. No. 86, at 32-33. I agree that the CBA clauses—which at worst substitute one group of unionized workers for another—are not "manifestly anticompetitive." *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Accordingly, *per se* condemnation is inappropriate, and I analyze the clauses under the rule of reason.

[*301] Second, do the CBA clauses function as "unreasonable" restraints under the rule of reason? The multi-part, burden-shifting rule of reason requires that the "plaintiff bear[] the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." **[**13]** *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 543 (2d Cir. 1993)* ("*Capital Imaging*"). Here, I conclude that the Ironworkers have failed to present evidence sufficient to show that the CBA clauses are anticompetitive under the rule of reason. As a result, the Ironworkers cannot state a prima facie case for violation of the Sherman Act, and I grant the Carpenters' motion for summary judgment.

A. Should the CBA clauses be analyzed under the *per se* rule or the rule of reason?

Most arrangements alleged to violate the antitrust laws are analyzed under the so-called rule of reason, a multi-part test through which the factfinder "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *See* Bus. Elecs. Corp., 485 U.S. at 723. A few arrangements, however, such as "group boycotts," are considered "unlawful *per se*." FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 458, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986). In order to avoid application of the rule of reason—which entails a "burdensome" and "demanding calculus," *Am. Steel Erectors v. Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, 815 F.3d 43, 61, 67 (1st Cir. 2016)* ("*ASE II*")—the Ironworkers attempt to obtain the benefit of the *per se* rule by "forcing the [CBA clauses] into the 'boycott' pigeonhole." *See* Ind. Fed'n of Dentists, 476 U.S. at 458. The Carpenters respond that the CBA clauses are not a "group boycott," but rather akin to "exclusive dealing requirements" that **[**14]** should be "analyzed under the rule of reason." Mem. Supp. Mot. Summ. J., Doc. No. 86, at 32-33. I agree with the Carpenters.

1. *Are the CBA clauses a proscribed "group boycott"?*

Although courts often list so-called "'[g]roup boycotts' . . . among the classes of economic activity that merit *per se* invalidation" under the antitrust laws, it is "far from certain" what conduct "fall[s] within the forbidden category." Nw.

Wholesale Stationers v. Pac. Stationery & Printing Co., 472 U.S. 284, 294, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985); *see also* *Spectators' Commc'n Network v. Colonial Country Club, 253 F.3d 215, 223 (5th Cir. 2001)* (observing that "the distinction between boycotts that are *per se* illegal and those judged by the rule of reason is often a vexing one"). Broad dicta in older cases notwithstanding, "*per se* condemnation is not visited on every arrangement that might, as a matter of language, be called a group boycott or concerted refusal to deal." *U.S. Healthcare v. Healthsource, Inc., 986 F.2d 589, 593 (1st Cir. 1993)*. Instead, the Supreme Court has "limit[ed] the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors."[6] **[*302]** *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*; *cf.* *Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999)* (stating that the "classic model of a group boycott" is "a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level") (quoting *Smith v. Pro Football, 593 F.2d 1173, 1178, 193 U.S. App. D.C. 19 (D.C. Cir. 1978))* (internal quotation marks omitted). Thus, for the Ironworkers **[**15]** to prevail on their boycott claim under the *per se* rule, "a horizontal agreement is a prerequisite." *PepsiCo, 315 F.3d at 110*.

The Carpenters argue that this case "obviously [does] not present" a group boycott under recent precedent, *see* *Ind. Fed'n of Dentists, 476 U.S. at 458*, because the challenged agreements were made "between parties at different levels of the market structure." Mem. Supp. Mot. Summ. J., Doc. No. 86, at 32. The Carpenters and the employers "did not compete" with one another; rather, the Carpenters "w[ere] an upstream supplier" of labor for the employers. *See* *MacDermid Printing Sols. v. Cortron Corp., 833 F.3d 172, 185 (2d Cir. 2016)*. Thus, the Carpenters argue, the agreements between the Carpenters and the employers were "no[t] . . . inherently anticompetitive" and should not be subject to *per se* treatment. *See id.*

The Ironworkers respond that the Carpenters' CBAs "involve both horizontal and vertical provisions." Suppl. Mem. Opp'n Mot. Summ. J., Doc. No. 116, at 11. As adduced at oral argument, the Ironworkers' theory appears to be that because most of the CBAs were made between the Carpenters and associations of employers, the vertical agreements between the Carpenters and the associations also operate as "horizontal agreements among the construction managers . . . [who are] parties to **[**16]** th[e] association[s]." *See* Mot. Hr'g Tr. (Jan. 24, 2018), Doc. No. 148, at 9. In other words, if the employers collectively agreed with the Carpenters to boycott the Ironworkers, then the employers also "agreed with each other to do it." *See id.* at 11.

I doubt that a third party's agreement with an association is by itself enough to establish a horizontal agreement among members of the association. "Mere membership in associations is not enough to establish participation in a conspiracy with other members of those associations," *Osborn v. Visa Inc., 797 F.3d 1057, 1067, 418 U.S. App. D.C. 193 (D.C. Cir. 2015)*, *cert. dismissed as improvidently granted*, *__ U.S. __, 137 S. Ct. 289, 196 L. Ed. 2d 396 (2016)* (mem.), and "concerted action does not exist every time a trade association member speaks or acts." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1007 (3d Cir. 1994)*. In the absence of evidence that "two or more of the association's members have committed themselves to the anti-competitive activity of the . . . association," the existence of the association alone does not suffice to infer a horizontal agreement.[7] *See* *id. at 1017* (Stapleton, J., concurring in part and dissenting in part). Because "membership alone is not proof of an

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[6] Agreements within the scope of the Sherman Act may be "'horizontal,' *i.e.*, 'agreement[s] between competitors at the same level of the market structure,' or 'vertical,' *i.e.*, 'combinations of persons at different levels of the market structure, *e.g.*, manufacturers and distributors.'" *Anderson News v. Am. Media, 680 F.3d 162, 182 (2d Cir. 2012)* (quoting *United States v. Topco Assocs., 405 U.S. 596, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972))*. Thus, an agreement among several general contractors, or between labor unions, might impose a "horizontal" restraint; but an agreement between a labor union, which supplies labor, and a general contractor, which purchases it, could not. In the latter example, the union and the contractor are part of a "vertical chain" and do not "compete on the same horizontal plane" within the market. *ASE II, 815 F.3d 43, 61, 62 (1st Cir. 2016)*.

[7] Of course, "it normally will not be difficult to show the necessary agreement among a group of [ ] members" because an association typically is "controlled by its members." *Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1017 (3d Cir. 1994)* (Stapleton, J., concurring in part and dissenting in part). That the Ironworkers have nonetheless failed to show any evidence of agreement among the employers here is therefore telling.

agreement," **[*303]** *Nova Designs v. Scuba Retailers Ass'n, 202 F.3d 1088, 1092 (9th Cir. 2000)*, I find unpersuasive the Ironworkers' argument that "multi-employer bargaining association[s] . . . by [their] very nature, involve horizontal agreements." Mot. **[**17]** Hr'g Tr. (Jan. 24, 2018), Doc. No. 148, at 12-13.

I need not dwell on whether the CBAs are better regarded as horizontal, vertical, or both, however, because even were the agreements primarily horizontal, "[t]his case . . . cannot be fitted into the category of group boycott cases." *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978)* (en banc). Not all horizontal agreements are *per se* violations of the antitrust laws. *See* *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, 814 F.2d 358, 370 (7th Cir. 1987)* ("*Premier*"); *cf.* *Bogan, 166 F.3d at 513, 516* ("assum[ing] plaintiffs' view of the Agreement as primarily horizontal, rather than vertical," but nevertheless holding that "[p]laintiffs fail[ed] to establish a threshold case for *per se* treatment"). Assuming, *arguendo*, that the Carpenters' CBAs entailed horizontal agreements among members of the associations, the Ironworkers have not even hinted at any "economic incentive" for the employers to boycott them. *See* *Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079, 1090 (6th Cir. 1996)*. Quite simply, the employers—as purchasers of labor—"would stand nothing to gain financially" by driving the Ironworkers out of the labor supply market. *See id.*

In order to illustrate that point, consider *Premier Electrical Construction Co. v. National Electrical Contractors Ass'n*, a case in which an employers' association actually used an agreement with a union to "eliminate a source of **[**18]** competition." *814 F.2d at 368*. In *Premier*, the National Electrical Contractors Association ("NECA") had agreed with the International Brotherhood of Electrical Workers ("IBEW") to create a National Electrical Industry Fund, into which members of the NECA would pay one percent of their gross payroll.[8] *Id. at 359*. Because members of the NECA were required to pay into the fund, their cost of doing business increased relative to non-members, and non-members soon were able to underbid NECA members for work. *See* *id. at 368*. Concerned, the NECA entered into a new agreement with the IBEW under which the IBEW would obtain, as part of any collective bargaining agreement with a firm that was not a member of the NECA, a commitment that the firm also make a contribution to the National Electrical Industry Fund. *Id. at 359*. The Seventh Circuit, following the Fourth Circuit, held that the "contribution requirement [was] price-fixing, a *per se* violation of the antitrust laws," because the NECA had "used the [IBEW] to increase its rivals' costs of doing business . . . and thereby raised the market price to its own advantage." *Id. at 368*. "The result was higher prices to purchasers of electrical work and higher profits for members" of the NECA, which "could **[**19]** be shared with the [u]nion" to "compensat[e] it for the assistance." *Id.*

Here, unlike *Premier*, it is far from obvious how the CBA clauses could have improperly raised costs or fixed-prices. There is no reason for employers—who purchase labor—to want higher labor prices. If (contrary to the evidence in the record) the Carpenters' prices were higher, then the employers who affiliated with them would be underbid by rivals who signed with the Ironworkers. If the quality of the Carpenters' work was lower (as the Ironworkers repeatedly suggest, without evidence), **[*304]** then that also would comparatively advantage employers who continued to affiliate with the Ironworkers. Furthermore, employers often enter into agreements with multiple unions, *cf.* *Carpenters Fringe Benefit Funds of Ill. v. McKenzie Eng'g, 217 F.3d 578, 583 (8th Cir. 2000)* (noting that employer "entered into pre-hire collective bargaining agreements with multiple craft unions whose claimed work jurisdictions frequently overlap[ped]"); *Stevens Eng'rs & Constructors v. Iron Workers Local 17 Pension Fund, 2016 U.S. Dist. LEXIS 114028, 2016 WL 4479486, at *18 (N.D. Ohio Aug. 25, 2016)* ("[T]he craft jurisdictions of many craft unions overlap and employers assign tasks that fall within the craft jurisdictions of multiple unions in different manners."), and **[**20]** different unions frequently work on a single construction project. *See, e.g.,* *Huber, Hunt & Nichols v. United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 38, 282 F.3d 746, 747-48 (9th Cir. 2002)*. Therefore, even if a large proportion of employers acceded to the Carpenters' CBA clauses, those employers would not necessarily be able to shut out their rivals who continued to affiliate with the Ironworkers.

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[8] The fund was intended to "defray the costs of the Association's bargaining with the Union on behalf of its members and administering their collective bargaining agreements." *Premier, 814 F.2d 358, 370 (7th Cir. 1987)*.

Indeed, notwithstanding the challenged CBA clauses, counsel for the Ironworkers admitted at the hearing that "sometimes [employers] just skip the Carpenters and bring in Ironworkers to actually do the work."[9] Mot. Hr'g Tr. (Jan. 24, 2018), Doc. No. 148, at 69. In other words, not only did the employers lack a clear incentive to drive the Ironworkers out of the market, but also, in practice, they seem to have continued employing the Ironworkers. That being so, I simply cannot understand how the employers had any "economic motivation [to participate in] a boycott," or how the CBA clauses would have enabled both the Carpenters and the employers to "benefit[] financially at the expense of consumers." *See* *Betkerur, 78 F.3d at 1090-91*. "Because the Agreement's anticompetitive effect . . . is not obvious," the Ironworkers have not "made a case sufficient to cross the threshold to *per se* treatment." *Bogan, 166 F.3d at 515*.

The Ironworkers, apparently recognizing **[**21]** that the employers' incentive to join the posited boycott is murky at best, strive to bring their case within the rule of *Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. In *Klor's*, a large department store chain, Broadway-Hale, used its "'monopolistic' buying power" to organize a boycott of its much smaller rival, Klor's. *Id. at 209*. Klor's filed suit under the Sherman Act, alleging that manufacturers and distributors had "conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms." *Id.* The Supreme Court held that the defendants had "[p]lainly" engaged in a group boycott. *Id. at 212*. The Court observed that Klor's "[a]lleged . . . a wide combination consisting of manufacturers, distributors and a retailer," which "t[ook] from Klor's its freedom to buy . . . in an open competitive market and dr[ove] it out of business as a dealer in the defendants' products," and also "deprive[d] the manufacturers and distributors of their freedom to sell to Klor's." *Id. at 213*. Thus, the Court concluded that the alleged conduct "clearly ha[d], by its 'nature' and 'character,' a 'monopolistic tendency,'" and was to be regarded as illegal *per se. See id.*

Klor's is admittedly difficult **[**22]** to reconcile with more recent cases, which have "recognized that the scope of *per se* illegality should be narrow in the context of vertical **[*305]** restraints." *Bus. Elecs. Corp., 485 U.S. at 724*; *cf., e.g.,* *Ron Tonkin Gran Turismo v. Fiat Distribs., 637 F.2d 1376, 1382 (9th Cir. 1981)* (noting that "*Klor's* has often been criticized"). In *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*, the Supreme Court distinguished *Klor's* on the basis that the case "involv[ed] not simply a 'vertical' agreement between supplier and customer, but . . . [also] a 'horizontal' agreement among competitors." *Id. at 136*. That is, not only did Broadway-Hale vertically agree with each manufacturer and distributor to boycott Klor's, but also the manufacturers and distributors "horizontal[ly] agree[d] among [themselves] . . . to hurt [Broadway-Hale's] competitor." *Id. at 135*. Taken together, *Klor's* and *NYNEX Corp*. indicate that the *per se* rule continues to apply to "situations in which a vertical player organizes a horizontal cartel." *United States v. Apple, Inc., 791 F.3d 290, 323 (2d Cir. 2015)*.

In other words, *Klor's* entailed an instance of a "hub-and-spoke" conspiracy, "in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'" *Id. at 314*. According to the Second Circuit, hub- and-spoke arrangements "consist of *both* vertical agreements between the hub and each spoke and a **[**23]** horizontal agreement among the spokes 'to adhere to the [hub's] terms.'" *Id.* (quoting VI Areeda & Hovenkamp (3d ed.), *supra*, at ¶ 1402c). Thus, notwithstanding the "'hub-and-spoke' metaphor," the plaintiff "must also prove the existence of a 'rim' to the wheel in the form of an agreement among the horizontal competitors." *Id. at 314 n.15*. For example, in *United States v. Apple, Inc.*, the Second Circuit held that Apple had "orchestrated a horizontal conspiracy among [publishers] to raise ebook prices" by vertically contracting with each publisher under terms that "were only attractive . . . to the extent [the publishers] acted collectively." *Id. at 297, 320*. Even though the contracts themselves "might well, if challenged, have to be evaluated under the rule of reason," the Second Circuit held that Apple was liable for the entire conspiracy under the *per se* rule because it used the vertical contracts to "organize[] a horizontal cartel." *Id. at 323*.

Apple shows why *Klor's* is inapposite to the present case: simply put, the Ironworkers have not placed a rim on their alleged wheel. Besides stating that the employers are members of associations (which, as noted above, is not enough to show a horizontal agreement), the Ironworkers **[**24]** have not shown or provided a reasonable basis to

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[9] Counsel for the Carpenters represented that the Ironworkers worked on four of the seven projects mentioned in the complaint. Mot. Hr'g Tr. (Jan. 24, 2018), Doc. No. 148, at 69.

infer any agreement among the employers to drive the Ironworkers out of the market.[10] Absent such an agreement, the Carpenters' allegedly pernicious motives on their own do not suffice to overcome the "presumption in favor of [the] rule-of-reason standard." *Bus. Elecs. Corp., 485 U.S. at 726*.

2. *Are the CBA clauses an "exclusive dealing" arrangement?*

The Ironworkers have failed to introduce "evidence of any horizontal agreement *among* general contractors or *among* [labor unions] to foreclose the plaintiffs **[*306]** from the . . . market." *See* *ASE II, 815 F.3d at 64*. Instead, the Ironworkers have shown the existence of a series of vertical agreements between the Carpenters (as suppliers of labor) and employers (as purchasers), by which the employers committed to obtain their labor only from unions affiliated with the Carpenters. The Carpenters assert that those "vertical arrangements" most closely resemble an "exclusive dealing" agreement and should be analyzed under the rule of reason. *Cf.* *id. at 67*.

An exclusive dealing agreement is "a contract between a [supplier] and a buyer that forbids the buyer from purchasing the contracted [service] from any other seller." XI Phillip E. Areeda & Herbert **[**25]** Hovenkamp, et al., ***Antitrust Law*** ¶ 1800, at 3 (2d ed. 2005) ("Areeda & Hovenkamp (2d ed.)"). Unlike a group boycott, an exclusive dealing agreement "is not a *per se* violation of the antitrust laws." *Stop & Shop Supermkt. Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 62 (1st Cir. 2004)* ("*Stop & Shop*"). Instead, "[e]xclusive dealing arrangements have a significant efficiency potential," were "generally approved" at common law, and "simply do not belong in a classification of practices that are even presumptively condemned without market analysis." XI Areeda & Hovenkamp (2d ed.), *supra*, ¶ 1820, at 4, 161, 163. As a result, "[e]xclusive dealing contracts are analyzed under the rule of reason."[11] *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp., 208 F.3d 655, 660 (8th Cir. 2000)* (citing *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961))*.

The Ironworkers insist unpersuasively that the CBA clauses are not exclusive dealing agreements, and propose five criteria for identifying such arrangements. According to the Ironworkers, exclusive dealing agreements consist only of arrangements whereby:

> (1) the buyer agrees to purchase all of its "supplies" from one source;
>
> (2) the agreement provides some business justification or pro-competitive features favorable to the buyer to warrant the exclusive arrangement;
>
> (3) the term of the arrangement is limited to a short-term, such as 2-3 years;
>
> (4) the exclusive arrangement is **[**26]** reached after a competitive bidding process; and
>
> (5) the agreement is vertical and not horizontal.

Suppl. Mem. Opp'n Mot. Summ. J., Doc. No. 116, at 10-11.

The first and last of the Ironworkers' proposed criteria are (partially) correct,[12] but the middle three only relate to the *reasonableness* of an exclusive dealing agreement, not whether it constitutes such an agreement at all. By asserting that "there are no pro-competitive effects or business justifications" to support the CBA clauses, *see* Suppl. Mem. Opp'n Mot. Summ. J., Doc. No. 116, at 11; that the Carpenters' "arrangements with the various [employers] have been in existence for over 20 years," *id.* at 11; and that "there was no competitive bidding process

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[10] Moreover, even if membership in an association sufficed, the Carpenters signed CBAs with *multiple* employers' associations, none of which are alleged to have been in horizontal agreements with one another. The amount of the market that would have been covered by any one hub-and-spoke agreement with a single employers' association would be too small to amount to a *per se* violation of the Sherman Act. *Cf.* *Premier, 814 F.2d at 371* (holding that *per se* treatment was appropriate because "[t]he agreement . . . affected 100 [percent] of an economically significant market").

[11] The Ironworkers argued at the hearing that "a group exclusive dealing arrangement . . . is an oxymoron because a group exclusive dealing arrangement is the definition of a concerted refusal to deal." Mot. Hr'g Tr. (Jan. 24, 2018), Doc. No. 148, at 23-24. That reasoning begs the question, however, for it assumes that CBA clauses entail horizontal agreements among the employers. I already have determined that the Ironworkers have not supported that assumption with evidence.

[12] With respect to the first proposed criterion, a seller also might contract to sell exclusively to one buyer (as when a parts supplier agrees to sell only to one automobile manufacturer).

before **[*307]** reaching the agreements," *id.* at 11, the Ironworkers might indicate that the CBA clauses "constitute[] an unreasonable restraint of trade . . . under the rule of reason." *Virgin Atl. Airways v. British Airways, 257 F.3d 256, 263 (2d Cir. 2001)* ("*Virgin Atl*."). But they do not transform those plainly vertical restraints into a horizontal group boycott.[13]

3. *Should all non-exempt labor arrangements be regarded as* per se *antitrust violations?*

Finally, the Ironworkers try to earn *per se* treatment by invoking a presumption against superfluity. *Cf., e.g., Kawashima v. Holder, 565 U.S. 478, 486, 132 S. Ct. 1166, 182 L. Ed. 2d 1 (2012)* (discussing **[**27]** presumption against superfluities in statutory interpretation). The reason that the Supreme Court developed the non-statutory labor exemption, they argue, "is because it was so obvious that any multi-employer bargaining association violates the antitrust laws." *See* Mot. Hr'g Tr. (Jan. 24, 2018), Doc. No. 148, at 12. Were labor agreements analyzed under the rule of reason, the Ironworkers claim that the non-statutory exemption would be unnecessary. Therefore, the Ironworkers assert, the existence of the non-statutory exemption means that *all* non-exempt agreements should be regarded as *per se* violations of the antitrust laws. That theory is flatly wrong.

The Second Circuit has expressly stated that "the failure of [a] defendant['s] claim for complete antitrust immunity does not mean that plaintiffs are entitled to prevail." *Jacobi v. Bache & Co., 520 F.2d 1231, 1237 (2d Cir. 1975)* (Friendly, J.). The Third Circuit, too, has observed that "[a] finding that particular union conduct . . . is non-exempt . . . should not drive a court inexorably to the conclusion that the union has violated the antitrust laws." *Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council, 670 F.2d 421, 426 (3d Cir. 1982)* ("*Muko II*"). Precisely because "the rule of reason provides the 'breathing space' necessary" for the labor laws to work, *see* *Jacobi, 520 F.2d at 1239*, courts "caution **[**28]** against mechanical or imprudent application of the *per se* rule in the labor context." *Muko II, 670 F.2d at 426*.

In fact, when the Second Circuit has analyzed non-exempt labor conduct under the antitrust laws, it has applied the rule of reason as a matter of course. *See* *Berman Enters. v. Local 333, United Marine Div., Int'l Longshoremen's Ass'n, 644 F.2d 930, 936-37 (2d Cir. 1981)*; *see also* *Commerce Tankers Corp. v. Nat'l Maritime Union of Am., AFL-CIO, 553 F.2d 793, 802 (2d Cir. 1977)* ("[E]ven if the 'nonstatutory' exemption does not apply, there is at least a substantial question whether a *per se* approach under the antitrust laws is applicable in the case of a non-exempt labor activity."); *id. at 802 n.8* (citing with approval Professor Handler's conclusion that "the [Supreme] Court intended that there be a full-scale rule of reason inquiry in every instance in which a non-exempt activity is claimed to be in violation of antitrust") (quoting Handler, *Labor and Antitrust: A Bit of History*, 40 Antitrust L.J. 233, 239-40 (1971)); *cf.* ***[*308]*** *Jacobi, 520 F.2d at 1238* ("[W]ithin the area of supervised self-regulation contemplated by the Securities Exchange Act, *per se* concepts are generally displaced and the courts are to examine whether the particular restraint, even though it would be a *per se* violation if performed by others, was reasonable."). That precedent indicates I should apply the rule of reason in this case.

Although the Third Circuit—which has addressed the question in greater detail—has **[**29]** left open the possibility of applying the *per se* rule in the labor contest "where appropriate," that court also has held that "[i]n most cases the rule of reason will supply the measure of illegality." *Muko II, 670 F.2d at 427-28*. Under the Third Circuit's test, if "union activity falls outside the protection of the labor exemption," then the "court must apply traditional antitrust principles in determining whether the activity in question violates the antitrust laws." *Id. at 427*. Even assuming, *arguendo*, that the Second Circuit would follow the Third Circuit's standard, I already have determined that *per se* condemnation would not be warranted under "traditional antitrust principles." *Id.* Accordingly, the *per se* rule does not apply.

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[13] Risibly, the Ironworkers also suggest that the CBA clauses are not exclusive dealing agreements because the general contractors and the unions are not in "a 'business' relationship, but rather, a 'labor' relationship." Suppl. Mem. Opp'n Mot. Summ. J., Doc. No. 116, at 11. That the unions are not for-profit businesses is irrelevant; for purposes of the various entities' location in the market, the unions "supply" labor and the general contractors "purchase" it. Furthermore, if the unions are conceived of as "labor" rather than "business" entities, then it is not clear why they should be subject to antitrust scrutiny at all (which was, in fact, the *Carpenters'* argument in contending that the CBA clauses fell within the non-statutory exemption).

In antitrust cases, "there is a presumption in favor of [the] rule-of-reason standard," and any "departure from that standard must be justified by demonstrable economic effect." *See* Bus. Elecs. Corp., 485 U.S. at 726. Here, the Ironworkers have not justified such a departure. Thus, I conclude that the CBA clauses must be analyzed under the rule of reason.

B. Do the CBA clauses function as unreasonable restraints under the rule of reason?

The rule of reason analysis "requires a burdensome multipart showing." ASE II, 815 F.3d at 67. First, the "plaintiff **[**30]** bears the initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." Capital Imaging, 996 F.2d at 543. "The fact that the defendant's actions prevent a plaintiff from competing in a market is not enough, standing alone, to satisfy this initial burden of proof." Virgin Atl., 257 F.3d at 264. If the plaintiff "surmounts its first hurdle," then "the burden shifts to the defendant to offer evidence of the pro-competitive 'redeeming virtues'" of the challenged conduct. *Id.*; Capital Imaging, 996 F.2d at 543. Should the defendant "come[] forward with such proof, the burden shifts back to plaintiff for it to demonstrate" that "the same procompetitive effect could be achieved through alternative means that are less restrictive of competition." Virgin Atl., 257 F.3d at 264; Capital Imaging, 996 F.2d at 543. Ultimately, in order to prove a violation of the Sherman Act, the plaintiff must show that the challenged conduct "will have an actual adverse effect on competition in the relevant market." Elec. Commc'ns Corp. v. Toshiba Am. Consumer Prods., 129 F.3d 240, 244 (2d Cir. 1997).

1. *Lack of antitrust injury*

As an initial matter, I question whether the labor union plaintiffs—the Iron Workers, Sheet Metal Workers, and Glaziers—have standing to attack the CBA clauses.[14] "[I]n order to have standing to **[*309]** prosecute private antitrust claims, plaintiffs must show **[**31]** more than that the defendants' conduct caused them an injury." Balaklaw v. Lovell, 14 F.3d 793, 797 (2d Cir. 1994). They must show "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)). "[I]njuries resulting from competition alone are not sufficient to constitute antitrust injuries." *Id.* Instead,

> the test for antitrust injury is essentially economic. A private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful. If the plaintiff's injury is directly related to the competitive evil that makes a practice unlawful, then that harm is antitrust injury. If, however, the harm doers not flow from a competitive evil, then it may be injury-in-fact, but not be an antitrust injury.

IIA Phillip E. Areeda & Herbert Hovenkamp, et al., ***Antitrust Law*** ¶ 391, at 318, 320 (3d ed. 2007) ("Areeda & Hovenkamp (3d ed.)").

In an exclusive dealing case, plaintiffs may show injury-in-fact by "argu[ing] that they are foreclosed (or excluded) from a market," i.e., that they have been "denied the ability **[**32]** to make sales that they would otherwise have made." *Id.* ¶ 397, at 435. But not every injury-in-fact constitutes an antitrust injury. For instance, an "exclusive-dealing partner whose business relationship was terminated in favor of another exclusive-dealing partner" is "[c]learly not a victim of antitrust injury." XI Areeda & Hovenkamp (2d ed.), *supra*, ¶ 1823, at 199.

That essentially is the situation presented here. "Hot cargo" clauses are "standard in construction industry CBAs, including those of the Plaintiff unions." *See* Mem. Supp. Mot. Summ. J., Doc. No. 86, at 10. Stripped of rhetoric, the gravamen of the Ironworkers' complaint is that the Carpenters have used their CBA clauses to enter into exclusive

[14] Previously, at the outset of the case, I denied the Carpenters' motion to dismiss the union plaintiffs' claims for lack of antitrust standing and concluded that the latter had "stated an injury that is recognized under ***antitrust law***." 2012 U.S. Dist. LEXIS 37523, 2012 WL 951793, at *14. With the benefit of a fuller record, however, I "revisit the issue on summary judgment." *See* IM Partners v. Debit Direct, 394 F. Supp. 2d 503, 521 n.12 (D. Conn. 2005); *cf.* Dorking Genetics v. United States, 76 F.3d 1261, 1271 (2d Cir. 1996) (noting that a 12(b)(6) movant "may . . . ask the district court to revisit [an] issue on summary judgment after discovery").

dealing arrangements with employers who formerly had exclusively dealt with the Ironworkers. The resulting "turf battle," *Ironworkers II, 869 F.3d at 97*, between two beneficiaries of exclusive dealing arrangements is not properly adjudicated under the antitrust laws. *Cf. Elec. Commc'ns Corp., 129 F.3d at 244* ("[I]t is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage **[**33]** the former distributor's business.").

Consider *Balaklaw v. Lovell*, in which a hospital switched its exclusive contract for anesthesiology services from one anesthesiologist (Balaklaw) to another (King). Balaklaw challenged the hospital's exclusive dealing agreement with King under the Sherman Act. *See 14 F.3d at 795-96*. The Second Circuit held that Balaklaw had not suffered an "antitrust injury" because there was "no foreclosure of competition." *Id. at 799* (internal quotation marks omitted). "From the consumers' point of view," the Court reasoned, "nothing about the market ha[d] changed," because Balaklaw already "had exclusive control over anesthesiology services" at the hospital "prior to the [challenged] agreement." *Id. at 798*. As a result, the hospital's choice of one set of exclusive dealing partners over another was "only a reshuffling of competitors" and did not increase or decrease opportunities for competition in the market. *Id. at 798* (quoting *Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992))*. Recalling that the antitrust laws "require plaintiffs to establish that the defendants **[*310]** *engaged in anticompetitive conduct* that caused them an antitrust injury," *id. at 800* (emphasis added), the Second Circuit held that Balaklaw—who "entered the competition for an exclusive contract . . . **[**34]** [and] lost"—did not suffer "an injury of the type the antitrust laws were intended to prevent." *Id. at 802*.

The Ironworkers attempt to distinguish *Balaklaw* on the basis that the plaintiff "had participated in a competitive process to obtain the exclusive contract," Mem. Opp'n Mot. Summ. J., Doc. No. 100, at 49, which (they allege) did not occur here. But the mere fact that the Carpenters and the Ironworkers did not participate in a formal competitive process does not mean that the choice of one over the other was more than "a reshuffling of competitors." *Cf. Balaklaw, 14 F.3d at 798*. According to the Ironworkers, the work at issue here was "traditionally performed by [them]" and "never sought" by the Carpenters. *Cf. Ironworkers II, 869 F.3d at 98*; *Ironworkers I, 157 F. Supp. 3d at 177*; *see Local Rule 56(a)(2)* Statement, Doc. No. 98, at 2 ("Plaintiff contractors performed eighty percent of the panel work ten years ago . . . . Iron Workers and Glaziers performed one hundred percent of the panelized window systems, punch windows, curtain wall installation and store fronts ten years ago . . . .") (internal parentheticals omitted). When the Carpenters began to obtain such work, the Ironworkers may have suffered "injury [as] a competitor," *see Virgin Atl., 257 F.3d at 265*, but that substitution of exclusive contractors did not by itself **[**35]** create "an adverse effect on competition market-wide." *Todd v. Exxon Corp., 275 F.3d 191, 213 (2d Cir. 2001)* (Sotomayor, J.). Because the Ironworkers have not shown that their injury stemmed from "impairment of the competitive structure of the market," *see Stop & Shop, 373 F.3d at 66* (citing *Brown Shoe Co. v. United States, 370 U.S. 294, 344, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962))*, they did not suffer—and do not have standing to raise—antitrust injury.[15]

"The Sherman Act . . . [is] designed to protect competition, not individual competitors." *Virgin Atl., 257 F.3d at 265*. Here, the Ironworkers' "simple loss of business" does not establish an antitrust injury, *Stop & Shop, 373 F.3d at 66*; "at most it reflects only harm to individual competitors, not to competition." *Unity Hosp., 208 F.3d at 661-62*.

2. *Lack of adverse effect on competition*

The other plaintiffs—M.R.S., Barrett, Peterson, Berlin Steel, Connecticut Ironworkers, and Sheet Metal Contractors—do appear to have antitrust standing to pursue Sherman Act claims. Nevertheless, their claims (along with those of the labor unions) fail at the rule of reason's first hurdle. Viewed in the light most favorable to the Ironworkers, the evidence would not permit a reasonable trier of fact to find that "the challenged action has had an

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[15] I held to the contrary in response to the motion to dismiss because the Carpenters had merely argued that the unions' "harm[s] [were] too indirect to support standing." *See 2012 U.S. Dist. LEXIS 37523, 2012 WL 951793, at *14*. As discovery has now shown, however, the problem is not that the unions' harms are indirect; it is that they are only are only harms to competitors, rather than to competition.

actual adverse effect on competition as a whole in the relevant market." Capital Imaging, 996 F.2d at 543. To show an "adverse effect on competition," *id.*, the Ironworkers rely heavily on the **[**36]** testimony of their expert witness, Prof. Edward Deak. Deak's report states that the restrictive clauses "*potentially* raise[] the price" of labor by "limit[ing] . . . the number of bidders." Deak Rep., Ex. 5 to Carroll Aff., Doc. No. 88-5, at 67 (emphasis added). The report cites no evidence, however, **[*311]** to show that the clauses have had or are likely to have "an *actual* adverse effect" on prices. *Cf.* Capital Imaging, 996 F.2d at 543. Indeed, Deak acknowledged during his deposition that he "didn't test the [CBA clauses'] impact on price" and "didn't do any analysis about whether the [C]arpenters' conduct increased prices." Deak Dep. (Mar. 24, 2014), Ex. 6 to Carroll Aff., Doc. No. 88-6, at 8, 9. Furthermore, Deak's report admits that "[u]nion carpenter hourly wages . . . are recognized as being lower than the hourly rates for union ironworkers," Deak Rep., Doc. No. 88-5, at 64, which hardly supports the conclusion that excluding the (higher-priced) Ironworkers from bidding would increase costs.[16]

Deak speculates that overall prices might increase because "[u]nion carpenters may require more hours of labor than other union trades in performing the work," *id.*, but there is no evidence to substantiate that supposition in **[**37]** the record. Deak testified that he "did not do . . . any analysis that said output was reduced because of the [C]arpenters" or that "the [C]arpenters' conduct resulted in a reduction in quality." Deak Dep., Doc. No. 88-6, at 9-10. Other evidence suggests that the Carpenters and the Ironworkers were equally efficient: Roland Levesque, the president and founder of plaintiff M.R.S. Enterprises, testified that the Carpenters "install[ed] exterior metal panels . . . at about the same efficiency rate as . . . sheet metal workers or ironworkers." Local Rule 56(a)(1) Statement, Doc. No. 87, at 22-23 (citing R. Levesque Dep. (Dec. 18, 2013), Ex. 46 to Carol Aff., Doc. No. 88-46, at 4). The Ironworkers complain that Levesque's assessment "simply [represents] testimony of a particular witness," Local Rule 56(a)(2) Statement, Doc. No. 97, at 15, but they, not the Carpenters, bear the burden to introduce sufficient evidence to show an "*actual* adverse effect on competition" under the rule of reason. Capital Imaging, 996 F.2d at 543. They have not done so.

The Ironworkers also fail to substantiate their Sherman Act claims by showing "market power." Market power refers to "the ability to raise prices above those that would be charged in a competitive market." *In re Aggrenox Antitrust Litig., 199 F. Supp. 3d 662, 665 (D. Conn. 2016)* (quoting **[**38]** *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*); *see* IIB Areeda & Hovenkamp (3d ed.), *supra*, ¶ 501, at 109 ("Market power is the ability to raise price profitably by restricting output. . . . A defendant firm has market power if it can raise price without a total loss of sales."). Market power can be shown directly, "by evidence of the control of prices or the exclusion of competition," or indirectly, by "proof that the defendant has a large percentage share of the relevant market." *Heerwagen v. Clear Channel Commc'ns, 435 F.3d 219, 227 (2d Cir. 2006)*. "The relevant market consists of a relevant product market and a relevant geographic market." *Id.* For exclusive dealing claims, "a plaintiff makes a prima facie case . . . by showing market structure, power, and coverage of the exclusive-dealing arrangement sufficient to create an inference of reduced output and higher prices in the affected market." XI Areeda & Hovenkamp (2d ed.), *supra*, ¶ 1820, at **[*312]** 161. The required degree of foreclosure to state a prima facie case in the exclusive dealing context is at minimum "30 or 40 percent." *See ASE II, 815 F.3d at 61*; *accord* XI Areeda & Hovenkamp (2d ed.), *supra*, ¶ 1822, at 194.

Here, the Ironworkers' effort to show market power fails because the report of their expert witness, Dr. Deak, does not establish a well-defined market **[**39]** or the Carpenters' share within it. The boundaries of the proposed product market are highly uncertain: Deak seems to arbitrarily limit the product market to union labor, even though many general contractors presumably hire non-union labor as well (and the Carpenters themselves allegedly "regard[] non-union carpenter work as [their primary] competition"). *See* Deak Rep., Doc. No. 88-5, at 66. In addition, Deak does not identify the dollar value of the relevant market; the total number of general contractors in the market; or even the number of signatories to the Carpenters' CBAs. *Compare id.* at 66 (stating that "[t]he

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[16] In their Answers to Interrogatories, the Carpenters offered "reduce[d] [ ] labor costs" due to lower "[w]age and benefit rates" as one reason that general contractors agreed to the restrictive clauses with the Carpenters. *See* Deak Rep., Ex. 5 to Carroll Aff., Doc. No. 88-5, at 73. As the leading antitrust treatise notes, "[e]xclusive contracts are often ways of organizing the market to encourage more competitive pricing than might otherwise occur," such as by "grouping purchases together into a single contract in order to reduce the costs of using the market." XI Areeda & Hovenkamp, *supra*, ¶ 1811, at 144.

[Carpenters] already ha[ve] approximately 400-700 signatory members throughout their six state region including the sub-state relevant market") *with id.* at 67 (stating that "some 700 [general contractor]s and [construction manager]s have signed with the [Carpenters] throughout New England").

With respect to the boundaries of the proposed geographic market, Deak purports to establish (based on the parties' headquarters and the jurisdictions defined in the CBAs) a precise geographic market consisting of Connecticut, Rhode Island, and four counties in western Massachusetts. *Id.* at 46. Nevertheless, **[**40]** throughout his report, Deak seems to rely on evidence of the Carpenters' market share throughout the larger New England region. *See, e.g., id.* at 75 ("[T]he Carpenters are currently signatory with hundreds of construction managers in the New England area and continue to sign additional construction managers."). Because the Carpenters are headquartered in Boston and maintain separate CBAs for work in the "Eastern Massachusetts Jurisdictional Area," to conflate their (perhaps dominant) market share in the Boston area with their market share in Connecticut, Rhode Island, and western Massachusetts likely overstates the Carpenters' power in the relevant geographic market. Simply put, the Ironworkers have "not supplied" the "reliable numbers" and geographic boundaries that "are an essential starting point" for a market power analysis. *See* *Stop & Shop, 373 F.3d at 68*.

The Ironworkers' case boils down to an unwarranted presumption against exclusive dealing agreements. They assert that "you do not have to be an expert in economics to know that if you eliminate competition, prices will eventually rise [and] quality will suffer." Mem. Opp'n Mot. Summ. J., Doc. No. 100, at 42. But that argument begs the question, for "[e]xclusive **[**41]** dealing foreclosing upstream rivals from access to downstream markets may not produce any competitive harm at all."[17] XI Areeda & Hovenkamp (2d ed.), *supra*, ¶ 1802, at 69. Even when a plaintiff suffers a "'foreclosure' injury" in the form of "den[ial of] access to a market" that would otherwise be open, that "private injury . . . may not be injury to *competition*." **[*313]** *Id.* at 71 (emphasis added). "Whether [ ] competition is injured depends on the availability of alternative[s]," as well as "how competitive the market was to begin with." *Id.* at 69.

Because the Ironworkers have not provided any evidence of "lower output and higher prices in a properly defined market," they have not shown "injury to 'competition,'" but (at most) merely injury to themselves as competitors. *See id.* That does not suffice to state a prima facie case under the rule of reason. *See* *NYNEX Corp., 525 U.S. at 135* ("[T]he plaintiff . . . must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself."); *Virgin Atl., 257 F.3d at 259* ("[W]hat the antitrust laws are designed to protect is competitive conduct, not individual competitors."). Hence, **[**42]** I grant the defendant's motion for summary judgment for failure to show an adverse effect on competition.

IV. Conclusion

For the foregoing reasons, I grant the Carpenters' motion for summary judgment. The Clerk shall enter judgment in favor of the defendant and close the case.

So ordered.

Dated at Bridgeport, Connecticut, this 23rd day of May 2018.

/s/ STEFAN R. UNDERHILL

Stefan R. Underhill

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[17] "As a matter of convention," the "upstream participant in a transaction" is the "supplier," Herbert Hovenkamp, *Antitrust Policy, Restricted Distribution, and the Market for Exclusionary Rights*, *71 Minn. L. Rev. 1293, 1307 n.64 (1987)*—here, the Carpenters. Through use of the exclusionary CBA clauses, the Carpenters have "foreclos[ed] [their] upstream rivals," the Ironworkers, "from access to downstream [purchasers]," the employers. *See* XI Phillip E. Areeda & Herbert Hovenkamp et al., ***Antitrust Law*** ¶ 1802, at 69 (2d ed. 2005).

United States District Judge

In re Interest Rate Swaps Antitrust Litig.

United States District Court for the Southern District of New York

May 23, 2018, Decided; May 23, 2018, Filed

16-MD-2704 (PAE); 16-MC-2704 (PAE)

Reporter

2018 U.S. Dist. LEXIS 86732 *; 2018-1 Trade Cas. (CCH) P80,391; 2018 WL 2332069

IN RE: INTEREST RATE SWAPS ANTITRUST LITIGATION. This Document Relates to All Actions

Prior History: *In re Interest Rate Swaps Antitrust Litig., 2016 U.S. Dist. LEXIS 101959 (S.D.N.Y., Aug. 3, 2016)*

Core Terms

Dealers, trading, platform, discovery, plaintiffs', allegations, all-to-all, negotiations, clearing, conspiracy, buy-side, deadline, parties, restore, anonymous, swaps, production of documents, electronic, pled, class plaintiff, launched, new allegation, entities, boycott, revive, amend, firms, discovery dispute, notice, substantial completion

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For IRS Antitrust MDL Plaintiffs, Plaintiff (1:16-mc-02704-PAE): Daniel Lawrence Brockett, Quinn Emanuel, New York, NY; Thomas P Ogden, Wollmuth Maher & Deutsch LLP, New York, NY.

For IRS Antitrust MDL Defendants, Defendant (1:16-mc-02704-PAE): Jon Randall Roellke, Morgan, Lewis & Bockius (DC), Washington, DC.

Judges: Paul A. Engelmayer, United States District Judge.

Opinion by: Paul A. Engelmayer

Opinion

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

This decision resolves a motion by the putative class plaintiffs in this multi-district litigation for leave to file a Third Amended Complaint. For the reasons that follow, that motion **[*12]** is granted in part and denied in part.

I. Background

This case centers on claims of *Sherman Act* *§ 1* violations affecting the market for interest-rate swaps ("IRS" or "IRSs"). Plaintiffs' core factual allegations and liability theories, and the case's procedural background through July 28, 2017, are detailed in the 108-page decision the Court issued that day. *See* *In re Interest Rate Swaps Antitrust Litigation, 261 F. Supp. 3d 430 (S.D.N.Y. 2017)* ("*In re IRS*"). It resolved motions to dismiss the two Second Amended Complaints: one by the putative plaintiff class ("SAC"); the other by non-class plaintiffs Javelin Capital Markets LLC ("Javelin") and Tera Group, Inc. ("Tera") ("JTSAC"). The Court incorporates that decision by reference and recites here only necessary background.

A. Initial Proceedings

On November 25, 2015, the initial complaint before this Court was filed. *See* Complaint, (No. 15 Civ. 9319). On June 2, 2016, the United States Judicial Panel on Multidistrict Litigation ("JPML") transferred all related cases to this Court for coordinated or consolidated pretrial proceedings with the actions pending in this District. Dkt. 1.[1]

On July 26, 2016, the Court held an initial conference and stayed formal discovery. *See* Dkt. 92. On August 3, 2016, the Court appointed Quinn **[*13]** Emanuel Urquhart & Sullivan, LLP, and Cohen Milstein Sellers & Toll, PLLC, as interim co-lead counsel for the putative class. Dkt. 99.

On September 9, 2016, class plaintiffs, Dkt. 113, and the Javelin/Tera plaintiffs, Dkt. 114, each filed an Amended Complaint. On November 4, 2016, defendants filed motions to dismiss. *See* Dkts. 123-134.

On December 9, 2016, class plaintiffs filed the SAC, Dkt. 142, and the Javelin/Tera plaintiffs filed the JTSAC, Dkt. 145 ("JTSAC"). The SAC was 145 pages and 406 paragraphs long.

On May 23, 2017, after extensive briefing on motions to dismiss under *Federal Rule of Civil Procedure 12(b)(6)* by each of the then-13 groups of corporate defendants and their affiliates, the Court heard argument. *See* Dkt. 233 (transcript).

B. July 28, 2017: The Court's Ruling on the Motions to Dismiss

In its ruling on the motions to dismiss, the Court drew a sharp distinction between the Sherman Act *§ 1* allegations regarding 2008-2012 (made by class plaintiffs only) and those regarding 2013-2016 (made by both sets of plaintiffs).

The Court dismissed the former claims and sustained the latter. That was for three distinct reasons: (1) the character, depth, and overall plausibility of plaintiffs' claims of collusive conduct among **[*14]** the investment banks who dealt in IRSs ("Dealer Defendants" or "Dealers") in violation of *§ 1* differed markedly across the two periods; (2) plaintiffs' claims based on injuries incurred before November 25,2011 fell outside the four-year statute of limitations and were time-barred; and (3) class plaintiffs lacked antitrust standing to pursue claims covering the pre-2013 period.

1. 2008-2012

The SAC's allegations of unlawful collusion during 2008-2012, the Court held, fell well short of plausibly alleging conduct violating *§ 1*. That was so whether the SAC was construed to allege parallel conduct by competitors occurring under circumstances giving rise to an inference of a *§ 1* conspiracy, direct evidence of a *§ 1* conspiracy, or both. *See generally* *In re IRS, 261 F. Supp. 3d at 463-472*.

As for parallel conduct by the Dealer Defendants, the Court noted, the SAC contained scant allegations of such during this period. The main parallel conduct alleged—choosing in various ways not to support the eventual emergence of electronic all-to-all trading of IRS—did not give rise to an inference of collusion. That was because there was good reason, as a matter of "rational and competitive business strategy," *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, "for any individual Dealer independently **[*15]** to have sought to maintain the status quo and to discourage, not facilitate, all-to-all IRS exchange trading," because, as alleged, "such platforms presented an existential threat to the Dealers' profit margins as market makers," *In re IRS, 261 F. Supp. 3d at 463-464*.

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[1] Docket references here are to 16-MD-2704, insofar as many filings pertinent to the motion to amend have not been filed on the docket in No. 16-MC-2704, the "master case" docket established for filings of significance, Dkt. 11, which is intended to encompass motions to dismiss and associated filings. The Court asks counsel henceforth to file substantive motions and supporting submissions, as well as letters relating to discovery disputes and to counsel's monthly status calls with the Court, on the dockets in both 16-MD-2704 and 16-MC-2704.

The inference urged by the SAC of an all-Dealer conspiracy to inhibit future electronic all-to-all trading platforms from eventually coming into being was made all the less plausible, the Court held, given the state of the industry during 2008-2012. Key infrastructure to support electronic anonymous all-to-all IRS trading was not yet in place. These included mechanisms for central clearing accessible to and financially supported by the buy-side. *Id. at 465*.

Rather, the regulatory impetus for the development of all-to-all trading had come from the Dodd-Frank statute, enacted July 21, 2010, and its 2012-2013 implementing regulations. *See Id. at 445-447*. These established a comprehensive regulatory framework for swaps including IRSs; required that swaps be traded on platforms ("swap execution facilities," or "SEFs"); required the buy side to trade IRSs via these new platforms; and mandated the central clearing of IRS trades. *See id.* The CFTC itself, the Court observed, had recognized **[*16]** that mandating central clearing would promote participation by the buy-side in anonymous all-to-all IRS trading in these new trading fora that Dodd-Frank had brought about. *See id. at 446* (citing Clearing Requirements Determination Under *Section 2(h)* of the *CEA, 77 Fed. Reg. 74,284, 74,287 (Dec. 13, 2012)* ("CFTC Clearing Rule")). At the same time, the CFTC had recognized, buy-side participants would face significant costs and burdens adapting to such platforms. These included infrastructural, technological, and financial costs (*e.g.*, posting of financial collateral to enable clearing of their trades).

Further, during 2008-2012, the companies that later came to offer all-to-all anonymous trading platforms for IRSs—Javelin, Tera, and three others—did not yet offer such platforms. There were thus no extant all-to-all trading platforms for the Dealers to boycott. *See generally Id. at 465* ("Before Dodd-Frank made this vital infrastructure a looming reality, there would have been no urgency for collective action to block all-to-all exchange trading from emerging.").

As to purported direct evidence of a conspiracy, the Court noted, the SAC mainly relied on allegations regarding "Project Fusion." *See id. at 465-466*. There, Dealers had purchased a controlling interest in Tradeweb—an entity **[*17]** which had developed a dealer-to-client request-for quotes ("RFQ") platform that operated consistent with the day's norms—allegedly to ensure that it would not expand to introduce all-to-all anonymous trading to the IRS market. *Id.* But the SAC's claims as to that venture fell well short of plausibly alleging a *§ 1* conspiracy. The SAC's claim of a plot to terminate a Tradeweb plan to open an all-to-all IRS platform was highly conclusory, both because the existence of such a plan was summarily pled, *id. at 466*, and because the SAC did not allege direct evidence of a conspiracy to quash such a plan, *id. at 466-467*. Further, the Court held, to the extent collective action was alleged in connection with Dealers' joint ownership in Tradeweb, this claim did not describe *per se* unlawful conduct. It described a joint venture among horizontal competitors that, as pled, was well-funded and had legitimate business objectives and potentially redeeming justifications. Under settled *§ 1* doctrine, it thus could be held unlawful only under the Rule of Reason. But, the Court held, the SAC failed to plead key facts to make out a Rule of Reason claim (including defining Tradeweb's product or geographic market and its market share or **[*18]** power within that market). The SAC also did not allege why Tradeweb's decision to focus its resources on trading platforms and asset classes other than a novel platform for all-to-all IRS trading had been, on balance, anti-competitive. *Id. at 467-469*.

Independently, the Court held that most of the SAC's *§ 1* claims as to 2008-2012 were time-barred. Rejecting plaintiffs' claim of fraudulent concealment, the Court held outside the four-year statute of limitations the SAC's claims based on injuries incurred before November 25, 2011. That ruling effectively supplied an alternative basis to dismiss the SAC's *§ 1* claim to the extent it covered 2008 through November 25,2011. *See id. at 487-490*.

Finally, the Court held, class plaintiffs lacked antitrust standing to pursue claims of injury suffered before 2013. The putative plaintiff must be an "efficient enforcer" of the antitrust laws, and a central factor in that inquiry is whether the plaintiff's claimed injury is speculative. *Id. at 491*. But in the years before 2013—when Dodd-Frank's mandates had yet to take effect and the SEFs that first offered all-to-all IRS trading had yet to emerge—the SAC's *§ 1* claims failed this standard. The SAC's theory was the Dealers had blocked from emerging **[*19]** the species of IRS trading fora that emerged in 2013-2014: platforms enabling electronic all-to-all anonymous trading. It postulated that, had these platforms arisen in 2008-2012, the prices at which class plaintiffs would have traded IRSs would have been superior. This theory of injury, the Court held, was "extraordinarily conjectural," as the SAC's "alternative history of

IRS trading for the first five years of the class period (2008-2012) requires too many leaps of imagination and guesswork for a claim of class injury to be viable." *Id. at 494*. That ruling provided a third basis for the dismissal of the claims covering 2008-2012. *See id. at 490-495*.

2. 2013-2016

In contrast, as to 2013-2016, the Court held, the SAC stated a viable *§ 1* claim of a group boycott. So did the JTSAC, which brought claims to the same effect on behalf of Javelin and Tera, which claimed to have been targeted by a Dealer boycott of the platforms they opened in 2013 and 2014. *See id. at 472*.

As to plausibility, by 2013-2016, the Court noted, platforms for all-to-all anonymous IRS trading had emerged, facilitated by Dodd-Frank and its implementing regulations. The background conditions and market infrastructure thus now made claims of a conspiracy **[*20]** to destroy or marginalize these platforms more plausible. In this period, as alleged, five such platforms emerged. These included three (Tera, Javelin, and TrueEx) that plaintiffs claimed were targets of a Dealer conspiracy. *See id.*

Further, unlike in the 2008-2012 period, the SAC alleged numerous acts of parallel conduct by competing Dealers suggestive of a conspiracy to boycott these platforms, not merely a common decision not to support or trade on these platforms. These included similar Dealer tactics at meetings with Javelin and Tera, parallel withholdings by Dealers of affiliated clearing services, common excuses and vocabulary, parallel conduct towards the exchanges' customers, and parallel refusals to consent to smaller "inter-dealer brokers" doing business with the new exchanges. *Id. at 472-474*. Strikingly, the SAC alleged parallel ruses by four Dealers towards Tera the day after Tera's first IRS trade. The four Dealers feigned sudden interest in "auditing" Tera—in an apparent attempt to block Tera's progress. *Id. at 473-474*. Other alleged incidents and statements by individual Dealers supported the claim of collusion. *Id. at 476-477*. Viewed in total, these allegations made plausible the claim that the Dealers had **[*21]** conspired to stunt these emergent exchanges, which threatened Dealers' profit margins. *See generally id. at 472-481*.

Nor did the other deficiencies of the 2008-2012 claims preclude the 2013-2016 claims. The later claims were undisputedly timely. And, as to antitrust standing, class plaintiffs' theory of injury from 2013-2016 was not inherently unduly speculative. The Court, however, did caution—including in a later order clarifying the scope of trades that class plaintiffs could pursue—that due attention to the mechanics of trading would be necessary as the case progressed to assure that plaintiffs' theories of injury were not unduly speculative. *Id. at 494-495*; *see also* Dkt. 251 (August 29, 2017 order).[2]

C. Subsequent Progress of This Litigation

Following resolution of the motions to dismiss, this litigation moved productively forward. The parties negotiated, and in August 2017 the Court approved, a case management plan governing, *inter alia*, fact discovery. *See* Dkt. 246 (August 21, 2017 order); Dkt. 250 (August 28, 2017 order). The plan set a May 21, 2018 deadline for the substantial completion of document production and a December 21, 2018 deadline for the completion of fact discovery.

To meet these **[*22]** deadlines, the parties and the Court worked intensively. In brief:

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[2] The balance of the July 28, 2017 decision involved issues not relevant here. On defendant-specific grounds, the Court dismissed plaintiffs' claims against three defendants or groups: a Dealer (HSBC Bank PLC), an inter-dealer broker (ICAP Capital Markets LLC), and an entity (TradeWeb Markets LLC) which allegedly first refrained from opening an all-to-all IRS platform and later opened such a platform but kept it minimally active. *See generally In re IRS, 261 F. Supp. 3d at 483-487*. The Court also rejected defendants' argument that the Dodd-Frank statute impliedly precluded plaintiffs' *§ 1* claims, *id. at 495-498*, and resolved challenges to state-law claims, *id. at 498-501*.

Counsel engaged in extensive negotiations over discovery parameters. These involved counsel for numerous entities, including the putative class; non-class plaintiffs Javelin and Tera; the 11 groups of Dealer Defendants that remained in the case; and third-party institutions to whom discovery was directed. These negotiations addressed such matters as custodians, topics, search terms, and time-frames.

Multiple times, the parties briefed discovery disputes, which the Court resolved in a series of written decisions. *See, e.g.*, Dkt. 266 (October 10, 2017 decision); Dkt. 296 (October 25, 2017 decision); Dkt. 322 (January 8, 2018 decision).

The Court also convened a monthly telephone conference with counsel. Each call was preceded by a joint letter from lead counsel giving a status update on the case, primarily focusing on discovery. These letters and calls enabled the Court to take stock of the progress of the case, including discovery; to give counsel direction on open issues; to receive a preview of unresolved discovery disputes; and to set briefing schedules as to discovery disputes. *See, e.g.*, Dkt. 302 (November 15, 2017 **[*23]** joint letter); Dkt. 308 (transcript of November 17, 2017 call); Dkt. 315 (December 13, 2017 joint letter); Dkt. 320 (transcript of December 15, 2017 call); Dkt. 324 (January 24, 2018 joint letter); Dkt. 331 (transcript of January 26, 2018 call).

Important here, these activities—and the production of documents, now well underway—were conducted against the backdrop of the decision on the motions to dismiss. The Court's rulings as to discovery were premised on—and took as durable—the Court's central holding that the surviving claims in the case were limited to the 2013-2016 period. Two examples illustrate the point.

October 10, 2017 discovery ruling: On October 10, 2017, the Court resolved a dispute as to the start date of the period as to which defendants were obliged to produce documents on topics relevant to the alleged conspiracy in 2013-2016. Plaintiffs argued that defendants should produce documents created on or after January 1, 2009, arguing that events before 2013 might be germane to the formation of the 2013-2016 conspiracy. Defendants proposed a start date of January 1, 2012.

The Court chose an intermediate start date: July 21, 2010, the date of Dodd-Frank's passage. This date, **[*24]** the Court held, balanced plaintiffs' interest in discovering defendants "pre-conspiracy dealings" against the burdens of obliging the 11 defendant groups to make pre-conspiracy discovery. Explaining why documents created after July 21, 2010 were more likely to be relevant than those created before, the Court explained: "[A]fter Dodd-Frank was enacted, it became materially more foreseeable that electronic all-to-all platforms for IRSs would one day develop." Dkt. 266 at 2. The extensive negotiations and agreements among counsel that ensued regarding document production parameters—including the selection of custodians and the assessment of the burdens yielded by particular electronic-review search terms—were premised on this ruling.

January 8, 2018 discovery rulings: On January 8, 2018, the Court resolved an omnibus set of seven discovery disputes that the parties had briefed, after notifying the Court that they had reached an impasse on these issues. *See* Dkt. 311 (notice of impasse); Dkt. 319 (December 19, 2017 joint letter-brief); Dkt. 322 (January 8, 2018 decision). The disputes involved events that had occurred or entities that had existed before 2013. The parties centrally disputed **[*25]** whether these topics were relevant to the surviving (2013-2016) conspiracy claims, and, if so, whether the burden of producing materials as to these topics outweighed the benefits of ordering production.

Resolving these disputes, the Court noted that all seven topics "either exclusively or largely involved the pre-2013 period," with defendants contending that the topics were therefore wholly or largely irrelevant, and plaintiffs "argu[ing] that these topics remain relevant to . . . the alleged Sherman Act *§ 1* conspiracy in 2013-2016 that the Court has held adequately pled." *See* Dkt. 322 at 2. The Court recognized that discovery from earlier years might remain relevant to the 2013-2016 claims (as reflected in the July 21, 2010 discovery cut-off date). But, the Court noted, "requests for discovery as to pre-2013 events" must "be critically evaluated for relevance and. . . any discovery that is ordered [must] be carefully tailored to viable theories of relevance." *Id.* at 3.

Balancing the importance of each category of records sought against the burden and expense of its production, *see Fed. R. Civ. P. 26(b)(1)*, the Court precluded discovery as to some topics altogether as irrelevant or scantly relevant to the surviving claims. **[*26]** As to others, the Court allowed discovery or targeted discovery where an adequate showing of relevance to the 2013-2016 period had been made. *See* Dkt. 322 at 4-13. The parties' ensuing negotiations and agreements regarding document production parameters turned on these rulings, too.

D. February 21, 2018: Plaintiffs Disclose the PTAC

On February 21, 2018, in a letter submitted in advance of a monthly status call, plaintiffs' counsel disclosed their intention to move for leave to file a Proposed Third Amended Complaint ("PTAC"). *See* Dkt. 335 (February 21, 2018 joint letter). The motion, a memorandum of law in support, and the 198-page, 549-paragraph PTAC were filed later that day. *See* Dkt. 337 ("Pl. Mem."), 338-1 ("PTAC").[3] These were filed on the last day on which, under the case management plan, motions seeking leave to amend were permitted.

The PTAC proposed to amend the SAC in three ways. First, plaintiffs proposed to add a plaintiff—the Los Angeles County Employees Retirement Association ("LACERA")—to serve alongside the existing class plaintiff, the Public School Teachers' Pension and Retirement Fund of Chicago ("CPTF"). Second, plaintiffs proposed to amplify their allegations with **[*27]** respect to 2013-2016. Third, most consequentially, plaintiffs proposed to restore their claims as to 2008-2012. In support, the PTAC proposed to add approximately 150 new paragraphs of pre-2013 allegations.

Before February 21, 2018, plaintiffs had not alerted the Court to the possibility of an amendment to revive the five years of dismissed claims. In contrast, plaintiffs had notified the Court in January 2018 of their intention to seek leave to amend to add LACERA as a plaintiff *See* Dkt. 324 at 2.

The PTAC's new allegations as to 2008-2012 largely related to two topics as to which the Court had dismissed claims in July 2017 and denied discovery in January 2018.

"Project Fusion": The first topic involved the 2007 "Project Fusion," addressed above, involving Tradeweb. The Court had dismissed the SAC's claims based on this episode. And in January 2018, the Court had precluded plaintiffs' bid for discovery on "Project Fusion" as irrelevant to the surviving claims. Dkt. 322 at 6.[4]

Swapstream: The second topic was a trading platform, Swapstream, which the Chicago Mercantile Exchange ("CME") had operated in 2008-2010. The SAC had alleged that, in 2008, CME had announced plans to introduce **[*28]** a clearing product called "CME Cleared Swaps" for all over-the-counter ("OTC") swaps executed on Swapstream. SAC ¶¶ 184-185. The Dealers, concerned that introduction of this product could lead CME one day to develop "successful clearinghouses and exchanges for other asset classes," *id.* ¶ 186, had "boycotted" Swapstream and relied instead on a different clearing entity, SwapClear, that cleared only inter-dealer trades, *id.* ¶ 188. In its ruling on the motions to dismiss, the Court had held that the Dealers' common decisions not to use CME's new clearing product did not make out a claim of collusion. *In re IRS, 261 F. Supp. 3d at 464 & n.13*. And, in January 2018, after plaintiffs had sought extensive discovery as to Swapstream and its clearing products on the theory that Swapstream had been a "SEF precursor," the Court had declined to authorize such discovery. Dkt. 322 at 4.

E. The February 23, 2018 Status Call

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[3] Javelin and Tera have not moved to amend their Second Amended Complaints. The Court hereafter uses "plaintiffs" to refer to class plaintiffs.

[4] The Court had allowed more limited discovery, after July 21, 2010, into the "Dealers' communications and collaboration in connection with operating Tradeweb." *Id.* This was to enable plaintiffs to test whether Tradeweb, in which Dealer personnel had served as directors or officers, had provided a forum in which Dealers had conspired to further the 2013-2016 conspiracy. *Id.* at 6-7.

A monthly status call was held two days later. *See* Dkt. 345 (transcript of February 23, 2018 call). The Court questioned class plaintiffs' counsel about the PTAC.

Counsel acknowledged that, apart from the addition of LACERA, counsel had not notified the defense about a possible amendment of the complaint until February **[*29]** 14, 2018. Dkt. 345 at 19-20. Plaintiffs' counsel further acknowledged that they had been considering filing a PTAC that would revive the dismissed claims from the date (July 28, 2017) of the Court's ruling dismissing those claims. *Id.* at 20.

Plaintiffs' counsel further acknowledged that a decision had been made *not* to notify the defense or the Court earlier of the possibility of a motion to amend to restore the 2008-2012 claims: "We wanted to make sure the amended complaint was in a near final form so that we could tell them with certainty what the new allegations would be." *Id.* at 21. Asked whether counsel had given thought during the preceding six-to-seven months to whether a possible amendment to revive the 2008-2012 claims might bear on the ongoing discovery discussions and negotiations, plaintiffs' counsel stated that they had not viewed their silence as "an affirmative decision to withhold information," but as a decision "to make sure this complaint was in a near final form and that we were set on filing." *Id.* at 21-22. Plaintiffs' counsel admitted that, were the 2008-2012 claims revived, it "would have an effect on the scope of discovery." *Id.* at 22.

Asked whether it had occurred to counsel that the PTAC might moot **[*30]** "the substantial investment of time" that counsel and the Court had spent since August "resolving and discussing discovery issues," plaintiffs' counsel stated: "It did." *Id.* Plaintiffs' counsel added: "We apologize for any inconvenience to the Court and defense counsel." *Id.* Counsel added that "[c]ertain critical witnesses only came to light recently and were still being talked to up through the time period that we notified defendants." *Id.* Reminded that they had given notice a month earlier to the proposed addition of LACERA, plaintiffs' counsel reiterated that while they had considered alerting the Court and defense in earlier status letters to the possible amendment to revive the dismissed claims, "we wanted to make sure it was something we were going to go through with . . . . And we again apologize for any inconvenience to the Court." *Id.* at 23.

Finally, plaintiffs' counsel clarified that, despite the PTAC's listing as defendants two entities (HSBC and ICAP) whom the Court had dismissed, plaintiffs had not intended to restore claims against those parties. But, plaintiffs' counsel stated, the PTAC was intended to restore claims against Tradeweb, another dismissed defendant. *Id.* at 26. Plaintiffs' **[*31]** counsel stated that they had not yet notified Tradeweb of the amended complaint that had been filed to restore claims against it. *Id.* at 26-28.

F. Later Submissions Relating to the PTAC

On March 30, 2018, defense counsel filed a memorandum of law opposing the PTAC to the extent it sought to restore dismissed claims, Dkt. 353 ("D. Mem."), and a declaration of Richard F. Schwed in support, Dkt. 354 ("Schwed Decl."). The same day, counsel for Tradeweb submitted a letter opposing the restoration of claims against it. Dkt. 355.

On April 2, 2018, plaintiffs' counsel filed a letter seeking leave to file a reply, noting that the defense had filed with their brief a document (the Project Magellan Agreement) relating to Swapstream which plaintiffs had only recently seen, Dkt. 356, and a declaration of counsel addressing the filing of the PTAC, Dkt. 356-1. The Court authorized a reply on that point. Dkt. 357. On April 3, 2018, plaintiffs filed a reply. Dkt. 359.

III. Discussion

The PTAC proposes to amend the SAC by (1) adding LACERA as a plaintiff; (2) amplifying the factual allegations regarding the 2013-2016 period as to which plaintiffs' *§ 1* claims have been held viable; and (3) adding extensive new factual allegations **[*32]** regarding 2008-2012 and on that basis reviving plaintiffs' claims as to that period. The

Court reviews these three categories of proposed amendments in turn, after first reviewing the governing legal standards.

A. Applicable Legal Standards

"Although *Rule 15(a) of the Federal Rules of Civil Procedure* provides that leave to amend 'shall be freely given when justice so requires,' it is within the sound discretion of the district court to grant or deny leave to amend." *McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007)*. "A district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Id.* (citing *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*). Leave to amend is properly denied upon on a showing of prejudice or bad faith, and an "[a]mendment may be prejudicial when, among other things, it would 'require the opponent to expend significant additional resources to conduct discovery and prepare for trial' or 'significantly delay the resolution of the dispute.' *AEP Energy Servs. Gas Holding Corp. v. Bank of Am., NA., 626 F.3d 699, 725-26 (2d Cir. 2010)* (quoting *State Teachers Ret. Bd. v. Fluor Corp., 654 F.2d 843, 856 (2d Cir. 1981))*; *see also* *Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72 (2d Cir. 1990)* ("The Court plainly has discretion . . . to deny leave to amend when the motion is made after an inordinate delay, no satisfactory explanation is offered for the delay, and the amendment would prejudice the defendant").

B. Leave to Add LACERA as a Plaintiff

Plaintiffs seek leave **[*33]** to add LACERA, a California municipal pension fund, as a plaintiff. Defendants do not oppose this, while reserving the right later to challenge LACERA's standing depending on discovery.

The Court grants this motion. The PTAC alleges facts about LACERA that make it a suitable plaintiff: As of June 30, 2016, late in the class period, LACERA held net assets in trust for pension benefits totaling $53.8 billion, and during this period, "LACERA entered into IRS transactions directly with multiple Dealer Defendants." PTAC ¶ 39. Adding LACERA has the benefit of assuring, on the anticipated motion for class certification, that the universe of IRS trades involving putative class plaintiffs will be broader, more diverse, and potentially more representative of the variety of covered trades. Defendants, who have had notice of LACERA's prospective addition since January 2018, do not claim that adding LACERA would meaningfully add to discovery burdens or affect the existing schedule.

C. Leave to Amplify the 2013-2016 Allegations

Plaintiffs seek leave to elaborate on the factual allegations regarding the 2013-2016 period as to which the Court has upheld the SAC's claims as viable. Defendants also do **[*34]** not oppose this amendment.

The Court grants this motion. The PTAC's new allegations about the 2013-2016 period fortify—and give defendants fuller notice of the nature of—plaintiffs' claims.

For example, the PTAC newly alleges: (1) a March 2013 meeting at which Tera demonstrated its trading platform, and after which an identified J.P. Morgan collateralized default swap trader warned a Tera employee that if Tera launched an anonymous central limit order book for swaps, the employee "would need personal security and should check his car for bombs," PTAC ¶ 357; (2) Javelin's October 2013 filing of the SEF industry's first "Made Available-to-Trade" ("MAT") application to the CFTC, which, if granted, would have enabled a wide range of cleared IRSs to be executed on SEFs, *id.* ¶ 408, but which prompted complaints and a withdrawal of liquidity from a Dealer, RBS, *id.* ¶ 409; (3) a warning by a Dealer employee to a Javelin representative, following Javelin's MAT application, that he "would never work on Wall Street again," *id.* ¶ 411; (4) the existence of buy-side support as of November 2013 for Javelin's platform and the expressed hope of these firms that Javelin's new "phased-in approach" for **[*35]** certain swaps might appease the Dealer Defendants, but which proved a "non-starter" because the Dealers reacted with "hostility," *id.* ¶¶ 412-413; and (5) an October 2014 meeting with Barclay's at which a Javelin representative was told that the Dealer Defendants had already "boxed out" Javelin's platform and at which "Barclays personnel expressly warned against any further MAT application, and even raised the prospect of physical intimidation," *id.* ¶ 415.

The PTAC also adds an allegation that appears aimed at clarifying the scope of damages plaintiffs intend to pursue if liability is established as to the 2013-2016 period. It alleges that had the three SEFs against which plaintiffs claim the Dealer Defendants conspired not been impeded, there would have been greater transparency and price competition not only on all-to-all IRS trades, but also, derivatively, more beneficial pricing on trades executed over the counter and on non-anonymous RFQ platforms. *See id.* ¶¶ 477-478.

Defendants do not argue that these new allegations would impose material burdens, meaningfully affect ongoing discovery, or disrupt the existing schedule. The Court accordingly permits those proposed amendments that **[*36]** amplify plaintiffs' claims as to 2013-2016.

D. Leave to Revive Plaintiffs' Claims as to 2008-2012

The thrust of the PTAC's new allegations as to 2008-2012 is that the Dealer Defendants colluded to impede from emerging two electronic-trading platforms that would have supported all-to-all anonymous trading of IRSs. One would have been operated by Tradeweb, *see, e.g., id.* ¶¶ 212-227, 238-240, 242, 277-282; the other, Swapstream, would have been operated by CME, *see, e.g., id.* ¶¶ 119-211; *see also id.* P 14 (CME and Tradeweb, as of 2007, were "two threats to the Dealer Defendants' hold on the IRS market"). The PTAC attempts to cure the SAC's pleading deficiencies as to these potential platforms. It also includes new allegations to the effect that the buy-side would have responded favorably during 2008-2012 had an all-to-all platform for IRS trading existed, and that the "pillars" needed to support such all-to-all trading (such as mechanisms for central clearing, order routing, and post-trade processing) were being used for inter-Dealer trades before Dodd-Frank and were adaptable to the buy-side's use. *See, e.g., id.* ¶¶ 92, 100-101, 104-118.

For multiple independent reasons, the Court denies plaintiffs **[*37]** leave to file the PTAC to the extent that it attempts to revive plaintiffs' claims as to 2008-2012.

1. Futility

The PTAC does not remedy the gauntlet of deficiencies that led the Court to dismiss the SAC's claims as to 2008-2012 for failure to state a claim. Amending these claims would thus be futile. Four points in particular merit discussion:

Antitrust standing/speculative injury: Even assuming a *§ 1* conspiracy were now well-pled based on the episodes alleged regarding the potential Tradeweb and CME platforms—and the Court does not so find—plaintiffs' theory of injury as to 2008-2012 would remain far too conjectural to survive.

A court determining whether a plaintiff is an "efficient enforcer" of the antitrust laws so as to have antitrust standing must consider factors including "the speculativeness of the [plaintiff's] alleged injury." *See* *In re IRS, 261 F. Supp. 3d at 490-491* (quoting *Gatt Commc'ns, Inc. v. PMC Assocs., LLC, 711 F.3d 68,78 (2d Cir. 2013)* (internal quotations omitted)). On this basis, the Court previously held that even were the SAC' s claims as to 2008-2012 otherwise viable, they would fail this requirement:

> [C]lass plaintiffs' theory of pre-2013 injury is extraordinarily conjectural, such that, had the *§ 1* claim as to that period not otherwise have been dismissed as implausible **[*38]** (and had the pre-2012 aspects of that claim not been dismissed as time-barred), the claim would not satisfy the requirements of antitrust standing. Among other infirmities, it is "entirely uncertain," *Gatt, 711 F.3d at 79*, that, absent the scheme, the necessary infrastructural preconditions for all-to-all trading, such as central clearing of IRS trades, would have developed before Dodd-Frank willed them into being in 2013. Plaintiffs' alternative history of IRS trading for the first five years of the class period (2008-2012) requires too many leaps of imagination and guesswork for a claim of

> class injury to be viable. *See Reading [Indus., Inc. v. Kennecott Copper Corp.*], 631 F.2d [10], at [14] [(2d Cir. 1980)] (no antitrust standing where indirect purchaser at end of vertical distribution line "predicate[d] its claim of injury on a basis too tenuous and conjectural for a valid causal finding of anticompetitive effect and damages"); *see also Paycom [Billing Servs. Inc. v. MasterCard Int'l Inc.*], 467 F.3d [283,] 293 [(2d Cir. 2006)] (no antitrust standing where chain of causation was "highly speculative" and was built on "conclusory allegations").

Id. at 494.

The new allegations in the PTAC do not cure this fundamental problem. Plaintiffs' claim is still that, that but for defendants' conduct, all-to-all anonymous trading platforms would have developed **[*39]** years prior to Dodd-Frank, such that defendants' conduct caused them injury on their 2008-2012 IRS trades. But in various ways including the following, plaintiffs' 2008-2012 theory of injury remains a product of speculation, imagination, and guesswork.

First, the PTAC does not allege that any such platform actually developed in the pre-2013 period, or came anywhere close. In this respect, the PTAC's allegations as to 2008-2012, like the SAC's, sharply contrast with those regarding 2013-2016. With respect to 2013-2016, plaintiffs concretely allege collusion to boycott and otherwise stymie three extant all-to-all anonymous IRS trading platforms (Javelin, Tera, and TrueEx) accessible to the buy-side. Plaintiffs are joined in so alleging by two entities that operated such platforms, Javelin and Tera. In contrast, the PTAC does not allege that either CME or Tradeweb ever launched such a platform during 2008-2012. *See* discussion *infra*, at 23-29. Nor does the PTAC allege that—despite such a platform's ostensible business logic, its ostensible appeal at the time to the buy-side, and the ostensible existence of the technological and infrastructural "pillars" that could be adapted to support such a platform—any **[*40]** entity, including ones like Bloomberg that are not alleged to have been boycotted, ever launched or came close to launching such a platform until after Dodd-Frank's mandates took effect in 2013.

Second, while the PTAC adds detail to its allegations as to the existence *among Dealers* of clearing arrangements, post-trade processing technology, and the necessary legal infrastructure in the pre-2013 period, *see* PTAC ¶¶ 104-118, its repeated allegation that these building blocks would have been seamlessly *adapted* to the all-to-all context, *see, e.g., id.* ¶¶ 100, 110-111,117, is conclusory. Plaintiffs posit the ready adaptation of such infrastructure as central clearing of trades from an inter-dealer environment in which swaps were traded among highly capitalized, repeat players to one that facilitated trading of sophisticated derivatives by any market participant, no matter how small, thinly capitalized, or inexperienced. But the PTAC does not concretely allege why this process would have been natural, fluid, or at all likely. On the contrary, the PTAC—tracking the observations of the CFTC when it later guided this process—elsewhere notes some of the formidable hurdles to such an evolution. **[*41]** *See, e.g.*, PTAC ¶¶ 98, 100, 110, 115, 334, 345 (acknowledging that buy-side clearing would require "operational changes," "connections," legal arrangements, collateral arrangements, and retention of clearing agents).

Third, the PTAC's claim that buy-side firms would have participated in an anonymous, all-to-all platform had one been introduced before Dodd-Frank is an *ipse dixit*. Although the PTAC alleges that buy-side firms were interested conceptually in such a potential platform, the PTAC does not allege that any buy-side firm, before Dodd-Frank's mandates took effect, had invested in any of the collateral, technological, or legal arrangements needed to facilitate such participation in anonymous all-to-all trading.[5] Class plaintiffs CPTF and LACERA, large public pension funds, do not allege that they did so. And while the PTAC lists large buy-side firms that had expressed interest in using central clearing so as to permit trading on an all-to-all platform, *see, e.g.*, PTAC ¶¶ 133-134 (listing Allstate, BlackRock, DE Shaw, Freddie Mac and PIMCO as firms to whom CME "successfully reached out," and stating that Citadel, Countrywide Financial Corporation, Nomura, and other "asset managers, **[*42]** hedge funds, and proprietary trading firms" had committed to "an Early Adopter Program for clearing via Swapstream"), it does not allege that any such firm made any investment or took other concrete action toward this end pre-Dodd-Frank. None of these firms is party to this lawsuit.

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[5] *See* CFTC Clearing Rule at 74,323 (IRS clearing requires "startup and ongoing costs relating to technology and infrastructure, new or updated legal agreements, . . . and costs related to collateralization").

Indeed, even after Dodd-Frank had *mandated* the central clearing and collateralization arrangements necessary to enable all-to-all swap trading, compliance with these obligations by buy-side participants proved challenging: Ultimately, the CFTC delayed implementation of its mandates, recognizing as late as December 2012 that buy-side firms were still scrambling to achieve "operational readiness" to clear their trades.[6] As the Court earlier observed: "The CFTC delayed implementation of this mandate to 2013, in part due to 'multiple requests from buy-side entities for extra time to cope with the costs and burdens imposed by implementing mandatory clearing, which one commenter described as 'overwhelming." *See* *In re IRS, 261 F. Supp. 3d at 446* (quoting CFTC Clearing Rule at 74,320).

Fourth and finally, to resolve reliably class plaintiffs' claim to have experienced pricing injuries on their 2008-2012 trades as a result of the absence of the IRS trading platforms they **[*43]** imagine, a jury presumably would have to do more than merely posit the existence of some such platform. A jury would also have to conjure features of the platform or platforms that might have been, such as their design, mechanics, costs, entry barriers, efficiencies, limitations, regulatory constraints, and trading metrics and modalities. The PTAC scarcely addresses such matters, even as to the platforms that it claims CME and Tradeweb, but for the alleged boycott, would have introduced.[7] Nor can the structural features of the allegedly aborted platforms be inferred from later events. While Dodd-Frank put into place a "SEF" framework for swaps trading, it cannot be assumed that the free market—but for the Dealers' allegedly illegal actions to quell CME and Tradeweb—would organically have arrived at the same place. The PTAC leaves these important parameters, which may well be inherently unknowable, to speculation.

In light of these and other factors, a jury evaluating plaintiffs' claims to have experienced injuries between 2008-2012 from the alleged conspiracy would thus be required to imagine a mode of market trading that—until mandated by a landmark federal statute and its implementing **[*44]** regulations aimed at stabilizing this corner of the financial system—never came to be (or even close). The PTAC's 2008-2012 claims would unavoidably require a jury to conjure an alternative history in which a form of marketplace that took federal legislation to bring about would have organically sprung up. Such would require an unacceptable amount of conjecture.

The PTAC's claim of injury as to 2008-2012, anchored in an imagined alternate history, therefore remains unacceptably speculative. It is "too tenuous and conjectural for a valid causal finding of anticompetitive effect and damages." *Reading, 631 F.2d at 13*.

Tradeweb/"Project Fusion" allegations: The PTAC also fails to rehabilitate the claim that "Project Fusion" violated *§ 1*. The Court held conclusory the SAC's allegation that "Tradeweb was planning to introduce electronic all-to-all trading to the IRS market" by "late 2007." The PTAC abandons that claim. In its stead, the PTAC asserts that (1) Tradeweb was gradually upgrading its swap trading capabilities and by 2006 "was in a race with CME and Bloomberg to develop the most advanced swaps execution platform," PTAC ¶ 212; (2) introducing all-to-all IRS trading was a "competitive necessity" for Tradeweb, **[*45]** because its "formidable adversaries" Bloomberg and CME were capable of, and exploring, doing so, *id.* ¶ 219; (3) Tradeweb was "primed to adopt all-to-all trading with central clearing," *id.* ¶ 102, and (4) unidentified Tradeweb executives, at unspecified times, "discussed the threat" presented by Bloomberg and CME and "discussed whether Tradeweb should upgrade its IRS trading platform to an all-to-all anonymous platform to fend off these threats," *id.* ¶ 223.

These reconfigured allegations about amorphous "discuss[ions]" and Tradeweb's being "primed" to adopt all-to-all trading, *id.* ¶ 102, again fall far short of plausibly alleging plaintiffs' "critical background premise," *In re IRS, 261 F. Supp. 3d at 466*: that Tradeweb was planning in 2007 to launch all-to-all IRS trading. Such a plan cannot be

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[6] *See* CFTC Clearing Rule, at 74,324 (stating in December 2012 that, "[i]n response to . . . concerns about legal documentation and operational readiness, the Commission. . . clarified that compliance with the clearing requirement will not be required for any swaps until March 11, 2013").

[7] In contrast to the 2013-2016 allegations, the owner-operators of the two platforms allegedly quashed in earlier years do not join in this lawsuit. (CME is a non-party. Tradeweb was sued in the SAC but dismissed; the PTAC would restore the claims against it.) The PTAC does not allege that, prior to Dodd-Frank, concrete specifications were ever developed for a CME or Tradeweb all-to-all trading platform for IRSs.

inferred, either, from the PTAC's general claims that Tradeweb intended to offer "efficient electronic trading," PTAC ¶¶ 215, 218, or that, but for a conspiracy, competitive pressure from Bloomberg and CME would have led Tradeweb to offer this form of IRS trading platform, *Id.* ¶¶ 219, 221. CME never launched such a platform, *see id.* ¶¶ 135, 159, and Bloomberg—which plaintiffs do not claim was the subject of a boycott or anything **[*46]** other than a total free agent—elected not to do so until Dodd-Frank compelled it to, *id.* ¶¶ 226, 442 & n.166. The PTAC's theory of a plot to block a Tradeweb plan to introduce all-to-all IRS trading thus starts with the ill-pled premise that there ever was such a plan.

The PTAC also fails to rectify the other pleading deficiencies in the Project Fusion allegations. The Court earlier held that Project Fusion, as a joint venture, was subject to review only under the Rule of Reason. To elude this ruling, plaintiffs dub the Project Fusion joint venture a "sham" and a "formalistic shell," PTAC ¶¶ 271, 282. But as the Court has explained, the facts pled in the SAC were inconsistent with those labels. Rather, the SAC alleged that:

> (1) The Dealers invested $280 million in Tradeweb; (2) they owned Tradeweb alongside existing owner Thomson; (3) Tradeweb, post-acquisition, was organized consistent with customary corporate formalities; (4) Tradeweb proceeded to expand other aspects of its trading platforms; and (5) its decision not to offer an all-to-all trading platform until 2013 put it on par with all other trading platforms of the day, including . . . Tera, Javelin, TrueEx, and Bloomberg.

In re IRS, 261 F. Supp. 3d at 468 n.17. Notably, **[*47]** the PTAC continues to plead these facts. *See* PTAC ¶¶ 241-251,268-276. Accordingly, even assuming a well-pled agreement among owners to terminate a Tradeweb plan to open an all-to-all IRS trading platform, the Project Fusion joint venture as alleged remains subject to review only under the Rule of Reason. *In re IRS, 261 F. Supp. 3d at 467-468* (collecting cases).[8]

The PTAC adds two paragraphs of allegations as to application of the Rule of Reason. *See* PTAC ¶¶ 281-282. These are far too spare and incomplete to close the gaps in the SAC's pleadings on this point. *See* *In re IRS, 261 F. Supp. 3d at 468-469*. Like the SAC, the PTAC lacks allegations defining Tradeweb's product or geographic market, *id. at 469*. It loosely recites that "[t]he relevant market is the market for IRS," PTAC ¶ 281; *compare* SAC IN 398-400, but that allegation is a mismatch for Tradeweb's function as alleged, which was not as a buyer or seller of (nor a market marker for) IRSs, but as a provider of electronic trading platforms, *In re IRS, 261 F. Supp. 3d at 468*. As to that market, the PTAC does not make any allegations as to Tradeweb's market power, let alone regarding its actual or potential competitors and/or the barriers to other entrants. It is silent as to the market share of Tradeweb's then-competitors (*e.g.*, Bloomberg, the New **[*48]** York Stock Exchange, Nasdaq, CME, or others). The assembled pleadings again do not allege "that Tradeweb had any presence, let alone power, in *any* market." *Id. at 469*.

The PTAC's failure to situate Tradeweb in any relevant market, as required, again leaves to conjecture the impact of this one market participant's alleged decision not to introduce a novel product (a new IRS trading platform) in favor of other business priorities. *See* *id. at 469*. And while the PTAC recites that this decision was anti-competitive because it "reduce[d] output," PTAC ¶ 280, it lacks non-conclusory allegations as to the pro-competitive benefits and anti-competitive harms of the joint venture's decision to focus Tradeweb's offerings (like those of competitor Bloomberg) on other products and platforms. Measured against the standards applicable to Rule of Reason claims, *see* *In re IRS, 261 F. Supp. 3d at 468*, the PTAC, like its predecessor, falls well short.

CME/Swapstream allegations: The vast majority of plaintiffs' new factual allegations concern CME's Swapstream platform. The PTAC substantially overhauls the SAC's claim of a Dealer boycott of that platform and an affiliated

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[8] In a separate bid to avoid Rule of Reason review, the PTAC labels the Tradeweb joint venture a "naked restraint" that was the product of collusion between the Dealer investors and Tradeweb itself On this basis, it alleges that Tradeweb's decisions after Project Fusion to forgo a plan to open an all-to-all IRS platform warrant per se condemnation. PTAC ¶ 277. This label notwithstanding, on the facts pled, as under the SAC, Tradeweb was not a horizontal competitor of the Dealers, as "it was a provider of electronic trading platforms, not a market maker." *In re IRS, 261 F. Supp. 3d at 468*. The label "naked restraint," which ***antitrust law*** uses in connection with horizontal competitors, therefore, does not fit.

fledgling clearing mechanism, CME Cleared Swaps. While the new allegations significantly **[*49]** flesh out plaintiffs' claims, they do not, in the end, viably plead a *§ 1* violation.

The PTAC alleges that, in 2006, CME, an operator of derivatives exchanges and trading platforms, PTAC ¶¶ 121-122, acquired a trading platform known as Swapstream, which until then had focused on a limited set of dealer-to-dealer IRS swaps in Europe, *id.* ¶¶ 124-127. It alleges that CME envisioned transforming Swapstream into a worldwide electronic platform for all-to-all anonymous IRS trading, *id.* ¶¶ 125,127,194, and that "[b]uy-side firms were clamoring to trade on Swapstream," *id.* ¶¶ 132-133. But, it alleges, CME realized the platform needed "a critical mass" of Dealer support to succeed. *Id.* ¶ 135. CME approached multiple Dealers and offered them "equity in the platform and an opportunity for revenue sharing." Supplemental Declaration of Richard Cohen, Dkt. 319-2 ("Cohen Suppl. Decl."), at ¶ 11 (cited at PTAC ¶ 105 n.19); *see also* PTAC ¶ 136. It did not find takers: certain Dealers (including Bank of America, Citi, Credit Suisse, Goldman Sachs, and JPMorgan) initially stated that they would "not support an IRS execution platform," PTAC ¶ 144, while others "were less overtly hostile to Swapstream, but **[*50]** still would not support it," *id.* ¶ 145. The PTAC alleges that "[p]rior to the[ir] meetings with the CME, the Dealer Defendants met and coordinated their positions and messaging." *Id.* ¶ 145. It further alleges that Dealers articulated "pretextual" concerns with CME's platform. *Id.* ¶¶ 183-184. CME tried to induce smaller dealers to participate by extending them preferred "founding member" status, but these efforts also did not bear fruit. *Id.* ¶¶ 150-151.

In fall 2008, CME's discussions with individual Dealers entered a second phase. By that time, CME's negotiations had "morphed into a group discussion" between CME and multiple Dealers, Cohen Suppl. Decl. ¶ 11, as a result, the PTAC alleges, of Dealers' insistence on "collective negotiations" as a means to "monitor and control Swapstream's development," *id.* ¶ 152. The Dealers were represented in these negotiations by a common lawyer, Edward Rosen from the Cleary Gottlieb firm. *Id.* ¶ 153. In the negotiations, the Dealers allegedly took common positions, sought "governance" over the platform as a means "to ensure they could control [its] development," and discouraged CME from operating a joint trading-and-clearing platform. *Id.* ¶ 155. Ultimately, **[*51]** CME "was unable to secure a critical mass of liquidity providers" and therefore "abandon[ed] Swapstream" as a trading platform, focusing instead on IRS clearing. *Id.* ¶¶ 158-159.

The PTAC alleges that CME next initiated joint negotiations with the Dealers regarding a "clearing-only solution" that would be "open to the buy-side." *Id.* ¶¶ 160-161. During these "Project Magellan" discussions, CME offered Dealers "revenue sharing" and "equity" in exchange for commitments to send trades to the new clearing platform. *Id.* ¶ 165. In these negotiations, the Dealers again took common positions, including insisting on means of control over CME's clearing platform. *Id.* ¶¶ 174-177. The negotiations led to a written "Clearing Revenue Share Agreement" between CME and most Dealer Defendants (save BPS). *See id.* ¶¶ 179-180. Under that agreement, the participating Dealers agreed to provide minimum clearing volume to CME in exchange for revenue sharing. *Id.* ¶ 179; *see also* Schwed Decl. Exh. K ("Magellan Agreement") §§ 2.01, 2.03, 4.02(e).[9] The PTAC terms the revenue-sharing provision a "poison pill" that provided that, "should CME ever launch an execution platform, the Dealer Defendants would capture nearly all the profits." **[*52]** PTAC ¶ 179.

The PTAC's allegations regarding Swapstream are more substantial than those regarding Tradeweb. And the PTAC pointedly presents the Swapstream allegations in a manner that plaintiffs argue "mirror[s] those already found sufficient by the Court as to the 2013-2016 period," including allegations of parallel conduct beyond refusing to agree to use the IRS platform that CME proposed to roll out. *See* Pl. Mem. 12-13. However, despite the PTAC's attempt to pattern the new allegations on those involving later years that the Court has sustained, the new allegations as to Swapstream differ materially from—and far less plausibly indicate a *§ 1* conspiracy than—plaintiffs' well-pled allegations of a 2013-2016 plot to boycott Javelin, Tera and TrueEx.

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[9] The Defendants filed the Magellan Agreement under seal pursuant to the protective order governing confidential material entered in this case, see Dkt. 300, and this Court's order, Dkt. 351.

First, a number of the PTAC's core allegations as to the scheme against Swapstream must be discounted or disregarded altogether, because they are contradicted either by pled or cognizable facts and/or because they fail pleading standards.

Plaintiffs, for example, claim that CME was driven to open an all-to-all IRS trading platform in 2007 because it, "Tradeweb, and Bloomberg [were] racing to be the first to launch such a platform." Pl. Mem. at **[*53]** 7; *see* PTAC ¶¶ 212, 220-224. However, this figure of speech aside, the PTAC does not allege such a "race" with these competitors, neither of whom is non-conclusorily pled to have then, or at any time before Dodd-Frank, planned or intended any such platform.[10]

Plaintiffs also imply that CME launched the Swapstream IRS trading platform before abandoning it. *See* Pl. Mem. at 8. In fact, on close reading, the PTAC confirms that no such platform was built or launched. *See, e.g.*, PTAC ¶¶ 119, 131, 135, 159. The PTAC's Swapstream theory is thus best described not as a Dealer boycott of an extant platform—as plaintiffs adequately plead with respect to Javelin, Tera, and TrueEx—but of a plot to deter CME from rolling out a new offering.

Plaintiffs also claim that the Project Magellan Agreement contained a "poison pill" aimed at pretermitting any attempt by CME to open an all-to-all anonymous IRS trading platform. *Id.* ¶ 179. Defendants attached the Project Magellan Agreement to their papers opposing leave to add these new claims. It is undisputedly cognizable here. The agreement demonstrably does *not* contain a "poison pill" or anything close. Rather, as defendants observe, the provision at issue **[*54]** states only that if the CME "establish[es] a new Electronic Trading Platform for IRS," it will grant the Magellan dealers a limited right to try to negotiate a Magellan-like agreement with the new trading platform. Magellan Agreement, § 5.05(b)(i). Specifically, CME agreed to:

> Negotiate in good faith with the Dealer Founding Members [i.e., the Magellan dealers] the terms of their participation in the Electronic Trading Platform on the most favorable terms offered to any other prospective participant supporting IRS Products on such Electronic Trading Platform (including . . . rights at least as favorable as the terms set forth in this Agreement, unless CME or such Electronic Trading Platform can demonstrate a reasonable commercial or regulatory basis for requiring adjustment of such terms) . . . .

Id. By its plain terms, the Magellan Agreement did *not* "poison" CME's plans to launch an IRS clearinghouse. And the contractual requirement that CME enter into good-faith negotiations towards a similar agreement in the event it launched an IRS clearinghouse cannot plausibly be painted as a "poison pill," either.

The PTAC also contains a significant number of conclusory allegations. These include the PTAC's **[*55]** central allegation relating to the period before joint discussions between the Dealers and CME began (*i.e.*, before the fall of 2008)—that some Dealers sought to bring other Dealers into line with respect to Swapstream. *See, e.g.*, PTAC ¶¶ 145, 151-152, 158. The PTAC's allegations on this score do not allege "a specific time, place or person involved." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565 n.10, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*.

Finally, the PTAC's persistent claims as to the motivations or actions of "the Dealer Defendants" as a general collective bloc, or generalized claims of parallel conduct, must also be set aside, like the similar claims in the SAC, as impermissible group pleading. *See In re IRS, 261 F. Supp. 3d at 478*; *see also* discussion *infra*, at 32-33 (listing examples). In contrast, the claims of a conspiracy to boycott Javelin, Tera, and Tradeweb were held viable because they were backed by specifically pled acts of common conduct, most strikingly, that four Dealers on the same day—the business day after Tera's first trade—had separately notified Tera that they would not clear trades on its platform until they had conducted a review of its rulebook, a move which was later mimicked by other Dealers and which the SAC credibly alleged was pretextual. *See In re IRS, 261 F. Supp. 3d at 473-474*.

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[10] As noted above, the PTAC abandons the SAC's express claim of a Tradeweb plan to introduce such a platform in lieu of a generalized claim of "discussions" of such among its executives. *Id.* ¶ 223. The PTAC does not allege any plan by Bloomberg prior to Dodd-Frank to enter this space. Rather, it alleges that in 2011—a year after Dodd-Frank mandated SEF trading—a Bloomberg executive stated that Bloomberg was "very ready to commence SEF trading." PTAC ¶ 117.

Second, and significant, although the PTAC **[*56]** does plead collective action regarding Swapstream, the well-pled allegations of concerted action among Dealers are centered on the period *after* joint negotiations between CME and the Dealers are alleged to have begun (*i.e.*, from the fall of 2008 onwards). In that period, as pled, discussions and lawyered negotiations had begun between CME and the Dealers to reach agreement regarding the terms under which participating Dealers collectively would participate in CME's Swapstream platform. As reviewed above, the parleys during this period occurred in two phases: regarding (1) CME's initial proposal to revamp Swapstream; and (2) CME's ensuing proposal—which resulted in a negotiated business arrangement memorialized in the Magellan Agreement—to launch a stand-alone clearinghouse.

This paradigm of collective negotiations between multiple collaborating competitors and a shared counterparty or counterparties to explore facially legitimate business arrangements does not lend itself to *per se* condemnation. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)* (standard setting is subject to the Rule of Reason). As the Court reviewed in its discussion of Tradeweb, legitimate joint business ventures, including at the point of their creation, **[*57]** are subject to the Rule of Reason, and "business practice[s]" involving the "core activity of [a] joint venture . . . do not fall within the narrow category of activity that is *per se* unlawful." *Texaco, Inc. v. Dagher, 547 U.S. 1, 8, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *see id.* at n.1; *Nw. Wholesaler Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* ("mere allegation of a concerted refusal to deal does not suffice" to merit *per se* condemnation "because not all concerted refusals to deal are predominantly competitive"); *Major League Baseball Props., Inc. v. Salvino, 542 F.3d 290, 316 (2d Cir. 2008)* ("*Per se* treatment is not appropriate. . . where the economic and competitive effects of the challenged practice are unclear"); *see also In re IRS, 261 F. Supp. 3d at 467* (collecting cases and holding Project Fusion subject to Rule of Reason review).

The facts pled reveal potential pro-competitive justifications from the collaboration here in connection with the Dealers' negotiations with CME, enough to persuade the Court that the conduct alleged—in contrast to a horizontal price-fixing conspiracy or the boycott pled against Javelin, Tera, and TrueEx—is not by nature suitable to condemnation *per se*. Both sets of discussions among the Dealers and CME had the potential, *inter alia*, (1) to launch a new venture by assuring CME of the critical mass of Dealer support it claimed to need; (2) to help CME set standards for a new modality of IRS **[*58]** trading acceptable to a broad range of market participants; and, (3) as in other business contexts involving negotiations with a swath of industry players, to avoid the inefficiencies associated with duplicative one-on-one negotiations. *See, e.g.*, PTAC ¶ 135 (noting CME's goal to enlist one or more Dealers from each of "Tier 1" and "Tier 2").

That the second stage of Dealer/CME negotiations led to a counseled agreement between CME and most (although not all) Dealer Defendants also weighs against finding *per se* anti-competitiveness. The Magellan Agreement's text, too, reveals a pro-competitive justification: The revenue-sharing pact enabled the introduction of a novel clearing platform whose standing was enhanced by the agreed participation of reputable Dealers who agreed to provide minimum clearing volume to the CME. *See id.* ¶¶ 160, 179-180.[11]

That leaves the Rule of Reason. Potentially, a viable Rule of Reason claim could have been pled with respect to the Dealers' collective action as to CME, attempting to show overall anti-competitive effect in a defined market. But unlike with respect to Tradeweb, the PTAC does not even gesture in that direction with respect to Swapstream, **[*59]** confining itself to a theory of *per se* illegality.

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[11] The above facts preclude the claim (PTAC ¶ 152) that the joint negotiations (*id.* ¶ 156) with respect to which the Dealers collaborated were an illegitimate sham that offered no efficiency enhancements so as to make Rule of Reason review unwarranted. That the Dealers had, and coordinated privately with, common Cleary Gottlieb counsel, took common positions in the joint negotiations, and sought governance rights in the CME clearinghouse, *id.* ¶¶ 152-157, 161-167, 183, 186, likewise do not signal a sham. Under the circumstances pled, seeking "governance" of the platform was understandable given each Dealer's interest in control of the new clearinghouse. The Dealers were being asked to take an investment stake in the clearinghouse, stood to receive potential returns from the clearing services the clearinghouse offered, and could face financial exposure in the event the clearinghouse defaulted. *See, e.g.*, PTAC ¶¶ 98, 100, 106.

In any event, the PTAC does not make the requisite pleadings to enable a Rule of Reason claim. It does not define the product or geographic market of the company, CME, whose offerings were allegedly skewed by the defendants' collective refusal to support an all-to-all IRS trading platform. Nor, although touting CME's capabilities, does it allege that CME had power in any market, including that for electronic exchanges with respect to swap trading generally or IRS trading in particular. *See* *In re IRS, 261 F. Supp. 3d at 469*. And while the PTAC denounces the Dealers' conduct as anti-competitive, *id.* ¶¶ 193-196, it does not assess these anti-competitive impacts against the potential pro-competitive benefits of the agreement that the collaborating Dealers negotiated towards, and eventually struck with CME, including those identified above.

The Court, finally, considers the PTAC's allegations of a boycott predating the initiation of "joint negotiations" (*id.* ¶ 156) with CME. By definition, the line of authority subjecting concerted activity in connection with competitors' joint ventures to Rule of Reason review does not apply to actions within this time window.

The limited **[*60]** allegations within this window, *see, e.g., id.* ¶¶ 136-151, however, do not adequately plead a *§ 1* conspiracy. The Dealers' parallel actions, motivations, perspectives, and intentions are largely pled generically and in undifferentiated fashion, with the PTAC not specifying a particular defendant or defendants. *See, e.g., id.* ¶ 139 ("[T]he Dealer Defendants became extremely concerned about losing valuable asset manager clients to a new CME-run IRS trading platform."); *id.* ¶ 141 ("Some of the Dealer Defendants' trading-desks initially expressed interest in Swapstream."); *id.* ¶ 143 ("The Dealer Defendants' strategic investment groups each responded to CME in a similar fashion."); *id.* ¶ 145 ("Prior to these meetings with the CME, the Dealer Defendants met and coordinated their position and messaging.").

As to this time window, the PTAC several times repeats the allegation that "the Dealer Defendants" traded on the Swapstream platform before, but not after, its acquisition by the CME. *Id.* ¶ 120, 124, 147. That allegation—if pled concretely—could certainly be telltale of illicit coordination among Dealers aimed at icing Swapstream, lest it expand in a manner threatening to the Dealers' interest. **[*61]** But this allegation is problematic, because, closely analyzed, the PTAC's factual allegations on this issue prove elusive. In all its 549 paragraphs, the PTAC identifies by name only two defendants (RBS and BNPP) that allegedly traded (or participated as market makers) on Swapstream before its acquisition by CME. *Id.* ¶ 124. And even if the PTAC's broad allegations to the effect that "the Dealer Defendants," *id.*, "many of the Dealer Defendants," *id.* ¶ 120, and/or "all of the Dealer Defendants," *id.* ¶ 147, had executed inter-dealer trades on Swapstream at some point before its acquisition by CME sufficed to implicate the 11 Dealer Defendants in such pre-CME trading, the PTAC nowhere alleges that Swapstream was facilitating more than *de minimus* trades as of the time of the CME acquisition, or, notably, that *any* entity (defendant or otherwise) was trading on the platform as of the time the "Dealer Defendants" allegedly ceased doing so in August 2007. *Id.* ¶ 147. The facts pled are too generalized, threadbare, and question-begging to permit the inference of a coordinated plot among the Dealers, in this way, to neutralize Swapstream.

The PTAC, finally, alleges that the Dealer Defendants were **[*62]** unsupportive of Swapstream and that they communicated to CME—either at the outset, *id.* ¶ 144, or thereafter, *id.* ¶ 145—that they would not "support an IRS execution platform," *id.* ¶ 144. But the Dealers' parallel lack of interest is not indicative of an inter-Dealer agreement. As pled, such conduct was consistent with any Dealer's independent self-interest. *See id.* ¶ 29 (the Dealer Defendants "want[ed] desperately to preserve the status quo' of the OTC market"). As the Court earlier explained in assessing why the SAC's similar allegation of the Dealers' common lack of support for all-to-all IRS trading was not indicative of collusion, "each Dealer had good reason to independently discourage . . . and not encourage, development of a new trading paradigm that threatened, someday, to cannibalize their trading profits." *In re IRS, 261 F. Supp. 3d at 464*; *see also* *Mayor and City Council of Baltimore v. Citigroup, 709 F.3d 129, 135 (2d Cir. 2009)* (inference of conspiracy will not arise when the coconspirators' parallel conduct "made perfect business sense").

As with its Tradeweb allegations, the PTAC's allegations as to CME and Swapstream therefore do not plead unlawful collusion among the Dealer Defendants. And viewing the PTAC's allegations in their entirety, it, like the SAC, does not plausibly plead **[*63]** a *§ 1* conspiracy among the Dealers.

The statute of limitations: A Sherman Act *§ 1* claim is subject to a four-year statute of limitations that runs from the date of injury. Class plaintiffs filed their initial Complaint on November 25, 2015. As in connection with the SAC, plaintiffs argue that the limitations period should be equitably tolled due to fraudulent concealment. This bid for relief from the statutory time bar is again unpersuasive.

In dismissing the SAC's claims of injury incurred prior to November 25, 2011, the Court found two required elements of fraudulent concealment lacking. *In re IRS, 261 F. Supp. 3d at 487-490*. First, as to the element of concealment, central facts as to the SAC's claim of a plot to block from emerging an all-to-all Tradeweb platform had *not* been concealed. These included the Dealers' collective ownership stake in Tradeweb and the visible nature of that platform's offerings. *Id. at 488-489*. Also in tension with a theory of concealment, the SAC's thesis was that, before 2012, the benefits of all-to-all IRS trading had been "widely recognized by market participants, regulators and economists" such that "absent a conspiracy . . . [e]volution to all-to-all trading that would have been open to the entire market **[*64]** would have been inevitable." *Id. at 488* (quoting SAC ¶¶ 87, 342); *see id.* (quoting SAC ¶ 99 that "[t]here were. . . no natural or technological reasons why the IRS market did not evolve by 2008, at the latest, to allow the buy side to conduct all-to-all trading of IRS on electronic platforms"). Second, for similar reasons, the Court rejected plaintiffs' claim that they had not been on inquiry notice as to pre-2012 claims. *Id. at 489* ("[A]ccepting class plaintiffs' premise that only a plot can explain the missing platform, class plaintiffs had every basis, in real time, to smell a rat."). As to a third element, diligence, defendants had raised substantial questions about the diligence of the class plaintiff, CPTF, before June 2014, when it claimed to have discovered that a conspiracy was afoot. The Court, however, had no occasion to resolve that element. *Id. at 489-490*.

The PTAC's new claims, focused on CME's decision not to introduce a Swapstream platform for all-to-all anonymous trading of IRSs, are subject to a similar critique.

Plaintiffs' theory remains that the failure of the IRS market to move towards such a trading model "was unnatural and contrary to expectations," as to suggest conspiratorial manipulation. *Id. at 489* **[*65]** ; *see* PTAC ¶¶ 89, 102-103. And while the CFTC's post-Dodd-Frank assessments call into question plaintiffs' claims that the buy-side before Dodd-Frank was ready, willing, and able to move to such a trading model, *see, e.g., In re IRS, 261 F. Supp. 3d at 446, 465*, the Court must take the PTAC at face value in claiming that the failure of such a platform to emerge was unnatural. The PTAC doubles down on that thesis, insofar as it adds the claim that the "pillars" or "pieces" needed to facilitate such a platform were all in place, "being utilized by the IRS Dealers well before Dodd-Frank," and adaptable to support an all-to-all IRS trading platform hospitable to the buy-side. *See, e.g.*, PTAC ¶¶ 92, 95, 102-103.

As to the element of inquiry notice, Swapstream's failure to evolve in this direction, as pled, occurred in broad daylight, putting plaintiffs on unusually acute inquiry notice. The PTAC alleges that, in 2007, CME had publicly announced a plan to offer all-to-all anonymous trading with central clearing for the buy-side. *Id.* ¶ 125 & nn.27-29 (quoting and citing July 2007 press release to this effect and prior news coverage). The PTAC further alleges that "[b]uy-side firms were clamoring to trade on Swapstream," *id.* ¶ 132, and that Swapstream had advertised these firms' interest in doing so, ¶ 133 (quoting Swapstream press release). But, the PTAC alleges, once the Dealers declined to participate, Swapstream aborted this plan. *Id.* ¶¶ 158-159. This too was a public event—CME announced it in a 2010 CME press release. *See* CME Group, Annual Report (Form 10-K) (February 26, 2010), available at https://www.sec.gov/Archives/edgar/data/1156375/000119312510043180/d10k.htm (CME "began the process of winding down [its] Swapstream operations" in 2009); D. Mem. at 23 n.14. On plaintiffs' theory that only a conspiracy—as opposed to a common lack of **[*66]** interest among Dealers in moving their IRS trading to such a platform, or a lack of buy-side readiness, or other lawful causes—can explain this event, plaintiffs, like the buy-side firms who assertedly had been awaiting Swapstream's rollout, had "reason to suspect the probability of any manner of wrongdoing," which is "all that is necessary to cause the tolling period to cease." *In re IRS, 261 F. Supp. 3d at 489* (quoting *131 Main St. Assocs. v. Manko, 179 F. Supp. 2d 339, 348 (S.D.N.Y. 2002))*.

As to the element of concealment, the PTAC generally alleges that there were secret meetings and other clandestine communications among Dealers both before and during the collective negotiations with CME. *See* PTAC ¶ 145 (Dealer Defendants "coordinated their position and messaging. . . through email, electronic chat messages, formal and informal industry events, dinners, and during and following meetings of Tradeweb's board of directors"); *Id.* ¶ 146. But these general allegations, unspecific as to time and content, are, like their similar forebears in the SAC, insufficient to show affirmative concealment. *See* *In re IRS, 261 F. Supp. 3d at 489* ("The SAC's claims of secret meetings under the aegis of such groups to further the pre-2012 plot are general and conclusory. These ill-pled allegations cannot discharge plaintiffs' burden to **[*67]** show concealment.") (internal citation omitted).[12]

Because the PTAC fails adequately to plead the elements of either concealment or of inquiry notice, the Court again has no occasion to address the third element: whether plaintiffs acted with the required diligence in inquiring into pre-November 25,2011 events, including with respect to why Tradeweb and Swapstream did not open the trading platforms that plaintiffs prefer. *See* *In re IRS, 261 F. Supp. 3d at 490*. As with the SAC, defendants raise substantial questions as to the adequacy of CPTF and LACERA's claims to have conducted such diligence, including noting that many of the new allegations in the PTAC rely on citations to public-record material. However, the burdens of undertaking this inquiry are, again, unjustified given the independent deficiencies found in plaintiffs' claims. *See id.*

For all the above reasons, granting the motion for leave to amend to restore plaintiffs' claims as to 2008-2012 would, therefore, be futile.

2. Delay, Prejudice, and Gamesmanship

Independent of the finding of futility, the Court finds that granting leave to restore the claims covering 2008 through 2012 would substantially delay this litigation. It would also unduly prejudice **[*68]** the defense. Further, the Court holds, plaintiffs' counsel's communications with the Court and defense during the extended period of discovery negotiations and litigation conveyed a misleading impression—that plaintiffs' claims were fixed at 2013-2016—whereas in fact counsel had in mind, and were actively pursuing, a transformative amendment to restore plaintiffs' claims as to the five prior years. On close review of the assembled communications, the Court is, regrettably, constrained to find an unwelcome degree of gamesmanship meriting denial of the motion for leave to amend. Because these considerations of delay, prejudice, and gamesmanship arise out of common events, the Court addresses them together.

Delay: Reviving the 2008-2012 claims would upend the schedule for discovery carefully negotiated by the parties and approved by the Court.

Relevant here, the case management plan set a May 21,2018 deadline for substantial completion of document production and a December 21,2018 deadline for the completion of all fact discovery. Most imaginable amendments, even if disclosed on the last date for a motion for leave to amend, could comfortably have been accommodated under this schedule. **[*69]** For example: an amendment adding claims of a fourth or fifth platform—alongside Javelin, Tera, and TrueEx—which the Dealers purportedly conspired in 2013-2016 to inhibit. Or the amendments to the 2013-2016 claims that plaintiffs separately pursue without objection, which add allegations of the Dealers' means and methods during 2013-2016 and sharpen or broaden theories of damages arising from the 2013-2016 conspiracy. Amendments of this nature would—and/or will—add to the parties' document production

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[12] The PTAC, finally, alleges that the Magellan Agreement contains a non-disclosure clause which prevented outsiders from discovering its secret "poison pill provision." PTAC ¶ 199. In fact, as noted, the Agreement does not contain a poison pill provision. Depending on the facts, a non-disclosure agreement can serve as an affirmative act of concealment. *Compare* *In re Copper Antitrust Litig., 436 F.3d 782, 790-791 (7th Cir. 2006)* (nondisclosure agreement supported equitable tolling), *with* *GO Comp. v. Microsoft Corp., 508 F.3d 170, 179 (4th Cir. 2007)* (finding claim time-barred and rejecting claim that nondisclosure agreements kept anti-competitive activities secret). Here, however, the Magellan agreement is facially benign, post-dates the alleged plot to terminate an all-to-all IRS trading platform, and governs a separate subject matter: the operation of and financial stakes of participants in CME's separate clearing platform. A non-disclosure clause in the agreement, therefore, lends no support to plaintiffs' claim of concealment.

and other discovery obligations. But they can be accomplished within the framework of the parties' carefully negotiated agreements as to trading data, custodians, databases, and search terms. And they are not in tension with the Court's rulings as to the time frame of document production. The addition of plaintiff LACERA is, similarly, readily accommodated to the case schedule.

In contrast, allowing the PTAC's pre-2013 claims would be functionally tantamount—or close to it—to allowing a new MDL-sized lawsuit to be hitched to the existing claims. To be sure, at a concept level, plaintiffs' core theory across 2008-2016 is the same: that Dealers at all times coordinated to thwart all-to-all **[*70]** trading platforms, whether potential (2008-2012) or extant (2013-2016). But, in practice, the PTAC's narrative and its claims regarding 2008-2012 implicate a host of events, entities, concepts, and personnel outside the scope of the 2013-2016 claims and outside the scope of the post-Dodd-Frank discovery that the Court has allowed on those claims.

Among other things, the claims as to the earlier period uniquely implicate:

• the Dealers' acquisition of an ownership interest in, and stewardship of, Tradeweb, beginning in 2007, including Tradeweb's earlier business plans and its decisions following the acquisition as to which platforms and asset classes to pursue, and the role of individual Dealers' personnel in those decisions, PTAC ¶¶ 212-282;

• the Dealers' dealings with CME, beginning in 2007, as relevant to IRS trading and Swapstream, including CME's evolving plans for that platforms, the steps the Dealers took ostensibly to influence Swapstream, and the two rounds of negotiations between the Dealers and CME, culminating in the Project Magellan Agreement, *id.* ¶¶ 119-211;

• the state of the IRS market as of 2007 and the extent to which it was ready for all-to all trading, including the **[*71]** state of clearing and various post-trade services, the services offered by providers such as SwapClear, SwapsWire (today, MarkitSERV), and the International Derivatives Clearing Group, and the utility to potential buy-side clearing of the software system Calypso, *id.* ¶¶ 104-118;

• the interactions relevant to IRS trading between 2007 and enactment of Dodd-Frank among all Dealer groups (including numerous individual personnel named in the PTAC), both directly with one another and as accomplished through industry fora like the ISDA, the Futures Industry Association, and working and drafting groups of these associations, *id.* ¶¶ 283-291;

• the conduct and communications of the Dealers, and numerous of their personnel named in the PTAC, relating to IRS trading between 2007 and enactment of Dodd-Frank towards interdealer brokers, including GFI Group, ICAP, and platforms under development in Europe such as i-Swap, *id.* ¶¶ 292-308; and

• the actions of the Dealers between 2007 and enactment of Dodd-Frank in allegedly erecting artificial barriers to buy-side clearing of IRS trades, including in connection with the Dealers' influence over OTCDerivNet (on whose board named representatives of various **[*72]** Dealers sat), LCH.Cleamet, and SwapClear, *Id.* ¶¶ 309-334.

Under these circumstances, allowing the PTAC's claims as to 2008-2012 to be added would require that the time-consuming and laborious process of framing the document discovery to be produced for that period begin from something close to a standing start. For many reasons, the parties' agreements as to document production parameters in 2013-2016 would not, logically, control discovery relevant to the 2008-2012 claims.

As to document custodians, at particular Dealers, given natural turnover and promotions and reassignments, there were assuredly different personnel responsible for IRS-related matters during the two periods. Beyond that, the many issues and incidents novel to the earlier period (*e.g.*, interactions with and exercise of influence over Tradeweb and CME/Swapstream) likely involved substantially different personnel at particular Dealers from those as to whom discovery has been authorized as to 2013-2016.

As to the delineations of topics and search terms that would guide document collection and review, the many distinct events, issues, entities, and players at issue in 2008-2012 similarly would require a fresh assessment **[*73]** of these parameters. So would the fact that plaintiffs' claims involve a materially different (pre-Dodd-Frank) regulatory environment than during 2013-2016. It is likely, too, that there would be rounds of discovery disputes requiring judicial intervention, including as to the start date for document review (numerous allegations in the PTAC date to 2007 and years before) and as to the permissibility of discovery into particular topics.

There would also be an overarching question as to the proper scale of overall discovery, which the Court would likely be called upon to resolve. Adding five years of claims to the existing four years would not ineluctably entitle plaintiffs to the receipt of 125% more discovery. A nine-year conspiracy claim implicating numerous episodes, issues, and personnel would by its nature require thoughtful application of the proportionality command of *Federal Rule of Civil Procedure 26(b)(1)*. To the extent that defense discovery for 2013-2016 had not already been produced to plaintiffs, a fair question would arise whether to revisit the agreed parameters of that discovery in the interests of keeping the overall discovery burden manageable.

The PTAC's expanded claims also implicate third parties. Those **[*74]** identified on the face of the PTAC include numerous clearinghouses, interdealer brokers, other service providers, and industry associations. Plaintiffs have pursued third-party discovery as to the 2013-2016 claims and could be expected to seek discovery from various entities named in the 2008-2012 claims. As to these third parties, the scope of discovery—potentially as sought by both sides—would be an issue. Extended negotiations (and/or discovery litigation) with these parties would be likely, possibly complicated by the greater age of the materials sought.

Finally, independent of electronic and hard-copy document discovery, the 2008-2012 claims would require—as have the 2013-2016 claims—the locating and harvesting of IRS trading data throughout the period. Such data is relevant, *inter alia*, to liability (including the existence of a pricing injury from the alleged conspiracy) and damages. Even assuming that such discovery demands did not give rise to disputes requiring extended negotiation and resolution, identifying and collecting this data, which before Dodd-Frank's SEF mandate took effect was likely held in decentralized locales, would likely take substantial time.

For these reasons, **[*75]** an amendment to add the industry-wide, complex, and half-decade-long claims proposed by the PTAC, if allowed to stand, would obliterate the May 21, 2018 deadline for substantial completion of document production.[13] In connection with the 2013-2016 period, it took counsel for the many parties (and third parties) seven months of focused work, beginning from the date of the ruling on the motion to dismiss, to formulate and narrow discovery demands, negotiate discovery parameters including as to custodians and search terms and strings, and to litigate to completion most discovery disputes as to matters pertinent to that period.[14] A similar exercise would now be necessitated as to plaintiffs' new claims.

All factors considered, the Court's judgment is that permitting the PTAC to be amended to add back five years of claims as to 2008-2012 would cause, at a bare minimum, a six-month delay of the substantial completion deadline for document production. A more realistic (yet still conservative) estimate is that, given the scale and splay of the added charges, reviving the 2008-2012 claims would require moving that deadline back by nine or more months.

Further, because plaintiffs' claims as **[*76]** to the two periods implicate common personnel and circumstances, in the event the PTAC were accepted, the deposition discovery scheduled to occur between May 21, 2018 and

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[13] This would have been so even if, improbably, all defendants had immediately acceded to the entire PTAC, such that negotiations over the scope of document production could have begun shortly after the PTAC's filing on February 21, 2018. A more realistic assumption for the start date of any negotiations over post-PTAC document production parameters is the date on which the Court realistically could have resolved the parties' dispute as to the viability of the PTAC's 2008-2012 claims. It took the Court two months after argument to resolve the motions to dismiss the SAC. As to the PTAC, the Court, on May 10, 2018, issued a bottom-line order notifying counsel as to how it had determined to resolve the motion for leave to amend and that a decision (this) would follow. Dkt. 386.

[14] One discrete dispute—only recently briefed—remains in the process of resolution as to cellphone records of Dealer employees, sought by plaintiffs. *See* Dkt. 384. The Court has also recently received briefing on, and resolved at a hearing, a dispute as to discovery plaintiffs have propounded on an inter-dealer broker. *See* Dkt. 382.

December 21, 2018, as a practical matter, would have to be shelved and put over, to enable expanded document discovery first to be completed. Otherwise, deponents relevant to both periods could face multiple depositions; and deposition preparation and questioning might be impeded by incomplete document discovery. The added five years of claims covering expanded topics, in the Court's assessment, would also likely require elongating the period for deposition discovery. While the Court would press to move expeditiously, a realistic estimate is that an additional three months for deposition discovery would be necessary.

All in, therefore, this Court's conservative estimate, informed by its experience managing this MDL and by its experience presiding over—and, earlier, litigating—other complex financial cases is that permitting the 2008-2012 claims to stand would cause a delay of—at the very least-12 months for the completion of fact discovery.

Prejudice: Apart from the inherent casualties of a long delay—which may compromise **[*77]** the truth-seeking process and parties' and witnesses' interest in closure—the amendment here, if granted, would palpably prejudice the defendants.

For seven months, defendants expended time, money, and energy in the discovery phase of this litigation on the only rational assumption as to this case's temporal scope: that plaintiffs' surviving claims were limited to 2013-2016.

On that premise, counsel exchanged several hundred discovery communications, held dozens of meet-and-confers addressing discovery, and "devoted enormous effort to reaching agreement on matters such as the scope of discovery, search terms, and custodians." D. Mem. at 6. Counsel also, after a series of meet-and-confers failed to yield resolution, litigated a series of disputes that turned on this temporal premise. One dispute involved the document-discovery start date; another involved whether pre-Dodd-Frank events and entities that had been implicated by the dismissed claims were fair game for discovery. The Court's resolution of these disputes in turn shaped the time-intensive discovery efforts that followed—including the identification of custodians, the formulation of search terms and search strings, the tabulation **[*78]** of "hit counts" aimed at measuring efficacy and burden and ensuing negotiations, and the collection of millions of documents. *Id.* It is safe to assume that, on these efforts, each of the 11 defendant groups devoted very substantial time and incurred very substantial legal fees.[15]

Reviving the 2008-2012 claims would negate this work, waste these efforts, and largely send the parties back to the discovery drawing board. It would effectively overrule the Court's rulings setting the document-discovery start date and excluding (in whole or large part) a host of pre-Dodd Frank topics from the scope of permitted discovery.[16] It would require counsel to start negotiating anew the expanded universe of discovery issues. It would require developing and testing new potential search terms to gauge the utility and burden of each. It would require counsel to revisit prior compromises based on aggregate burdens for each defendant in light of the added burdens presented by the amended allegations and extended time period. It would almost certainly open up new rounds of protracted litigation over discovery disputes. It is safe to assume that the duplicative fees (of counsel and litigation support) and costs **[*79]** wasted by the need for this do-over, when measured across the 11 defense firms, would extend well into seven figures, to say nothing of the wasted time of client personnel.

In these circumstances, plaintiffs' terse incantation of regret for "any inconvenience," Dkt. 345 at 22, 23, that may have been caused by the last-minute disclosure of this most consequential proposed amendment is quite unequal to the moment. It reflects a lack of appreciation, or perhaps denial, of the scale of the work that the proposed amendment would moot. *Cf. BNP Paribas Mortg. Corp. v. Bank of Am., N.A., No. 09 CIV. 9783 RWS, 2013 U.S. Dist. LEXIS 174580, 2013 WL 6484727, at *6 (S.D.N.Y. Dec. 9, 2013)* (denying motion to amend, based on prejudice stemming from length of case and because amendment would have "interfere[d] with ongoing expert discovery and trial preparation"); *In re "Agent Orange" Prod. Liab. Litig., 220 F.R.D. 22, 26 (E.D.N.Y. 2004)* ("Leave

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[15] The time spent by the Court resolving the discovery disputes alone—which was substantial—gives the Court insight as to the formidable amount of time that counsel for each party expended on the range of discovery matters summarized above.

[16] The pre-Dodd-Frank topics as to which the Court substantially or wholly precluded discovery as irrelevant or marginally so included CME's Swapstream platform, *see* Dkt. 322, at 4, Project Fusion, *id.* at 6, SwapClear's rulebook restrictions, *id.* at 8-9, and the Dealers' activities with respect to OTCDerivNet, SwapClear, and LCH.Clearnet, *id.* at 12-13.

to amend must nonetheless be denied because of the large additional expenditures of time and effort that would be required by the court and parties.").

Plaintiffs' arguments against finding prejudice miss the mark. Plaintiffs note that that the new claims "address subjects that were raised in previous complaints." Pl. Mem. at 24. But that **[*80]** observation does not grapple with the sunk costs that would largely go to waste were discussions as to discovery parameters required to start anew. And the fact that plaintiffs have repeatedly attempted to refine their claims as to these subjects—the PTAC is plaintiffs' fourth complaint—*disfavors* granting leave to amend. The principal subjects of the amendment (Project Fusion and CME/Swapstream) were at the heart of the claims the Court dismissed. Plaintiffs then sought discovery on these subjects, which the Court denied. This is thus the third time that plaintiffs have litigated in an attempt to insert these subjects into this case. *See, e.g., State Trading Corp. of India v. Assuranceforeningen Skuld, 921 F.2d 409, 418 (2d Cir. 1990)* ("[A] busy district court need not allow itself to be imposed upon by the presentation of theories seriatim.") (internal quotation omitted).

Plaintiffs also note that as of when they moved to amend, no "substantive" documents had been produced or any depositions held. Pl. Mem. at 24. But that argument trivializes the intensive pre-production work by all counsel over the preceding seven months that the PTAC would supervene. In any event, defendants, executing on the negotiated discovery plan, have since made voluminous document productions, ***[*81]*** *see* Dkt. 388 at 1 (May 16, 2018 status letter), and, following a recent limited extension of the substantial completion deadline, are on track to achieve substantial completion of document production by late June.[17]

Gamesmanship: The Court, finally, addresses plaintiffs' counsels' conduct towards the Court and the defense in connection with the bid to restore the 2008-2012 claims.

Plaintiffs' counsel began to consider amending to restore these claims on July 28, 2017, *see* Dkt. 345 at 20, and thereafter investigated such an amendment, Dkt. 356 at ¶ 5. Many of the PTAC's new allegations as to 2008-2012 are sourced to publicly available materials, which plaintiffs' counsel appear to have accessed between July 28, 2017 and February 2018. *See, e.g.*, PTAC ¶¶ 100 & nn.17-18, 112 & n.20, 117 & n.21, 118 & n.22, 122 & nn.23-24, 124 & nn.25-26, 125 & nn.27-29, 131 & n.30, 133 & nn.31-32, 169 & nn.33-34, 172 & n.36, 213 & n.38, 214 & n.39, 215 & nn.40-41, 216 & nn.42-43, 217 & nn.44-45, 218 & nn.46-47, and 238 & n.62; *see also* Dkt. 356-1 ¶ 5 ("We had already pled all of the relevant facts of which we had knowledge in our prior pleading."). Counsel also conducted interviews or follow-up interviews **[*82]** regarding the 2008-2012 claims: three in September 2017, four in October 2017, two in December 2017, five in January 2017, and eight between February 1 and 21, 2018. Dkt. 343 at 3.

Plaintiffs' counsel first disclosed their intention to move for leave to restore the 2008-2012 claims to the defense on February 14, 2018 and to the Court on February 21, 2018—the latter being the deadline for so moving. Plaintiffs' counsel admit having made an affirmative decision not to disclose earlier the prospect of moving to so amend. Dkt. 345 at 21. Plaintiffs' counsel explain that they did not have a legal duty to disclose a possible amendment. And they represent that they did not make a "final decision" to file a proposed amended complaint along these lines until February 12, 2018. *See* Dkt. 345 at 24 (status call of February 23, 2018); Dkt. 343 (letter of February 23, 2018) ("[W]e did not make a final decision to proceed until we were satisfied, based on interviews and other research conducted in late January and February 2018, that our allegations were well-founded."); Dkt. 356-1 (declaration of April 2, 2018) ("On or around February 12, 2018, following these interviews, we believed we had learned **[*83]** enough key facts to support the proposed amendment.").

Plaintiffs' counsel are correct that there was no freestanding duty—under the law or the case management plan—to reveal in advance a forthcoming amendment, even a sweeping one. Plaintiffs' silence on that point, however, did not occur in a vacuum. During the seven months while plaintiffs' counsel were actively working towards an amendment that would vastly expand the temporal and substantive contours of this litigation, a separate work-stream was underway. Specifically, counsel for all parties—drawing heavily at times on the resources of the Court—

[17] In a status call with counsel held May 18, 2018, the Court, on consent, extended the substantial completion deadline until June 29, 2018.

were intensively negotiating, litigating, and implementing, at great time and expense, an MDL discovery plan premised on the current contours of the case.

A question therefore is presented by plaintiffs' counsel's communications with the Court and defense during this process. Having reviewed those communications, the Court, regrettably, concludes this: In ways large and small, plaintiffs' counsel throughout these seven months fed the false impression that the temporal scope of plaintiffs' claims was fixed at 2013-2016. The result was to mislead the Court and the defense and to occasion **[*84]** extensive work and expense that—had the retooled 2008-2012 claims proven viable—would have largely gone wasted. And, even crediting as true the representation that the "final decision" to file a PTAC was made shortly before the filing deadline, counsel's choice not to reveal earlier the substantial prospect of such a game-changing amendment while counsel's conduct and statements suggested otherwise prevented the Court and experienced counsel for all parties from assessing the impact of—and adapting the case management plan to accommodate—the possibility of such a consequential event.

The following communications with the Court are illustrative:

- ***August 2017 case management plan***: On August 18, 2017, the parties submitted a jointly proposed case management plan, Dkt. 245-1, which the Court approved, Dkts. 246, 250. At the Court's direction, the plan set prompt but achievable deadlines for fact discovery and for intermediate activities foundational to the fact-discovery process. In addition to those reviewed above regarding substantial completion of document production and fact discovery, these included that the parties: (a) designate "outside counsel data representatives" "to begin a **[*85]** meet and confer process regarding the scope of data productions in this proceeding within twenty-one (21) days" of court approval of the plan; (b) provide "a preliminary document custodian list" within 21 days and "preliminary search terms" within 30 days; and (c) "determine whether they are in agreement or disagreement on document custodians" within 45 days. This agreed-upon schedule sits uneasily alongside counsel's contemporaneous pursuit of claims whose addition would inherently make it obsolete—and all the more obsolete were the motion for leave to amend to be filed on the last permissible date.

- ***August 2017 motion for clarification***: On August 11, 2017, plaintiffs moved for clarification of "a narrow aspect" of the July 28 ruling, to wit, that the Court had not limited their 2013-2016 claims to "order book trading" alone but instead had preserved claims as to all anonymous request-for-quotes ("RFQ") trading on the three exchanges at issue (Javelin, Tera, and TrueEx). *See* Dkts. 241-242. The Court so clarified. Dkt. 251 at 1. Although not directed to the temporal scope of claims, a fair implication of this request, given plaintiffs' silence, was that plaintiffs did not intend to **[*86]** take issue with the other parameters of their claims as resolved by the July 28 ruling.

- ***October 2017 dispute regarding defense discovery***: As noted, plaintiffs sought pre-2013 discovery as relevant to their 2013-2016 claims. They asked the Court to order the defense to produce documents from January 2009 forward, Dkt. 254 at 3, while stating that—"to address any reasonable burden objections"—they were willing to receive documents from January 2010 forward if defendants agreed also to produce their regulatory production from a CFTC investigation and their document production from a separate MDL involving credit default swaps, *id*. A natural implication of plaintiffs' motion and negotiating position was that plaintiffs would not later ask for production of documents dating to January 2008 (or earlier), as the amendment that plaintiffs then had under consideration, to add claims dating to 2008, would necessarily contemplate.

- ***October 2017 dispute regarding CPTF's standing***: On October 18, 2017, defendants sought formal discovery from CPTF, to substantiate that CPTF had participated in IRS trades within the case's scope as narrowed. Dkt. 270. In opposition, plaintiffs argued that expediting **[*87]** discovery would "disregard the schedule in the case, which the parties negotiated and the Court ordered," and "disrupt the orderly flow of discovery." Dkt. 295 at 1. In contrast, plaintiffs noted, CPTF "has been diligently meeting every deadline under this schedule." *Id.* The Court ruled for plaintiffs. Dkt. 296 at 1. A natural implication of these statements was that plaintiffs were committed to "the schedule in the case" and did not foresee events that might "disrupt the orderly flow of discovery."

• ***November 15-17, 2017 status letter/call***: The parties' November 15, 2017 joint letter reported on discovery negotiations and an agreement to extend certain interim deadlines, and, referring to discovery disputes as to pre-2013 events, that "some disagreements relating to the scope of discovery may require resolution by the Court." Dkt. 302 at 1-2. In the ensuing call, the Court asked whether there was "anything else that class plaintiffs have to report to me other than what's in the November 15 letter?" Plaintiffs' counsel said no, noting only that these discovery disputes were nearing an impasse. Dkt. 308 at 4, 9-10. The Court asked counsel, upon an impasse, promptly to brief "gating issues," **[*88]** to allow the Court to resolve "threshold issues that are holding us up"; counsel stated that they remained hopeful that the schedule in the case management plan was realistic. *Id.* at 8, 14-15. That schedule, of course, would be wholly *unrealistic* in the event that the motion plaintiffs were then considering to restore the 2008-2012 claims were made and granted. And the Court fairly read counsel's negative response to its question whether class plaintiffs had "anything else" to report to imply the absence of any unreported matters of consequence, which an amendment to more than double the case's scale surely would be.

• ***December 13-15, 2017 status letter/call***: The parties' December 13, 2017 joint letter reported an impasse on the pre-2013 discovery issues, but anticipated that the resolution of these issues would likely resolve disagreements over defendants' document custodians. Dkt. 315 at 1. In the ensuing call, plaintiffs' counsel expressed confidence that, after those rulings, "we hopefully can hit the ground running." Dkt. 320 at 7. The Court asked counsel: "Does any party anticipate any other issue being brought in reasonably short order to the Court's attention?" *Id.* at 10-11. Other than possible disputes **[*89]** regarding search terms after the Court's ruling, plaintiffs' counsel said no. *Id.* at 11. Counsel's Statements—and negative response to the Court's inquiry about whether other issues might arise in reasonably short order—again sit uncomfortably alongside their ongoing consideration of moving to restore the 2008-2012 claims, the deadline for which was two months away and as to which plaintiffs' counsel had by then conducted nine interviews. *See* Dkt. 343 at 3.

• ***December 2017 omnibus discovery disputes***: On December 19, 2017, plaintiffs moved for discovery on numerous pre-Dodd Frank subjects, including Tradeweb/Project Fusion and CME/Swapstream. In a joint letter setting out each side's position, Dkt. 319, plaintiffs argued only that these subjects were germane to the existing 2013-2016 claims. Plaintiffs said nothing about potential restoration of the 2008-2012 claims (to which these subjects also related). As discussed earlier, the entire exercise of litigating and resolving these issues stood to be mooted by the amendment that plaintiffs then had under consideration to restore the 2008-2012 claims. On top of the time counsel spent negotiating and briefing these disputes, the Court, to keep the **[*90]** case on schedule, spent significant time in late December 2017 and early January 2018 resolving them. *See* Dkt. 322 (January 8, 2018 order resolving disputes).

• ***January 24-26, 2018 status letter/call***: The parties' January 24, 2018 joint letter stated that, in light of the resolution of the omnibus discovery disputes, "it appears that any further disputes regarding the scope of document discovery will primarily involve party-specific issues, as opposed to gating issues." Dkt. 324 at 1. It added that plaintiffs had asked "each defendant" whether "it is on track to meet the substantial completion deadline" for document productions. *Id.* The letter further reported that plaintiffs anticipated seeking leave to add LACERA, and, if defendants agreed, the parties would submit a proposed order to that effect. *Id.* at 2. In the ensuing call, the Court asked defense counsel if there was any prejudice to adding LACERA; the defense responded that, subject to reserving the right to challenge standing, it did not expect to object to this amendment. Dkt. 331 at 17-18. Various of plaintiffs' counsel's statements are problematic in light of the amendment then under consideration to revive the 2008-2012 claims, **[*91]** as to which counsel had by then conducted 14 interviews. The statement that future discovery issues were likely to be "party-specific" is coherent only upon the assumption that the claims at issue not expand beyond 2013-2016. The statement that plaintiffs' counsel had asked each defendant whether it was "on track to meet the substantial completion deadline" presupposes that *plaintiffs* did not have in mind a motion to be filed three weeks later that would vitiate that deadline. Plaintiffs' volunteering of their intention to seek to add LACERA by the February 21 deadline fairly implied the absence of other intended amendments. And the Court's inquiry whether that addition might cause any prejudice was a natural opportunity for responsible counsel to alert the Court to the far more consequential amendment that plaintiffs were pursuing.

The Court is constrained to express its disappointment at counsel's lack of candor. The assembled record reflects a series of points over a half-year period at which responsible counsel, to assure that the Court was not badly misled as to the direction that counsel anticipated for this complex and important multi-district litigation, would and should have **[*92]** disclosed the real and presumably growing prospect of pursuing a game-changing amendment. At each juncture, however, plaintiffs' counsel—deliberately—chose not to do so. Plaintiffs' counsel instead repeatedly assured the Court that this litigation was on track to meet the deadlines in the case management plan and that counsel were dedicated to meeting those deadlines. Audaciously, in correspondence with the Court, plaintiffs' counsel even chided the defense for filing a discovery motion that could disrupt the orderly case schedule to which plaintiffs professed to be "diligently" committed, *see* Dkt. 295, and touted that they had inquired of each defendant whether it was on track to meet the deadline for substantial completion of document production, *see* Dkt. 324. Plaintiffs' counsel also foisted on the Court and the defense costly and time-consuming discovery motions that the expanded claims, which counsel were actively exploring, would have rendered obsolete. The Court expected better of the estimable and experienced counsel whose applications to lead the putative class the Court was pleased to grant.

Plaintiffs' counsel were also unacceptably coy in their dealings with the defense. **[*93]** The discovery negotiations and litigation here centrally turned on the aggregate burden presented by plaintiffs' discovery requests. Plaintiffs' counsel's decision to keep under wraps the possibility of a momentous amendment, and to feign that the claims to be litigated were fixed at 2013-2016, enabled plaintiffs to lock in commitments as to aggregate discovery pertinent to the 2013-2016 claims. Only when those negotiations had essentially reached fruition did plaintiffs disclose their bid to expand their claims by five years.

The Court therefore concludes, reluctantly but firmly and after considered attention to the question, that plaintiffs' counsel engaged in unacceptable gamesmanship. Presumably concerned that earlier disclosure of their intention to move to revive the dismissed claims might lead the defense to object or the Court to pretermit such a bid, plaintiffs kept mum until virtually the last possible minute. The result of this tactical conduct was to mislead both the Court and opposing counsel as to a highly material dimension of this litigation and to cause both to expend significant time, and counsel to incur substantial costs and expenses, on work that the amended complaint **[*94]** stood to overtake. This conduct independently warrants denial of the motion for leave to restore the 2008-2012 claims. *Cf. State Trading Corp., 921 F.2d at 418* (denying leave to amend based on tactical decision not to earlier plead new allegations; "not unreasonable to impute lack of good faith" to plaintiff where tactical delay appeared undertaken to reduce chance *of forum non conveniens* dismissal).[18]

The Court finally addresses two justifications plaintiffs' counsel give for not alerting the Court earlier to the prospect of the amendment.

First, counsel assert that their silence was necessitated "by the work-product doctrine." Dkt. 356-1 ¶ 7. That is wrong. While that doctrine might shield from discovery the substance of counsel's legal work, that doctrine would not be implicated by providing earlier notice of a potential tectonic amendment, any more than it was implicated by plaintiffs' courtesy of giving the Court and defense advance notice of their intention to add LACERA as a class plaintiff.

Second, counsel claim to have feared witness tampering, based on an incident in which an in-house lawyer for defendant Bank of America attempted to contact Richard Cohen, a former executive whom plaintiffs' filings had identified **[*95]** as a consultant. *Id.* ¶ 8. Plaintiffs extrapolate that the defense groups would have responded to notice of a potential PTAC by "persuading or coercing former employees not to cooperate with us." *Id.* ¶ 7. There is,

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[18] For avoidance of doubt, although the case law identifies counsel's bad faith as a basis to deny a motion for leave to amend, the Court has chosen not to reach the issue of whether the conduct in question is properly termed such. The Court's judgment is that the finding of gamesmanship, on the facts here, is sufficient to support denial of leave to amend and that no productive purpose would be served by inquiring further into bad faith. The Court's discussion of gamesmanship above, therefore, should not be taken as reflecting a finding of bad faith with respect to any firm or individual, as the Court has not so found. The Court is further deeply respectful of the vigor and top quality of plaintiffs' counsel's overall representation of the putative class in this case, and is confident that this episode will prove aberrational.

however, a world of difference between disclosing an intention to move for leave to amend and disclosing witness identities. And had this concern been raised, the Court, upon a proper showing, stood ready to use its supervisory powers to enjoin or otherwise guard against witness tampering. Further, had the need arisen for the Court to test plaintiffs' *bona fides* in pursuing an amendment, the obvious solution was for plaintiffs to make an *in camera* submission to the extent that witness names or other confidential material were implicated. *See, e.g.*, Dkt. 343 at 3 (listing—in redacted form, with the Court's authorization—witnesses interviewed in connection with the PTAC).

Accordingly, the Court holds that, independent of the proposed amendment's futility, the factors of delay, undue prejudice, and plaintiffs' counsel's gamesmanship support denial of the motion to amend to restore the 2008-2012 claims.[19]

CONCLUSION

For the reasons reviewed above, the Court grants in part and denies in part plaintiffs' motion to file the Proposed Third Amended Complaint. The Court directs plaintiffs, within one week of this order, to file a Third Amended Complaint consistent with the rulings herein.[20]

SO ORDERED.

Dated: May 23, 2018

New York, New York

/s/ Paul A. Engelmayer

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[19] In light of these findings, and the distinct procedural posture of this case, the cases on which plaintiffs rely are far afield. *Pasternack v. Shrader, 863 F.3d 162 (2d Cir. 2017)*, held that "the denial of leave to amend, based solely on delay and litigation expense, was an abuse of discretion." *Id. at 174*. Unlike in *Pasternack*, the Court's findings here of delay and prejudicial incurring of expenses are not generalized but are solidly anchored in a detailed record and the Court has also found gamesmanship. Further, although in *Pasternack* "essentially no discovery had been undertaken," here, counsel had engaged in more than six months of intensive and expensive negotiations and litigation over discovery (as well as initial rounds of document production) which, along with the scheduling order, the amendment would subvert. Also inapposite is *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160 (2d Cir. 2015)*. The Second Circuit there reversed a denial of leave to amend because the district court had put plaintiffs to "a Hobson's choice: agree to cure deficiencies not yet fully briefed and decided or forfeit the opportunity to replead." *Id. at 190*. The Circuit held that the district court had abused its discretion under *Rule 15* to deny leave to amend in finding that a plaintiff had forfeited its right to amend by standing by its allegations after defendant's objections were previewed at an informal pre-motion conference. Nothing of the sort happened here: Prior to the PTAC, plaintiffs filed three successive complaints, including an SAC filed after defendants filed a proper motion to dismiss an initial amended complaint. Although the case management plan set a deadline for motions for leave to amend, *Rule 15* did not afford plaintiffs an entitlement to file a *fourth* complaint, let alone one that proposed to more than double the temporal reach of plaintiffs' claims. *See, e.g., F5 Capital v. Pappas, 856 F.3d 61, 90 (2d Cir. 2017)*; *Lopez v. Ctpartners Exec. Search Inc., 173 F. Supp. 3d 12, 42-44 (S.D.N.Y. 2016)*. In any event, the findings here of long delay, undue prejudice, and gamesmanship distinguish *Loreley*. For the same reasons—and also because the amendment here was not based on discovery that yielded new evidence—*WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1059 (9th Cir. 2011)* is of no help to plaintiffs here. Finally, the district court decisions on which plaintiffs rely are inapposite. *See, e.g., Boiling v. Gold, No. C13-0872JLR, 2015 U.S. Dist. LEXIS 66063, 2015 WL 2406487, at *4-6 (W.D. Wash. May 19, 2015)* (addressing only futility of proposed third amended complaint, not other considerations); *United States v. Int'l Bus. Machs. Corp., 66 F.R.D. 223, 227 (S.D.N.Y. 1975)* (allowing amendment which court found unnecessary given its conclusion that the allegations therein were already embraced by the existing complaint); *Kissing Camels Surgery Ctr., LLC v. Centura Health Corp., No. 12-CV-3012-WJM-BNB, 2014 U.S. Dist. LEXIS 156357, 2014 WL 5599127, at *3 (D. Colo. Nov. 4, 2014)* **[*96]** (allowing amendment where plaintiffs promptly sought leave to amend after dismissal order, amendments were based on information learned in discovery, and no showing of delay, undue prejudice, or gamesmanship had been made).

[20] In light of this ruling, there is no factual basis for plaintiffs' proposed restoration of claims against Tradeweb. The Third Amended Complaint, as filed, is not to include such claims.

Paul A. Engelmayer

United States District Judge

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XY, LLC v. Trans Ova Genetics, L.C.

United States Court of Appeals for the Federal Circuit

May 23, 2018, Decided

2016-2054, 2016-2136

Reporter

890 F.3d 1282 *; 2018 U.S. App. LEXIS 13530 **; 127 U.S.P.Q.2D (BNA) 1084 ***; 2018-1 Trade Cas. (CCH) P80,389; 2018 WL 2324460

XY, LLC, Plaintiff-Cross-Appellant v. TRANS OVA GENETICS, L.C., Defendant-Appellant

Subsequent History: Motion granted by, in part, Motion denied by, in part, Motion granted by *XY, LLC v. Trans Ova Genetics, LC, 2019 U.S. Dist. LEXIS 52909 (D. Colo., Mar. 28, 2019)*

Motion denied by, Without prejudice, Motion denied by, As moot *XY, LLC v. Trans Ova Genetics, LLC, 2020 U.S. Dist. LEXIS 20164 (D. Colo., Feb. 6, 2020)*

Motion granted by *XY, LLC v. Trans Ova Genetics, LC, 2020 U.S. Dist. LEXIS 78716 (D. Colo., May 5, 2020)*

Prior History: **[**1]** Appeals from the United States District Court for the District of Colorado in No. 1:13-cv-00876-WJM-NYW, Judge William J. Martinez.

XY, LLC v. Trans Ova Genetics, LC, 2016 U.S. Dist. LEXIS 47671 (D. Colo., Apr. 8, 2016)
XY, LLC v. Trans Ova Genetics, LC, 2015 U.S. Dist. LEXIS 38421 (D. Colo., Mar. 26, 2015)

Disposition: AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART AND REMANDED.

Core Terms

district court, Patent, invalidity, ongoing, infringement, parties, collateral estoppel, estoppel, royalty rate, royalty, willfulness, breached, sorting, cells, Termination, antitrust, Fluid, continuing conspiracy, breach of contract, circumstances, sperm, summary judgment, Freezing, damages, license, moot, jury's finding, verdict form, calculating, affirmance

LexisNexis® Headnotes

Patent Law > Jurisdiction & Review > Standards of Review > Abuse of Discretion

Patent Law > ... > Damages > Patentholder Losses > Reasonable Royalties

HN1[] **Standards of Review, Abuse of Discretion**

The court reviews a district court's methodology for calculating an ongoing royalty under the abuse of discretion standard.

Civil Procedure > Trials > Judgment as Matter of Law

Civil Procedure > ... > Summary Judgment > Appellate Review > Standards of Review

HN2[] **Trials, Judgment as Matter of Law**

The Tenth Circuit reviews de novo a district court's grant of summary judgment, and denial of a motion for judgment as a matter of law.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Trials > Jury Trials > Jury Instructions

HN3[] **Standards of Review, Abuse of Discretion**

The Tenth Circuit reviews whether a district court erred in refusing to give a particular jury instruction under the abuse of discretion standard. However, the Tenth Circuit also reviews all the instructions de novo to determine whether the absence of the requested instruction resulted in a misstatement of the applicable law to the jury. The Tenth Circuit then determines whether the instructions, taken as a whole, convey the proper law and focus the jury on the relevant inquiry.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN4[] **Standards of Review, Abuse of Discretion**

The Tenth Circuit uses an abuse of discretion standard when it reviews (1) a district court's decision to deny a motion for reconsideration; (2) a district court's decision on a motion for a new trial, and (3) a challenge to the language and structure of a special verdict form.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN5[] **Sherman Act, Defenses**

The *Sherman Act's* statute of limitations bars recovery if a cause of action is asserted more than four years after it accrues. *15 U.S.C.S. § 15b*.

Antitrust & Trade Law > Business & Corporate Compliance > Antitrust

Civil Procedure > Appeals

HN6[] **Antitrust & Trade Law**

As a general proposition, when reviewing a district court's judgment involving federal ***antitrust law***, the U.S. Court of Appeals for the Federal Circuit is guided by the law of the regional circuit in which that district court sits.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Time Limitations

HN7[] **Sherman Act, Defenses**

The U.S. Supreme Court recognized the continuing conspiracy exception in Zenith Radio Corp. (In the context of a continuing conspiracy to violate the antitrust laws, each time a plaintiff is injured by an act of the defendants, a cause of action accrues to recover the damages caused by that act and as to those damages, the statute of limitations runs from the commission of the act). The Tenth Circuit elaborated on the exception in Kaw Valley Electric Cooperative Co. by holding that an act may trigger the exception only if it satisfies a two-part test: (1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff.

Antitrust & Trade Law > Sherman Act > Defenses

Governments > Legislation > Statute of Limitations > Pleadings & Proof

HN8[] **Sherman Act, Defenses**

When a party invokes the continuing conspiracy exception, that party bears the burden of proof to establish it. In Kaw Valley, the Tenth Circuit stated that, to come within the continuing conspiracy exception, a plaintiff must show that it has been injured by continued, separate antitrust violations within the limitations period. In a court of common law a party defendant pleads the statute of limitations; the plaintiff replies an exception, and he must raise a prima facie case by evidence.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

HN9[] **Entitlement as Matter of Law, Legal Entitlement**

The U.S. Supreme Court made clear in Celotex that, at summary judgment, a party is entitled to judgment as a matter of law when the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Business & Corporate Compliance > ... > Standards of Performance > Contracts Law > Standards of Performance

HN10[] **Contracts, Standards of Performance**

Under Colorado contract law, it is a condition of each party's remaining duties to render performances that there be no uncured material failure by the other party to render any such performance due at an earlier time.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN11[] **Reviewability of Lower Court Decisions, Preservation for Review**

It is the general rule that a federal appellate court does not consider an issue not passed upon below.

Civil Procedure > Trials > Jury Trials > Verdicts

HN12[] **Jury Trials, Verdicts**

As a general matter, it must be left to the sound discretion of the trial court what form of verdict to request of a jury.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Patent Law > Infringement Actions > Defenses > Patent Invalidity

HN13[] **Estoppel, Collateral Estoppel**

A patentee, having been afforded the opportunity to exhaust his remedy of appeal from a holding of invalidity, has had his "day in court," and a defendant should not have to continue defending a suit for infringement of an adjudged invalid patent. An affirmance of an invalidity finding, whether from a district court or the Board, has a collateral estoppel effect on all pending or co-pending actions. The U.S. Court of Appeals for the Federal Circuit has long applied the U.S. Supreme Court's holding in Blonder-Tongue to apply collateral estoppel in mooting pending district court findings of no invalidity based on intervening final decisions of patent invalidity. The Federal Circuit also recently applied the U.S. Supreme Court's holding in B&B Hardware to apply such estoppel to Board decisions.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Patent Law > Infringement Actions > Defenses > Patent Invalidity

HN14[] **Estoppel, Collateral Estoppel**

A remand for briefing is not a requirement to applying estoppel when there is no indication from the patent owner that it did not have a full and fair opportunity to litigate the validity of its patent in the parallel case.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Patent Law > Infringement Actions > Defenses > Patent Invalidity

HN15[] **Estoppel, Collateral Estoppel**

An unrelated accused infringer may take advantage of an unenforceability decision under the collateral estoppel doctrine.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN16[] **Jury Trials, Province of Court & Jury**

The jury holds the exclusive function of appraising credibility and determining the weight to be given to testimony.

Patent Law > ... > Damages > Patentholder Losses > Reasonable Royalties

HN17[] **Patentholder Losses, Reasonable Royalties**

There is a "fundamental difference" between a reasonable royalty for pre-verdict infringement and damages for post-verdict infringement. For example, when calculating an ongoing royalty rate, the district court should consider the change in the parties' bargaining positions, and the resulting change in economic circumstances, resulting from the determination of liability. When patent claims are held to be not invalid and infringed, this amounts to a substantial shift in the bargaining position of the parties. The court has also instructed district courts to consider changed economic circumstances, such as changes related to the market for the patented products. District courts may consider "additional evidence" of "economic circumstances that may be of value in determining an appropriate ongoing royalty. The requirement to focus on changed circumstances is particularly important when an ongoing royalty effectively serves as a replacement for whatever reasonable royalty a later jury would have calculated in a suit to compensate the patentee for future infringement. The later jury would necessarily be focused on what a hypothetical negotiation would look like after the prior infringement verdict. Therefore, post-verdict factors should drive the ongoing royalty rate calculation in determining whether such a rate should be different from the jury's rate.

Patent Law > ... > Damages > Patentholder Losses > Reasonable Royalties

HN18[] **Patentholder Losses, Reasonable Royalties**

District courts may award a lower ongoing royalty rate if economic factors have changed in the infringer's favor post-verdict--for example, if a newly-developed non-infringing alternative takes market share from the patented products.

Counsel: PRATIK A. SHAH, Akin, Gump, Strauss, Hauer & Feld, LLP, Washington, DC, argued for plaintiff-cross-appellant. Also represented by ZE-WEN JULIUS CHEN; DANIEL LYNN MOFFETT, KIRT S. O'NEILL, San Antonio, TX.

CHARLES DANIEL OSSOLA, Hunton & Williams LLP, Washington, DC, argued for defendant-appellant. Also represented by DAVID A. KELLY, Atlanta, GA; DONALD EARL LAKE, III, GEORGE GUY MATAVA, SAMANTHA KAY PICANS, Lewis Brisbois Bisgaard & Smith, Denver, CO.

Judges: Before NEWMAN, DYK and CHEN, Circuit Judges. Opinion for the court filed by Circuit Judge CHEN. Opinion concurring-in-part, dissenting-in-part filed by Circuit Judge NEWMAN.

Opinion by: CHEN

Opinion

[*1086] [*1285]** CHEN, *Circuit Judge*.

Plaintiff-Cross-Appellant XY, LLC (XY) sued Defendant-Appellant Trans Ova Genetics, L.C. (Trans Ova) for patent infringement and breach of contract. Trans Ova counterclaimed, alleging patent invalidity, breach of contract, and antitrust violations. The district court granted summary judgment in favor of XY on Trans Ova's antitrust counterclaims. A jury **[**2]** found breaches of contract by both parties and awarded damages. The jury also found **[*1286]** that (i) Trans Ova failed to prove that the asserted patent claims were invalid, (ii) Trans Ova willfully infringed the asserted claims, and (iii) XY was entitled to damages for patent infringement. The parties filed various post-trial motions. The district court denied all of Trans Ova's requested relief on the antitrust, breach of contract, invalidity, and willfulness issues and granted XY's request for an ongoing royalty. Trans Ova appeals the district court's antitrust, breach of contract, invalidity, and willfulness rulings. XY appeals the ongoing royalty rate adopted by the district court.

We affirm in part, vacate in part, and remand. Two issues presented on appeal are moot. With respect to the remaining issues, we affirm on all issues except the district court's ongoing royalty rate, which we vacate. We remand for the district court to recalculate an ongoing royalty rate in accordance with this opinion.

Background

I. Technological Background

XY's patents relate to the sorting of X- and Y-chromosome-bearing sperm cells, which can be used for selective breeding purposes. Some of the asserted patent **[**3]** claims require the use of "flow cytometry," a process by which cells flow through a flow cytometer at a high rate of speed in a fluid stream and "are evaluated at several thousands of [cells] per second." J.A. 8346-47.

Dr. Lawrence Johnson developed a technique for sorting animal semen using flow cytometry **[***1087]** in the 1980s as part of research sponsored by the United States Department of Agriculture (USDA). Dr. Johnson's technique is patented in U.S. Patent No. 5,135,759 (the Johnson Patent), which issued in 1992. The Johnson Patent was initially licensed to XY under a USDA partnership program. The Johnson method involves staining DNA in sperm cells with a dye; using a laser beam to activate the fluorescence of the dye (with X-chromosome cells being brighter because they contain more DNA than Y-chromosome cells); detecting the amount of fluorescence in the cells; and sorting the cells into separate containers for X and Y cells.

Six of XY's patents are at issue in this appeal. They can be grouped into four categories: (1) the "Fluid Patents" (U.S. Patent Nos. 6,149,867 and 6,524,860); (2) the "Freezing Patent" (U.S. Patent No. 7,820,425); (3) the "In-Vitro Fertilization Patent" (U.S. Patent No. 8,569,053); and (4) the "Reverse Sort Patents"[1] (U.S. Patent Nos. 7,713,687 and 7,771,921).

The Fluid Patents claim flow cytometry devices and **[**4]** methods that use "sheath fluids" to provide optimum pre- and post-sorting fluid environments for the cells to "achieve as unaffected a sorted result as possible." '867 patent, J.A. 13485 col. 4 ll. 40-55, J.A. 13493 col. 20 ll. 1-4; '860 patent, J.A. 13516 col. 18 ll. 47-50, J.A. 13509 col. 4 ll. 27-43. The claimed fluids are introduced in a "coordinated" fashion such that the cells' fluid environment changes at various stages of the sorting process to minimize stress on the cells and keep as many of the cells alive as possible. *See, e.g.*, '867 patent, J.A. 13490 col. 13 ll. 1-65, J.A. 13493 col. 20 l. 1.

The Freezing Patent claims methods for "cryopreserving sperm that have been selected for a specific characteristic." J.A. 13300 col. 2 ll. 9-10, 16-17; J.A. 13315 col. 31 l. 64 - col. 32 l. 11. The claimed methods purport to "facilitat[e] storage and/or shipment **[*1287]** of selected sperm samples to sites distant from the collection site." J.A. 13300 col. 2 ll. 44-46. According to the patent, thawing the samples "yields viable sperm that can be used in procedures such as artificial insemination . . . and in vitro fertilization." *Id.* col. 2 ll. 46-48.

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[1] The Reverse Sort Patents involve a sorting process that reverses the order of steps recited in the sorting process described in the Freezing Patent. In the Freezing Patent, sperm is first sorted and then frozen, while in the Reverse Sort Patents, the sperm is first frozen, then thawed and sorted.

The Reverse Sort Patents claim methods of first freezing, then thawing, and **[**5]** finally sorting sperm cells. *See, e.g.*, '687 patent, J.A. 13434 col. 30 ll. 9-42. The parties agree that a principal difference between the claimed methods in the Reverse Sort Patents and prior art methods is the use of a relatively high concentration of dye for staining the sperm cells in the Reverse Sort Patents—greater than 40 micromolar. *See, e.g., id.* col. 30 ll. 15-17.

The In-Vitro Fertilization Patent claims methods of in-vitro fertilization using sorted and reverse sorted sperm. *See generally* J.A. 14930-31 col. 10 l. 14 - col. 12 l. 26.

II. Factual Background

Trans Ova provides services related to embryo transfer and in-vitro fertilization for cattle. Before the events giving rise to this lawsuit, Trans Ova purchased sorted semen from Inguran, LLC (Inguran), which was a licensee of XY's patents. Trans Ova became dissatisfied with the quality of Inguran's product, however, and sought to license XY's technology to produce its own sorted semen.

XY and Trans Ova entered into a five-year licensing agreement (the Agreement) in April 2004 under which Trans Ova was authorized to use XY's technology in animal breeding. The Agreement was subject to automatic renewal in April 2009, unless, *inter alia* ***[**6]*** , Trans Ova was in material breach of the Agreement. XY retained the right to terminate the Agreement in the event of certain breaches by Trans Ova, upon written notice to Trans Ova.

In November 2007, Inguran acquired XY and, in the same month, XY sent a letter purporting to terminate the Agreement (Termination Letter) because of alleged breaches by Trans Ova. Trans Ova disagreed with XY's allegations of breach and argued that the Agreement had not been terminated. Over the course of several years, the parties negotiated but failed to resolve their disputes. Trans Ova continued to make royalty payments to XY pursuant to the Agreement, in accordance with its position that the Agreement had not been terminated, but XY declined all payments except one (which XY alleges it accepted in error). During the period of negotiations, XY alleges that it became aware of further breaches by Trans Ova (in addition to those alleged in **[***1088]** the Termination Letter), including underpayment of royalties and development of improvements to XY's technology without disclosure of such improvements to XY.

III. Procedural History

In March 2012, XY sued Trans Ova for patent infringement in the United States District Court **[**7]** for the Western District of Texas. Trans Ova moved to dismiss or transfer for improper venue. On March 28, 2013, the district judge granted Trans Ova's motion and transferred the case to the District of Colorado. XY filed an amended complaint, adding claims for breach of contract and unjust enrichment. Trans Ova, in turn, asserted (1) patent invalidity, (2) monopolization and attempted monopolization under the Sherman Act, and (3) breach of contract by XY and Inguran.[2]

[*1288] A. Summary Judgment

XY moved for summary judgment that Trans Ova's antitrust claims were barred by the applicable four-year statute of limitations. Trans Ova argued in response that the "continuing conspiracy" exception, per Tenth Circuit case law, effectively restarted the limitations period with each "new and independent act" that inflicted "new and accumulating injury" on Trans Ova after XY sent the Termination Letter. J.A. 41 (quoting *Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1088 (10th Cir. 2006))*. The district court determined that Trans Ova had not identified any new injury resulting from XY's post-termination actions in its brief in opposition to XY's motion. Therefore, the district court held that the continuing conspiracy exception did not apply and Trans Ova's antitrust **[**8]** claims were barred by the statute of limitations. *Id.* at 43-44.

[2] Inguran was previously a party to this suit. After dismissing Trans Ova's antitrust counterclaims, the district court granted Inguran's motion for judgment on the pleadings as to the remaining claims against Inguran and removed Inguran from the suit. *See* J.A. 55-63.

Trans Ova filed a motion for reconsideration, which the district court denied. The district court reaffirmed its ruling that Trans Ova had failed to show a triable issue of new and accumulating injury resulting from any of XY's post-termination actions. The district court clarified that, in granting summary judgment, it had assumed that the Termination Letter was not a "final act" that permanently excluded Trans Ova from the market, but "nevertheless found that Trans Ova did not meet the threshold requirement to show that any subsequent acts caused new injuries." J.A. 50. "It was Trans Ova's burden, in opposing summary judgment, to present evidence that the continuing conspiracy exception applied" and "Trans Ova's failure to address the new injury prong of the analysis fell short of meeting that burden." *Id.* (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*. Trans Ova's identification of two allegedly new categories of injuries in its briefing on the motion for reconsideration "should have been included in its prior briefing" and thus came too late. J.A. 51.

B. Jury Trial

The case proceeded to a jury trial. The jury found that both parties had breached the Agreement. Specifically, **[**9]** the jury found that Trans Ova materially breached and failed to cure prior to the April 2009 renewal date set out in the Agreement. As a result, under the jury's finding, the Agreement terminated in April 2009, and Trans Ova's post-termination use of XY's patented technology was unlicensed and infringing. The jury also found, however, that XY violated the Agreement and its duty of good faith and fair dealing by attempting to terminate the license in November 2007. As compensation for the respective breaches, the jury awarded XY $1,481,000 and Trans Ova $528,000 in damages.

The jury also found that none of the asserted patent claims were invalid and that Trans Ova willfully infringed. The jury awarded XY $4,585,000 for Trans Ova's patent infringement. In addition, the jury found that XY had unclean hands from its purported termination of the Agreement in November 2007.

C. Post-Trial

After trial, Trans Ova filed motions on the breach of contract, willfulness, and invalidity issues. XY filed motions seeking an award of an ongoing royalty and enhanced damages.

Regarding the breach of contract issues, Trans Ova moved for judgment as a matter of law under *Rule 50(b)* or, in the alternative, a new trial **[**10]** under *Rule 59(a)* or an amended judgment under *Rule 59(e)*. Trans Ova argued that XY's attempt to terminate the Agreement **[***1089]** was a material breach that excused Trans Ova's obligations under the Agreement and that the jury's findings that both parties breached **[*1289]** and were entitled to damages were irreconcilable. Trans Ova also argued that the jury verdict form was structured in such a way that the jury was not able to determine whether Trans Ova's obligations under the Agreement had been suspended due to XY's breach. At trial, the district court overruled an objection by Trans Ova to the verdict form that was based on similar arguments. The district court denied Trans Ova's motion, inferring that the jury found a material breach by Trans Ova before XY sent the Termination Letter. The district court also determined that a reasonable jury could have reached the conclusions reflected in the verdict form based on the evidence presented at trial.

With respect to willfulness, Trans Ova moved under *Rule 59(e)* for a ruling of no willful infringement. XY opposed the motion, arguing, *inter alia*, that Trans Ova could not seek its requested relief because Trans Ova had not challenged the sufficiency of XY's evidence on willfulness by **[**11]** moving under *Rule 50(a)* at trial. The district court rejected this argument, stating that "Trans Ova's argument is not a challenge to the sufficiency of XY's evidence at trial, but rather an argument that the jury's willful infringement finding was clearly erroneous as a matter of law." J.A. 11. More particularly, the district court understood Trans Ova to be arguing that certain of its invalidity defenses were objectively reasonable under the test for willfulness set out in *In re Seagate Technology, LLC, 497 F.3d 1360 (Fed. Cir. 2007)* (en banc). The district court determined that the invalidity defenses were objectively reasonable and granted Trans Ova's motion, finding no willful infringement as a matter of law. However, as explained, *infra*, the district court later revisited this decision after the Supreme Court issued its opinion in *Halo Electronics, Inc. v. Pulse Electronics, Inc., 136 S. Ct. 1923, 195 L. Ed. 2d 278 (2016)*.

On invalidity, Trans Ova moved under *Rule 59(a)* for a new trial. The district court denied the motion, holding that Trans Ova's arguments in support of the motion were merely a critique of XY's expert's opinions and amounted to nothing more than a rehash of arguments presented to the jury at trial. Trans Ova had stipulated to the qualification of XY's expert to testify regarding "the subject matter of the asserted patents" under **[**12]** *Federal Rule of Evidence 702*. The district court held that Trans Ova was not entitled to a new trial because "Trans Ova's arguments point to a classic battle of the experts . . . rather than an indication that the overwhelming weight of the evidence leans but one way." J.A. 16-17.

XY filed a motion requesting that the district court set an ongoing royalty as an equitable remedy for Trans Ova's future infringement. The district court noted Trans Ova's admission that it intended to continue to practice XY's patents and determined that an ongoing royalty would be appropriate. The district court then observed that the jury effectively adopted the 15% royalty rate on gross sales and the 4% royalty rate for reverse sorting services proposed by XY's damages expert at trial. The district court also noted that "every one of XY's prior licenses include[d] a 10% royalty rate, which tend[ed] to prove that 10% [was] XY's established royalty." J.A. 28. After considering the relevant evidence and the parties' various arguments under certain of the factors set out in *Georgia-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970)*, the district court calculated an ongoing royalty rate for gross sales by averaging the jury's 15% rate with the 10% rate in XY's prior licenses to arrive at a **[**13]** rate of 12.5%. For reverse sorting services, the district court awarded an ongoing royalty rate of 2%, half of the jury's rate for those services.

[*1290] XY also moved for an award of enhanced damages, which the district court denied.

Based on the jury's unclean hands finding, the district court denied XY's unjust enrichment claim and XY's request for injunctive relief.

D. Post-Judgment

After the Supreme Court issued its decision in *Halo*, XY moved under *Rule 59(e)* to alter or amend the judgment with respect to the ongoing royalty rate and under *Rule 60(b)(6)* to reconsider the district court's finding of no willful infringement and denial of enhanced damages. The district court denied XY's motion with respect to the ongoing royalty rate. Regarding willfulness, the district court granted XY's motion in part by reinstating the jury's finding of willfulness—in view of *Halo*'s **[***1090]** abrogation of the objective prong of *Seagate*'s test for willfulness, under which the district court had granted judgment as a matter of law of no willful infringement—but denied XY's motion for reconsideration of the district court's denial of enhanced damages.

Trans Ova appeals the district court's rulings on the antitrust, breach of contract, invalidity, **[**14]** and willfulness issues. XY appeals the district court's calculation of the ongoing royalty rate. We have jurisdiction pursuant to *28 U.S.C. § 1295(a)(1)*.

Standards of Review

HN1[] We review a district court's methodology for calculating an ongoing royalty under the abuse of discretion standard. *See* *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc., 694 F.3d 1312, 1332 (Fed. Cir. 2012)*.

We review each of the other disputed issues in this appeal under the law of the regional circuit, the Tenth Circuit. *Classen Immunotherapies, Inc. v. Elan Pharms., Inc., 786 F.3d 892, 896 (Fed. Cir. 2015)* (grant of summary judgment); *Lincoln Nat'l Life Ins. Co. v. Transamerica Life Ins. Co., 609 F.3d 1364, 1367 (Fed. Cir. 2010)* (denial of judgment as a matter of law); *Voda v. Cordis Corp., 536 F.3d 1311, 1328 (Fed. Cir. 2008)* (challenge to jury instructions); *Lummus Indus., Inc. v. D.M. & E. Corp., 862 F.2d 267, 273 (Fed. Cir. 1988)* (challenge to special verdict form); *Golden Bridge Tech., Inc. v. Apple Inc., 758 F.3d 1362, 1367 (Fed. Cir. 2014)* (denial of motion for reconsideration); *Promega Corp. v. Life Techs. Corp., 875 F.3d 651, 659 (Fed. Cir. 2017)* (denial of new trial).

HN2[] The Tenth Circuit reviews *de novo* a district court's grant of summary judgment, *Timmons v. White, 314 F.3d 1229, 1232 (10th Cir. 2003)*, and denial of a motion for judgment as a matter of law, *Jones v. United Parcel Serv., Inc., 674 F.3d 1187, 1195 (10th Cir. 2012)*.

HN3[] The Tenth Circuit reviews whether a district court erred in refusing to give a particular jury instruction under the abuse of discretion standard. *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1231 (10th Cir. 1999)*. However, the Tenth Circuit also "review[s] all the instructions *de novo* to determine whether the absence of the requested instruction resulted in a misstatement of the applicable law to the jury." *Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1152 (10th Cir. 1999)*. The Tenth Circuit then determines whether the instructions, taken as a whole, convey the proper law and focus the jury **[**15]** on the relevant inquiry. *Id.*

HN4[] The Tenth Circuit also uses an abuse of discretion standard when it reviews (1) a district court's decision to deny a motion for reconsideration, *Wright ex rel. Tr. Co. of Kan. v. Abbott Labs., Inc., 259 F.3d 1226, 1235 (10th Cir. 2001)*; (2) a district court's decision on a motion for a new trial, *United States v. Lamy, 521 F.3d 1257, 1265-66* ***[*1291]*** *(10th Cir. 2008)*; and (3) a challenge to the language and structure of a special verdict form, *Webb v. ABF Freight Sys., Inc., 155 F.3d 1230, 1249 (10th Cir. 1998)*.

Discussion

I. Trans Ova's Antitrust Counterclaims

Trans Ova asserted counterclaims under *§ 2* of the Sherman Act alleging monopolization and attempted monopolization of the market for sorting nonhuman, mammalian semen by sex. *HN5*[] The Sherman Act's statute of limitations bars recovery if a cause of action is asserted more than four years after it accrues. *15 U.S.C. § 15b*. It is undisputed that Trans Ova's antitrust causes of action first accrued in November 2007 when XY sent the Termination Letter. The instant litigation began in 2012. Therefore, Trans Ova's antitrust counterclaims are barred by the statute of limitations unless an exception applies. The only potential exception identified by Trans Ova is the continuing conspiracy exception. The parties agree that Tenth Circuit case law governs our determination of whether the continuing conspiracy exception should apply in this case. *See In re Indep. Serv. Orgs. Antitrust Litig., 203 F.3d 1322, 1325 (Fed. Cir. 2000)* *HN6*[] ("As a **[**16]** general proposition, when reviewing a district court's judgment involving federal ***antitrust law***, we are guided by the law of the regional circuit in which that district court sits.").

HN7[] The Supreme Court recognized the continuing conspiracy exception in *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S. Ct. 795, 28 L. Ed. 2d 77 (1971)* ("In the context of a continuing conspiracy to violate the antitrust laws, . . . each **[***1091]** time a plaintiff is injured by an act of the defendants[,] a cause of action accrues . . . to recover the damages caused by that act and . . . , as to those damages, the statute of limitations runs from the commission of the act."). The Tenth Circuit elaborated on the exception in *Kaw Valley Electric Cooperative Co. v. Kansas Electric Power Cooperative, Inc*. by holding that an act may trigger the exception only if it satisfies a two-part test: "(1) It must be a new and independent act that is not merely a reaffirmation of a previous act; and (2) it must inflict new and accumulating injury on the plaintiff." *872 F.2d 931, 933 (10th Cir. 1989)* (quoting *Pace Indus., Inc. v. Three Phoenix Co., 813 F.2d 234, 238 (9th Cir. 1987))*; *see also* *Champagne Metals, 458 F.3d at 1088* (applying the *Kaw Valley* test).

As an initial matter, the parties dispute whether the movants (XY and Inguran) or Trans Ova bore the burden of proof on the applicability of the continuing conspiracy exception. Trans Ova argues **[**17]** that it was the movants' obligation to present sufficient undisputed evidence to establish that the Termination Letter was "a final act that caused all of the injuries." Trans Ova Open. Br. at 13 (citing *Celotex Corp. v. Catrett, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986))*. According to Trans Ova, the district court erred when it placed the burden on Trans Ova to show a new and independent act that inflicted new and accumulating injury. XY counters that Trans Ova bore the burden to show a triable issue as to the applicability of the continuing conspiracy exception, because "the party who seeks to recover, upon the ground of his being within some exception of the statute of limitations, is bound to establish such exception by proof" and the "plain language of *Rule 56(c)* mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." XY Resp. Br. at 24-25 (quoting *Somerville's Ex'rs v. Hamilton, 17 U.S. (4 Wheat.) 230, 234,* ***[*1292]*** *4 L. Ed. 558 (1819)*; *Celotex, 477 U.S. at 322*).

We agree with XY that Trans Ova bore the burden to present evidence that the continuing conspiracy exception applied. *See* *Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230, 233 (6th Cir. 1974)* (noting that, ***HN8***[] when a party invokes the continuing conspiracy exception, that party bears the burden of **[**18]** proof to establish it). In *Kaw Valley*, the Tenth Circuit stated that, to come within the continuing conspiracy exception, "a ***plaintiff*** must show that it has been injured by 'continued, separate antitrust violations within the limitations period.'" *872 F.2d at 933* (emphasis added) (quoting *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1301 (9th Cir. 1986))*; *see also* *Piatt v. Vattier, 34 U.S. (9 Pet.) 405, 413, 9 L. Ed. 173 (1835)* ("In a court of common law a party defendant pleads the statute of limitations; the plaintiff replies an exception, and he must raise a prima facie case by evidence.").

HN9[] The Supreme Court made clear in *Celotex* that, at summary judgment, a party is entitled to judgment as a matter of law when "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *477 U.S. at 323*. Under *Kaw Valley*, the "new and accumulating injury" is an essential element of proving applicability of the continuing conspiracy exception and an issue on which Trans Ova bore the burden of proof at trial. *See* *Kaw Valley, 872 F.2d at 934-35* (finding that the continuing conspiracy exception did not apply because there was no accumulating injury). Because Trans Ova bore the burden of proof, and because Trans Ova failed to identify any "new and accumulating injury" resulting from any of XY's post-termination **[**19]** acts in its brief opposing XY's motion for summary judgment,[3] the district court did not err in granting summary judgment in XY's favor.[4]

For the foregoing reasons, we affirm the district court's grant of XY's motion for summary judgment on Trans Ova's antitrust counterclaims.[5]

[*1092]** II. Breach of Contract

Trans Ova presses three arguments on the breach of contract issues: (1) Trans Ova's breaches were excused by XY's prior material breach and continuing breaches, (2) the jury's findings that both parties breached were irreconcilably inconsistent, and (3) the district court abused its discretion **[*1293]** by adopting a confusing and improperly structured special verdict form.

First, Trans Ova argues that its obligations under the Agreement were excused because XY materially breached the Agreement before Trans Ova breached. ***HN10***[] Under Colorado contract law, "it is a condition of each party's remaining duties to render performances . . . that there be no uncured material failure by the other party to render any such performance due at an earlier time." *Colo. Interstate Gas Co. v. Chemco, Inc., 854 P.2d 1232, 1239 (Colo. 1993)*.[6] The district court rejected this argument and held that a reasonable jury could have found that Trans **[**20]** Ova materially breached before XY by underpaying royalties and developing improvements to XY's

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[3] *See generally* Trans Ova's Br. in Opp'n to XY's Mot. for Summ. J., *XY, LLC v. Trans Ova Genetics, LC*, No. 13-CV-876 (D. Colo. Aug. 22, 2014), ECF No. 247. Trans Ova's brief alleged only a single injury that resulted from XY's conduct: exclusion from the relevant market covered by XY's patents. *See id.*

[4] The district court did not abuse its discretion in disregarding arguments about new and accumulating harm that Trans Ova raised for the first time in its motion for reconsideration. *See* *Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000)* (affirming district court's decision to disregard arguments and evidence presented for the first time in a motion for reconsideration).

[5] Trans Ova argues that the district court's decision turned on its erroneous interpretation of Trans Ova's expert's testimony. In particular, Trans Ova argues that the district court incorrectly read Trans Ova's expert testimony characterizing the antitrust damages as overlapping with the contract damages to mean that there was only a single antitrust injury. However, the district court expressly stated that it "did not rely on [Trans Ova's expert's] testimony as evidence that no new injury had been inflicted." J.A. 52. The district court's decision rested on Trans Ova's failure to raise arguments identifying a new and accumulating injury, not on any consideration of expert testimony on damages.

[6] The parties agree that Colorado contract law applies here.

technology without disclosing such improvements to XY. J.A. 7-10 (citing trial evidence). We agree with the district court that a reasonable jury could have found that Trans Ova's breaches occurred before XY's breach based on the trial evidence. Therefore, like the district court, we reject Trans Ova's argument that its breaches were excused by XY's later breach.

Second, Trans Ova argues that the jury's findings are inconsistent because, if Trans Ova materially breached before XY, XY's breach must have been excused. However, Trans Ova never presented this argument to the district court in its briefing in support of its post-trial motion. Trans Ova only argued before the district court that there was insufficient evidence for a reasonable jury to conclude that Trans Ova breached before XY. Moreover, XY has not appealed the jury's finding that it was liable for breach of contract, nor did XY argue in its briefing on Trans Ova's post-trial motion that its breach should be excused by Trans Ova's prior breach. Because Trans Ova did not present this argument to the district court, we decline to **[**21]** consider it in the first instance on appeal. *Singleton v. Wulff, 428 U.S. 106, 120, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976)* ***HN11***[] ("[I]t is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.").

Finally, Trans Ova argues that the district court abused its discretion by adopting XY's proposed special verdict form. In particular, Trans Ova argues that the district court erred by not including a question about whether XY's breach was material in the verdict form. Significantly, Trans Ova does not argue that the jury was improperly instructed as to what constitutes a material breach, because the parties stipulated to the proposed jury instruction on this issue. ***HN12***[] As a general matter, "it must be left to the sound discretion of the trial court what form of verdict to request of a jury." *See* *Structural Rubber Prods. Co. v. Park Rubber Co., 749 F.2d 707, 720 (Fed. Cir. 1984)*; *ClearOne Commc'ns, Inc. v. Bowers, 643 F.3d 735, 765 (10th Cir. 2011)*. We see no reason to deviate from this general rule in this case and find no abuse of discretion by the district court in adopting XY's proposed verdict form. Because the jury was properly instructed on materiality, the jury was adequately equipped to determine how a material breach by one party affected later breaches by the opposing party. In view of the jury instructions, the verdict form was not "clearly unreasonable." *Lazare Kaplan Int'l, Inc. v. Photoscribe Techs., Inc., 714 F.3d 1289, 1293 (Fed. Cir. 2013)*.

For the **[**22]** foregoing reasons, we affirm the district court's denial of Trans Ova's motion on the breach of contract issues.

III. Invalidity

Trans Ova argues that the district court abused its discretion in denying Trans **[*1294]** Ova's motion for a new trial on the invalidity issues. XY counters that the district court did not abuse its discretion, because Trans Ova's motion improperly requested that the district court reweigh the evidence and reevaluate the credibility of XY's expert, Dr. James Wood. **[***1093]** XY notes that Trans Ova stipulated as to Dr. Wood's expertise and competency to testify before the jury in the areas of flow cytometry and the subject matter of the asserted patents.

A. Collateral Estoppel

As a threshold matter, we need not address Trans Ova's invalidity arguments as to the Freezing Patent claims in view of our affirmance today in a separate appeal invalidating these same claims, which collaterally estops XY from asserting the patent in any further proceedings. In this separate case appealed to us and argued on the same day as the instant appeal, the Patent Trial and Appeal Board of the U.S. Patent and Trademark Office (Board) held that these claims are unpatentable in a final written decision **[**23]** from an *inter partes* review proceeding. *See generally XY, LLC v. ABS Glob., Inc.*, Appeal No. 16-2228. In a separate order issued today, we affirm the Board's decision.[7]

That affirmance renders final a judgment on the invalidity of the Freezing Patent, and has an immediate issue-preclusive effect on any pending or co-pending actions involving the patent. This court has previously applied

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[7] On remand, the district court should consider the impact, if any, of our affirmance of the Board's decision that held claims unpatentable on the damages award and whether a new trial on damages is warranted.

collateral estoppel to such co-pending cases because *HN13*[] "a patentee, having been afforded the opportunity to exhaust his remedy of appeal from a holding of invalidity, has had his 'day in court,'" and a defendant should not have to continue "defend[ing] a suit for infringement of [an] adjudged invalid patent." *U.S. Ethernet Innovations, LLC v. Tex. Instruments Inc., 645 F. App'x 1026, 1028-30 (Fed. Cir. 2016)* (citing *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971))*; *Translogic Tech., Inc. v. Hitachi, Ltd., 250 F. App'x 988 (Fed. Cir. 2007)*.[8]

We do not find, as the Dissent states, that "in the event of conflict the administrative agency's decision 'moots' the district court's decision." Dissent at 6. Rather, we find that an affirmance of an invalidity finding, whether from a district court or the Board, has a collateral estoppel effect on all pending or co-pending actions. This court has long applied the Supreme Court's holding in *Blonder-Tongue* to apply collateral estoppel in mooting pending district court findings of no invalidity based **[**24]** on intervening final decisions of patent invalidity. *See, e.g., Mendenhall v. Barber-Greene Co., 26 F.3d 1573, 1576 (Fed. Cir. 1994)*; *Dana Corp. v. NOK, Inc., 882 F.2d 505, 507-08 (Fed. Cir. 1989)*. This court also recently applied the Supreme Court's holding in *B&B Hardware, Inc. v. Hargis Industries, Inc., 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015)*, to apply such estoppel to Board decisions. *See MaxLinear, Inc. v. CF CRESPE LLC, 880 F.3d 1373 (Fed. Cir. 2018)*. The instant case is a straightforward application of this court's and Supreme Court precedent.

As to the Dissent's concern of applying estoppel without briefing, both precedent and the parties' positions allow application of collateral estoppel *sua sponte* here. *HN14*[] A remand for briefing is not a requirement to applying estoppel when there is no indication **[*1295]** from the Patent Owner that "it did not have a full and fair opportunity to litigate the validity" of its patent in the parallel case. *Dana Corp., 882 F.2d at 508*. Here, in oral argument, both parties assumed that an affirmance of the Board's decision would result in estoppel and thus simply disputed the result of such estoppel. Trans Ova argued that an affirmance would call for a remand of this case to reassess damages in light of the Freezing Patent's invalidity, while XY argued that an affirmance would not require a remand because the asserted patents were grouped in a way where the invalidation of one patent would not affect the damages award. Oral Arg. at 1:30-46, 18:10-19:20. There **[**25]** is no indication that either party thought estoppel would not apply. Thus, this court, in circumstances such as this one, applies estoppel *sua sponte* to avoid "unnecessary judicial waste" from remanding an issue that has a clear estoppel effect. *Arizona v. California, 530 U.S. 392, 412, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)*.

Further, the fact that the Defendant in this case and the Petitioners in an *inter partes* review at the Board were different parties is of no consequence. *HN15*[] "An unrelated accused infringer may . . . take advantage of an unenforceability decision under the collateral estoppel doctrine." *Pharmacia & Upjohn Co. v. Mylan Pharms., Inc., **[***1094]** 170 F.3d 1373, 1379 (Fed. Cir. 1999)* (affirming district court application of collateral estoppel).

Thus, in view of this court's concurrent affirmance of the Board's decisions in *XY, LLC v. ABS Global, Inc.*, Appeal No. 16-2228, we do not address Trans Ova's invalidity arguments as to the Freezing Patent claims in this appeal, and dismiss Trans Ova's appeal of the district court's decision on this issue as moot.

B. Abuse of Discretion

For the remaining patents-at-issue, we agree with XY that the district court did not abuse its discretion in denying Trans Ova's motion for a new trial on the issue of patent invalidity. First, *HN16*[] "[t]he jury holds 'the exclusive function of appraising credibility . . . [and] **[**26]** determining the weight to be given to the testimony.'" J.A. 17 (quoting *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd., 210 F.3d 1207, 1227 (10th Cir. 2000))*. Second, the jury's findings of no invalidity for these patents is supported by substantial evidence, as discussed *infra*.

For the In-Vitro Fertilization Patent, asserted claim 9 requires "produc[ing] sex-selected embryos capable of blastocyst formation." XY Principal Br. at 42. Dr. Wood testified that the primary reference asserted against claim 9, the Merton reference, disclosed only a "failed experiment" that did not show producing sex-selected embryos

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[8] These decisions are non-precedential, but lay out the reasoning for co-pending appellate decisions having a preclusive effect on each other.

capable of blastocyst formation. J.A. 11324. Although 1.5% of inseminated oocytes (i.e., eggs) reached blastocyst stage in Merton's experiment, Dr. Wood testified that this was a statistically insignificant result and that the blastocyst formation could have been caused by external stimuli via parthenogenesis. *See* J.A. 11323 ll. 15-22 ("[C]leavage is the first stage of [embryo] development. . . . [T]he cleavage process can be stimulated by either a sperm entering the oocyte or it can be stimulated by [a] change in environment" that "stimulate[s]" the embryo "to go through what's called parthenogenesis . . . ."). The jury reasonably credited Dr. Wood's testimony **[**27]** and determined that claim 9 of the In-Vitro Fertilization Patent was not invalid because the Merton reference did not disclose the limitation reciting "produc[ing] sex-selected embryos capable of blastocyst formation."

[*1296] The asserted claims of the Fluid Patents (claims 12 and 13 of the '867 patent and claims 1 and 32 of the '860 patent) require chemical coordination between pre- and post-sort fluids that are added to sperm cells to help them survive the sorting process. XY Principal Br. at 45. Dr. Wood testified that, although the prior art reference (the Johnson Patent) disclosed the fluids, it did not contemplate any coordination in introducing the fluids so as to aid the sperm in adapting at each transition between sorting stages. *Id.* at 46. The Karabinus reference, another reference asserted against the Fluid Patents, also did not disclose coordination according to Dr. Wood. *Id.* at 47. Dr. Wood testified that coordination requires more than the mere introduction of fluid into the sorting process, which was all that the asserted prior art references taught. The jury reasonably relied on Dr. Wood's testimony to reject Trans Ova's invalidity arguments on the Fluid Patents.

The asserted claims of the Reverse Sort Patents (claims **[**28]** 1, 2, and 13 of the '687 patent and claims 1, 2, 5, and 18 of the '921 patent) were also found to be not invalid by the jury. The parties disputed whether the common claim step of dyeing the sperm cells with "Hoechst 33342 stain" at a concentration of greater than 40 micromolar would have been obvious over prior art references that disclosed using a concentration of approximately 9 micromolar. Dr. Wood testified that a person of ordinary skill would not have increased the staining amount from 9 to 40 because skilled artisans (1) were already satisfied with the staining capabilities at 9 and (2) would have been concerned about the toxicity to the sperm cells caused by the increase to 40. The jury reasonably relied on this testimony from Dr. Wood to find that a person of ordinary skill in the art would not have found the increase to 40 to be obvious and, therefore, that the asserted claims of the Reverse Sort Patents were not invalid.

For the foregoing reasons, we affirm the district court's denial of Trans Ova's motion for a new trial on the invalidity issues.

IV. Willfulness

As noted, *supra*, the district court declined to award enhanced damages, even after it reinstated the jury's willfulness finding. Because **[**29]** no enhanced damages were awarded, which XY does not appeal, we dismiss as moot Trans Ova's appeal of the district court's decision to reinstate the jury's finding that Trans Ova's infringement was willful. *See* *Odetics, Inc. v. Storage Tech. Corp.,* ***[***1095]*** *185 F.3d 1259, 1274-75 (Fed. Cir. 1999)* (holding that a dispute about the district court's limitation of the time period during which the jury could find willful infringement was moot in view of the court's determination that the district court did not abuse its discretion in declining to award enhanced damages).

V. Ongoing Royalty

The parties do not dispute the district court's decision to award an ongoing royalty. The only dispute relates to the appropriateness of the district court's mandated rates. In particular, XY appeals the district court's 12.5% rate for gross sales of products practicing the patents and 2% rate for reverse sorting services. XY argues that these ongoing royalty rates are too low in view of the jury's decision to award backward-looking damages based on a 15% rate on gross sales and a 4% rate on reverse sorting services.[9] XY argues that the district court misapplied **[*1297]** our precedent by neglecting to focus on the post-verdict economic circumstances of the parties when calculating the ongoing royalty **[**30]** rates. Trans Ova argues in response that the district court "had broad discretion to assess a reasonable ongoing royalty rate" and that "XY seeks to strip . . . all district courts . . . of that

[9] Trans Ova does not contest that the jury relied on these rates to arrive at its damages award.

discretion by requiring that they set an ongoing royalty rate no lower than the amount awarded for infringement absent exceptional circumstances." Trans Ova Resp. Br. at 48.

In *Amado v. Microsoft Corp.*, we held that ***HN17***[] there is a "fundamental difference" between "a reasonable royalty for pre-verdict infringement and damages for post-verdict infringement." *517 F.3d 1353, 1360 (Fed. Cir. 2008)*. For example, when calculating an ongoing royalty rate, the district court should consider the "change in the parties' bargaining positions, and the resulting change in economic circumstances, resulting from the determination of liability." *Id. at 1362*. When patent claims are held to be not invalid and infringed, this amounts to a "substantial shift in the bargaining position of the parties." *ActiveVideo Networks, Inc. v. Verizon Commc'ns, Inc., 694 F.3d 1312, 1342 (Fed. Cir. 2012)*. We have also instructed district courts to consider changed economic circumstances, such as changes related to the market for the patented products. *Paice LLC v. Toyota Motor Corp., 504 F.3d 1293, 1315 n.15 (Fed. Cir. 2007)*; *ActiveVideo, 694 F.3d at 1343* (noting that district courts may consider "additional evidence" of "economic circumstances that may be of value **[**31]** in determining an appropriate ongoing royalty").

The requirement to focus on changed circumstances is particularly important when, as in this case, an ongoing royalty effectively serves as a replacement for whatever reasonable royalty a later jury would have calculated in a suit to compensate the patentee for future infringement. *See* *Paice, 504 F.3d at 1315 n.15* ("This process will . . . allow the parties the opportunity to present evidence regarding an appropriate [ongoing] royalty rate to ***compensate*** [the patentee] . . . ." (emphasis added)). The later jury would necessarily be focused on what a hypothetical negotiation would look like ***after*** the prior infringement verdict. Therefore, post-verdict factors should drive the ongoing royalty rate calculation in determining whether such a rate should be different from the jury's rate. *See* *Arctic Cat Inc. v. Bombardier Recreational Prods. Inc., 876 F.3d 1350, 1370 (Fed. Cir. 2017)* ("Ongoing royalties may be based on a post-judgment hypothetical negotiation using the *Georgia-Pacific* factors.").

The district court focused on pre-verdict factors that were either irrelevant or less relevant than post-verdict factors. In particular, the district court awarded an ongoing royalty based on an average between the jury's reasonable royalty for past infringement (15%) **[**32]** and the rate established in the parties' pre-suit license Agreement (10%). There are several problems with the district court's usage of the 10% license rate in determining the ongoing royalty rate. First, that license rate had already been considered by the jury when it found that a higher rate of 15% was warranted for assessing damages, and that determination has not been appealed. To incorporate the license rate a second time in the context of the ongoing rate essentially amounts to undoing a jury finding. Second, the license rate was arrived at in the context of the parties' pre-suit bargaining positions. It therefore is not relevant to assessing any changed circumstances that could alter a hypothetical negotiation between the date of first infringement and the date of the jury's verdict. The district court also appeared **[***1096]** to consider XY's past behavior in engaging in "failed negotiations to enter into an amended license **[*1298]** agreement with Trans Ova" in calculating the ongoing royalty. J.A. 26-27. However, the district court cited no evidence that the parties' past actions would carry forward during future infringement or why they would be relevant for calculating a royalty rate for **[**33]** ***future*** patent infringement. The district court thus provided no reasoned basis for lowering the royalty XY could recover for future infringement from the rate the jury provided for past infringement. The focus should have been on XY's improved bargaining position and any other changed economic factors (as articulated in *Amado*, *ActiveVideo*, and *Paice*) rather than XY's past acts.

XY points out that, if we were to affirm the result in this case, it would result in the "absurd practical result . . . that XY would have been better off forgoing the 12.5% ongoing royalty and suing Trans Ova repeatedly for future infringement at the jury's 15% reasonable royalty rate." XY Reply Br. at 13. Assuming no changed circumstances exist (either good or bad for XY) between the date of first infringement and the date of the jury's verdict, we agree with XY that allowing the district court's ongoing rates to stand in this case would create an odd situation. Although ***HN18***[] district courts may award a lower ongoing royalty rate if economic factors have changed in the infringer's favor post-verdict—for example, if a newly-developed non-infringing alternative takes market share from the patented products—the district **[**34]** court identified no economic factors that would justify the imposition of rates that were lower than the jury's.[10]

For these reasons, we vacate the district court's ongoing royalty rate and remand with instructions to recalculate the rate in accordance with this opinion.

CONCLUSION

We have considered all of the parties' remaining arguments. They do not affect our decisions on any of the disputed issues. For the foregoing reasons, the district court's judgment is

AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART AND REMANDED

Concur by: NEWMAN (In Part)

Dissent by: NEWMAN (In Part)

Dissent

NEWMAN, *Circuit Judge*, concurring-in-part, dissenting-in-part.

I concur in the court's judgment on the contract and antitrust issues. My concern is with the holding that the district court's judgment of validity of the Freezing Patent is "moot" on the ground of collateral estoppel. This holding of estoppel is based on a PTAB ruling in a separate case involving non-mutual parties, and contravenes not only the America Invents Act's estoppel provision, but also the general law of collateral estoppel. Of further concern, this holding that judicial authority is estopped by an administrative agency ruling between non-mutual parties warrants **[**35]** attention to the constitutional balance among the branches of government. In addition, due process is not served by my colleagues' *sua sponte* creation of this estoppel on this appeal, without notice to the parties, without briefing, and without opportunity to respond.

I respectfully dissent from the panel majority's holding of collateral estoppel and ensuing invalidity as to the Freezing Patent. I concur as to validity and infringement of the two Fluid Patents, the In-Vitro Fertilization Patent, and the two Reverse Sort Patents. I also would affirm the jury's damages verdict.

[*1299] ***DISCUSSION***

The America Invents Act contains the following special estoppel provision applied to a civil action involving an alleged infringer who obtained inter partes review in the PTO:

> *35 U.S.C. § 315(e)(2)*. Civil actions and other proceedings. - The petitioner in an inter partes review of a claim in a patent under this chapter that results in a final written decision under *section 318(a)*, or the real party in interest or privy of the petitioner, may not assert either in a civil action arising in whole or in part under *section 1338* of title 28 or in a proceeding before the International Trade Commission under section 337 of the Tariff Act of 1930 that the claim is invalid **[**36]** on any ground that the petitioner raised or reasonably could have raised during that inter partes review.

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[10] To the contrary, the district court stated: "The evidence at trial showed that the use of sorted semen via XY's technology has spread rapidly in recent years, and the success and popularity of XY's methods suggests that a higher rate than that in the Agreement may be appropriate." J.A. 27.

[*1097]** Thus *section 315(e)(2)* estops the PTAB petitioner from asserting designated grounds of invalidity in a civil action. However, that is not the situation here. This appeal is from a district court civil action to which the PTAB petitioner (or its privy) is not a party.

In the district court decision here on appeal, validity of the Freezing Patent was first found by a jury and sustained by the district judge. The jury's finding of no invalidity is supported by substantial evidence. The jury verdict and the district court's judgment of validity of the Freezing Patent are not "mooted" by the PTAB's invalidity decision between non-mutual parties. The PTAB's decision may indeed be sustainable on the "substantial evidence" standard of the Administrative Procedure Act (APA), but the agency decision does not automatically override and estop the district court's earlier validity judgment, and remove that judgment from our appellate cognizance. Contrary to the majority's position, the district court's judgment that is here on appeal requires our appellate response, not discard.

Nor can the PTAB's decision be **[**37]** somehow validated by our concurrent separate affirmance of that agency decision on the APA standard of review. That separate action cannot ratify our concurrent refusal to apply the Article III standard of review to the district court decision here on appeal; that separate action cannot justify our discard of the district court's judgment as "mooted" by the agency decision. The law of collateral estoppel does not contemplate that result.

In *United States v. Mendoza, 464 U.S. 154, 104 S. Ct. 568, 78 L. Ed. 2d 379 (1984)*, the Court explained the principle of collateral estoppel:

> [L]ike the related doctrine of res judicata, [collateral estoppel] serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

Id. at 158 (quoting *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980))* (footnote omitted). However, the Court has recognized the constitutional concerns raised by collateral estoppel: "The issue of collateral estoppel is a question that clouds the underlying issue of constitutionality." *Mackey v. Mendoza-Martinez, 362 U.S. 384, 387, 80 S. Ct. 785, 4 L. Ed. 2d 812 (1960)*. In *Mackey*, the Court remanded to the district court "to put in issue the question of collateral estoppel and to obtain an adjudication upon it." *Id.* Here, however, this court *sua sponte* finds collateral estoppel, discarding **[**38]** the district court judgment without consideration of the merits.

The Court teaches that estoppel is not routinely automatic. In *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971)*, for example, the **[*1300]** Court rejected the position "that a plea of estoppel by an infringement or royalty suit defendant must automatically be accepted once the defendant in support of his plea identified the issue in suit as the identical question finally decided against the patentee or one of his privies in previous litigation." *Id. at 332-33*.

In *Montana v. United States, 440 U.S. 147, 162, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979)*, the Court further guided that collateral estoppel is subject to a variety of exceptions. The Federal Circuit so acknowledged in *Bingaman v. Department of Treasury, 127 F.3d 1431, 1437 (Fed. Cir. 1997)* ("Collateral estoppel is subject to exceptions when the circumstances dictate."). Yet today no opportunity is provided to raise possible exceptions and objections.

The *Restatement (Second) of Judgments §§ 28-29* collects the many "Exceptions to the General Rule of Issue Preclusion." *Section 28* recites circumstances in which relitigation of an issue has been held not to be precluded in a subsequent action between the same parties. *Section 29* records additional circumstances negating issue preclusion when there is non-mutuality of parties:

> (1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in **[**39]** the actions involved;
> (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and deXY, termination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in **[***1098]** the first action between himself and his present adversary;
(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make **[**40]** it appropriate that the party be permitted to relitigate the issue.

Restatement § 29 (citing cases). Applying these principles to this appeal, we need understand no more than the different standards of validity in the PTAB and the district court, the different burdens of proof, and the different standards of appellate review in this court, to appreciate that inconsistent decisions can be reached in the PTAB and the district court, all weighing heavily against estoppel.[1] My colleagues' **[*1301]** holding that in the event of conflict the administrative agency's decision "moots" the district court's decision, raises critical issues of constitutional balance.

The imposition of estoppel by my colleagues contravenes the America Invents Act, *§ 315(e)(2)*, as well as the Supreme Court's rulings. My colleagues rely on *Dana Corp. v. NOK, Inc., 882 F.2d 505 (Fed. Cir. 1989)*, to support depriving XY of the opportunity to contest the appellate application of collateral estoppel. Maj. Op. at 20. Yet in *Dana Corp*. the parties had opportunity to debate the issue; it was not an appellate surprise, as we explained:

> NOK first raised estoppel in its reply brief. The parties addressed the issue at oral argument, during which Dana's counsel asserted that collateral estoppel **[**41]** should not be applied against Dana to defeat its infringement claim against NOK based on invalidity of the '621 patent. After oral argument, this court ordered the parties to file supplemental briefs on that issue. Dana was required to address "its position that collateral estoppel should not be applied to this case and the related question of the propriety of this court, in the first instance, making that determination."

882 F.2d at 508 (quoting Order). In contrast, estoppel was not raised on this appeal, was not briefed, not argued at the hearing,[2] not briefed post-hearing.

The court in *Dana Corp*. held that a remand was unnecessary because the patentee did not seek to supplement the record. My colleagues deny XY this opportunity, despite no party raising the question of whether estoppel negates or moots this district court judgment. "The indispensable ingredients of due process are notice and an opportunity to be heard by a disinterested decision-maker." *Abbott Labs. v. Cordis Corp., 710 F.3d 1318, 1328 (Fed. Cir. 2013)*

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[1] My colleagues rely on this panel's concurrent affirmance of the PTAB's invalidation of the Freezing Patent in a non-mutual proceeding, *XY, LLC v. ABS Global, Inc.*, Appeal No. 16-2228. On the standard of "substantial evidence," the PTAB decision is supportable. However, on the district court's standard of "clear and convincing evidence," or even applying the standard of "preponderant evidence," the Freezing Patent retains validity. This discrepancy and the ensuing uncertainty of outcome illuminate a major flaw in the America Invents Act. Although it is now confirmed that Congress has authority to authorize the PTAB to invalidate issued patents, see *Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 200 L. Ed. 2d 671, 2018 WL 1914662 (U.S. 2018)*, it cannot be inferred that Congress also authorized the PTAB to override the judgments of Article III courts.

[2] The panel majority proposes that "[t]here is no indication that either party thought estoppel would not apply." Maj. Op. at 20. However, neither is there any indication that either party thought estoppel would apply—it was never discussed. "The fallacy of the argument consists in assuming the very ground in controversy." *Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 697, 4 L. Ed. 629 (1819)* (Story, J., concurring).

(citing *Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876-81, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 (2009)*; *LaChance v. Erickson, 522 U.S. 262, 266, 118 S. Ct. 753, 139 L. Ed. 2d 695 (1998)*; *Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978)*; *Mathews v. Eldridge, 424 U.S. 319, 333,* **[***1099]** *96 S. Ct. 893, 47 L. Ed. 2d 18 (1976))*. *Dana Corp*. afforded procedural safeguards that my colleagues deny.

My colleagues argue that their imposition of *sua sponte* estoppel avoids "unnecessary judicial waste." Maj. Op. at 20. However, the conclusion of estoppel is reached without receiving **[**42]** the argument of the parties. Due process is not "unnecessary judicial waste."

The majority's imposition of collateral estoppel is inconsistent with precedent. In *B&B Hardware, Inc. v. Hargis Industries, Inc., 135 S. Ct. 1293, 1303, 191 L. Ed. 2d 222 (2015)*, the Court applied issue preclusion arising from agency and Eighth Circuit trademark rulings, explaining why the "well-known exceptions" in *§ 28 of the Restatement* were not applicable on the facts that existed. Collateral estoppel is not subject to automatic imposition without affording any opportunity for party discussion.

The opportunity to rebut a charge of collateral estoppel is a consistent theme in this court's jurisprudence, including the **[*1302]** cases cited by the panel majority. In *Mendenhall v. Barber-Greene Co., 26 F.3d 1573, 1580 (Fed. Cir. 1994)*, this court observed that "[e]ach appellant raised the issue [of collateral estoppel] during pending litigation at virtually the earliest possible date." In *Pharmacia & Upjohn Co. v. Mylan Pharmaceuticals, Inc., 170 F.3d 1373 (Fed. Cir. 1999)*, the district court imposed collateral estoppel on the patentee, and on appeal the patentee had the opportunity to argue against preclusion. *Id. at 1379-80*. Conflicting views of the PTAB and the district court as to the Freezing Patent's validity does not lead to automatic eradication of the district court's judgment of validity. In *Arizona v. California, 530 U.S. 392, 412-13, 120 S. Ct. 2304, 147 L. Ed. 2d 374 (2000)*, relied upon by the majority, the Court declined to *sua sponte* accept a preclusion defense.

Our **[**43]** non-precedential opinions are in accord with this established jurisprudence. In *U.S. Ethernet Innovations, LLC v. Texas Instruments Inc., 645 F. App'x 1026 (Fed. Cir. 2016)*, the district court afforded the patentee the opportunity to rebut application of collateral estoppel, and the ruling of failure to rebut was a subject of the appeal. *Id. at 1028-29*. Similarly, in *Translogic Technology, Inc. v. Hitachi, Ltd, et al., 250 F. App'x 988 (Fed. Cir. 2007)*, the patentee argued against the application of collateral estoppel.

The panel majority seeks support in this court's recent decision in *MaxLinear, Inc. v. CF Crespe LLC, 880 F.3d 1373 (Fed. Cir. 2018)*. Maj. Op. at 19-20. However, *MaxLinear* was not a case of collateral estoppel; *MaxLinear* related to inconsistent PTAB decisions, whereby this court remanded to the PTAB instructing that: "On remand, the Board must consider whether the dependent claims 4, 6-9, and 21 can survive the unpatentability of claims 1 and 17 from which they depend in view of the prior art cited in the '728 IPR." *Id. at 1377-78*. This was not an application of collateral estoppel on appellate review.

Here, collateral estoppel was not pleaded and was not argued, yet is imposed on appeal without opportunity for response—contrary to precedent requiring that the precluded party "had a full and fair opportunity to present its arguments" concerning estoppel. *Transclean Corp. v. Jiffy Lube International, Inc., 474 F.3d 1298, 1308 (Fed. Cir. 2007)*. The cases cited by the panel majority do not support their position; they support **[**44]** the contrary position.

These departures from statute, precedent, practice, and due process add to the uncertainty of the patent grant, and thus add disincentive to patent-supported innovation. I discern no benefit to the public. I respectfully dissent.